IN THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. P198 of 2015

BETWEEN

SATNARINE MAHARAJ

APPELLANT

AND

THE GREAT NORTHERN INSURANCE COMPANY LIMITED

FIRST RESPONDENT

AND

MAGARET GARAWAY FENTON

SECOND RESPONDENT

Panel: **Mendonça, J.A.**
Smith, J.A
Jones, J.A.

Appearances: **Mr. Manwah for the Appellant**
Mr. Palmer for the Respondents

Date of delivery: February 16th 2016

JUDGMENT

Delivered by A. Mendonça, J.A.

1. On February 16th 2016 we allowed this appeal and gave brief for our reasons for so doing. We now expand on the reasons given and reduce them to writing in the form of this judgment.

2. This is an appeal from the Case Management Judge's striking out of the appellant's claim and entering judgment in favour of the second respondent on her counterclaim with damages and costs to be assessed. The issue raised in this appeal is whether the Judge was correct to strike the claim in view of the failure of the appellant to defend the counterclaim of the second respondent and to enter judgment on the counterclaim.

3. The background to this appeal is fairly straightforward. By claim form and statement of case filed on September 22nd 2014 the appellant commenced these proceedings against the respondents claiming damages arising out of a motor vehicular collision which the appellant claimed was caused by the negligence of the second respondent.

4. In the statement of case the appellant averred that he was proceeding in a northerly direction along the Southern Main in Cunupia when the second respondent's vehicle, which was driven by the second respondent and which was travelling in the opposite direction, suddenly swerved and crossed into the appellant's lane thereby colliding with his vehicle. The appellant claimed that the collision occurred as a consequence of the second respondent's negligence and he set out in the statement of case particulars of the negligence of second respondent.

5. The first respondent was joined in the proceedings as the insurer of the second respondent's vehicle.

6. The respondents filed a joint defence. They denied that the collision occurred as a consequence of the second respondent's negligence. They alleged that the collision was caused by the appellant's negligence when he so negligently managed and/or controlled his vehicle in attempting to overtake a vehicle that he came into the path of the second respondent. The respondents alleged that

as a result of the emergency thereby created that the second respondent pulled to her left but despite her best efforts the appellant's vehicle collided with the second respondent's vehicle causing the same to collide with another vehicle. The respondents therefore alleged that the collision was caused wholly and/or in part by the negligence of the appellant. The respondents set out in the defence particulars of the appellant's negligence.

7. The second respondent further counterclaimed for the damage done to her vehicle as a consequence of the appellant's negligence. In the counterclaim she repeated the allegations contained in the defence. They were incorporated in the counterclaim by reference to the relevant paragraphs in the defence. The allegations contained in the counterclaim were therefore identical to those contained in the defence.

8. The defence to the counterclaim was due by January 19th 2015 but the appellant failed to file a defence.

9. By reason of the admission of the averments of negligence made against the appellant and by his failure, neglect and/or omission to file a defence to the counterclaim,

10. By notice of application filed on April 20th 2015 the respondents applied for the following orders:

1. Pursuant to rule 18.12(2)(a) of the Civil Proceedings Rules 1998 (the CPR) judgment be entered against the appellant with damages to be assessed by a Master in Chambers by reason of the neglect, failure and/or omission on the part of the appellant to file a defence to the counterclaim as a result of which the appellant is deemed to admit the averments of negligence made by the respondents in the counterclaim;

2. By reason of the admission of the averments of negligence made against the appellant and by his failure, neglect and/or omission to file a defence to the counterclaim, the appellant's claim against the respondents be struck out with costs to be paid by the appellant to the respondents which costs are to be assessed in default of agreements;
3. The costs occasioned by the application be paid by the appellant to the respondents;

4. Such further and no other relief.

11. After the filing of the respondents' notice of application, the appellant applied to extend the time for the filing of the defence to counterclaim.

12. Both applications were heard together by the Case Management Judge. The Judge refused the appellant's application for the extension of time for the filing of the defence to counterclaim. With respect to the respondents' application, the respondents argued before the Judge that as the appellant failed to file a defence to the counterclaim he was deemed to have admitted the counterclaim. In those circumstances the appellant in relation to the claim against the respondents cannot seek to rely on the averments of negligence made by him in the statement of case as they are inconsistent with his being deemed to admit the averments of negligence made against him in the counterclaim.

13. The Judge accepted the respondents' argument and granted their application. She accordingly struck out the appellant's claim and gave judgment for the respondents on the counterclaim with damages and costs. The Judge stated:

> *"On the [respondents'] application this Court accepts the [respondents'] submission that on a holistic reading of rule 18.9(2), Rule 18.12(1) and Rule 18.12(2)(a) of the Civil Proceedings Rules, 1998 as amended ("the CPR"), the [appellant] is indeed deemed to admit all the averments laid at his feet as contained in the [respondents'] Counterclaim.*
>
> *Further, the [appellant], having failed to file such a Defence to material averments as to his negligence contained in the Counterclaim and thereby being deemed to admit the same, cannot be permitted by this Court to pursue his claim for negligence as contained in his Statement of Case in the face of such admission.*
>
> *To allow this would make a mockery not only of the operation of the CPR but also of the much vaunted overriding objective and its intended impact on an assertive case management flow."*

14. The appellant appealed from the orders of the Judge. At the hearing of the appeal, however, Counsel for the appellant indicated that he was not challenging the order of the Judge refusing the appellant's application for an extension of time to file the defence to the counterclaim and he expressly abandoned the appeal in that regard. He however argued that the Judge was wrong to give judgment in favour of the respondents on the counterclaim and to strike out the appellant's claim.

15. Before we summarize the submissions before the Court it is convenient to highlight the relevant provisions of the CPR.

16. Under the CPR a counterclaim is treated as an ancillary claim. This is to be found at rule 18.1(1)(a) which provides as follows:

> *"18.1 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;"*

The person making the ancillary claim is the ancillary claimant and the ancillary defendant is the defendant to that claim (see rule 18.1(2)).

Rule 18.2 provides that an ancillary claim is to be treated as if it were a claim for the purposes of the CPR but 18.2(2) disapplies certain rules to an ancillary claim including the provisions of Part 12 which enable a claimant to enter a default judgment and "rule 12.7 (nature of default judgment)".

17. The ancillary defendant may file a defence and the rules relating to a defence to a claim are applicable to a defence to an ancillary claim except part 12 (see rule 18.9).

18. Rule 18.12 contains provisions that are applicable where the ancillary defendant fails to file a defence. Of relevance is rule 18.12(2)(a) which is as follows:

> *"(2) The party against whom the ancillary claim is made-*

(a) is deemed to admit the ancillary claim, and is bound by any judgment or decision in the main proceedings insofar as it is relevant to any matter arising in the ancillary claim;"

19. Counsel for the appellant before this Court accepted that by failing to file a defence to the counterclaim the appellant was deemed to admit the counterclaim. This was the clear effect of rule 18.2(2)(a). This he submitted, however, did not entitle the second respondent as ancillary claimant to judgment on the counterclaim. Rather, the second respondent was entitled to have the admissions taken into account in the main claim between the appellant and the respondents. In other words the respondents must wait until the Court hears the dispute between the appellant and the respondents. Counsel submitted that if that approach is adopted in this case, the deemed admissions of the appellant was that the accident was caused "wholly or in part" by the appellant's negligence. A trial of the claim was necessary to determine whether he was wholly liable or partly liable, and if the latter the extent of his liability. The Judge was therefore wrong to make the orders on the respondents' application that are the subject of this appeal.

20. Counsel for the respondents emphasized rule 18.12(2)(a). He submitted that the effect of that rule was that the appellant having failed to file a defence to the counterclaim was deemed to admit it. The appellant, therefore, was deemed to admit the allegations of liability for the collision and had lost the opportunity to challenge liability or to seek an apportionment of liability. If the Court were to continue with the claim the effect of that would be to allow the appellant a further opportunity to dispute the allegations and having admitted them he should not be allowed to do so. In the circumstances the respondent contends the Judge was entitled to strike out the claim and give judgment in favour of the second respondent on the counterclaim.

21. It is clear from the submissions that there is no issue between the parties that by having failed to defend the counterclaim the appellant is deemed to admit it. The parties were *ad idem* that this meant that the appellant was deemed to admit not only the relief claimed in the counterclaim but the averments contained in counterclaim as well. We think that the parties were correct to adopt that position as that is so from the plain wording of rule 18.12(2)(a). Where they part company however is on the effect of the admissions in this case. That is of course the crux of the dispute and lies at the heart of determining this appeal.

22. When faced with an application such as the respondents' in this case, the approach of the Court must be to determine the effect of the deemed admissions on the claim. It is necessary for the court to carefully consider the admissions and ask itself whether any of the allegations in the claim can exist consistently with the deemed admissions. If there are allegations that cannot stand in view of the deemed admissions the court must assess how that impacts on the claim.

23. There of course need be no connection between the claim and the counterclaim (see rule 18.5(2)). In such a case it is unlikely that the failure to defend the counterclaim will have any significant impact on the claim. Where, however, the counterclaim is wrapped up in the claim and intimately connected to it the position can be expected to be different.

24. It is the position in this case that the counterclaim is intimately wrapped up with the defence. As we mentioned the allegations contained in the counterclaim are identical to those contained in the defence. In those circumstances neither party contended that the effect of admitting the counterclaim can have no impact on the claim.. The appellant's position was that the claim should not have been struck out by the Judge. The appellant, however, conceded that in an appropriate case the admissions deemed to arise from the failure to defend the counterclaim can result in the dismissal of the claim. We think it must be right that there would be cases where the deemed admissions arising from the failure to defend the counterclaim can result in the dismissal of the claim. One such case is where the effect of the claimant admitting the counterclaim would lead to a contradictory outcome on the claim if it were allowed to continue. To permit the claimant to proceed with the claim in those circumstances would be an abuse of process. The respondents submitted that that was this case.

25. The core of the appellant's argument that this claim should not have been struck out was that the averment in the counterclaim that the accident occurred "wholly or in part by the negligence of the" appellant gave him some "wiggle room" as it was necessary for there to be a determination of whether the claimant was wholly liable or only partly liable and if so in what proportion

26. The averments in the counterclaim, which the appellant must be treated as having admitted, are that the second respondent was lawfully and properly driving her vehicle along the Southern Main Road in a southerly direction when the appellant who was travelling in the opposite direction so

negligently drove, managed and/or controlled his vehicle in attempting to overtake a vehicle that his vehicle swerved into second respondent's lane and collided with her vehicle despite her best efforts to avoid a collision . It is entirely inconsistent with that if the appellant were to contend that the accident occurred when the second respondent's vehicle crossed into his lane and there broadsided his vehicle.

27. The appellant therefore can no longer contend that the accident was caused when the second respondent vehicle came into his lane. But is that necessarily the end of the matter in this case? We think not as there is the admission that the collision occurred wholly or in part as a consequence of the second respondent's negligence. So there is therefore an admission in the counterclaim that the collision was caused wholly or in part by the negligence of the second respondent, who is the claimant on the counterclaim. The question is what does that mean for the purposes of the claim. In our judgment it leaves the question still to be decided whether the damage resulting from the accident was the result partly of the appellant's fault and partly from the second respondent's fault and raises the issue of contributory negligence. Notwithstanding the deemed admissions by the failure to file a defence to the counterclaim, that remains a live issue on the claim as there is no clear admission that the accident was not in any way the fault of the second respondent.

28. Section 28 (1) of the Supreme Court of Judicature Act. Chap. 4:01 deals with the apportionment of liability in cases of contributory negligence. This section, so far as is material, is as follows:

> *"28(1) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage…"*

The reference in the section to *"damage*" suffered *"as a result partly of his own fault and partly of the fault of any other person or persons*" means that for the purposes of contributory negligence it is necessary to distinguish between fault causative of the accident and fault causative of the damage. In **Charlesworth and Percy on Negligence** (13th ed) (at para 4-21) it is noted that for the purposes of

contributory negligence, the only relevant fault is that which is causative of the damage suffered. They say that a distinction can arise between such fault and fault causative of an accident even where the accident leads in turn to damage (see for example **Davies v Swan Motor Co. (Swansea) Ltd.** [1949] 2 K.B. 291 and **Jones v Livox Quarries Ltd.** [1952] 2 Q.B. 608).

29. In **Davies v Swan Motor Co. (Swansea) Ltd**, supra, Denning L.J, after referring to the English section corresponding to section 28 (1) of the Supreme Court of Judicature Act, stated:

> *"Speaking generally, therefore, the questions in road traffic accidents are simply these: What faults were there which caused the damage? What are the proportions in which the damage should be apportioned having regard to the respective responsibilities of those in fault?"*

In this case while the appellant can no longer contend that the accident was caused when the second respondent came into his lane, the fault for the resulting damage is an issue that arises on the claim and remains be determined. The particulars of negligence in the counterclaim which have been admitted do not detract from that position. As one would imagine the particulars of negligence referred to the negligence of the appellant. All of them however are not inconsistent with the allegations made by the appellant in the claim. So for example there are particulars of negligence in the counterclaim to the effect that the appellant failed to keep a proper lookout and was driving without due care and attention. Those allegations are however not inconsistent with averments that the second respondent also failed to keep a proper look out or was driving at a speed which was dangerous to the public and other drivers on the road and so may bear some fault for the damage suffered.

30. In the circumstances in our view notwithstanding the admission of the counterclaim, the issue of contributory negligence is still a live one. Although the appellant's position has now been rendered difficult in view of the failure to defend the counterclaim, we cannot at this stage say that there exists no ground for the continuation of the claim. We are therefore of the view that the Judge was wrong to strike out the claim and accordingly we allow this appeal and set aside the order of the Judge below.

31. The judgment on the counterclaim should also be set aside. On the trial of the claim any findings as to the responsibility for the resulting damage will of course be binding on the parties and must be taken into account in relation to the counterclaim. The final disposition of the counterclaim is best left to be dealt with at the trial of the claim.

32. In the circumstance we allow the appeal and set aside the order of the Judge. With respect to costs we order that the respondents pay the appellant's costs of the application in the Court below; such costs to be assessed by the Registrar. With respect to the costs of the appeal the respondents shall pay the appellant's costs determined at half of the assessed costs of the application.

A. Mendonça,
Justice of Appeal

G. Smith,
Justice of Appeal

J. Jones,
Justice of Appeal