[2010] JMCA Civ 4

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 19/2009

BEFORE: THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MRS. JUSTICE HARRIS, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A.

BETWEEN	**FIESTA JAMAICA LIMITED**	**APPELLANT**
AND	**NATIONAL WATER COMMISSION**	**RESPONDENT**

Christopher Dunkley instructed by Phillipson Partners for the Appellant

Kevin Williams, for the Respondent

November 23 & 24, 2009 and February 26, 2010

HARRISON, J.A

[1] I have read the judgment of my sister Harris J.A. and agree with her reasoning and conclusion. I have nothing further to add.

HARRIS, J.A.

[2] This is an appeal against an order of Donald McIntosh, J. in which he refused an application by the appellant for leave to file defence out of time and

consequently granted summary judgment to the respondent against the appellant.

[3] The appellant is a company incorporated under the laws of Jamaica and is the owner and or contractor of the Grand Palladium Fiesta Group, which, at all material times carried out the construction of a hotel at Point, Lucea in the parish of Hanover. The respondent is a statutory corporation which is engaged in the business of providing and maintaining a water supply system throughout Jamaica. The respondent owned or was in possession of a 500 mm water transmission pipeline running along the main from Flint River to Lucea.

[4] On the 14th November 2007, by way of a claim form, the respondent initiated proceedings against the appellant claiming damages for trespass, seeking the following relief:

> "1. An injunction requiring the Defendant its servants and/or agents to restore the Claimant's 500 dis. D.I. transmission treated water pipeline and diversion adjacent to the Palladium Hotels and Resorts, Point, in the parish of Hanover.
>
> 2. An order for the Defendant its servant and agents to provide the Claimant with certified copy drawings and plans relating to all works performed on the Claimant's 500mm pipeline.
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> 3. Damages for trespass.
>
> 4. Interest pursuant to the Law Reform (Miscellaneous Provisions) Act.
>
> 5. Costs.

6. Such Further relief as this Honourable Court deems just."

[5] Paragraphs 3 to 12 of the particulars of claim which accompanied the claim form, state as follows:

> "3. The Claimant on June 2, 2006 received a written request dated May 31, 2006 from the Defendant through its servant and/or agent N.O Whyte & Associates Ltd. for 300 m^3 of water per month to be supplied to the phase 1 of the 2000 room Hotel Project being undertaken by the Defendant.
>
> 4. The Claimant and Defendant entered into discussions in or around June 2006 concerning the provision of the requested water supply to the Hotel Project by way of a connection to the Claimant's 500mm (20 inch) nominal treated water transmission main running from Great River to Lucea along the Northcoast Highway.
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> 5. The Claimant on Wednesday February 28, 2007 effected the connection of the Defendant to its 500mm (20") x 200mm (8") nominal diameter tee terminating in a closed 200mm (8") nominal diameter gate valve at the location and orientation requested by the Defendant.
>
> 6. In or around August 2007 the Defendant commenced significant excavation works for the creation of a tunnel opposite to the entrance of the Hotel Project and in close proximity to the Claimant's 500mm transmission main.
>
> 7. By letters dated August 15, 2007 and September 4, 2007 the Claimant requested that the Defendant provide the Claimant with construction methodology for mitigating adverse effects to the Claimant's 500mm transmission main, design plans for support and structure during and following construction along with scheduled timeline for the completion of these activities.

8. The defendant (sic) proposal for the diversion of the Claimant's 500mm dis. treated was (sic) water main was forwarded to the Claimant by letter dated September 13, 2007 enclosing detailed drawing prepared by N.O. Harding and Associates Ltd.

9. The Defendants (sic) proposal was rejected as the drawings submitted failed to comply with the Claimants (sic) specifications as set out in letter to the Defendant dated September 4, 2007 and as discussed in a meeting between the Claimant's and Defendant's representatives on August 29, 2007.

10. On or about October 16, 2007, the Defendant, its servants and/or agents diverted the Claimant's pipeline without having first sought or obtained the Claimant's consent or approval of the works to be performed. The said diversion was done negligently and in breach of the Claimant (sic) specifications.

PARTICULARS OF NEGLIGENCE AND/OR BREACH OF SPECIFICATIONS

a. Causing the 500mm pipe to leak in two places where there was no leak before.

b. Installing a wholly inadequate air valve both in terms of size and pressure rating thereby reducing the space for the water to flow.

c. Failing to properly install the air valve thereby causing a leak.

d. Failing to properly enclose and protect the air valve thereby exposing it to vandalism or theft.

e. Failing to use any anti-corrosion protective coating on the bolts on the 8 flanged joints.

f. Failing to anchor blocks in the vicinity of the pipelines where excavation work was done.

g. Using wholly inadequate blocks which are nearest the (sic) diversion.

h. Failing to use "thrust" blocks to counter the forces that the water pressure creates to avoid lateral movement and damage to the pipe.

i. Failing to provide protective walls or concrete casing to avoid damage to the pipe from accidents or from vandalism.

j. Exposing the pipe and leaving the Claimant vulnerable to liability for injury caused to members of the public.

k. Failing to liaise with the Claimant to implement proper shut down plans to reduce supply problems during the period of construction and to avoid contamination of the pipeline.

l. Failing to engage the services of qualified contractors for the design and implementation of the pipe diversion.

m. Failing to obtain consent before proceeding with excavation works; Failing to provide the Claimant with final specifications and details for its approval and for its records in respect of future maintenance of the diverted pipe.

11. In addition to the matters aforesaid the Defendant has also trespassed on the property and works of the Claimant in that the Defendant cut into a 500mm pipe which was the property of the Claimant with (sic) any consent or authority from the Claimant and thereby compromised the Claimant and has caused the Claimant to suffer loss and damage and incur expenses.

12. On or about November 13, 2007 the aforesaid pipeline ruptured at the upper downstream flange of the air valve causing loss of treated water and flooding of the immediate area and forcing the

Claimant to shut off its potable supply operations along that main and depriving customers from Flint River in Hanover to Lucea including the Lucea Hospital and several schools."

[6] On the 14th November, 2007 the respondent, by an application for court orders sought and obtained the following ex parte order:

"1. Within 7 days of service of this order the Defendant do whether by themselves or by their servants and or agents repair and restore the Claimant's 500 dis. D.I. transmission treated water pipeline adjacent to the Palladium Hotels and Resorts, Point, in the parish of Hanover according to the following specifications:

i. Alignment of all joints between the original pipeline and the area of diversion,

ii. Install a 4 inch (4") air valve with a minimum recommended pressure rating (10 bars),

iii. Install a metal enclosure with anti-corrosion protective coating for the air valve with access to allow for maintenance,

iv. Anti-corrosion protective coating for the 8 flanged joints and bolts.

v. Replacement of the Anchor blocks support with concrete thrust blocks of at least 3000 psi in strength and with reinforcement bars of at least ½ inch able to withstand 15 bars of pressure.

vi. Wrapping of the entire section of the diverted pipeline with polythene a (sic) existed on original pipeline.

vii. Bedding of the diverted pipe with hydraulically compacted sand, and backfilled with well graded marl approved by the Chief Engineer of

the National Water Commission and hydraulically compacted 6 inch layers

viii. Adequate mounting of the diverted pipeline on a reinforced concrete cradle of at least 3000 psi strength.

ix. Construction of protective walls wherever the pipe is exposed above ground.

x. Any other specification required by the Claimant for the repair and stability of the pipeline."

[7] On the 22nd November, 2007 the following consent order was entered into by the parties:

"1. By consent

(a). The Respondent to establish an escrow on interest bearing account in the joint names of the Attorneys-at-Law for the Claimant and Respondent an initial sum of US$20,000,000 to cover the expenses and costs for doing the repair and restorative works to the Claimant's 500mm pipeline whether by the Claimant or its servants or agents Sogea Satom (design contractors) and Tankweld Special Projects (works contractor) to abide the further order of this Court or agreement between the parties relating to payment out.

(b) Liberty to apply to the Claimant to apply for further sums to be paid in to the interest bearing account after the provision of detailed drawings and estimates by the Claimant and/or its contractors aforesaid.

2. The account at paragraph 1 (a) is to be opened on or before the 26th November 2007, and the Respondent is ordered to pay the further sum of US$10,000.00

into the interest bearing account established at paragraph 1 (a) hereof on the same terms as set out in that paragraph."

[8] On the 28th December, 2007 a further consent order was made in the following terms:

"1. Ordered that the further sum of $24,500.00 be paid to the Claimant on or before December 31, 2007.

2. Liberty to Apply:

a. to the Claimant to seek such any (sic) additional sums as we require for the repair and restorative works to the Claimant (sic) 500mm pipeline

b. to the Defendant for further and better particulars as to the costs of restorative works to the Claimant (sic) 500mm pipeline.

3. Leave granted to the Defendant to serve defence on or before January 30, 2008.

4. Costs reserved

5. Claimant to prepare file and serve this order."

[9] On the 3rd July 2008, the appellant filed an ancillary claim against the respondent and Nigel Harding t/a N.O. Harding Mechanical & Civil Engineering Services, claiming an indemnity for negligence and for monies paid by the appellant for repair work done with respect to the damaged pipeline. Paragraphs 2 – 15 of the particulars of the ancillary claim state as follows:

"2. The Ancillary Defendant, Nigel Harding trading as N.O. Harding Mechanical & Civil Engineering Services ("N.O. Harding") was at all material times a Hanover based contractor with whom the Defendant was made

to understand that the Claimant had a continuing professional relationship.

3. In August 2007, N.O. Harding was recommended by the Claimant to design and construct a diversion for the Claimant's 500mm transmission waterline.

4. Pursuant to this recommendation, Fiesta contracted N.O. Harding to design plans and construct the diversion pursuant to the Claimant's requirements as set out in its letters dated August 15, 2007 and September 4, 2007.

5. On September 20, 2007 N.O. Harding submitted to the Defendant its technical design and proforma invoice to execute the contracted work.

6. On September 21, 2008 the Defendant issued a cheque in the amount of US$22,522.12 to N.O. Harding to cover the cost of materials coming from overseas as projected in its proforma invoice.

7. The Defendant is aware that the contractor, N.O. Harding presented the design to the Claimant whose officers reviewed and proposed modifications to same, being additional concrete anchor supports at various points.

8. The modifications were immediately effected and the Defendant was given the Claimant's approval to proceed.

9. On September 24, 2007 (three days after the first advance payment), N.O. Harding submitted a second invoice claiming one third (1/3) of the remaining balance. The Defendant paid to N.O. Harding the sum of US$5000.00 on October 5, 2007.

10. After the completion of the project by the contractor on October 14, 2007, the Claimant's representative, Mr. Oniel Shand was invited to review the works done and save for its request for an additional anchor in the centre of the pipeline, which was immediately put

in place, expressed complete satisfaction with the work.

11. Thereafter the Claimant's 500mm transmission pipeline developed a leak. N.O. Harding indicated it was not willing to make the repairs at his own expense and presented to the Defendant an invoice for the repair of the pipeline, refusing to do such repairs unless and until the Defendant had paid the sum requested.

12. Given the urgency arising from the disruption of the water service to Lucea and its environs three days after the presentation of the invoice the Defendant under protest paid the sum of US$13,720.00 to N.O. Harding for the repair of the NWC pipeline.

13. N.O. Harding claimed to have repaired the pipeline but less than Forty-Eight hours (48hrs) after such repairs were effected the pipeline failed again. The Claimant maintains that the said diversion was negligently performed.

14. The Claimant thereafter insisted that another contractor, Sogea Satom, be engaged with the Defendant being responsible for all costs arising from the corrective work.

15. As a result of the foregoing the Defendant has suffered loss and damage and incurred expenses.

PARTICULARS OF LOSS

• Payment made to N.O. Harding to correct their faulty work and to repair leaks to pipeline	US$13,720.00
Less Outstanding on diversion contract	US$10,000.00
Balance Recoverable	US$ 3,720.00
• Payment made to NWC for work done by Sogea Satum in repairing NWC Pipeline	US$92,501.00
• NWC's Claim for Special Damages	JA$2,536,371.35

- Legal costs

[10] A defence to the ancillary claim denying liability was filed by the ancillary defendant.

[11] The appellant failed to file its defence notwithstanding the time prescribed by the consent order of the 28th December, 2007. By an application on the 11th July, 2008, the appellant sought leave for an extension of time within which to file its defence. On the 7th November, 2008 the respondent made an application for summary judgment against the appellant and for damages to be assessed. Both applications were heard on the 12th January, 2009 on which date the following orders were made:

> "1. The Defendant's Application filed July 11, 2008 is hereby struck out, with costs to the Respondent/Claimant to be agreed or taxed.
>
> 2. The Claimant's Application filed on November 7, 2008 is granted in terms of paragraph (1) and (2) as follows:
>
> (1) That Judgment be entered for the Claimant/Applicant against the Defendant, FIESTA JAMAICA LIMITED with damages to be assessed.
>
> (2) Costs on the application to the Claimant to be agreed or taxed.
>
> 3. Matter set for Assessment of Damages on the 24th day of August, 2009.
>
> 4. Defendant is hereby permitted to contest the quantum of damages.

5. Claimant's Attorneys-At-Law to prepare file and serve this Court Order."

[12] From this order the appellant has filed ten grounds of appeal. Grounds 1 – 5 are as follows:

"1. The Learned Judge in Chambers erred in granting summary judgment to the Respondent/Claimant on their Particulars of Claim dated November 14, 2007, which under the heading "Particulars of Loss" read as follows:

i).	Repairing leaks to pipeline	(blank)
ii).	Water loss	particulars to be provided
iii).	Cost of labour	after assessment

in which circumstances, the Appellant/Ancillary Claimant ought to have been permitted leave to file its Defence out of Time and in any event, the Respondent/Claimant's particulars of loss were at no time before the Court as required by law.

2. The learned Judge in Chambers erred in failing to appreciate that the Appellant/Ancillary Claimant had complied with the Court's Order of November 14, 2007, leaving only the matter of the Respondent/Claimant un-particularized claim, which was required to be before the Court before any application for summary judgment could properly be made or heard.

3. The Learned Judge in Chambers disclosed a pre-disposition to the Respondent/Claimant's application for summary judgment on the basis of the Respondent/Claimant's Submissions before him upon their ex-parte Application for Court Orders on November 14, 2007.

4. That at the time of the Respondent/Claimant's ex-parte Application, the Appellant/Ancillary Claimant

was obviously unable to contribute or defend the Respondent/Claimant's suggestions to the Court, however, at the joint hearing of the respective applications, the Learned Judge in Chambers made several references to material communicated to him at the ex-parte application in considering the applications before him on January 12, 2009.

5. That in particular, the Learned Judge in Chambers commented that he was told by the Respondent/Claimant at the ex-parte hearing that its services were offered to the Appellant/Ancillary Claimant but refused on the basis of costs in favour of the services of the Ancillary Defendant, without regard to the self-serving nature of such a contention."

[13] Mr. Dunkley submitted that the learned judge failed to fully consider the appellant's draft defence and the averment in its affidavit as to the connection between the appellant and the ancillary claimant. He argued that the proposed defence raises serious issues in negligence and trespass. The learned judge, he argued, should have taken into account the fact that the auxiliary claim in negligence and the claim for contribution thereunder together with the claim in trespass showed that issue had been joined between the parties.

[14] Mr. Williams submitted that the question of liability had been determined by the orders and the acknowledgement of service. He argued that the appellant, having consented to the orders and having complied with the orders by making the requisite payments, taken together with the appellant's indication on the acknowledgement of service to pay for the repairs, clearly admitted

liability. The only remaining issue, he argued, as between the appellant and the respondent, was that of quantum of damages.

[15] The first issue to be addressed is whether the appellant ought to have been granted an extension of time to file the proposed defence. The principle governing the court's approach in determining whether leave ought to be granted on an application for extension of time was summarized by Lightman J., in an application for extension of time to appeal in the case of **Commissioner of Customs and Excise v. Eastwood Care Homes (Ilkeston) Ltd and Ors.** [2001] EWHC Ch 456. He is reported to have outlined the principle as follows:

> "In deciding whether an application for extension of time was to succeed under rule 3.1(2) it was no longer sufficient to apply a rigid formula in deciding whether an extension has to be granted. Each application has to be viewed by reference to the criterion of justice.
>
> Among the factors which had to be taken into account were the length of the delay, the explanation for the delay, the prejudice to the other party, the merits of the appeal, the effect of the delay on public administration, the importance of compliance with time limits bearing in mind that they were there to be observed and the resources of the parties which might, in particular be relevant to the question of prejudice."

[16] The question arising is whether the affidavit supporting the application contained material which was sufficiently meritorious to have warranted the order sought. The learned judge would be constrained to pay special attention

to the material relied upon by the appellant not only to satisfy himself that the appellant had given good reasons for its failure to have filed its defence in the time prescribed by Rule 10.3 (1) of the Civil Procedure Rules (C.P.R.) but also that the proposed defence had merit.

[17] Before the learned judge was an affidavit of Miss Daicia Welds in support of the application to which a draft defence was exhibited. Paragraphs 3 - 8 of the affidavit read:

> "3. That on November 14, 2007 the Claimant filed an application for an injunction to restrain the Defendant on the grounds that the Defendant and or its agents had caused damage to its 500mm transmission pipeline.
>
> 4. That at the Court hearing on November 22, 2007 and December 28, 2007 the parties consented to allow the Claimant to repair the damage to its 500mm pipeline and the Defendant would provide the reasonable costs for the repair.
>
> 5. To date the Defendant has paid to the Claimant approximately US$92,501.00 to repair, reconstruct and supervise the works to the 500mm pipeline.
>
> 6. The Claimant has indicated their intention to proceed with the original Claim filed on November 14, 2007 and by letter dated April 22, 2008 have particularized the aspect of their claim on which they intend to proceed.
>
> 7. That in the premises, the delay in filing a Defence was not deliberate nor was it meant to disregard a timely response to the Claimant's claim.
>
> 8. The Defendant wishes to defend the Claim and have (sic) as much of the breaches alleged by the Claimant arose in part or in whole as a result of the Negligence

> of third party contractors who are now the subject of an Ancillary Claim in this Suit. I exhibit hereto a copy of the draft Defence marked **"DW-1"** for identification."

[18] The appellant filed an acknowledgement of service. As prescribed by Rule 10. 3 (1) of the C.P.R., the appellant was required to have filed its defence within 42 days after the service of the claim form. This it did not do. I must pause here to mention that although the order of the 28th December 2007 granted leave to the appellant to serve a defence, there is nothing on the records disclosing that a defence had been filed or that an application had ever been made prior to the 11th July 2008 to file a defence.

[19] An examination of Miss Weld's affidavit does not disclose any plausible excuse for the appellant's failure to adhere to the requirement of Rule 10.3 (1). Approximately six months elapsed before the application was made. The existence of the injunction against the appellant, to which Miss Welds made reference, could not be considered a good reason which would have delayed the appellant from making the application earlier than it had done. Although an injunction had been in place, it would not have in any way precluded the appellant from seeking to have the time extended in order to file its defence. Interestingly, the injunction was granted ex parte and no attempt was ever made to set it aside.

[20] Paragraphs 4 and 5 of the affidavit are particularly revealing. They show that the appellant had consented to meet the cost of repairs to the damaged

pipeline and had disbursed to the respondent approximately US$92,501.00 in this regard. The inescapable inference to be drawn is that the appellant had accepted that it had damaged the pipeline, had agreed to and had taken steps to compensate the respondent. It could not be said that any difficulty would be encountered in regarding this as an admission of liability by the appellant.

[21] I would not regard the delay in making the application inordinate. Although no good explanation had been proferred for the delay, in the interest of justice, I think it is important that the proposed defence is examined in order to determine whether it discloses an arguable defence to the claim. It is necessary to set out paragraphs 3- 16 of the proposed defence, which state as follows:

> "3. The defendant will say that on August 8, 2007, the Defendant, with the permission of the Hanover Parish Council, commenced excavation of an underpass with access to both sides of its property. As a result of a National Water Commission ("NWC) 500mm pipeline, which is laid perpendicular to the direction of the tunnel, it became necessary to make a diversion of the said pipeline.
>
> 4. The Defendant admits paragraph 7 and will further say that at a meeting on August 29, 2007 the Claimant, through its agent, Mr. Oneil Shand of the Western Division of the National Water Commission recommended that the Defendant could subcontract Mr. Nigel Harding trading as N.O. Harding Mechanical and Civil Engineering Services ("Contractors") to provide all the requirements of the NWC as listed in their letters dated August 15, 2007 and September 4, 2007.

5. N.O. Harding is a Hanover based contractor with whom the Defendant was made to understand that the Claimant had a continuing professional relationship.

6. Acting on the Claimant's recommendation, the Defendant contracted N.O. Harding to design the plans along with the schedule and construction methodology.

7. The Defendant admits paragraph 8 of the Particulars of Claim.

8. The Defendant makes no admissions to paragraphs 9 but will say that the responsibility for providing the Defendant's design and construction of the abovementioned diversion rested with the contractor.

9. The Defendant is aware that the contractor presented the design to the Claimant whose officers reviewed same and proposed modifications, being additional concrete anchor supports at various points.

10. The modifications were made immediately and the Defendant was given the go ahead to proceed from the Claimant.

11. After completion of the project by the contractor on October 14, 2007, the Claimant's representative, Mr. Oneil Shand was invited to review the works done and save for his request for an additional anchor in the centre of the pipeline, which was immediately put in place, expressed complete satisfaction with the work.

12. The Defendant therefore denies paragraph 10 and says that at all material times it had the Claimant's expressed and/or implied consent to proceed with the construction of the diversion of the 500mm pipeline.

13. The Defendant denies that it was of itself, negligent or had committed any breaches as alleged and say that and will say that any such allegations of breaches

would be answerable by, or ultimately the responsibility of its contractor N.O. Harding.

14. The Defendant denies paragraph 11 and repeats paragraphs 9 to 12.

15. The Defendant makes no admission as to paragraph 13 and repeats paragraphs 4 and 8 to 11 above.

16. The Defendant will rely on an Ancillary Claim against N.O. Harding Mechanical and Civil Engineering Services."

[22] The appellant's averment in paragraph 3 that it obtained permission from the Hanover Parish Council to commence the excavation work is unsustainable. The Hanover Parish Council and the respondent are different entities. No action has been brought against the Hanover Parish Council. The respondent's claim is against the appellant. Any consent given by the Parish Council would not in any way enure to the benefit of the appellant.

[23] In paragraph 4 of the proposed defence, the appellant alleges that it retained the services of the contractor to make the diversion of the respondent's pipeline on the recommendation of the respondent. In my view, this does not raise an answer to any of the averments in the claim. In the circumstances of this case, liability cannot be ascribed to the respondent for work done by the contractor even if such work is found to be defective. It is evident that the contractor's services were engaged by the appellant and any issue as to the work done by the contractor, at the appellant's bidding, lies between the appellant and the contractor.

[24] In paragraphs 7 to 9 of the particulars of claim, it is stated that the appellant submitted to the respondent a proposal for diversion of its 500mm water main together with drawings prepared by the contractor employed by the appellant. These drawings, the respondent states, were rejected. It was the respondent's further averment in paragraph 10 that on or about the 16th October, 2007, without its consent, the pipeline was diverted by the appellant and or its servant or agent resulting in damage thereto. In answering these allegations, the appellant, in paragraphs 6, and 8- 11 of the defence essentially alleges that the responsibility for the preparation of the drawings and the construction of the diversion of the pipeline should be laid at the feet of the contractor and that if any breaches were committed they would be answerable by him. By these averments the appellant implicitly assigns blame to the contractor. The fact that the contractor was employed by the appellant is not in dispute. No issue had been raised in the proposed defence to show that the contractor was not the appellant's servant or agent.

[25] The statement in paragraph 12 of the proposed defence that the appellant had obtained the expressed and or implied consent of the respondent runs contrary to that which had been pleaded in paragraph 4 that the excavation work had commenced with the Parish Council's permission. As earlier indicated, the Parish Council is not a defendant in the action. It is clear that any permission given would have been that of the Parish Council and not

the respondent's. It follows that the averment that consent had been given by the respondent could not be successfully raised as an issue.

[26] Mr. Dunkley contended that the appellant, in the draft defence, denied liability for negligence and the learned judge ought to have regard to the principle relating to breaches of an independent contractor by appreciating that any breach committed would have been attributable to the contractor. In my judgment, the denial of negligence in the proposed defence is clearly eroded by the appellant's consent to repair the damage to the pipeline. Further, there would have been no necessity for the learned judge to have taken into account any allegation relating to an independent contractor, as there was no pleading in the proposed defence stating the contractor to be an independent contractor.

[27] No good reason was proffered to have driven the learned judge to have given favourable consideration to the appellant's application for an extension of time. The allegations advanced in the proposed defence do not raise any answer to the claim. The learned judge was correct in refusing to grant leave to the appellant to defend as the proposed defence raises no triable issue worthy of a defence.

[28] The further question relates to the grant of the summary judgment on the claim. Mr. Dunkley argued that the learned judge erred in granting summary judgment on the ground that the proposed defence proffered no proper defence

without giving due regard to the fact that the appellant was prejudiced by reason of the respondent's failure to particularize its loss.

[29] Part 15 of the C.P.R empowers the court to determine a claim or a particular issue in a claim without trial. By Rule 15.2 the court is permitted to grant summary judgment on a claim or on a particular issue of the claim in circumstances where a claimant has no real prospect of succeeding on a claim or issue or a defendant has no real prospect of defending the claim successfully. The rule reads:

> "15.2. The court may give summary judgment on the claim or on a particular issue if it considers that:
>
> (a) the claimant has no real prospect of succeeding on the claim or the issue; or
>
> (b) the defendant has no real prospect of successfully defending the claim or issue."

[30] Rule 15.6 outlines the powers of the court in granting summary judgment. The rule reads:

> "15.6 On hearing an application for summary judgment the court may-
>
> (a) give summary judgment on any issue of fact or law whether or not such judgment will bring the proceedings to an end;
>
> (b) strike out or dismiss the claim in whole or in part;

(c) dismiss the application;

(d) make a conditional order; or

(e) make such other order as may seem fit."

[31] A court, in the exercise of its discretionary powers must pay due regard to the phrase "no real prospect of succeeding" as specified in Rule 15.2. These words are critical. They lay down the criterion which influences a decision as to whether a party has shown that his claim or defence, as the case may be, has a realistic possibility of success, should the case proceed to trial. The applicable test is that it must be demonstrated that the relevant party's prospect of success is realistic and not fanciful. In **Swain v. Hillman** [2001] All ER 91, 92 at paragraph [10] Lord Woolf recognized the test in the following context:

> "The words 'no real prospect of being successful or succeeding do not need any amplification, they speak for themselves. The word "real" distinguishes fanciful prospect of success or, as, Mr. Bidder QC submits, they direct the court to the need to see whether there is a realistic as opposed to a fanciful prospect of success."

[32] Where appropriate a judge should invoke the powers conferred by the rule. In **Swain v. Hillman** at page 94 Lord Woolf states:

> "*It is important that a judge in appropriate cases should make use of the power contained in Part 24 [which is similar to Rule 15.2 of the C.P.R]. In doing so he or she gives effect to the overriding objectives contained in Part 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and, I would add, generally that it is in the interest of*

> *justice. If a claimant has a case which is bound to fail, then it is the claimant's interests to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a claimant should know this as soon as possible ...*"

[33] At page 95 he went on to state:

> "*Useful though the power is under Part 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial. As Mr. Bidder put it in his submissions, the proper disposal of an issue under Part 24 does not involve the judge conducting a mini trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily.*"

[34] In **Three Rivers District Council v. Governor and Company of the Bank of England** [2001] UKHL 16, Lord Hutton gives guidance to the approach which a judge should adopt in dealing with the applicable test. At page 44 he said:

> "The important words are "no real prospect of succeeding." It requires the judge to undertake an exercise of judgment. He must decide whether to exercise the power to decide the case without a trial and give summary judgment. It is a 'discretionary' power, ie one where the choice whether to exercise the power lies within the jurisdiction of the judge. Secondly, he must carry out the necessary exercise of assessing the prospects of success of the relevant party. If he concludes that there is "no real prospect", he may decide the case accordingly."

[35] The important question is whether there was material which demonstrated that there are issues to be investigated at trial. It was contended

by Mr. Dunkley that the ancillary claim supplements the defence. The respondent brought its claim against the appellant in trespass while the appellant's ancillary claim was essentially in negligence, in particular the negligence of its contractor who was never a party to the respondent's claim. It has been noted that the appellant, in its particulars of the ancillary claim seeks to recover damages for breach of contract and reputational loss. No facts had been pleaded to sustain these claims. The respondent's claim was pleaded with particularity, averring an act of intrusion by the appellant on its pipeline, causing damage to it. As previously indicated, there were no allegations raised by the appellant in its proposed defence which amount to an answer to that which has been pleaded in the claim. Consequently, it cannot be said that there are any issues on which the parties have been joined to have enabled the appellant to successfully pursue its defence even if leave had been granted to defend.

[36] It is perfectly true, as submitted by Mr. Dunkley that the respondent did not particularize its loss. I do recognize that a claimant has a duty to specifically plead his loss as a defendant ought to know the particulars and extent of such loss which he may be required to meet. In the instant case, the absence of the particulars of loss in the particulars of claim would in no way operate prejudicially to the appellant. The appellant was fully cognizant of the extent of the respondent's loss with respect to the repairs to the pipeline. A statement of such loss had been submitted to the appellant by way of approved invoices outlining the nature and costs of repairs to the pipeline and the cost of the construction

of a protective wall. Surely, no violence would be done if the respondent takes the appropriate steps to remedy this defect. On an appraisal of the case as a whole, there is no real possibility of the appellant succeeding at trial.

[37] The appellant's contention that the learned judge exhibited a predisposition to the respondent's application for summary judgment founded on the respondent's submissions on its ex parte application is devoid of merit. At the hearing of the ex parte application, were the affidavits of Gaile Walters, Maurice Manning and Oniel Shand with relevant exhibits in support of the application. These affidavits were served on the appellant. There was no response to them. On the 12th January, 2009 the same affidavits used in support of the ex parte application, together with the affidavit of Miss Welds, were before the learned judge. Miss Welds' affidavit did not in any way challenge the evidence contained in the affidavits in support of the respondent's application.

[38] It is of significance that in paragraph 6 of its acknowledgement of service, the appellant stated that it intended to defend the claim. However, in paragraph 8 it stated that it would admit part of the claim, that is "to pay for the required work". It is clear that the learned judge, in order to arrive at a decision as to whether the appellant had advanced an arguable defence, would have considered the contents of the particulars of claim and the affidavit of Miss Welds, taking into account such evidence as was disclosed by the exhibits

supplied by the respondent as well as the fact that the appellant stipulated that it would pay for the required work.

These grounds fail.

Ground 6

> "6. That having regard to ground (3), the Learned Judge in Chambers failed to accept the Respondent/Claimant's Affidavit exhibiting draft Defence averring the connection between the Appellant/Ancillary Claimant and the Ancillary Defendant, which if permitted to stand, would aid the Appellant/Ancillary Claimant's Defence to the action."

[39] It was argued by Mr. Dunkley that on an assessment of damages in the principal suit, the appellant would not have the opportunity to properly address the claim for the negligence of the contractor, as consideration could not be given to the defence of negligence which had been pleaded in the ancillary claim.

[40] The respondent's claim against the appellant relates to trespass to the respondent's property, namely, its pipeline, its chattel. Trespass to a chattel, like trespass to land, comprises any act of direct interference with such chattel, without lawful justification. Damage occurring as a direct consequence of the negligence of a defendant may also fall within the purview of trespass. See **Leame v. Bray** (1803) 3 East 593.

[41] Negligence within the context of the respondent's claim implies a voluntary intentional act committed within the tort of trespass by the appellant in

diverting and damaging the respondent's pipeline without the respondent's consent. Such negligence is designated by the appellant's intrusion on and interference with the pipeline by reason of the diversion. The appellant's claim by way of the ancillary claim is confined to the negligence of the party contracted by it to remedy the defect in and the damage to the pipeline. All averments in the ancillary claim point to negligence on the part of the ancillary defendant, the contractor, whose services had been secured by the appellant.

[42] The pleadings do not disclose the ancillary defendant to be an agent or servant of the respondent. Nor does the ancillary claim in any way connect the ancillary defendant to the respondent. Although, in paragraph 4 of the proposed defence, it is stated that the contractor's services were retained on the recommendation of the respondent, the fact that the appellant had consented to the repairs to the pipeline and had made payments thereto, clearly shows an assumption of culpability on the part of the appellant. And indeed, as Mr. Williams rightly submitted, the appellant had not only assumed liability for the damage to the pipeline but by necessary implication, had also assumed responsibility for the work done by the ancillary defendant.

This ground is not sustainable.

Ground 7

"The Learned Judge in Chambers erred in ordering summary judgment against the Appellant/Ancillary Claimant without any or any sufficient regard to the fact that an ancillary claim was filed in the Honourable Court in circumstances where:

a. The Ancillary Defendant was absent from the summary judgment hearing of the appellant/Ancillary Claimant,

b. the obvious implication that a successful ancillary claim would have led to quantum being determined prior to the Appellant/Ancillary Claimant's involvement;"

[43] Mr. Williams submitted that where an ancillary claim is not a counter claim against a claimant, a party cannot insist on the trial of the claim and the ancillary claim simultaneously unless the ancillary claimant satisfies the provisions of Rule 18.9 of the C.P.R.

[44] Rule 18.9 (1) of the C.P.R makes provision for matters relevant to the question as to whether an ancillary claim should be considered separately from a principal claim. The rule reads:

> 18.9 "(1) This rule applies when the court is considering whether to-
>
> (a) permit an ancillary claim to be made
>
> (b) dismiss an ancillary claim; or
>
> (c) require the ancillary claim to be dealt with separately from the claim."

[45] The learned judge was not required to invoke any of the factors specified in either (a) (b) or (c) of the rule. At the time of the applications for extension of time to file defence and for summary judgment, there was no application before

him to consider any matter relevant to any question relating to the ancillary claim.

[46] Additionally, under Rule 18. 1 (2) (a) an ancillary claim may be treated as a counterclaim, which, would ordinarily be dealt with at the same time as the main claim. However, the ancillary claim filed by the appellant cannot be treated as a counterclaim. The respondent's claim is in trespass, while the ancillary claim is essentially in negligence and in particular, the negligence of the appellant's agent or servant who was never named a defendant to the respondent's claim. There are no issues joined on the claim and the ancillary claim which would render it expedient for both claims to be heard simultaneously.

[47] The absence of the ancillary defendant from the hearing of the applications is immaterial. No issue was joined between the respondent on its claim and the ancillary defendant on the ancillary claim to have warranted the ancillary defendant's presence.

This ground also fails.

Ground 8

> "The Learned Judge in Chambers further erred in believing that his Order to permit the Ancillary Defendant to take part in the assessment of damages was sufficient, without any or any (sic) regard to the obvious legal effect of placing the issue of quantum before that of liability, as between the Appellant/Ancillary Claimant and the Ancillary Defendant."

[48] This ground is misconceived. The order of the learned judge commissioned that the appellant be at liberty to contest the question of quantum of damages. Such an order indubitably relates to the issue of quantum as between the respondent and the appellant on the respondent's claim. The ancillary claim raises a separate and distinct claim. There is nothing in the order of the learned judge which could be construed as his having contemplated that the ancillary defendant ought to be permitted to participate in the question of quantum of damages.

[49] Grounds 9 and 10

> "9. Further, a consolidated action would permit ventilation as to what, if any contribution could be attributed to the Respondent/Claimant beyond the limited issues permitted to be raised at assessment of damages.
>
> 10. That the Learned Judge in Chambers erred in failing to properly balance the interests of the respective parties, and that this matter ought to be consolidated with the ancillary claim, and be heard, which would best serve the interest of justice."

[50] Mr. Williams submitted that there was no issue before the learned judge with respect to a claim for contribution or indemnity against the respondent as there were no allegations suggesting liability on the respondent's part for damage to the pipeline, nor was there any pleading in the proposed defence in support thereof. A claim for contribution, he argued must either be in the form

of an ancillary claim against the respondent by the appellant or by a clear statement to that effect in a defence.

[51] It cannot be denied that the court has discretionary powers to consolidate pending actions. Although the main purpose of consolidation is to save costs , normally, consolidation will only be ordered in circumstances where there are common questions of law or fact in separate actions " having sufficient importance in proportion to the rest of each action to render it desirable that the whole of the matters should be disposed of at the same time." (See **Daws v. Daily Sketch & Sunday Graphic, Ltd and Anor.** [1960] 1 W.L.R 126; [196] 1 All E. R 397).

[52] As earlier stated, the main claim and the ancillary claim are two separate actions. There was nothing on the pleadings before the learned judge, disclosing any allegation of culpability on the part of the respondent. Although the respondent is named a party to the ancillary claim, the allegations raised therein point to negligence on the part of the ancillary defendant and contribution or an indemnity from him. In my judgment, the question of the ancillary defendant's negligence or contribution or indemnification by the respondent was never an issue before the learned judge. There are no questions of law or fact which are common to the main claim and the ancillary claim which are sufficiently important to warrant the hearing of both matters simultaneously. There was

nothing which would have permitted the learned judge to have ordered consolidation of the main claim and the ancillary claim

[53] Mr. Dunkley contended that in all the circumstances the application of the overriding objective to deal with cases justly and expeditiously would require that all the issues be disposed of contemporaneously in order to avoid injustice.

[54] In the exercise of its discretion, the court is constrained to act within the dictates of the rules. It cannot be denied that the court must interpret the rules within the context of the overriding objective which requires the court to deal with cases justly. However, where the rules make specific provision as to how a matter should proceed, the court must give effect to that rule.

[55] Rule 15.6 (2) expressly provides that the court may stay execution of a summary judgment until after the trial of any ancillary claim made by a defendant against whom the summary judgment was given. The language of the rule is clear and precise. It imposes an obligation on the court to give effect to the provisions of the rule. In such circumstance, the court cannot invoke the overriding objective. It would have been open to the learned judge to have made an order in terms of the rule. He having failed to do so, in my judgment, it would have been incumbent on the appellant to have sought the court's leave for the stay.

[56] These grounds are not maintainable.

[57] In my opinion the learned judge was justified in refusing permission to the appellant to file a defence, the proposed defence being unmeritorious. He was perfectly correct in granting the respondent summary judgment and ordering that the action should proceed to assessment of damages. There would have been no obligation on his part to have ordered that the ancillary claim be heard contemporaneously with the assessment of damages.

[58] I would dismiss the appeal with costs to the respondent to be agreed or taxed.

DUKHARAN, J.A.

[59] I agree.

ORDER

HARRISON, J.A.

Appeal dismissed. Costs to the respondent to be agreed or taxed.