IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2010HCV03150

BETWEEN	**NYRON WRIGHT**	**CLAIMANT**
AND	**CEON COLLINS**	**DEFENDANT**
	AND	
BETWEEN	**CEON COLLINS**	**ANCILLARY CLAIMANT**
AND	**NYRON WRIGHT**	**1st ANCILLARY DEFENDANT**
AND	**AMECO CARIBBEAN INCORPORATED LIMITED**	**2nd ANCILLARY DEFENDANT**
AND	**CABLE AND WIRELESS JAMAICA LIMITED**	**3rd ANCILLARY DEFENDANT**

IN CHAMBERS

Miss Racquel Dunbar instructed by Dunbar & Co. for the Ancillary Claimant

Miss Nicosie Dummett for the 3rd Ancillary Defendant

February 15 and April 15, 2016

Limitation of actions - Application to amend ancillary defence-whether proposed ancillary claim statute barred- Law Reform (Tort-Feasors) Act - Civil Procedure Rules Parts 18 and 20

SIMMONS J

BACKGROUND

[1] Mr. Nyron Wright (the claimant) has filed an action against Mr. Ceon Collins (the defendant/ancillary claimant) whereby he sought to recover damages for injuries he allegedly sustained as a result of a motor vehicle accident that occurred on July 3, 2009 along the Montpelier main road in the parish of Saint James. According to Mr. Wright the accident was caused as a result of Mr. Collins' negligent operation of his motor vehicle.

[2] The defendant has denied the allegation of negligence. Heaverred that the collision was caused solely or substantially by the negligence of the claimant who he says attempted to overtake a vehicle while the defendant was already in the process of overtaking his vehicle thereby causing a collision. The defendant has brought a counterclaim against the claimant for damages for negligence.

[3] At the time of the accident the claimant was the driver of a motor truck licensed CF6446, which was owned by Ameco Caribbean Incorporated Limited (Ameco). He was also the authorised driver of Cable and Wireless Jamaica Limited (Cable and Wireless) which was the lessor of the truck.

[4] As a result of the counterclaim by Mr. Collins, Mr. Wright made a claim against Ameco for an indemnity in respect of all sums that he may have been adjudged liable to pay Mr. Collins, whether by way of damages, interest or costs or alternatively to recover contribution towards any adjudged sum.

[5] Mr. Collins, perhaps out of an abundance of caution, felt it necessary to amend his counterclaim to include an allegation of negligence against both Cable and Wireless and Ameco. They filed a defence dated November 7, 2012 in which they denied any negligence.

[6] A Notice of Proceedings was served on NEM Insurance Company Limited informing them that an action has been filed by Mr. Collins against its insured, Ameco and Cable and Wireless.

[7] The claim was discontinued against Ameco on the 25th February 2014.

[8] Mr. Wright and Mr. Collins arrived at a settlement and the claim was discontinued against Mr. Collins on the 39th November 2015.

[9] What remains is Mr. Collins' counterclaim against Ameco and Cable and Wireless.

THE APPLICATION TO AMEND

[10] By way of an Application for Court Orders dated July 17, 2015 Cable and Wireless is seeking the Court's permission to amend its Ancillary Defence to include a claim against Mr. Collins for the damage done to the vehicle which it had leased from Ameco. The company has also sought relief from sanctions.

[11] The grounds of the application are as follows:-

(i) Liability and quantum are in dispute;

(ii) The 3rd ancillary defendant has a property damage claim which Advantage General Insurance Company knew about since 2009 and did not settle as it was awaiting the outcome of those proceedings;

(iii) The cause of action arises from the same facts now under consideration; and

(iv) There will be no prejudice to the ancillary claimant.

3rd ANCILLARY DEFENDANT'S SUBMISSIONS

[12] Counsel for the 3rd ancillary defendant began her submissions by inviting the Court to examine the origins of an ancillary claim. In this regard, she relied on the ***Law Reform (Tort-Feasors) Act*** of 1946 (***the Act***) as authority for the submission that a joint tort-feasor's cause of action arises when judgment against him has been pronounced or determined.

[13] Miss Dummett submitted that there is fallacy in the argument that the ***Limitation of Actions Act*** applies to ancillary claims in the same way it does to the main suit. She sought to illustrate the point by stating that if the claimant through inadvertence or through deliberate calculation files his claim on the eve of the limitation period then the ancillary claimant (defendant) would be unable to raise any Defence or join anyone who he feels contributed to the wrong the claimant has suffered.

[14] She also stated that if an ancillary claimant wilfully allows the time to run and joins an ancillary defendant on the eve of the limitation period the result would have a devastating blow to the ancillary defendant as he could not, at that stage, put forward his own Defence or counterclaim to the suit. This she said would result in the ancillary defendant having the burden of being involved in the litigation without the benefit of having any redress in respect of perceived wrongs committed against him.

[15] Counsel referred to the case of ***Mervis Taylor v Owen Lowe et al***, (unreported), Supreme Court, Jamaica, suit no. C.L.1995/T188, delivered on the 9 May 2006, in support of her submissions. She indicated that in the above case Sykes J concluded that the cause of action for an ancillary claimant (third party) arose only after the determination of the main suit. She also submitted that the cause of action for Mr. Collins has not yet arisen and the ancillary defendant should therefore be permitted to amend its Defence to include the property damage claim.

[16] The case of ***Donovan Minott v Norvel Dervin Nevins et al***(unreported), Supreme Court, Jamaica, 2015 JMSC Civ 225, delivered on 18 November 2015 was also relied upon. It was highlighted that in this case Bertram-Linton J (Ag.) stated that:-

> *"…time has not yet begun to run for the purposes of the Ancillary Claim because the 1st and 2nd Defendants have not yet been held liable. The Ancillary claim is therefore not statute barred"*[1]

[17] Reference was also made to rule 20.4 of the ***Civil Procedure Rules***, ***2002*** (***CPR***) which was amended because the previous rule ran counter to a party's constitutional right to be heard and to put one's best case forward. She argued that rule 20.6 does not apply to the instant case and rule 26.9 should be regarded as the authoritative rule.

[18] It was submitted that the 3rd ancillary defendant's ability to amend the Defence to include the property damage claim is not statute barred. It was stated that the cause of action (third party action) giving rise to the ancillary claim has not yet arisen or only just arose and the fact that permission is needed to amend the document does not negate the right which has accrued pursuant to ***the Act***.

DEFENDANT/ANCILLARY CLAIMANT'S SUBMISSIONS

[19] Counsel for Mr. Collins has strongly opposed the 3rd ancillary defendant's application. The Court was urged to consider the timing of the amendments. He relied on the following passage in ***Blackstone's Civil Practice 2004*** which states as follows:-

> *"Lateness is often combined with related factors, such as impact on the trial dates, and whether the party seeking to amend can be criticised for failing to apply earlier because they had known for some time of the material forming the basis of the amended case."*[2]

[20] It was argued that the 3rd ancillary defendant has been actively involved in the matter since October 2012 and had knowledge and possession of all the details pertaining to the damage to the vehicle from July 2009 but chose to solely defend the claim made against it by the defendant.

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[1]Paragraph 12
[2]Page 314

[21] It was also argued that at no time prior to July 21, 2015did it in any way indicate or seek to invoke its options under rule 18 of the ***CPR*** and make a claim for damage to the vehicle.

[22] Counsel submitted that the 3rd ancillary defendant had the opportunity to make a claim against the defendant at mediation and at the various Case Management Conferences which were held. The last Case Management Conference, it was argued, was held one month before the limitation period had run out. However, the 3rd ancillary defendant did not use any of the opportunities there to make its claim.

[23] It was argued that the defendant is now being asked to face a claim that is severely prejudicial to him. Counsel stated that when the limitation period expired on July 3, 2015 the defendant had the *sword of Damocles* lifted from his head and no amount of costs can compensate him for the loss of that sense of relief.

[24] Counsel argued that the defendant defended the claim made by the claimant and knew what he was facing for the last five (5) years and on the brink of trial it is unfair and unjust to ask him to face a new claim that he at no time had in his contemplation.

[25] Counsel submitted that in considering whether or not to allow an amendment, the Court should be guided by the overriding objective as well as the factors outlined in ***Gladstone Allen v Donald Allen*** (unreported), Supreme Court, Jamaica, [2014] JMSC Civ. 220. They are:

> *"(a) Whether granting the amendment will be prejudicial to the other side;*
>
> (b) *Whether there would be no injustice caused to the other side;*
>
> (c) *Whether the other side would be taken by surprise;*
>
> (d) *How great a change is made in the issues by the proposed amendments"*

[26] Counsel also referred to the case of ***Ketteman v Hansel Properties Ltd*** [1988] 1 All ER 38 where Lord Griffiths stated that it is not the practice to allow a defence which is wholly different from that pleaded to be raised by amendment at the end of a trial. It was further noted that in ***Ketteman*** Lord Griffiths also stated that there is a clear difference between allowing amendments to clarify the issues in dispute and those that permit a distinct defence to be raised for the first time.

[27] It was contended that the proposed amendments are not required in order to clarify the issues before the Court but seek to introduce an entirely new claim against the defendant. Counsel submitted that the late attempt to introduce a claim against the defendant has taken him by surprise. In fact, it was submitted, since the 3rd ancillary defendant is not the owner of the vehicle the claim is totally unexpected.

[28] Counsel also stated that the List of Documents filed by the 3rd ancillary defendant disclosed no documents that would have alerted anyone that there was a property damage claim looming. It was pointed out that the application to amend is being made three (3) years after the 3rd ancillary defendant filed its Defence to the ancillary claim and no explanation has been offered as to why the 3rdancillary defendant has rested on its laurels for three (3) years when it had documents pertaining to the damage to the vehicle in its possession since the accident occurred.

[29] A passage from chapter fifteen (15) of the fourteenth edition of ***A Practical Approach to Civil Procedure*** by Stuart Sime was relied upon by Counsel. It reads:-

> *"The underlying principle is that all amendments should be made which are necessary to ensure that the real question in controversy between the parties is determined, provided such amendments can be made without causing injustice to any other party"*

[30] Counsel expressed the view that the proposed amendment would cause injustice to Mr. Collins. It was therefore submitted that the justice of the case and the promotion of the overriding objective should result in a refusal of the application.

THE ISSUES

1. Whether or not the 3rd the ancillary defendant cause of action arises only after the determination of the main suit?
2. Whether or not the 3rd ancillary defendant's application to amend its Defence is time barred?
3. Whether the 3rd ancillary defendant should be given permission to amend its Defence to include a claim against the defendant?

DISCUSSION

Whether or not the3rd ancillary defendant's cause of action arises only after the determination of the main suit?

[31] Section 3 (1) of the Act states:-

> *"Where damage is suffered by any person as a result of a tort (whether or not such tort is also a crime) –*
>
> *(a) judgment recovered against any tort-feasor liable in respect of such damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tort-feasor in respect of the same damage;*
>
> *(b) if more than one action is brought in respect of such damage by or on behalf of the person by whom it was suffered, or for the benefit of the estate, or of the wife, husband, parent or child of such person, against tort-feasors liable in respect of the damage (whether as joint tort-feasors or otherwise) the sums recoverable under the judgments given in those actions by way of damages shall not in the aggregate exceed the amount of the damages awarded by the judgment first given; and in any of those actions, other than that in which judgment is first given, the plaintiff shall not be entitled to costs unless*

the court is of the opinion that there was reasonable ground for bringing the action;

(c) any tort-feasor in respect of such damage may recover contribution from any other tort-feasor who is, or would if sued have been, liable in respect of the same damage, (whether as a joint tort-feasor or otherwise) so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which contribution is sought."

[32] Counsel for the 3rd ancillary defendant submitted that the cause of action for an ancillary claimant arose only after the determination of the main suit but it seems to me that this cannot be a correct legal position.

[33] Rule 18.1(2) (a) of the ***CPR***, states that:-

An "ancillary claim" is any claim other than a claim 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.

[34] Rule18.5 (1) of the ***CPR*** outlines the procedure for making an ancillary claim. It states:-

"a defendant may make an ancillary claim without the court's permission if –

a) in the case of a counterclaim, it is filed with the defence; or

b) in any other case, the ancillary claim form is filed before or at the same time the defence is filed."

[35] This rule clearly indicates that a counterclaim may be filed at the same time as the Defence is filed and if a defendant files a counterclaim he becomes an ancillary claimant. A counterclaim is simply the formal assertion of a cause of action by one person (the defendant) against another (usually the claimant).

Therefore, Counsel's argument that an ancillary claimant's cause of action only arises after the determination of the main suit cannot be correct.

[36] If an ancillary claimant's cause of action arose only after the determination of the main suit then Mr. Collins would not have been able to make a counterclaim against Mr. Wright until after the matter between them had been determined.

[37] Rule 18.9 of the ***CPR*** addresses matters relevant to the question whether an ancillary claim should be dealt with separately from the main claim. It is my view that if an ancillary claim can be dealt with separately from the main claim the cause of action on which it is based must have already arisen. This is so because a Court of law will not treat with a matter if there is no basis for dealing with it. The fact that a counterclaim may be dealt with in circumstances where the substantive action has been dismissed reinforces the point.

[38] An ancillary claim arises out of the main claim and that, in and of itself conveys the existence of common issues of law or fact which may ground or form the basis of some cause of action for an ancillary claim. Whether it is a claim by a defendant against some other person or a claim by an ancillary defendant against some other person.

[39] The Court of Appeal case of ***Medical Immunodiagnostic Laboratory Limited v Dorett O'Meally Johnson***(unreported), Court of Appeal, Jamaica, [2010] JMCA Civ 42, judgment delivered 3 October 2010, is somewhat helpful. The appeal challenged the decision of Master George (Ag) (as she then was) who refused permission to allow Medical Immunodiagnostic to join Timos Trading Limited as an ancillary defendant to the proceedings which had been commenced in the Supreme Court. Master George (Ag) refused permission to file the ancillary claim on the basis that the claim was statute barred.

[40] The case is relevant because the learned Judges of the Court of Appeal dealt with the cause of action for the proposed ancillary claim as having accrued just like the causes of action in tort and contract cases. In determining how to

tabulate time the learned judges made no mention of a dependence on the determination of the main suit.

[41] If it is that the cause of action for an ancillary claim only accrued after the determination of the main suit then the learned judges would not have considered the question of limitation because Medical Diagnostic would have been well within time. However, in granting permission to issue the ancillary claim, it seems to me that time was counted from when the facts which were necessary to ground the cause of action came into existence.

[42] It is my view that Counsel for the 3rd ancillary defendant misinterpreted the judgment of Sykes J in the case of ***Mervis Taylor v Owen Lowe et al*** (supra) because he did not conclude that the cause of action for an ancillary claimant arose only after the determination of the main suit.

[43] In ***Mervis Taylor*** Sykes J analysed section 3(1) of ***the Act***. It is perhaps useful, at this stage, to set out this section in some detail.

> *"3(1) Where damage is suffered by any person as a result of a tort (whether or not such tort is also a crime)-*
>
> a. *judgment recovered against any tort-feasor liable in respect of such damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tort-feasor in respect of such damage;*
>
> b. *if more than one action is brought in respect of such damage by or on behalf of the person by whom it was suffered, or for the benefit of the estate, or of the wife, husband, parent or child of such person, against tort-feasors liable in respect of the damage (whether as joint tort-feasors or otherwise) the sums recoverable under the judgments given in those actions by way of damages shall not in the aggregate exceed the amount of the damages awarded by the judgment first given; and in any of those actions, other than that which judgment is first given, the plaintiff shall not be*

entitled to costs unless the court is of opinion that there was reasonable ground for bringing the action;

c. *any tort-feasor liable in respect of such damage may recover contribution from any other tort-feasor who is, or would if sued have been, liable in respect of the same damage, (whether as a joint tort-feasor or otherwise) so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which contribution is sought"*

[44] In ***Mervis Taylor*** the claimant alleged that he was hit by a motor vehicle driven by the defendant. The defendant denied liability and attributed the cause of the accident to another person. He decided to initiate third party proceedings against that individual and also the Attorney General claiming contribution or indemnity from them in the event that he was found liable. The question before Sykes J was whether the third party action was statute barred.

[45] Sykes J concluded that under section 3(1) of ***the Act***, the limitation period for third party proceedings begins from the date of judgment against the defendant. He ruled that it is the fact of judgment that gives the defendant a cause of action against third parties.

[46] The learned Judge in his consideration of the issue examined the House of Lords decision of ***George Wimpey & Co. Ltd v B.O.A.C*** [1955] A.C 169. In ***George Wimpey*** Lord Reid seemed to have reasoned that the defendant's action against a third party arose out of the original suit. He said:

> *"…it is true that they are not liable to the plaintiff directly but Wimpeys could only recover from B.O.A.C because the negligence of B.O.A.C. caused damage to Littlewood".*

Therefore, in his view, the subsequent action was so connected to the original action that it somehow latched on or related back to the cause of action in the original suit and time would run from when that cause of action arose.

[47] Sykes J was of the view that it is unlikely that such reasoning could be sound because it seems to defeat the purpose of ***the Act*** which was to remove the hardship caused to a defendant who, before its enactment, was unable to sue for contribution. He opined that Lord Reid's reasoning would also create hardship for a defendant as his cause of action would be connected to that of the claimant and could potentially rob him of time within which to bring his own action against another tort - feasor. This would result it being either difficult or in some cases, impossible for a defendant to recover contribution.

[48] The ***Act*** applies in instances where a claimant, having obtained judgment against one tort-feasor, also wishes to proceed against other tort-feasors. It also applies in instances where the defendant, having been found liable, seeks contribution from another person who, in his view, ought to share the blame. Time would not start to run against that defendant until he is found to be liable.

[49] What the ***Mervis Taylor*** case shows is that the cause of action for a defendant who is seeking to recover contribution or indemnity is deemed to arise after judgment has been obtained. Sykes J did not lay down a blanket rule that the cause of action for all ancillary claims arises after the determination of the suit.

[50] This case is of a different nature than what was dealt with in ***Mervis Taylor***. Ameco was brought into the action by Mr. Wright who, when countersued, sought to recover contribution or indemnity from Ameco in the event that he was found liable. When Mr. Wright brought Ameco into the matter and it was discovered that Cable and Wireless was the lessor of the motor truck owned by Ameco, Mr. Collins amended his counterclaim to include both Ameco and Cable and Wireless. Mr. Wright did not continue proceedings against Ameco and Mr. Wright and Mr. Collins (the original parties) settled the matter. So what now remains is Mr. Collins' counterclaim against Ameco and Cable and Wireless. Cable and Wireless now desires to make a property damage claim against Mr. Collins.

[51] In my judgment, ***the Act*** is inapplicable to the case at bar. This case has nothing to do with a defendant seeking contribution from a third party to invoke section

3(1)(c) of ***the Act*** or a successful claimant pursuing action against another tort - feasor to invoke section 3(1)(a). The 3rd ancillary defendant had the right to pursue its cause of action independently of the claimant's claim.

Whether or not the 3rd ancillary defendant's application to amend its Defence is time barred?

[52] Counsel for the 3rd ancillary defendant argued that if the ***Limitation of Actions Act*** applies to an ancillary claim in the same way it does to the substantive suit this could result in an injustice to an ancillary claimant. She stated that where a claimant through inadvertence or deliberate calculation filed his claim on the eve of the expiry of limitation period an ancillary claimant (defendant) would be unable to raise any Defence or join anyone who he feels contributed to the wrong the claimant has suffered.

[53] I have difficulty with Counsel's argument and I will explain why. Broadly speaking, the ***Limitation of Actions Act*** prescribes a period of time within which a person ought to bring his claim. However, generally speaking, there is no bar to a claim being brought after the limitation period has expired because the expiration of a limitation period does not extinguish the claimant's right, but only gives a defence that may be asserted by the defendant. In other words, the effects of the expiration of the limitation period do not occur automatically. They only occur if the defendant raises the expiration as a defence.

[54] In ***Ronex Properties Ltd v John Laing Construction Ltd and others*** [1982] 3 All ER 961 Donaldson LJ noted:-

> *"…it is trite law that the English Limitation Acts bar the remedy and not the right, and furthermore that they do not even have this effect unless and until pleaded. Even when pleaded, they are subject to various exceptions, such as acknowledgment of a debt or concealed fraud which can be raised by way of reply".*

[55] It must be remembered that limitation is a procedural defence and it will not be taken by the court on its own motion.

[56] Therefore, if a claimant files his claim on the eve of the expiry of the limitation period, a defendant would still be able to raise a defence and join a party if he desires to do so. Similarly, if an ancillary claimant allows time to run and joins an ancillary defendant on the eve of the expiry of the limitation period it would not, in my opinion, have a devastating blow to the ancillary defendant as he would not be precluded from putting forward his defence.

[57] If the foregoing views are not compelling then this subsequent view may assist. The ***CPR*** provides that the period for filing a Defence is forty two (42) days after the service of the claim form and the procedure for filing an ancillary claim states that a counterclaim may be made with the Defence. So it matters not that the claimant filed his action on the cusps of the limitation period because the ***CPR*** indicates that the defendant may, in the time allotted, defend the action once he is served.

[58] The ***CPR*** also indicates that a person against whom an ancillary claim is made may file a Defence and the period for filing such a Defence is forty two (42) days after the date of service of the ancillary claim. Here again, it can be seen that the ***CPR*** gives the ancillary defendant time to defend an action.

[59] As regards claims for contribution and indemnity, it is my view that if the claimant files his claim on the eve of the period of limitation this would not operate as a hindrance to the defendant (ancillary claimant) recovering contribution because under ***the Act*** such an action can be brought after judgment.

[60] Where a defendant is not seeking an indemnity but is alleging that he has suffered damage due to the actions of the claimant that is a separate cause of action. Whilst it is true that it may be more conveniently dealt with, with the main suit, it can stand on its own.

[61] In this matter, it is clear that Cable and Wireless could have brought a claim against Mr. Collins for the property damage if it had so desired. Even If Mr.

Collins had never filed his claim, Cable and Wireless could still have brought its claim.

[62] In support of her argument that the ancillary claim is not statute barred Counsel relied on the case of ***Donovan Minott v Norvel Dervin Nevins et al*** (supra). I consider it important to recite the facts of the case.

[63] In this case the claimant brought proceedings against two parties in respect of damage sustained by him in an accident. Both parties alleged that the accident was caused as a result of the actions of another party. Consequently, they issued third-party proceedings, by way of an ancillary claim, against that party for contribution and/or indemnity against any judgment obtained by the claimant against them. The third party sought an Order for summary judgment against the ancillary claimants and asked that the ancillary claim be struck out on the basis that the claim was statute barred.

[64] Bertram-Linton J considered the ***Mervis Taylor*** case and found that in the circumstances of the case before her the ancillary claim was properly before the Court. The application to strike out the ancillary claim was therefore refused.

[65] It can be observed that the facts of the ***Donovan Minott*** and ***Mervis Taylor*** cases are somewhat similar. In both cases the defendants attributed the cause of the accident to another person and decided to initiate proceedings against that individual or those individuals claiming contribution or indemnity from them in the event that they were found liable.

[66] Therefore in both cases ***the Act*** was applicable and for both defendants the limitation period would not have begun until after judgment had been obtained.

[67] The ***Donovan Minott*** case is not authority for the position that, as regards all ancillary claims, time does not begin to run until after the defendant has been found liable. The circumstances of that particular case led to such a finding.

[68] It is relevant to point out that the party that now seeks the amendment (Cable and Wireless), was not brought into the claim by Mr. Wright. Mr. Wright did not seek to recover contribution from or be indemnified by the company in the event of liability. He only sought recourse from Ameco. Cable and Wireless was brought into the matter by Mr. Collins who amended his counterclaim to include the company as a party.

[69] In my view, this is important because the cases that Counsel for the 3rd ancillary defendant relied on dealt with instances where the defendants were trying to recover contribution from a party who they felt were solely or substantially to blame. So these cases are factually quite different from the case that I now have before me.

[70] In this particular instance, I agree with the position that time runs from the point when facts exist which establish all the essential elements of a cause of action. (See Stuart Sime, ***A Practical Approach to Civil Procedure***, 9thed, 2006 page 62).

[71] In my judgment, Cable and Wireless' cause of action accrued when the accident occurred and when the alleged property damage happened, that is, in July 2009 and the company could have brought its claim against Mr. Collins then. Its claim is therefore statute barred.

Whether the 3rd ancillary defendant should be given permission to amend its Defence to include a claim against the defendant?

[72] Rule20.4 (2) of the **CPR** states as follows:-

> *"Statements of case may only be amended after a case management conference with the permission of the court"*

[73] Rule 20.6 states:-

> 1. *This rule applies to an amendment in a statement of case after the end of the relevant limitation period*

2. *The court may allow an amendment to correct a mistake as to the name of a party but only where the mistake was-*

    a. *genuine; and*

    b. *not one which would in all the circumstances cause reasonable doubt as to the identity of a party in question.*

[74] Counsel for the 3rd ancillary defendant argued that since the limitation period does not apply to ancillary claims until after the determination of the main suit then rule 20.6 does not apply to the present circumstances.

[75] She also argued that the applicable rule is rule 26.9. Counsel emphasised this part of the rule:-

> *"Any error of procedure or failure to comply with a rule, practice direction or court order does not invalidate any step taken in the proceedings unless the court so orders"*

[76] In my mind, this section is inapplicable because there has been no error of procedure or, strictly speaking, failure to comply with a rule, direction or order. The third ancillary defendant simply wants to amend its' Defence to bring a claim against Mr. Collins for property damage.

[77] In light of the fact that I have found that the limitation period has expired in this case it follows that I cannot agree with Counsel that rule 20.6 does not apply.

[78] Notably, rule 20 of the ***CPR*** addresses various scenarios:-

(i) amendments to statements of case before the case management conference- in this instance the Court's permission is not required (except in the instances specified in the Rule);

(ii) amendments to statements of case after the case management conference and before the limitation period has expired- in this instance the Court's permission is required; and

(iii) amendments to statements of case after the case management conference and after the relevant limitation period has expired.

[79] In the present case the amendment is being sought after the case management conference and after the limitation period for bringing the claim has expired.

[80] Rule18.2 (5) states which rules of the ***CPR*** are not applicable to ancillary claims. Part 20 is not listed and is therefore, applicable. Rule18.5 (2) states that where either rule18.3 or of rule 18.5 (1) do not apply, an ancillary claim may only be made if the court gives permission.

[81] Rule18.5 (2) seems to give the Court a wide discretion to allow an ancillary claim to be made. However, Rule 20.6 which is applicable to ancillary claims stipulates a specific circumstance in which the court can allow an amendment.

[82] It seems to me that, after the expiration of the limitation period, under rule 20.6 a party can only amend its statement of case in the circumstances set out in rule 20.6 (2), that is, to correct the mistake as to the name of a party.

[83] This is unlike the position which obtained under the ***Judicature (Civil Procedure Code) Law*** which gave the court the discretion to permit an amendment of the pleadings at any stage of the proceedings. The main consideration which guided the Court was whether the amendment was necessary for the purpose of determining the real questions in controversy between the parties.(See Title 27 of the ***Judicature (Civil Procedure Code) Law***, section 259)

[84] The current regime under the ***CPR*** is also less permissive than that which obtains in the United Kingdom. The UK ***Civil Procedure Rules***, 1998 states as follows:-

> *"Amendments to statements of case after the end of a relevant limitation period*
>
> *1. This rule applies where-*

a. *a party applies to amend his statement of case in one of the ways mentioned in this rule; and*

b. *a period of limitation has expired under-*

i. *the Limitation Act 1980;*

ii. *the Foreign Limitation Periods Act 1984; or*

iii. *any other enactment which allows such an amendment, or under which such an amendment is allowed.*

2. The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings.

3. The court may allow an amendment to correct a mistake as to the name of a party, but only where the mistake was genuine and not one which would cause reasonable doubt as to the identity of the party in question.

4. The court may allow an amendment to alter the capacity in which a party claims if the new capacity is one which that party had when the proceedings started or has since acquired."

[My emphasis]

[85] The amendment which is being sought in the instant case, whilst arising out of the same facts as the substantive claim does not fall within the circumstances outlined in rule 20.6 (2) of the ***CPR***.

[86] Now, one may be tempted to invoke the 'overriding objective' but it has been ruled time and time again that the overriding objective cannot be used as a means to evade what a particular rule dictates. In the case of ***The Treasure Island Company & another v Audubon Holdings Ltd and others*** [BVI] Civil

Appeal No. 22 of 2003, judgment delivered 20 September 2004 Saunders JA expressed the principle in the following terms:-

> *"the overriding objective does not in and of itself empower the Court to do anything or grant to the Court any discretion. It is simply a statement of principle to which the Court must seek to give effect when it interprets any provision or when it exercises any discretion specifically granted by the rules. Any discretion exercised by the Court must be found not in the overriding objective but in the specific provision itself".*

[87] This principle was also applied by Sykes J in ***Campbell v National Fuels and Lubricants Ltd*** C.L 1999. C/262 judgment delivered 2 November 2004, where the application to amend the particulars of claim was refused.

[88] Even if the limitation period has not expired, the Court In deciding whether to exercise its discretion in favour of the applicant must consider the issue of prejudice.

[89] The accident occurred in 2009 and the claim was filed in 2010. By way of a Further Amended Defence and Counterclaim dated October 5, 2012 and filed on October 8, 2012Mr. Collins brought Cable and Wireless into the matter by making a counterclaim against them. A Further Amended Ancillary Claim Form, similarly dated, was also filed by Mr. Collins on October 8, 2012.

[90] The first Case Management Conference (CMC) was slated to be held on October 10, 2012. It was adjourned until February 7, 2013. In the meantime, a reply to Further Amended Counterclaim was done by both Ameco and Cable and Wireless. It was dated November 7, 2012 and filed on November 12, 2012. This reply contained a notice of intention to object to the loss adjusters assessor's report and invoice that Mr. Collins had exhibited to his claim for compensation for the damage done to his motor vehicle licensed 0757 EY.

[91] Ameco and Cable and Wireless filed their Defence on November 12, 2012. It was dated November 7, 2012.

[92] The minute of order dated February 7, 2013 does not show the attendance of representatives for Ameco and Cable and Wireless at the CMC. The CMC was adjourned until July 16, 2013. The minute of order dated July 16, 2013 shows the attendance of Counsel for Ameco and Cable and Wireless. The CMC was adjourned until January 29, 2014. The minute of order dated January 29, 2014 also shows the attendance of Counsel for Ameco and Cable and Wireless. The CMC was adjourned until July 16, 2014.

[93] A mediation report was filed on June 5, 2014. It shows that Counsel for Ameco and Cable and Wireless attended the mediation session held on March 27, 2014.

[94] The minute of order dated July 16, 2014 again shows the attendance of Counsel for Ameco and Cable and Wireless at the CMC. This CMC was adjourned until February 19, 2015. The minute of order dated February 19, 2015 gives no indication that Counsel for Ameco and Cable and Wireless attended. The CMC was again adjourned until June 3, 2015.

[95] It can hardly be denied therefore that Cable and Wireless had more than ample time to include the claim against Mr. Collins in its Defence.

[96] The judgment of Lord Griffiths in the House of Lord's decision of ***Ketteman and others v Hansel Properties Ltd*** [1988] 1 All ER 38 is useful and though quite lengthy I feel inclined to extract a particular portion. It is as follows:

> *"Furthermore, whatever may have been the rule of conduct a hundred years ago, today it is not the practice invariably to allow a defence which is wholly different from that pleaded to be raised by amendment at the end of the trial even on terms that an adjournment is granted and that the defendant pays all the costs thrown away. There is a clear difference between allowing amendments to clarify issues in dispute and those that permit a distinct defence to be raised for the first time".*

He continued:

> *"Whether an amendment should be granted is a matter for the discretion of the trial judge he should be guided in the exercise of his discretion by his assessment of where justice lies. Many and diverse factors will bear on the exercise of this discretion. I do not think it possible to enumerate them all or wise to attempt to do so. But justice cannot always be measured in terms of money and in my view a judge is entitled to weigh in the balance the strain the litigation imposes on litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues, the raising of false hopes, and the legitimate expectation that the trial will determine the issues one way or the other..."*

Lord Griffiths also said:

> *"Another factor that a judge must weigh in the balance is the pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age"*[3]

[97] The rules do not state any specific matters that the Court should take into consideration when deciding whether or not to grant an application to amend. Therefore, Lord Griffith's judgment gives valuable guidance. The question is: where does justice lie?

[98] The facts of ***Ketteman*** are quite extraordinary. In this case during the course of the closing speeches of the trial the third defendants applied for leave to amend their Defence to plead that the claim against them was outside the limitation period.

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[99] Needless to say Lord Griffiths was not impressed. In the case before me the amendment is being sought before the trial so it can be distinguished from the ***Ketteman*** case on that point.

[100] The stage at which the amendment is being sought as well as the nature of the amendment is clearly relevant. The amendment in the present case is quite a substantial one. Cable and Wireless wants to amend its statement of case to claim a significant sum (over one million eight hundred thousand dollars) from Mr. Collins for damage done to the vehicle that was being driven by Mr. Wright on the day of the accident. There is a clear difference between allowing amendments to clarify issues in dispute and those that permit a distinct issue to be raised for the first time.

[101] It has been said that the Court is more accommodating of amendments if those amendments concern matters which had only emerged at a late stage. Certainly, we are past the age of litigation by ambush and parties must when they file their claim bring forward all aspects of it. It can safely be said that in respect of any damage that was allegedly done to the vehicle then Cable and Wireless would have been equipped with the knowledge of the damage since July 2009 when the accident occurred. In fact, in the affidavit supporting the application to amend dated and filed on July 21, 2015 Miss Dummett, the deponent, annexed assessment reports, invoices, estimates, receipts and loss of use forms all relating to the property damage and dated 2009.

[102] In the said affidavit Miss Dummett informed the Court that it was through inadvertence why no claim was made for the repairs in the ancillary defence. Due to the length of time that has elapsed I do not find this to be a satisfactory explanation. Cable and Wireless has been involved in the matter since November 2012. The matter was slated for numerous Case Management Conferences and has been subjected to numerous adjournments. The parties even attended mediation.

[103] In her affidavit Counsel indicated that the insurance companies had agreed to await the outcome of the court proceedings before addressing the issue and Mr. Collins' insurance company, Advantage General Insurance Company, was aware of the property damage claim since 2009. To this I say, but so was Cable and Wireless and it was their duty to plead it. As regards court proceedings, the battle that Mr. Collins must fight is the one which is before the Court. Mr. Collins is entitled to rely on the pleadings.

[104] I am aware that in the insurance realm, under the laws of agency, an agent's knowledge can be imputed to the insurer but whether an insurer's knowledge can be imputed to the insured is certainly not trite law. Moreover, even if Mr. Collins was aware of the property damage claim then arguably this also demonstrates how he may be prejudiced, in that, it was never pursued in Court therefore he may have had some expectation that since it was not initially pursued it would never be.

[105] In accordance with ***Ketteman*** I am entitled to weigh in the balance the strain litigation imposes on litigants, particularly if they are personal litigants rather than business corporations and the anxieties occasioned by facing new issues. Mr. Collins is a personal litigant and Cable and Wireless is a business corporation therefore the strain of litigation is more likely greater for Mr. Collins than Cable and Wireless. To now ask him to engage in further preparations to meet the claim is not to an issue to be taken lightly.

[106] In ***Gladstone Allen v Donald Allen*** [2014] JMSC Civ. 220 the Court endorsed the following factors as factors which should be considered when deciding whether to permit amendments. They include:-

1. Whether granting the amendment will be prejudicial to the other side;

2. Whether there would be no injustice caused to the other side;

3. Whether the other side would be taken by surprise; and

4. How great a change is made in the issues by the proposed amendments

[107] Like Lord Griffiths I am of the view that justice cannot always be measured in terms of money and in light of the particular circumstances of this case, though the amendment is being sought before trial the prejudice to Mr. Collins is striking.

[108] However, that is not the end of the matter. Rule18.9 of the ***CPR*** is also relevant. It is expressly stated that the Rule applies when the Court is considering whether to permit an ancillary claim to be made. The rule states:-

> *"The court must have regard to all the circumstances of the case including-*
>
> *a. the connection between the ancillary claim and the claim;*
>
> *b. whether the ancillary claimant is seeking substantially the same remedy which some other party is claiming from the ancillary claimant;*
>
> *c. whether the facts in the ancillary claim are substantially the same, or closely connected with, the facts in the claim; and*
>
> *d. whether the ancillary claimant wants the court to decide any question connected with the subject matter of the proceedings-*
>
> *i. not only between the existing parties but also between existing parties and the proposed ancillary defendant; or*
>
> *ii. to which the proposed ancillary defendant is already a party but also in some further capacity*

[109] It cannot be disputed that there is a connection between Mr. Collins' claim and Cable and Wireless's proposed claim. Cable and Wireless is seeking substantially the same remedy as Mr. Collins and the facts in Cable and Wireless's proposed claim are substantially the same as the facts in Mr. Collins'

claim. Furthermore, Cable and Wireless, by virtue of this proposed claim, wants this Court to decide questions connected with the subject matter of the proceedings.

[110] It must however be noted that the factors listed in the above rule are not exhaustive. In accordance with the overriding objective of dealing with cases *"justly"* the ***CPR*** has provided that, so far as is convenient, all issues between the parties should be resolved together. This would obviously save time and costs by avoiding multiplicity of claims and the risk of irreconcilable judgments. (See ***Blackstone's Civil Practice***, 2010 page 391).

[111] However, having regard to all the circumstances of the case, though the considerations in rule 18.9(2) are favourable to Cable and Wireless, I am not inclined to permit the amendment.

[112] It is hereby ordered as follows:

(i) The application by the third ancillary defendant to amend its ancillary Defence to include a claim against the defendant (Mr. Collins) is refused.

(ii) Costs to the ancillary claimant to be taxed if not agreed