[2013] JMSC Civ 194

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2013 HCV 00752

BETWEEN	HUGH BENNETT & JACQUELINE BENNETT	CLAIMANTS
A N D	MICHAEL WILLIAMS	DEFENDANT

Leone Hines-Smith, holding brief for Debayo Adidepe, for the Claimants/Applicants

Marcelle Donaldson, instructed by Shellards, for the Defendant

Heard: November 5, 8, and 22, 2013

APPLICATION FOR EXTENSION OF TIME TO FILE DEFENCE – NEED TO ALSO OBTAIN EXTENSION OF TIME TO FILE ACKNOWLEDGEMENT OF SERVICE – NEGLECT OF ATTORNEY IN FAILING TO FILE DEFENCE IN TIME – FAILURE OF APPLICANT TO OFFER ANY EXPLANATION FOR FAILURE TO FILE ACKNOWLEDGEMENT OF SERVICE – FILING OF COUNTERCLAIM AND ANCILLARY CLAIM – 'ANCILLARY CLAIM' DEFINED IN RULES OF COURT AS INCLUDING 'COUNTERCLAIM' – FACTORS TO BE CONSIDERED BY COURT IN DECIDING WHETHER TO GRANT AN EXTENSION OF TIME FOR FILING OF DEFENCE – LENGTH OF DELAY – REASONS FOR DELAY – PREJUDICE TO CLAIMANT – WHETHER PROPOSED DEFENCE HAS A REALISTIC PROSPECT OF SUCCESS – FORFEITURE OF PURCHASE PRICE DEPOSIT PURSUANT TO LAND SALE AGREEMENT – WHETHER DEFENDANT ENTITLED TO FORFEIT DEPOSIT

Anderson, K., J.

IN CHAMBERS

[1] In respect of this matter, the respective claim form and particulars of claim, were filed on February 8, 2013, claiming damages of $600,000.00 which represents the deposit paid for the purchase of property located at 1740 North Carlisle Place, Cumberland, in the parish of St. Catherine and registered at volume 1248, folio 345.

[6] As such, the 'ancillary claim' and its 'particulars', are superfluous documents. This court should and will therefore in managing this case, strike out the ancillary claim.

[7] The claimants did not, in response to either the defendant's counterclaim or ancillary claim, file a defence to either of same, within the required 42 day period. In addition, the claimant did not file any acknowledgement of service of counterclaim or ancillary claim within the required 14 day period, or at all.

[8] On April 12, 2013, the defendant filed a request for default judgment, seeking judgment in default of filing acknowledgement of service in response to the defendant's ancillary claim. In that request for default judgment, the defendant claims for the sum of $579,799.00, plus interest, court fees and costs.

[9] The defendant has not yet obtained default judgment, as requested. The claimant has, as of July 15, 2013, filed a defence to counterclaim and in a separate document, filed a defence to ancillary claim. As of yet though, the claimants have filed no acknowledgment of service, either as regards the defendant's counterclaim, or as regards the defendant's ancillary claim. The claimants' defence to ancillary claim and defence to counterclaim, are not surprisingly, identical in all respects.

[10] On July 19, 2013, the claimants filed an application for time to be enlarged for the filing of a defence to the counterclaim and the ancillary claim and for the respective defences to counterclaim and ancillary claim, to stand as filed. The claimants have also, in that application, sought relief from sanctions and such further or other relief as may be just.

[11] No sanction has been imposed on the claimants and thus, no relief from sanctions can properly be granted. Sanctions as referred to in our rules of court, refer to a situation in which a party's statement of case has been struck out under Part 26, arising from that party's failure to comply with a rule, order or direction of the court. See **rule 26.3(1)(a), read along with rule 26.4 and rule 26.8 of the CPR** in that regard. In respect of the matter at hand, whilst the claimants are certainly out of time insofar as the filing of an acknowledgement of service and defence to counterclaim are concerned, no sanction has been imposed upon them arising from their failure to comply with rules of

[2] The defence and counterclaim were filed on March 14, 2013. In the counterclaim, the total sum claimed for is $579,799.00. By that counterclaim, the defendant is contending that the claimants' deposit was forfeited, as a consequence of the agreement for sale having been cancelled 'by no fault of the purchasers.' See in that regard, special conditions Nos. 6 and 7 of the agreement for sale. In addition, the defendant is, in that counterclaim, contending that by virtue of the claimants' failure to complete the agreement for sale, the defendant was unable to liquidate the mortgages which he had previously secured on the property, with Victoria Mutual Building Society (V.M.B.S). As a result, the defendant alleges that he had to continue making those mortgage payments, in the sum of $34,070.00 per month from May, 2012 to March, 2013, making a total of $374,770.00. In addition, the defendant has counterclaimed for interest and penalties on the said mortgage payments, in the sum of $205,029.00. Thus, total loss counterclaimed for, by the defendant, is: ($374,770.00 ł $205,029.00) - $579,779.00.

[3] Surprisingly, the defendant thought it necessary to file an ancillary claim form and particulars of ancillary claim, on March 14, 2013. Having filed the same simultaneously with the defence, no permission of the court was either required by law, or sought by the defendant, to file same. See **rule 18.5(1) and (2) of the Civil Procedures Rules (hereinafter referred to as 'the CPR')**.

[4] The particulars of that ancillary claim, mirror the particulars of the counterclaim and the reliefs being sought by means of that ancillary claim, are in large measure, the same as were being sought by means of the counterclaim. The only difference between the reliefs sought, is that in the particulars of the ancillary claim, the defendant has claimed for 'damages for breach of contract' and 'costs.' In the counterclaim, the defendant has only claimed for special damages, to the extent as set out above.

[5] The term 'ancillary claim' is defined **in rule 18.1(2) of the CPR**, as being:

> *'...any claim other than by a claimant against a defendant or a claim for a set off contained in a defence and includes:*
> *(a) a counterclaim by a defendant against the claimant or against the claimant and some other person...'*

by this court, nor has the main body of that affidavit, for the purposes of this court's ruling on the applicants'/claimants' application for extensions of time. This court holds the view that otherwise inadmissible affidavit evidence cannot be admitted into evidence and taken into account by this court, merely by means of the attachment of that inadmissible affidavit evidence to a lawfully prepared and filed affidavit. If it were otherwise, it would make a mockery of Jamaica's rules of court which prescribe the circumstances in which affidavit evidence purportededly deponed to outside of Jamaica and in which documentary exhibits attached to any affidavit, may properly be considered by a court as constituting evidence.

[13] In addressing the pertinent application, it must firstly be stated, that this court cannot enlarge the time for the filing of the claimant's defence to counterclaim, without also enlarging the time for the filing of the claimant's acknowledgement of service of the defendant's counterclaim/ancillary claim. The claimants though, have, only as of today (November 22, 2013) applied for such order. This therefore brings into sharp focus, the provisions of **rule 11.13 of the CPR**. That rule provides that, '*an applicant may not ask at any hearing for an order which was not sought in the application unless the court gives permission.*' This court has given such permission, following on this court having , on November 22, 2013 – that being the date when my ruling on the claimants' application was made known to the parties, before such ruling was rendered by this court, informed counsel for the parties, that such permission was necessary, at which time, the claimants' counsel asked for such permission to be granted. That request was not objected to by the defence counsel and was therefore granted by this court.

[14] The claimants have, in their application, set out their reliance on several grounds for same. Grounds 1-6 therefore, could conveniently be summarized as follows – '*The claimants have a defence to the defendant's counterclaim/ancillary claim, which has a realistic prospect of success.*' All of the particulars of that 'defence' should have only been set out in affidavit evidence led in support of the application. This was done, but equally so, quite unnecessarily, was set out with some particularity, in the grounds for this application.

court in that regard. Even if a default judgment were to be granted against them in respect of the defendant's ancillary claim/counterclaim, this would not be equivalent to, nor should it be equated with the imposition of a sanction. A sanction on a party can only properly be imposed by a Judge of this court, either arising from an order made on an application under **rule 26.3(1) of the CPR**, or from the failure of a party to comply with an unless order.

[12] At this juncture, it must be made known to the parties, that as regards the application now under consideration, there are two affidavits which this court has given consideration to, along with all other court documentation which has been duly filed, in respect of the claim, counterclaim and ancillary claim. Those two affidavits are as follows: (i) Affidavit of Hugh and Jacqueline Bennett, as filed on July 19, 2013;
(ii) Affidavit of U. Tamara James, as filed on September 25, 2013 and those two affidavits, were filed in support of the application and have been jointly deposed to, by the applicants/claimants. The second of those two affidavits, was filed in response to the application, in the sense that it is being relied upon by the defendant and has been attached to Ms. James' affidavit as an exhibit. This is an affidavit which was deposed to by the defendant, who seeks to rely on same, in response to the application. This court though, will not act on any of the contents of the defendant's said affidavit evidence. It will not act on same, because same was purportedly sworn to in Baltimore, Maryland, United States of America, on September 16, 2013. This court does not know whether that affidavit was sworn to, in accordance with the law in Baltimore, Maryland, United States of America, as applicable to the swearing by a deponent, to affidavit evidence. Furthermore, that affidavit does not purport to have been sworn in accordance with the law and procedure of Baltimore, Maryland, United States of America. In the circumstances, this court does not accept, as there is no basis for it to properly do so, that the said affidavit has been made outside of Jamaica, in accordance with the provisions of **rule 30.4(5) and (6) of the CPR**. Furthermore, this court has noticed that there are several documents attached to that affidavit, which have been referred to therein, as exhibits. Those documents have not been duly endorsed, by the purported deponent to that affidavit, this being the defendant, nor is there alternatively, a proper certificate attached to any of those documents, in accordance with **rule 30.5(4) of the CPR**. As such, those documents as attached to that affidavit, have not been considered

As regards the reliance by the applicants/claimants, on the court's over-riding objective, as a ground of their application, this court has been mindful, for the purpose of this ruling, as it must be, whether this is set out as a ground for an application for court orders or not, that in applying any of its powers which it is authorized to exercise pursuant to Jamaica's rules of court, as also, in interpreting any rules of court, this court must always apply the, *'over-riding objective' of, 'dealing with cases justly'*, which is a term that has, comprised within it, several facets/elements.

[18] Somewhat surprisingly, it has not been set out as a ground for this application, that this court is empowered, by virtue **of rule 26.1(2)(c) of the CPR**, to extend the time for compliance with any rule of court, even if the application for an extension of time is made after the time for compliance has passed. This court must and will, nonetheless, apply this rule of court, for the purpose of determining this application.

[19] That **rule of court – 26.1(2)(c)**, reposes in this court, a discretionary power. In exercising that power, the legal principles are settled. This court must consider the following factors: Firstly whether the party who is seeking an extension of time for the filing of a court document such as a defence, has a proposed defence which, if permitted to be relied on, would have a realistic prospect of success. This is an important factor, since, if the defence as proposed, has no realistic prospect of success, it would not only be pointless, but also a manifest waste of the time and costs, not only of the parties, but also, of the court, to grant an extension of time to a party, merely so as to permit that party to pursue a hopeless defence. Even though it is an important factor though, it is no more important than the other factors to be considered by this court, in ruling on an application such as this, as are set out below.

[20] Secondly, this court must consider what was the length of the delay and thirdly, the extent to which, if to any 'extent at all, 'prejudice' may be caused to the party who/which is opposing the delay, if the extension of time as is being sought, were to be granted.

[21] Fourthly, this court must consider whether the applicant has set out before the court, by means of evidence, a good reason for the delay. This must be so, since, as has been stated by courts, time and time again, delays are the bane of the justice

[15] Grounds 7 and 8 of the said application, are not grounds which can properly be relied upon, in any respect, in support of this application, as those grounds relate to the basis of the claimants' claim and cannot form the basis of the claimants' proposed defence to counterclaim/ancillary claim. As such, this court will pay no further regard to either of those grounds, as they are, quite frankly, of no relevance to, nor can they be of any assistance to the applicants/claimants, in respect of, this application.

[16] Ground 9 as is being relied on in support of this application, has no merit whatsoever. That ground reads as follows – '*That without the benefit of orders from this Honourable Court the claimant faces real and genuine financial hardship and suffers the real prospect of not obtaining the property that has been purchased by the said claimant.*' This is an entirely unmeritorious ground, since the claimants have, even in their claim, never sought specific performance of the relevant agreement for sale and thus, are not seeking, even by means of their own claim, to obtain the relevant property. In any event, quite to the contrary of what this ground suggests, the said property has not even come seriously, 'in close view', of being purchased by the claimants, unless the mere payment of a potentially refundable deposit by the claimants, is considered as such. All that the claimants have claimed against the defendant for, is for a refund of their deposit which was paid over to the defendant, pursuant to the relevant agreement for sale. Also, there is no doubt that the claimants are contending that they have suffered genuine financial hardship arising from that which they allege, is a breach of the relevant agreement for sale by the defendant. Even if that is so though, the existence of a valid claim certainly can never, in and of itself, be properly viewed by this court as constituting a realistically, prospectively successful defence to a counterclaim or ancillary claim, or as a basis for the granting by this court, to that claimant, of an extension of time for the filing of a defence to counterclaim/ancillary claim and for the filing of an acknowledgement of service to counterclaim/ancillary claim.

[17] The other two grounds of this application, are that:

> *(i)* *'... the court's over-riding objective will be advanced by the making of the orders being sought herein, and*
>
> *(ii)* *That there is no prejudice to the respondent's case.'*

South East Regional Health Authority – Claim No. 2006 HCV 00816. Rules of court must, of necessity be applied wholistically, if the overall interests of justice are to be attained.

[23] Furthermore, it ought always to be carefully noted by litigants and attorneys alike, that, that this court, although having a discretion which it can exercise in a party's favour, to extend time, cannot and ought not to be expected to exercise its discretion in a party's favour, unless sufficient material, in the form of evidence, has been placed before this court, such as could properly enable this court to exercise its discretion in favour of the party who/which is applying for an extension of time. If this were not so, then it would be equivalent to a party in breach of a rule or order of court requiring that a particular court document be filed and/or served by a particular date, having an unqualified right to an extension of time. Such an approach would seriously undermine the over-riding objective, of Jamaica's rules of court, that being, to deal with cases justly. See: **Patrick v Walker** – [1969] 11J.L.R. 303. All of the aforementioned legal principles as regards how courts should, in general, assess applications for extensions of time, are clearly set out in the following cases: **Attorney General of Jamaica and Roshane Dixon** and **Attorney General of Jamaica and Sheldon Dockery** – [2013] JMCA Civ 23; and **Fiesta Jamaica Ltd and National Water Commission** – [2010] JMCA Civ. 4; and **Peter Haddad and Donald Silvera** – SCCA No. 31/2003; and **Revici and Prentice Hall Inc.** – [1969] 1 W.L.R. 157.

[24] Applying those settled legal principles to the applicants'/ claimants' application for an extension of time, as is now at hand, this court has firstly, taken note that the length of the delay in the filing by the claimants of a defence to counterclaim/ancillary claim, has been approximately two months and two weeks. This is so because, service of the defendants' counterclaim and ancillary claim respectively, was effected lawfully, via facsimile which was transmitted to the office of the claimants' attorney, namely, Mr. Debayo Adidepe, on March 18, 2013. The claimants' defence to ancillary claim and defence to counterclaim (these being separate court documents) were both filed on July 15, 2013. The claimants would have had, according to this court's rules, 42 clear days after service on them, of the defendant's counterclaim and ancillary claim, to have filed and served their defence to counterclaim and defence to ancillary claim. See **rule**

system and thus, ought not to be tolerated as almost being a matter of course, or as something to be expected. If this court were to adopt such an approach to applications for extensions of time, it would mean that the court's process, would once again revert to being 'litigant and attorney-driven' rather than, as it now is and indeed, ought to be, 'court-driven.'

[22] Each of the aforementioned factors, being of equal importance insofar as this court's consideration of an application such as this is concerned, must be considered, 'in the round', or other words, 'wholistically', and in the overall context of the particular circumstances of each particular case, rather than as a checklist, in respect of which this court must, as it were, 'keep score' and depending on whether the applicant has successfully overcome, for example, three of the four specified considerations which this court must take into account, the applicant should be successful. To the contrary, everything must be viewed by this court, in respect of an application such as this, wholistically, in the context of the overall interests of justice. Thus for instance, if the length of the delay has not been properly explained and/or justified, then even though the delay may not be unduly long and even though the defendant may have a meritorious defence, it would and should, by no means, automatically follow, that an extension of time for the filing of that defence, ought to be granted. This is so because, the weaker the excuse for the delay and worse yet of course, if there is no reason whatsoever, offered for the delay, this court should be very loathe to exercise its discretion in favour of the party who/which is seeking an extension of time. This does not and cannot mean however, that if a party's proposed defence has a realistic prospect of success, nonetheless, that party will be 'shut out of the court's gates', because of delay whether properly justified or not, in the filing by that party, of a particular court document. Instead, everything must be considered wholistically, since otherwise, a default judgment would be entered in circumstances where a defendant has a defence which has a realistic prospect of success and if that happens, that defendant could then apply to set aside that default judgment. If that were to occur, although this court must consider the length of delay in filing of the required court document(s) and the reason(s) for that delay, the primary consideration for this court, in deciding on whether or not to set aside a default judgment is whether or not the defendant's defence has a realistic prospect of success. See: **Marcia Jarrett and**

[26] Despite the best efforts of counsel for the applicants, to convince this court that a good reason has been proffered to this court by her clients, as to why the claimants'/applicants' defence to counterclaim and defence to ancillary claim, were not filed within the time as allotted for that purpose, by Jamaica's rules of court, this court has not at all been so convinced.

[27] Firstly, this court has not been made aware as to the precise date by which the relevant defences had been duly prepared, executed by the applicants or someone else on their behalf (as is permitted in special circumstances) and were thus, ready to be filed. Instead, it has merely been deposed to by the applicants, in their joint affidavit, that due to the omission and oversight of clerks employed in the office of their then attorney – Mr. Adidepe, the relevant defences were not filed within time. To simply have stated the same and offer that to this court as a good excuse for the delay, is not enough to constitute a good reason for the delay. It is not enough, because, this court does not even know, in the first instance, how long the length of delay was, between when the relevant defences were fully prepared and ready for filing, as against when it was that the same were actually filed. Secondly, this court does not know when it was that the attorney and/or his office, became fully aware that the relevant defences were out of time. This is important because, if for example, the attorney for a party whose defence has been filed out of time, became aware, only one day after the time limit for the filing of that defence had expired, that the said defence, having not by then been filed, was out of time for same, but thereafter, nonchalantly were to not have gone about the process of ensuring the prompt filing of same thereafter, and instead, did not file same until two months thereafter (that time period being used only as an example), then clearly, there would be 'no good reason for the delay.' Everything in terms of what is to be considered as either constituting or not constituting a good reason for delay, has of necessity, to be considered in a context. As such, in an application for an extension of time, such as this is, the full context of the reason for the delay, must be made known to this court. It is only if the full context of same is known by the court, that this court would be in a proper position to determine that there has been good reason proffered to this court, for the delay. In that regard, it ought to be remembered by litigants and attorneys, that the burden of establishing good reason for the delay, always rests

10.3(1) of the CPR in this regard. That 42 day period, which is to be calculated as, 'clear days', as per **rule 3.2 of the CPR**, would have expired on April 30, 2013. Those defences were not however, filed until July 15, 2013. That delay is not, in terms of its length, if considered only in that context, an excessive one. Whether or not a delay in filing of a court document is an excessive one though, cannot merely be considered in the context of the actual length of the delay. Instead, the length of the delay must be considered also, in the contexts of what has transpired in terms of the court processes, as also, in terms of what ought to have transpired, but has not transpired, because of the delay. In the case at hand, the late filing by the applicants/claimants of their respective defences to counterclaim and ancillary claim, have led the defendant, understandably and appropriately, to file a request for default judgment. That request though, equally understandably, will not be adjudicated upon by the Supreme Court Registrar, in circumstances wherein there now exists before this court, an application by the claimants, for an extension of time for the filing of those defences. Thus, the defendant is presently precluded from obtaining that default judgment, not only until this court has ruled on the present application, but also, only if this court rules on the said application, in favour of the defendant. All in all though, this court does not view the length of delay in the filing by the applicants/claimants of a defence to counterclaim/ancillary claim as excessive, in the case at hand and furthermore, this court did not understand that counsel for the defendant was at all suggesting otherwise, during oral submissions as regards this application, as were made before this court.

[25] What reason, if any, has been proffered for the delay? That reason has been briefly set out in the applicants'/claimants' affidavit, which was, on July 19, 2013, filed in support of their application. It is as set out in paragraph 5 of that affidavit, read along with paragraph 4, which is referenced at this juncture, solely for contextual purposes. Those paragraphs, when read seriatim, read as follows:

> *'That the claimants failed to file their defence to the counterclaim and the ancillary claim within the time specified by the rules.' (paragraph 4) 'That the defence to the counterclaim and the ancillary claim were prepared and to be filed but due to the omission and oversight of the clerks employed in counsel's chambers the defence were not filed on time.'*

attorney himself (this clearly being, in any event, a distinction without a difference), the precise contextual details of that inaction, are entirely, unknown by this court, as neither the applicants, nor anyone on their behalf, have made such known to this court.

[29] In any event though, if even a good reason can be taken as having been provided to this court for the delay by the applicants/claimants in filing their respective defences to counterclaim and ancillary claim and thus, this court were to hereafter be considered as having erred in having reached a contrary conclusion, it would, in any event, be to no avail insofar as the applicants/claimants are concerned. It will not avail them, because they have not at all offered any explanation for the delay in filing an acknowledgement of service in response to the counterclaim, as also in response to the separately filed ancillary claim. Thus, the claimants ought to have either filed two separate acknowledgements of service, or at least, filed one acknowledgement of service, acknowledging the receipt by them, of both the defendant's counterclaim and his ancillary claim and specifying therein, whether they intended to defend against either such (counterclaim/ancillary claim).

[30] The neglect of the claimants' attorney is thus far worse than it may seem, if not carefully considered. Why would he have gone about preparing a defence to the defendants' counterclaim and ancillary claim, if he had not, by then, already ensured that an acknowledgement of service, had been filed and served, in accordance with **rule 9.3(1) of the CPR**? That rule requires that an acknowledgement of service be filed within 14 days after service of the claim form.

[31] In the case at hand, the defendant has filed and served an ancillary claim and a counterclaim. This court has earlier, in this ruling made it clear that it was entirely inappropriate and unnecessary for the defendant to have filed two separate court documents in that regard, since the defendant's counterclaim is to be treated, for the purposes of our rules of court, as being an 'ancillary claim.' See again, **rule 18.1(2)(a) of the CPR**. Furthermore, for the purposes of the applicable rules of court, in **rule 18.2(1) of CPR**, it is provided that – '*An ancillary claim is to be treated as if it were a claim for the purposes of these rules, except as provided by this part.*' As such, an acknowledgement of service of both the defendant's ancillary claim, as well as the

squarely on the shoulders of the party who makes the assertion that such good reason exists. As such, that burden will, in respect of an application for an extension of time, always rest on the shoulders of the applicant. In respect of the applicants'/claimants' present application, that burden has clearly not been met, not only because there is no evidence from which the context of the reason proffered for the relevant delay, can properly be discerned by this court, but also, for the further reason as set out immediately below.

[28] In the case – **Ken Sales and Marketing Limited v James and Company (a firm)** – Supreme Court Civil Appeal No. 3/05, it was made clear by His Lordship, the then President of Jamaica's Court of Appeal, at page 6 of that judgment, that '*inadvertence and certain procedural problems in office*', on the part of an attorney, which led to an acknowledgement of service having been filed out of time by the defendant in that claim, did not constitute, '*a good explanation for failure to file an acknowledgement of service in time.*' Where attorneys, or members of their staff, are negligent, the remedy is as was clearly stated by Jamaica's former Chief Justice Wolfe, in **Wood v H.G. Liquors** – [1995] 48 W.I.R. 240, at p. 255, a claim against the attorneys. These sentiments were echoed with approval by my brother Judge, Mr. Justice Sykes, from as long ago as 2005, in the case: **Eunice Holding and Yvonne Williams** – Claim No. C.L.H 227 of 1995, at paragraph 7 of this court's ruling, in that claim, in respect of an application to set aside judgment in default of defence. Equally, I have, in a prior judgment of mine, as was rendered in the case: **Nadine Billone and Experts 2010 Company Limited** – [2013] JMSC Civ 150, also agreed with that viewpoint. Furthermore, in the case: **B and J Equipment Rental Limited and Joseph Nanco** – Supreme Court Civil Appeal No. 101/2012, which was before the Court of Appeal as a procedural appeal and was, at that time, decided upon by a single Judge of that court, His Lordship, Mr. Justice Morrison, J.A., accepted the conclusion of this court as was rendered in that case, by my sister Judge, Mrs. Justice McDonald-Bishop, that complete and unexplained inaction on the part of an attorney insofar as the failure to file a defence within time, is not to be accepted as constituting, 'a good reason for the delay.' The situation is precisely the same here, in that, whilst the inaction has been made known, by evidence, albeit that it is therein, specifically stated as being the inaction of clerical and office staff of an attorney, as distinct from the inaction of the

defendant's counterclaim, ought to have been both filed and served by the claimants. This was a step which the claimants were required to take, in the event that they wished to defend against either the counterclaim, or the ancillary claim, or both. In that regard, this is made evident by the provisions of **rule 9.2(1) of the CPR**, which state:

> *'A defendant who wishes – (a) to dispute the claim; or (b) to dispute the court's jurisdiction, must file at the registry at which the claim form was issued an acknowledgement of service in form 3 or 4 containing a notice of intention to defend and a copy of the acknowledgement of service to the claimant's attorney-at-law.'*

The only exception to the requirement of a person who intends to defend a claim, needing to file and serve an acknowledgement of service within 14 days of service of the claim/counterclaim/ancillary claim on him/them, is as provided for in **rule 9.2(5) of the CPR**, this being that, *'... the defendant need not file an acknowledgement of service if a defence is filed and served on the claimant or the claimant's attorney-at-law within the period specified in **rule 9.3 of the CPR**.'* The period as specified in **rule 9.3 of the CPR**, is the period ordinary applicable to the time period within which the acknowledgement of service must be filed and served, that being: 14 days.

[32] In the circumstances, in the case at hand, the applicants/claimants, ought to have filed an acknowledgement of service within 14 clear days of the service upon them, via their attorney, of the ancillary claim, as well as the counterclaim. Accordingly, the claimants are, to date, out of time by almost seven months and three weeks for the filing of same. This court has deduced this, insofar as the date when this ruling is being orally made known to the parties, by this court, is November 22, 2013. The applicants'/claimants' acknowledgement(s) of service ought to have been filed and served by or before April 2, 2013. To date however, no such acknowledgement of service has, as yet been filed by the applicants/ claimants. In the circumstances, the extent of delay by the applicants/claimants in the filing of same, can now only properly be described by this court as, 'egregious.'

[33] Not only has the applicants'/claimants' delay in that regard been egregious, but moreover, and worse yet for the applicants/claimants, absolutely no explanation has been offered by them collectively, or by either of them, or even by anyone else, for and

on their behalf, for the said delay. It is almost as though they were not even aware of the need to file an acknowledgement or acknowledgements of service. Of this though, this court cannot be expected to speculate and will not so speculate. In any event, it matters not, because the failure of the applicants/claimants to know what was legally required of them in that regard, if even this court were prepared to accept that to be so, which this court is not, could hardly be a good reason for the delay. If even also, this court were minded to infer that the failure to file an acknowledgement of service was due to inadvertence or carelessness on the part of their attorney this it should be made known, not being an inference which this court is minded to draw, in the absence of any evidence which could properly enable this court to come to that inferential conclusion, nonetheless, any such inadvertence or carelessness, even if this court had determined that same existed would not constitute, 'good reason for the delay.'

[34] In the circumstances, the length of delay (otherwise described herein as 'the extent of delay'), by the applications/claimants in the filing of acknowledgement(s) of service, in response to the defendant's counterclaim and ancillary claim, which were duly filed and served on them, being egregious and their failure to offer any explanation whatsoever for such delay, must of necessity, weigh very heavily against the applicants/claimants in respect of their present application. In that regard, it must not at all be disregarded, that this court cannot and ought not to grant an extension of time for the filing of a defence unless this court has also granted, in the first instance, an extension of time for the filing of an acknowledgement of service. Thus, it is the application for the extension of time for the filing of acknowledgement(s) of service, which must first be determined by this court, before this court can or ought to properly go on to consider whether to grant an extension of time for the filing of defence. This must be so, since it is a condition precedent for the filing by a defendant, in the present circumstances, of a defence, that an acknowledgement of service must first have been filed, or by court order granting extensions of time, both for filing of acknowledgement of service and defence, the same could simultaneously be filed out of time, in accordance with this court's order.

[35] Whilst the filing of an acknowledgement of service is though, in the present circumstances, a condition precedent for the filing of a defence, it does not and cannot

inexorably follow, that if this court were to be minded to grant an extension of time for the filing by the applicants/claimants, of a defence to counterclaim/ancillary this court ought or must, in that circumstance, also grant to the applicants/claimants, an extension of time for the filing of acknowledgement(s) of service. These two applications, pertaining to different documents, one of which has been filed, whereas the other has not and in respect of which, for one, the extent of delay in filing, could hardly be described as extremely lengthy, much less 'egregious', whereas the other has been precisely so described in this ruling and also, in respect of one, there has been, at least, some explanation offered for the delay, whereas, in respect of the other, no such explanation has been offered, are clearly different applications, which this court must treat with differently. It is entirely conceivable as a matter of law therefore, that this court may have been minded to grant the applicants'/claimants' application for an extension of time for the filing of a defence to counterclaim/ancillary claim, but may not actually do so, because, on the other hand, this court is not minded to grant an extension of time for the filing of acknowledgement(s) of service. In such a circumstance, not only would it be pointless to grant an extension of time for the filing of a defence to counterclaim/ancillary claim, but also, it would be anathema to the interests of justice, which requires that this court consider time and costs and also, ensure that each case before the court, is allotted an appropriate share of the court's resources, bearing in mind at all times, that this court has limited resources and that there are several other cases before this court, which also require the allocation to them of appropriate shares of this court's limited resources.

[36] This court will next, in this ruling, address its mind to the issue of whether there would be any 'prejudice' to the defendant if this application were to be granted and if so, the extent of such 'prejudice.' The term 'prejudice' ought not to be considered in a narrow way. It is a term which ought to be considered, just as this application, in a practical and wholistic way. Thus, whilst of course, there could be no real prejudice to the respondent/defendant if it would be overall, in the interests of justice, to grant the applicants'/claimants' application, nonetheless, what this court must determine, in deciding on whether such real prejudice exists or not, is, when looked at wholistically, whether such prejudice would be, in a very practical sense, substantial in nature. It is for that reason, that academics, legal practitioners and judges alike, have often

preferred to use the terms, 'real prejudice' or 'substantial prejudice', instead of 'prejudice', when addressing their minds to applications such as these. The term 'prejudice' is though, to my mind, always to be assessed by this court, by considering such in a practical and wholistic way and thus, is to be viewed in the context of whether it is substantial or perhaps even irremediable or not, this as distinct from minimal, or readily compensable by an order for costs to be paid.

[37] This court accepts as correct, the approach as suggested by Sir Thomas Bingham, M.R., in **Costellow v Somerset County Council** – [1993] 1 W.L.R. 256, at p. 264 H, with respect to an application for an extension of time – 'Saving special cases or exceptional circumstances it can rarely be appropriate, on an overall assessment of what justice requires to deny the plaintiff an extension, (where the denial will stifle his action) because of a procedural default, which, even if unjustifiable, has caused the defendant no prejudice for which he cannot be compensated by an award of costs.' This dicta has been cited with approval, in a later case – **Johnson and Coburn** – [1999] All E.R. (D) 1309, as also by the Jamaica Court of Appeal, in the case: **Administrator General of Jamaica (Administrator – Estate Alvin Augustus Cargill – deceased)** and **Vivian Plowright and Ferdinand Murphy** – Supreme Court Civil Appeal No. 55/99; and **West Indies Sugar v Stanley Minnell** – [1993] 30 J.L.R. 542, at p. 545, per Forte, J.A. The **Costellow case** was decided pre- CPR, whereas the **Johnson case** was decided post – CPR.

[38] In **Mortgage Corporation Limited v Sandoes** – [1996] TLR 75, England's Court of Appeal gave guidance as to the approach which litigants can expect the court to adopt to the failure to adhere to time limits contained in the rules or directions of the court. That guidance is comprised in ten points of equal significance, which are as follows:

(1) Time requirements laid down by the rules and directions given by the court are not merely targets to be attempted, they are rules to be observed.

(ii) At the same time, the over-riding principle is that justice must be done.

(iii) Litigants are entitled to have their cases resolved with reasonable expedition. Non-compliance with time limits can cause prejudice to one or more of the parties to the litigation.

(iv) In addition, the vacation or adjournment of the date of trial, prejudices other litigants and disrupts the administration of justice.

(v) Extensions of time which involve the vacation or adjournment of trial dates, should therefore be granted as a last resort.

(vi) Where time limits have not been complied with, the parties should co-operate in reaching an agreement as to new time limits which will not involve the date of trial being postponed.

(vii) If they reach such an agreement, they can ordinarily expect the court to give effect to that agreement at the trial and it is not necessary to make a separate application solely for this purpose.

(viii) The court will not look with favour on the party who seeks to take tactical advantage from the failure of another party to comply with time limits.

(ix) In the absence of an agreement as to a new time-table, an application should be made promptly to the court for directions.

(x) In considering whether to grant an extension of time to a party who is in default, the court will look at all the circumstances, including the considerations identified above.

[39] This court, for the purposes of this application and other similar applications as may come before it in the future, accepts that overall, the approach as set out by England's Court of Appeal and recited above, is the correct approach to be adopted by this court with respect to applications such as these. In looking at, 'all the circumstances', of course, this court must and will take into account each of the factors as specified in paragraphs 19-21 of these reasons for ruling, but as I have also stated in paragraph 22 of these reasons for ruling, everything must be considered by this court, wholistically and in the context of the particular circumstances of each particular case. The objective of this court always must be, not to punish a party in default, but rather, to ensure that justice be done as between the respective parties.

[40] This is why Jamaica's rules of court have made it clear that parties can agree on extensions of time for compliance with any rule of court, or court order, other than a court order as to trial dates. Trial dates can only be adjourned by order of this court. Other than with respect to proposed trial adjournments however, it is expected of parties to a claim, in the requirement which they have, pursuant to **rule 1.3 of the CPR**, to

further the over-riding objective, to do their utmost best and comply, for the most part, with rules and orders of court setting timetables for various steps to be taken as regards any claim. If, as should rarely occur, a party requires an extension of time, then co-operation of the opposing party, should be sought, in order for an extension of time in that regard, to be agreed upon. To do this, saves time and costs and also, does not require this court to allot to that case, a disproportionate share of its already limited resources. It is not appropriate, where there has been default in compliance with a time limit rule of court, or court order, to strategically attempt to take tactical advantage of same, for the purpose of obtaining judgment, or some other advantage. Such an approach is not one which is in furtherance of the interests of justice, but rather, is one which is designed only to further the relevant litigant's personal interest in gaining, if he can, such strategic tactical advantage. The rules of court as regards agreements to extensions of time for filing of defence and proposed trial date adjournments of consent of the parties are set out in **rules 10.3(5)-(8) and 27.11(1), (2), (5) and (6) of the CPR.** There would undoubtedly be prejudice that would ensue to the defendant, in respect of the matter at hand, if this application were to be granted. This would be so because, if such were to be granted, then the defendant would not be able to obtain a default judgment, unless, after the court has granted such extension of time to the applicants/claimants, they have once again failed to comply with those time limitations.

[41] It is worthy of note though, that the defendant has requested judgment in default of acknowledgement of service. At this time, even if this court were to deny the applicants'/claimants' application for an extension of time though, as Jamaica's rules of court are presently worded, such could not properly be granted by the Registrar. This is so, because of the precise wording **of rule 12.4(a), (b) and (c) of the CPR**. **Rule 12.4(a)-(c) of the CPR** must be considered conjunctively. That rule in those respects, provides as follows:

> '*The registry at the request of the claimant must enter judgment against a defendant for failure to file an acknowledgement of service, if – (a) the claimant proves service of the claim form and particulars of claim on that defendant; (b) the period for filing an acknowledgement of service under* ***rule 9.3 of the CPR*** *has expired, (c) that defendant has not file (i) an acknowledgement of service; or (ii) a defence to the claim or any part of it.*

In the matter at hand, the claimants have filed a defence to the counterclaim, as also, a separate court document entitled, 'defence to ancillary claim.' They filed both of same, on July 15, 2013. The defendant's request for default judgment was filed before the claimants' defence to counter claim and ancillary claim, was filed, since that request was filed on April 12, 2013 – that being within ten days of the date on which the claimants' acknowledgement of service ought to have been filed. There is no evidence before this court, that the parties had, at any time, even so much as attempted to reach agreement on an extension of time for the filing of that/those acknowledgement(s) of service. Either party could have and should have reached out to the opposing party in terms of the claim, with a view to reaching agreement in that regard. Instead of having done that, it is this court's considered opinion, that the defendant sought, through his counsel, to take tactical advantage of the claimants' failure to file the requisite acknowledgement of service. This was not the correct approach. I say this with all due respect to the law firm which is on record as representing the defendant and the attorney from that firm who was then responsible for the defendant's conduct of his defence – this not having been Ms. Marcelle Donaldson, attorney-at-law, who appeared before me, on the defendant's behalf, in response to this application. In any event though, as things presently stand, there having been defences filed to counterclaim and ancillary claim, there cannot lawfully or properly be granted by the Registrar, a judgment in default of acknowledgement of service. If the Registrar were to grant such a judgment, she would be doing so, contrary **to rule 12.4(c) of the CPR**. The Registrar could though, prior to the claimants having filed defences to the counterclaim/ancillary claim, have obtained the default judgment in default of acknowledgement of service, but not so now, since those defences have been filed.

[42] This certainly does not mean though, that the defendant cannot, even at this stage, if the applicants'/claimants' present application fails, obtain thereafter, judgment in default of defence – this as distinct from judgment in default of acknowledgement of service. The defendant can, if this application by the claimants, has been determined in his favour, obtain a judgment in default of defence, pursuant to **rule 12.5 of the CPR**. That rule is worded differently from the rule which sets out the circumstances in which a judgment for failure to file an acknowledgement of service, can be obtained. Thus, in

rule 12.5 of the CPR, it is, to the extent as is relevant to be quoted for present purposes, provides as follows :

> *'The registry must enter judgment at the request of the claimant against a defendant for failure to defend if – (a) the claimant proves service of the claim form and particulars of claim on that defendant; or an acknowledgement of service has been filed by the defendant against whom judgment is sought; (c) the period for filing a defence and any extension agreed by the parties or ordered by the court has expired; (d) that defendant has not filed a defence within time to the claim or any part of ....'*

[43] From the wording of **rule 12.5 of the CPR**, as compared with **rule 12.4 of the CPR**, what seems clear to this court, is that whilst one cannot properly obtain a judgment in default of the filing of an acknowledgement of service, if a defence to the claim has been filed prior to that proposed default judgment having been granted by the Registrar, this even if no acknowledgement of service has been filed, the legal situation is different insofar as the proposed entry by the Registrar, of a judgment in default of defence, is concerned. This is so because, in respect of the latter, once there is no pending application for an extension of time within which to file defence and the 'claimant' has proven service of the claim form and particulars of claim, on the defendant, then, even if that defendant has filed an acknowledgement of service and/or a defence, prior to judgment having been entered against him, judgment in default must be entered against him, if the filed defence, was not so filed within time. The time allotted by the rules of court for that purposes, is 42 days for a claim form matter. Default judgments cannot be obtained in respect of fixed date claim form matters. The only means by which a defendant in default of filing a defence within time, can avoid having a default judgment being entered against him by the registrar, is if that defendant has filed an application for an extension of time to file defence. In the matter now at hand therefore, once said application has been disposed of by this court, if the same is disposed of in a manner which is favourable to the defendant, this would then entitle the defendant to file a request for judgment in default of defence and on that request, the Registrar of this court, would then be obliged to enter judgment in his favour. Accordingly, there would be some measure of prejudice caused to the defendant, if this

application were to be granted, but this court, in assessing everything in a wholistic way, so as to determine whether such prejudice is either overwhelming, or irremediable by means of an order of costs which can be made by this court, against the party who had been in default and is applying for an extension of time, must go on to consider the defendant's defence, or proposed defence (as the case may be) and in that regard, must assess, the strengths and/or weakness of same, when considered on paper, without, in the matter now at hand, there being any oral evidence available to be considered. In assessing the strengths and/or weaknesses of the claimants' defence, to counterclaim and defence to ancillary claim, which will hereafter, for practical purposes, be viewed by this court as a single document, for the purpose of determining whether that defence has a realistic prospect of success, this court is entitled to and should, where necessary, or at least, to the extent that the court considers necessary, pay careful regard to all documents which have been filed before the court and not merely limit itself to viewing the defendant's defence in the context only, of the claimant's claim form and particulars of claim. This is the approach to be taken in summary judgment applications as made by claimants, wherein, the court must assess whether the defendant's defence has a real/realistic prospect of success, in accordance with **rule 13.3(1) of the CPR**. See: **Swain v Hillman** – [2001] 1 All E.R. 91; **ED and F Man Liquid Products Ltd. v Patel and another** – [2003] EWCA Civ 472; and **ASE Metals NV and Exclusive Hoilday of Elegance Ltd.** – [2013] JMCA Civ 37; and **Andrew Robertson and Toyojam Ltd. and Ewen Haughton** – Claim No. 2006 HCV2311. This court will adopt a similar approach, for the purpose of determining whether the applicants'/claimants' defence, which was filed out of time, has any 'real' or 'realistic' (these terms are to be understood in the same way), prospect of success.

[44] This court should though, before addressing the defence as filed by the claimants to the defendant's counterclaim and ancillary claim, go on to state that it must be recognized by litigants and attorneys alike, that a willingness and capacity to pay the costs of a party, in relation not only an application for an extension of time, but further, in relation to all court processes related to that claim, which flow from the court having granted an extension of time, does not entitle that party, if in default with compliance with a time limit either as imposed by a rule or order of the court, to obtain an extension of time. If it were otherwise, a wealthy party who has applied for an extension of time,

would always be entitled to obtain same, whereas an impecunious party would not be equally treated with by the court, in that respect. See: **Haddad and Silvera** (*op. cit.*).

[45] This court has earlier set out in these reasons, at paragraph 2, the basis for the defendant's counterclaim/ancillary claim, as made against the claimants. In response to same, the claimants are contending that they are not liable to the defendant at all. The claimants, being the once intended purchasers of the relevant land parcel, failed to produce the required letter of commitment from the intended primary financiers of their intended purchase of the said property. Upon the execution of the agreement for sale, the intended purchasers of the relevant land parcel, being the claimants, paid a deposit towards the property's purchase price and that deposit was in the sum of $600,000.00. This is the sum which they are now seeking to have awarded to them by this court, as this is the sum which they are claiming from the defendant. The sum of $600,000.00 represents 10% of the purchase price for that land parcel. That deposit was forfeited pursuant to the provisions of special conditions 6 and 7 of the relevant agreement for sale. In that regard, the defendant having forfeited the 10% deposit, is also, by means of his counterclaim, seeking to recover damages for breach of contract and more specifically, damages for that which he claims as being consequential losses which he suffered, arising from the claimants' failure to comply with the agreement for sale. The claimants in response, have denied that they were in breach of the agreement for sale, albeit that they do accept that they were in default in providing the required letter of commitment within the requisite time frame. In that regard, special conditions 6 and 7 are what is known in law as liquidated damages clauses, this as distinct from penalty clauses. In the circumstances, the claimants are also contending that they are not liable to the defendant, because the defendant has suffered no loss for which he is entitled by law to recover compensation from the claimants for. This court takes the view that the defendant has already recovered the deposit paid by the claimants and by virtue of special conditions 6 and 7, he can only otherwise recover for half cost as presumably paid by the claimants, for the preparation of the agreement for sale. The defendant has made no claim for this sum. In the case of **Workers Trust and Merchant Bank v Dojap Investments** (P.C.) – [1993] A.C. 573, it was held by the Privy Council, that a deposit is subject to forfeiture, if it is a reasonable amount, such as for example, 10%, as against the 25%, which it was in that matter.

[46] The claimants are contending that the agreement for sale should have been cancelled pursuant to clause 6 and not clause 7 of the special conditions of sale. The distinction between these two clauses in that agreement for sale, is that one of those clauses, being clause 7, is framed in general terms, albeit that it is, just as clause 6, a liquidated damages clause. Clause 6 is, on the other hand, framed in specific terms and sets out the liquidated damages payable by the intended purchasers in the event that they fail to deliver to the intended vendor's attorney, the requisite letter of commitment, within 45 days of the execution of the agreement. Following on that, once the vendor cancelled the agreement, the vendor was only entitled to recover as liquidated damages, the purchaser's half cost of the agreement for sale.

[47] This courts hold the view that the claimants' defence is one which has a realistic prospect of success. It has such because, if clause 7 of the special conditions, could have been relied on in circumstances where the letter of commitment was not obtained and handed over by the intended purchasers within the requisite time period, what would have been the point of incorporating within the agreement for sale, clause 6? This court will always, in interpreting a contract, seek to give meaning and effect to all of the clauses as contained in that contract. This is the very essence of freedom of contract, which courts in this jurisdiction are very loathe to interfere with. In any event, in the defendant's counterclaim, he is seeking to claim compensation under clause 7, which he is not permitted by clause 7, in any event, to properly claim for.

[48] The proper approach to the interpretation of contractual documents is as set out in the case: **Investors Compensation Scheme Ltd. v West Bromwich Building Society** – [1998] 1W.L.R. 896 (H.L.). In that case, Ld. Hoffman stated the following principles:

(i) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in which they were at the time of the contract.

(ii) The background was famously referred to by Ld. Wilberforce as the 'matrix of fact', but this phrase is, if anything, on understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception

to be included next, it includes absolutely anything which could have affected the way in which the language of the document would have been understood by a reasonable man.

(iii) The law excludes from the admissible background, the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life.

(iv) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of it words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous, but even (as occasionally happens in everyday life) to conclude that the parties must, for whatever reasons, have used the wrong words or syntax.

(v) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require the judge to attribute to the parties, an intention which they plainly could not have had.

[49] Applying these principles to the case at hand this court takes the view that it is distinctly probable that a reasonable man, in interpreting the relevant contract (agreement for sale), in the context of the relevant background, would have concluded that if there was a failure, by the intended purchasers, to provide the requisite letter of commitment within the requisite time period, then clause 6 of that contract would have to be utilized by the vendor, if it was (as it was in the case at hand), solely on that basis that the intended vendor cancelled the contract. If clause 6 had been utilized as the basis for cancelling that contract, the intended vendor was only entitled to recover from the intended purchasers, being the applicant/claimants herein, half cost of the agreement for sale. The intended vendor, being the defendant herein, would, if that interpretation were to be applied to the relevant contract by this court, be liable to the applicants/claimants for the $600,000.00 which they have claimed for, from him – this being the $600,000.00 deposit which they are contending , was wrongly forfeited by the

intended vendor, pursuant to clause 7. In the circumstances, this court believes that the applicants/claimants do have, not only a strong defence to the defendant's counterclaim, but furthermore, have a compelling basis for the claim being pursued by them against the defendant. In the circumstances, there would, at most only be minimal prejudice to the defendant, if the claimants' present application were to be granted by this court.

Conclusion

[50] In respect of this application, this court will grant same, as on the balance, in the overall interests of justice, it appears to this court, that the defendant's counterclaim and ancillary claim are such as can likely be successfully defended against by the claimants and it appears to this court, that the claimants have always been, if given the opportunity by this court to do so, strongly desirous of defending same. This court will therefore now, after having first heard from the parties, afford time to the applicants/claimants to file and serve their defence, as well as an acknowledgement of service. Furthermore, in exercise of this court's case management powers, this court is minded to strike out one or the other, of the counterclaim and ancillary claim, as filed by the defendant, since one or the other of same, must, of necessity, be superfluous. I will now hear from the respective parties' counsel in that regard. If this court does strike out one or the other of same, this court will require the law firm representing the defendant to show cause, at an agreed on, later date, as to why a wasted costs order should not be made against them, arising from their pursuit, on their client's behalf, of superfluous court proceedings. Equally too, this court will require the claimants' attorney to show cause why an order for costs in relation to this application, should not be made in the form of a wasted costs order against attorney Adidepe.

Note: The parties to this claim agreed not to each other and thus, no wasted costs order has been made.