

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2018-02473

BETWEEN

JAMEEL BOWEN

Claimant

AND

SELWYN SEALY

Defendant

AND

THE NEW INDIA ASSURANCE COMPANY (TRINIDAD & TOBAGO) LIMITED

Co-Defendant

By Ancillary Claim

SELWYN SEALY

Defendant/Ancillary Claimant

AND

THE NEW INDIA ASSURANCE COMPANY (TRINIDAD & TOBAGO) LIMITED

Co-Defendant/Second Ancillary Claimant

AND

JAMEEL BOWEN

Claimant/Ancillary Defendant

AND

BEACON INSURANCE COMPANY LIMITED

Ancillary Co-Defendant

Before the Honourable Mr. Justice Robin N. Mohammed

Date of Delivery: 4 December 2019

Appearances:

Ms. Nathifa Lowman for the Claimant/Ancillary Defendant and the Ancillary Co-Defendant

Mr. Prakash Deonarine instructed by Mr. Johnathan Rattan for the Defendants/Ancillary Claimant and the Co-Defendant/Second Ancillary Claimant

**DECISION ON TWO APPLICATIONS FILED ON 30 APRIL 2019 - ONE BY THE
ANCILLARY CLAIMANTS AND ONE BY THE ANCILLARY DEFENDANTS**

I. Introduction

[1] There are two applications before this Court for determination, both filed on 30 April 2019. The first was filed by the Ancillary Defendant and Ancillary Co-Defendant seeking to have the Ancillary Claim struck out with the alternative relief for an extension of time to file a Defence to the Ancillary Claim. The second was filed by the Ancillary Claimants pursuant to **Part 18.12(2) of the Civil Proceedings Rules 1998 (“the CPR”)**, seeking an order that the Ancillary Defendant be deemed to have admitted the Ancillary Claim and to be bound by any judgment or decision in the main proceedings. The Ancillary Claimants also seek an order to have paragraphs 6, 7 and 8 of the Claimant’s Statement of Case and the purported Defence to the Ancillary Claim struck out.

[2] By Claim Form and Statement of Case filed on 12 July 2018, the Claimant commenced these proceedings against the Defendant and Co-Defendant claiming damages arising out of a motor vehicular collision, which the Claimant claimed was caused by the negligence of the Defendant.

[3] In the Statement of Case, the Claimant averred that he was proceeding south along the Southern Main Road, McBean, Couva, in his motor vehicle registration number PBM 7924. When he attempted to turn right into Sonny Ladoo Road, the Defendant in his motor vehicle registration number TCY 2189 overtook the vehicle, which was at the rear of the Claimant’s vehicle causing same to collide with the right front side of the Claimant’s vehicle. The Claimant claimed that the collision was caused solely by the negligence of the Defendant in driving and/or management and/or control of his motor vehicle and he set out the particulars of negligence of the Defendant in the Statement of Case.

- [4] The Co-Defendant was joined in the proceedings as the insurer of the Defendant's vehicle. The Defendant and Co-Defendant entered their appearance on 20 July 2018. They filed a joint defence on 4 October 2018. They denied that the collision occurred because of the Defendant's negligence and attributed the cause of the collision to the negligence, wholly and/or in part, to the Claimant and/or motor vehicle registration number PBM 7924. The Defendant and Co-Defendant alleged that the Defendant was proceeding in his motor vehicle registration number TCY 2189 in a southerly direction along the Old Southern Main Road when the Claimant pulled to the extreme left without any indication of his intent to do so, after which the Defendant attempted to pass him. When the Defendant had almost passed the Claimant's vehicle, the Claimant suddenly and without warning attempted to make a U-turn on the Southern Main Road and came into contact with the Defendant's vehicle causing him to strike a wall on the Eastern side of the road. The Defendants therefore alleged that the collision was caused wholly and/or in part by the negligence of the Claimant. The Defendants set out in the Defence the particulars of the Claimant's alleged negligence.
- [5] Upon the filing of the Defence, the first case management conference (CMC) was scheduled for 20 November 2018. However, by letter dated 19 November 2018, attorney-at-law for the Defendant and Co-Defendant indicated to the Court that the pleadings in the matter were not yet closed. The Court was further informed that the Defendant and Co-Defendant intended to commence Ancillary proceedings against Beacon Insurance Company Ltd, the intended Ancillary Co-Defendant and insurer of the Claimant's vehicle.
- [6] On 13 December 2018, the Defendants filed an Ancillary Claim against the Ancillary Defendant and joined the Ancillary Co-Defendant as the insurer of the Ancillary Defendant's vehicle. The Ancillary Claimants claimed against the Ancillary Defendant and the Ancillary Co-Defendant, inter alia, judgment on damages, costs and interest and an indemnity and/or contribution from the Ancillary Co-Defendant as the authorized insurer of the Ancillary Defendant's vehicle, in respect of any judgment including costs and interest that may be obtained against the Ancillary Claimant.

[7] The CMC was then fixed for 16 January 2019. However, by letter dated 15 January 2019, attorney-at-law for the Defendant and Co-Defendant again informed the Court that the pleadings in the matter were not yet closed. They informed the Court that Ancillary proceedings were filed on 13 December 2018 against the Ancillary Defendant and the Ancillary Co-Defendant and that the Ancillary Defendant was only served on 10 January 2019. The attorney-at-law, therefore, requested that the hearing fixed for 16 January 2019 be re-scheduled. The Court granted this request and re-scheduled the CMC to 27 March 2019.

[8] The Ancillary Co-Defendant entered its appearance to the Ancillary Claim on 29 January 2019 and filed its Defence to the Ancillary Claim on 14 March 2019. The Ancillary Co-Defendant averred that the collision was caused by the sole and/or contributory negligence of motor vehicle registration number TCY 2189 and set out the particulars of negligence in its Defence. The Ancillary Defendant subsequently filed his Defence to the Ancillary Claim on 25 March 2019.

[9] The first CMC was convened on 9 April 2019. On this date, the Court ordered (i) the proposed application by the Ancillary Defendant and the Ancillary Co-Defendant be filed and served on or before 30 April 2019; and (ii) the proposed application by the Ancillary Claimants in relation to the Defence filed by the Ancillary Defendant on 25 March 2019 to be filed and served on or before 30 April 2019. The CMC was adjourned to 2 July 2019 but subsequently relisted to 18 July 2019. The parties complied with the Court's order.

Ancillary Claimants' Notice of Application filed on 30 April 2019

[10] By Notice of Application filed 30 April 2019, the Ancillary Claimants applied for the following orders pursuant to **Part 18.12(2) and Part 26.2 of the CPR**:

1. Paragraphs 6, 7 and 8 of the Claimant's Statement of Case filed on 12 July 2018 be struck out;
2. That the entirety of the Ancillary Defence of the Ancillary Defendant filed on 25 March 2019 be struck out;

3. That the costs of this application be provided for.

[11] The Ancillary Claimants stated that they filed their Ancillary Claim on 13 December 2018 and the Ancillary Defendant failed to file a Defence to the Ancillary Claim by 8 February 2019, that is, 28 days after the service of the Ancillary Claim as provided for in **Part 18.12(2)(a) of the CPR**. Therefore, the Ancillary Defendant is deemed to have admitted the Ancillary Claim.

[12] It is the Ancillary Claimants contention that the ramification of this development is that the Ancillary Defendant has admitted that the accident, which occurred on 30 July 2015, was as a result of the Ancillary Defendant attempting to make an unlawful U-turn along the Old Southern Main Road, McBean, Couva. Therefore, permitting the Claimant to proceed with the facts as alleged in his Statement of Case would lead to a contradictory outcome and amount to an abuse of process.

[13] It was further contended that although the Ancillary Defendant has filed a purported Defence to the Ancillary Claim on 25 March 2019, he has not made the requisite application for relief from sanctions despite this issue having been raised at the first hearing of this matter on 27 March 2019.

[14] Consequent to this argument, it is yet further contended that paragraphs 6, 7 and 8 of the Claimant's Statement of Case and the Ancillary Defence ought to be struck out on the grounds that they impermissibly purport to raise the very issues of negligence which the Claimant is deemed to have admitted by virtue of **Part 18.12(2)(a) of the CPR**.

Ancillary Defendants' Notice of Application filed 30 April 2019

[15] By Notice of Application filed 30 April 2019, the Ancillary Defendant and Ancillary Co-Defendant applied for the following orders:

1. That the Ancillary Claim filed on 13 December 2018 be struck out for failure to comply with the requirements of **Rule 18.5(3) the CPR**.

2. Alternatively, that the time for filing of the Defence to the Ancillary Claim is extended to 25 March 2019.
3. That the Defendant and Co-Defendant do pay the costs of this application.

[16] In his grounds for the Application, the Ancillary Defendant stated that the Ancillary Claim is, essentially, a Counterclaim in accordance with **Part 18.1(1)(a) of the CPR**. It was argued that the Ancillary Claim is a form of counterclaim, which was brought by the Ancillary Claimants in response to the Claimant's Claim, which is included in the same proceedings. The "Counterclaim" alleges that the Ancillary Claimant is entitled to a remedy against the Ancillary Defendant arising out of the said motor vehicular collision. The Ancillary Claimants further counterclaimed for damages and consequential loss arising out of the accident.

[17] The Ancillary Defendant contended that contrary to the provisions of **Part 18.5(3) of the CPR**, the Ancillary Claimants did not make the Counterclaim at the time of filing and serving their joint Defence. Furthermore, the Ancillary Claimants have not sought the permission of the Court to file the said Counterclaim at any other time and at the date of filing, did not have the permission of the Court to file same.

[18] In that regard, the Court, pursuant to **Part 26.2(1)(a) of the CPR**, ought to strike out the "Counterclaim" for failure to comply with the requirements of **Part 18.5(3) of the CPR**.

[19] Moreover, the Ancillary Defendant stated that if the Court is minded to permit the Ancillary Claim, then he is seeking an extension of time to file his Defence to the Ancillary Claim.

[20] Upon the matter coming up for hearing of the two Notices of Application filed on 30 April 2019, the Court gave directions for the filing and exchanging of written submissions and reply submissions. The Defendants filed their written submissions on 12 September 2019 and the Claimant filed his written submissions on 13 September and his response submissions on 1 October 2019.

[21] The Court will now give its ruling on the two applications. However, the Court finds it prudent to deal with the Ancillary Defendant's Application first wherein the Ancillary Defendant requests that the Ancillary Claim be struck out for failing to comply with **Rule 18.5(3) of the CPR**. The Ancillary Claimants' Application is contingent on the success of the Ancillary Defendant's Application.

II. Submissions

[22] The Ancillary Defendant, in support of his Application, submitted that under **Part 18 of the CPR**, counterclaims are distinguished from claims for contribution and indemnity and other forms of ancillary claims. The Ancillary Defendant contended that the Ancillary Claim filed by the Ancillary Claimants is in truth and fact a counterclaim within the meaning of **Rule 18.1(1)(a) of the CPR** and is not a claim for contribution or indemnity or any of the other forms of ancillary claims described in the rule. Counsel for the Ancillary Defendant relied on the authority of **Krisendaye Balgobin & Rampersad Balgobin v Pinkey Algoo and Ors**¹ wherein this Court examined the difference between counterclaims and other ancillary claims.

[23] Counsel for the Ancillary Defendant contended that despite its form, the Ancillary Claim filed herein is not a claim for contribution or a claim for indemnity for the following reasons:

- (i) A claim for contribution or indemnity is where a party who has been sued (the defendant) looks to a third party for a contribution or indemnity in relation to the damage of the Claimant;
- (ii) On the contrary, the Ancillary Claimants are making a claim against the Ancillary Defendant and his insurer in relation to the Ancillary Claimants' own damage; and
- (iii) There is no pleading within the Ancillary Claim that a party, other than the Ancillary Defendant, is liable to indemnify the Ancillary Claimants or contribute to the damages in the event that the Ancillary Claimants are found liable for the damage claimed by the Ancillary Defendant in his Claim Form and Statement of Case.

¹ CV2014-04731

[24] Counsel submitted that the Ancillary Claimants failed to comply with the procedure for making a Counterclaim as outlined in **Part 18.5(3) of the CPR**. It was contended that the “Counterclaim” was not filed at the same time of filing and serving the Defence of the Defendant and the Co-Defendant on 4 October 2018. The “Counterclaim” was filed subsequently, without the leave of the Court on 13 December 2018. Therefore, the “Counterclaim” is irregular.

[25] Counsel for the Ancillary Defendants submitted that since the date of filing, the Ancillary Claimants have failed and/or refused to seek permission of the Court to file their Counterclaim. Accordingly, the Ancillary Claim is not properly before the Court. Owing to the Ancillary Claimants’ failure to make an application for permission to file the Counterclaim, the Court ought to strike it out for failing to comply with **Part 18.5 of the CPR**.

[26] Counsel for the Ancillary Claimants, in opposition to the Ancillary Defendants’ Application, submitted that the Ancillary Claim filed herein claims, *inter alia*, an indemnity and/or contribution, both against the Ancillary Defendant and the Ancillary Co-Defendant. Counsel submitted that the learning in **Balgobin and Balgobin v Algoo & Ors** (*supra*) supports the notion that Ancillary Claims are those geared towards, *inter alia*, obtaining indemnities and/or contributions from third parties.

[27] Counsel also relied on the learning in **Principles of Practice, Adrian Zuckerman at para 4.57 page 185** wherein the learned authors reasoned that a claim for contribution or indemnity brought by a Defendant against another person (whether already a party or not) must be advanced as an additional claim (ancillary claim). It was further noted therein that a claim for contribution consists of an assertion of a right to recover from another person, all or part of the amount that the Defendant might be found liable to pay on the grounds that the other person contributed to the loss in respect of which the Defendant is sued. Counsel contended that this applies to the case at bar since the Ancillary Claim is centred on indemnity and/or contribution.

[28] Counsel contended that as envisaged by **Section 20 of the Supreme Court of Judicature Act, Chap 4:01**, Ancillary Claims are brought to avoid multiplicity of proceedings and inconsistent judgments, to save legal costs and judicial time so that it was quite proper for an Ancillary Claim to be filed as done in the claim at bar. Counsel submitted that the Ancillary Claim is properly before the Court and need not have been filed as a Counterclaim.

[29] The Ancillary Claimants, in support of their Application, submitted that an Ancillary Defendant admits the Ancillary Claim when he fails to file an Ancillary Defence: **Part 18.12(2)(a) of the CPR**. Therefore, the Ancillary Defendants' failure to file a Defence to the Ancillary Claim must be treated as them having admitted the Ancillary Claim. In that regard, the Claimant can no longer contend in his Statement of Case, *inter alia*, that the accident herein occurred while he was attempting to turn right into Sonny Ladoo Road when the Defendant collided with the right front side of his vehicle.

[30] Counsel submitted that if the Claimant were allowed to continue with his averments, this would lead to an abuse of process as the admission would lead to a contradictory outcome: the Claimant would be contending two different versions of events. In that regard, paragraphs 6, 7 and 8 of the Claimant's Statement of Case ought to be struck out because if they were allowed to stand, they would lead to an outcome, contradictory to his deemed admissions and would therefore constitute an abuse of process. Counsel for the Ancillary Claimants relied on the authority of **Satnarine Maharaj v The Great Northern Insurance Company and Margaret Garaway Fenton**² in support of his proposition.

[31] Counsel for the Ancillary Claimants contended that the Ancillary Defendants failed to file a Defence to the Ancillary Claim by 8 February 2019, that is, 28 days after service of the Ancillary Claim on 13 December 2018. He, however, filed a purported "Ancillary Defence" on 25 March 2019. The Ancillary Defendants, thereafter, filed their application for an extension of time over a month after the purported Ancillary Defence was filed and almost 3 months after it was due.

² Civil Appeal No P.198 of 2015

[32] Counsel relied on the authority of **Balgobin and Balgobin v Algoo and Ors** (*supra*) wherein this Court outlined the proper procedure the Ancillary Defendants ought to adopt for failing to file a Defence to the Counterclaim, that is, apply for relief from sanctions. The Court pointed to the *Practice Direction on Late Filing of Document* stating that documents filed after the period prescribed by any rule must be accompanied by an application for an extension of time and one for relief from sanctions. Consequently, with no application for relief from sanctions filed and the Ancillary Defendants not complying with the said practice direction, the Ancillary Defence cannot stand as filed and falls to be struck out.

[33] In objection to the Ancillary Claimants' Application, the Ancillary Defendant submitted that if the Court is not minded to strike out the Ancillary Claimants' "Counterclaim", the Court may, through its case management powers, grant the requisite permission to the Defendants to file a Counterclaim in the proper form. Consequently, time would only run for the Claimant to file his Defence to Counterclaim from the date that the proper Counterclaim is served on him. Counsel for the Ancillary Defendants submitted that the Ancillary Claimants cannot petition the Court to invoke the provisions of **Part 18.12 of the CPR** where they have not properly filed their Ancillary Claim.

III. Issues

[34] The issues that fall for determination are as follows:

- 1. Is the Ancillary Claim filed on the 13 December 2018 a Counterclaim within the meaning of Part 18.1(1)(a) CPR?**
- 2. If the answer to the above question is in the affirmative, was the Ancillary Claim filed in compliance with the requirements of Part 18.5 CPR?**
- 3. If so, is the Ancillary Defendant deemed to have admitted the Ancillary Claim pursuant to Part 18.12(2) CPR?**
- 4. Should the Court grant the Ancillary Defendant an extension of time to file his Defence to the Ancillary Claim?**

IV. Law and Analysis

[35] The two Applications are based primarily on the provisions contained in **Part 18 of the CPR**, which relate to counterclaims, ancillary claims and other similar claims. The relevant provisions are cited hereunder.

Issue 1: Is the Ancillary Claim filed on 13 December 2018 a Counterclaim within the meaning of Part 18.1(1)(a) of the CPR?

[36] **Part 18.1 CPR** defines an Ancillary Claim to include a counterclaim as follows:

- (1) An “***Ancillary Claim***” is any claim other than a claim by a Claimant against a Defendant or a claim by a Defendant to be entitled to a set off and includes –
- (a) a counterclaim by a defendant against the claimant or against the claimant and some other person;
 - (b) a claim by the defendant against any person (whether or not already a party) for contribution or indemnity or some other remedy; and
 - (c) where an ancillary claim has been made against a person, any claim made by that person against any other person (whether or not already a party).

[37] **Part 18.2 of the CPR** provides that an Ancillary Claim is to be treated as if it were a claim for the purposes of the Rules with the proviso that Part 8.13, 8.14 (which deal with time within which a claim may be served) and Part 12, which deals with default judgment, do not apply.

[38] **Part 18.3 of the CPR** specifically deals with a Defendant’s claim for contribution or indemnity from a Co-Defendant. This Rule states as follows:

- (1) A defendant who has filed a Defence may make an ancillary claim for contribution or indemnity against another defendant by –
- (a) issuing a notice containing a statement of the nature and grounds of his claim; and
 - (b) serving that notice on the other defendants.
- (2) Rule 18.4 does not apply to an ancillary claim made under this rule.

[39] In the **Editorial Introduction to Part 20 of the UK CPR (White Book, Volume 1, 2014)**, which deals with counterclaims and other additional claims, it is stated that the best known form of an additional claim is in “*the form of a claim made against the claimant by the defendant.*” This is known as a counterclaim. However, as an example of other additional claims, which represents ancillary claims in our Rules, the **White Book** *ibid* states:

“Another example of an additional claim procedure is the procedure that caters for the situation where, in response to the claimant’s claim, the defendant (whilst perhaps admitting liability in whole or in part) in effect points their finger at a third party alleging that they are obliged to indemnify them for any liability to the claimant, or to contribute to the satisfaction of any judgment.”

[40] It therefore follows that an Ancillary Claim includes a counterclaim **and** a claim for contribution and/or indemnity against any person. The both ancillary claims are different in nature; however, they may be included on the same document. **The CPR** provide a different procedure for filing of these two types of ancillary claims before the Court. Therefore, it is necessary to determine under which one of the two ancillary claims does the Ancillary Claim filed on 13 December 2018 fall.

[41] In the Ancillary Claim filed on 13 December 2018, the Ancillary Claimants claimed against the Ancillary Defendant and the Ancillary Co-Defendant as follows:

- a. A Declaration that the Ancillary Co-Defendant is joined to this action pursuant to **Section 10A of the Motor Vehicles Insurance (Third Party Risks) (Amendment) Act 1996** being the insurer of the Ancillary Defendant’s vehicle on the 30th day of July 2015 and are (*sic*) at all material times liable to satisfy any judgment obtained against the Ancillary Defendant;
- b. Judgment against the Ancillary Defendant for damages, interest and costs;
- c. Judgment against the Ancillary Co-Defendant for damages, interest and costs for which the Ancillary Defendant is found liable;

- d.* An indemnity and/or contribution in respect of the Claimant's Claim and interest which the Ancillary Claimants may be ordered to pay to the Claimant;
- e.* Costs of this action;
- f.* Interest pursuant to Section 25 of the Supreme Court of Judicature Act Chap 4:01; and
- g.* Such further and/or other relief as the nature of the case requires.

[42] In the pleadings, the Defendant and Co-Defendant in the Ancillary Claim repeated the averments from their Defence filed on 4 October 2018 that the accident was caused by the negligence wholly and/or in part of the Ancillary Defendant and/or motor vehicle PBM 7924. They then proceeded to set out the particulars of negligence of the Ancillary Defendant. At paragraph 9 of the Ancillary Claim, the Ancillary Claimants contended that they have suffered consequential loss and damages totalling \$103,034.50.

[43] Having examined the contents of the Ancillary Claim filed on 13 December 2018, I agree with the Ancillary Defendant's submissions that the Ancillary Claim is in essence a Counterclaim within the meaning of **Part 18.1(1)(a) of the CPR** and not a claim for contribution or indemnity or some other remedy.

[44] The Ancillary Claimants, in their Ancillary Claim, is essentially counterclaiming against the Ancillary Defendant and the Ancillary Co-Defendant that the Ancillary Defendant is responsible for the accident caused on 30 July 2015 and that the Ancillary Co-Defendant is liable to satisfy any judgment obtained against the Ancillary Defendant as his insurer. The reliefs sought at (a), (b) and (c) of the Ancillary Claim as highlighted in paragraph [41] of this judgment is indicative of this. The Court finds that the Ancillary Claim is in effect similar in form to the Claim Form and Statement of Case filed by the Claimant on 12 July 2018.

[45] The Ancillary Claimants submitted that the Ancillary Claim filed on 13 December 2018 claims an indemnity and/or contribution against the Ancillary Defendant and the

Ancillary Co-Defendant. However, having regard to the definition of indemnity, I disagree with the Ancillary Claimants.

[46] An indemnity is the right of someone to recover from a third party the whole amount, which he himself is liable to pay³. **Halsbury's Laws of England, Insurance Vol 60 2018 at para 3** states as follows:

“Most contracts of insurance belong to the general category of contracts of indemnity in the sense that the insurer's liability is limited to the actual loss which is, in fact, proved. The happening of the event does not of itself entitle the insured to payment of the sum stipulated in the policy; the event must, in fact, result in a pecuniary loss to the insured, who then becomes entitled to be indemnified subject to the limitations of his contract.”

[47] Therefore, in a matter like this before the Court, it would be the defaulting party, demanding the insurance company, to satisfy any judgment, including costs and interest that may be obtained against him.

[48] The Ancillary Claimants, in their Ancillary Claim, are not seeking any contribution and/or indemnity from either of the parties to the Ancillary Claim for any loss that they may suffer if judgment is obtained against them. In fact, at (d) in paragraph [41] above, it appears that the Ancillary Claimants are seeking a contribution and/or indemnity from the Ancillary Defendant's insurer if the Ancillary Claimant (the Defendant) is found to be liable for the accident and judgment is obtained against him. However, this is not allowable; the Ancillary Claimant would have to claim for contribution and indemnity from the Co-Defendant as his insurance company with whom he has a contract of insurance. By doing so, that would amount to an Ancillary Claim within the meaning of **Part 18.1(1)(b) of the CPR.**

[49] The Court is of the opinion that the Ancillary Claimants are seeking a *declaration* that the Ancillary Co-Defendant is liable to satisfy any judgment that may be given against the

³ Glossary to the White Book, Volume 1, 2014

Ancillary Defendant. The Ancillary Claimants cannot claim an indemnity from the Ancillary Co-Defendant on behalf of the Ancillary Defendant. It appears that the relief was either misconceived or badly drafted.

[50] Furthermore, the Ancillary Claimants in their Ancillary Claim stated that the Ancillary Co-Defendant was joined to the proceedings as the Ancillary Defendant's insurer to satisfy any judgment that may be given against the Ancillary Defendant in favour of the Ancillary Claimants. Therefore, it is clear that the Ancillary Claimants are in fact bringing a Counterclaim against the Claimant and some other person as provided for within the meaning of **Part 18.1(1)(a) of the CPR**.

[51] In that regard, the Court is of the opinion that the Ancillary Claim filed on 13 December 2018 is not a claim for contribution and/or indemnity (**Part 18.1(1)(b) of the CPR**) but a Counterclaim within the meaning of **Part 18.1(1)(a) of the CPR**.

[52] Having determined that the Ancillary Claim filed on the 13 December 2018 is in fact a Counterclaim against the Claimant, the Court now has to determine whether it was appropriately filed in accordance with the Rules of Court.

Issue 2: Was the Ancillary Claim filed in compliance with the requirements of Part 18.5(3) of the CPR?

[53] **Part 18.5 of the CPR** provides for the making of a Counterclaim. **Part 18.5(1)** states as follows:

(1) A defendant who alleges that he has a claim or is entitled to a remedy against the claimant may file and serve a counterclaim, as well as filing and serving a defence.

(2) There need be no connection between the claim and a counterclaim.

(3) The defendant may make a counterclaim –

(a) without the court's permission if he files and serves it at the same time as the defence; or

(b) with the court's permission at any other time.

(4) The court may give the defendant such permission at a case management conference.

[54] It is undisputed that the Ancillary Claim was not filed at the same time of the filing of the Defence. The joint Defence of the Defendants was filed on 4 October 2018. Accordingly, any Counterclaim by the Defendants against the Claimant and any other person ought also to be filed at that time without the permission of the Court.

[55] However, considering the fact that the Defendants filed this Ancillary Claim (Counterclaim) after the filing of their Defence, permission ought to have been obtained from the Court to file same.

[56] In this regard, the Court can, pursuant to **Part 26.2(1)(a) of the CPR**, strike out a Statement of Case or part of Statement of Case if it appears to the Court that there has been a failure to comply with a rule, practice direction, order or direction, given by the Court in the proceedings. A Statement of Case includes a Counterclaim and Ancillary Claim (**Part 2.3 of the CPR**).

[57] As such, the Court is of the opinion that the Ancillary Claimants failed to file their Ancillary Claim (in essence, their Counterclaim) in accordance with **Part 18.5(3) of the CPR**. Consequently, the Ancillary Claim filed on the 13 December 2018 ought to be struck out.

[58] If this be the case, then the need for a Defence to the Ancillary Claim becomes otiose, which in turn means that there is also no need for the application for an extension of time to file a Defence to the Ancillary Claim.

[59] However, the Claimant/Ancillary Defendants' attorneys, in their written submissions filed on 13 September 2019, at paragraph 25, submitted that in the event the Court is not minded to strike out the "Counterclaim" of the Defendants, the Court may, through its case management powers, grant the requisite permission to the Defendants to file a Counterclaim in the proper form. This submission gives the Court the distinct impression

that the Claimant is not opposed to the Defendants having a Counterclaim before the Court, once it complies with the Rules of Court and once they are given the opportunity to put in a Defence to the Counterclaim.

[60] Bearing this in mind, and considering the first CMC has not come to an end, the Court can still grant the Defendant and Co-Defendant permission to file their Counterclaim pursuant to **Part 18.5(4) of the CPR**. The Court therefore agrees with the Claimant that time would only begin to run for the Claimant to file his Defence to the Counterclaim from the date that the Counterclaim is duly filed and served.

V. Disposition

[61] Accordingly, in light of the foregoing analyses and findings, the Order of the Court is as follows:

ORDER:

- 1. The Ancillary Claim filed on 13 December 2018 be and is hereby struck out.**
- 2. The Ancillary Claimants' Notice of Application filed on 30 April 2019 be and is hereby dismissed.**
- 3. Permission be and is hereby granted to the Defendant to file his Counterclaim to the Claim filed on 12 July 2018 on or before 19 December 2019.**
- 4. The Defendants shall pay to the Claimant the costs of both Applications filed on 30 April 2019 to be assessed in accordance with Part 67.11 of the CPR 1998, in default of agreement.**
- 5. In the event there is no agreement on the quantum of costs, then the Claimant/Ancillary Defendants to file and serve a Statement of Costs for assessment on or before 31 January 2020.**
- 6. The Defendants/Ancillary Claimants to file and serve Objections, if any, to the items of costs on or before 21 February 2020.**

Robin N. Mohammed
Judge