[2010] JMCA Civ 42

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 154/2009

BEFORE: THE HON MR JUSTICE HARRISON JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA (Ag)

BETWEEN	**MEDICAL AND IMMUNIODIAGNOSTIC LABORATORY LIMITED**	**APPELLANT**
AND	**DORETT O'MEALLY JOHNSON**	**RESPONDENT**

Vincent Chen instructed by Chen, Green & Co for the appellant/proposed ancillary claimant

Jalil Dabdoub instructed by Dabdoub, Dabdoub & Co for the proposed ancillary defendant

9, 10 June and 3 December 2010

HARRISON JA

[1] I have read the draft judgment of Phillips JA and I am in full agreement with the conclusion arrived at. The background to the appeal and the submissions made by the attorneys-at-Law have been adequately set out in her judgment, so I need not repeat them in this judgment. I do wish however, to make a few comments of my own.

[2] This appeal challenges the decision of Master George (Ag) who on 16 November 2009, refused permission to allow Medical and Immuniodiagnostic Laboratory Limited (the defendant/appellant) to join Timos Trading Limited as ancillary defendant in proceedings which had commenced in the Supreme Court.

[3] Master George (Ag) refused permission to file the ancillary claim on the basis that the claim was statute barred. She stated inter alia:

> "My view is that as permission was being awaited to file this application, the claim was not yet filed or issued against the Ancillary Defendant although one was filed along with the application in support thereof. Therefore if time began to run from 28th March 2003….it would now be statute barred."

[4] Now, the law makes it abundantly clear that an action shall not be commenced after the expiration of six years from the date on which the cause of action accrued: see the Limitation of Actions Act. A 'cause of action' has been defined as "every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court": **Read v Brown** [1888] 22 QBD 128, 131.

[5] The general rule in contract is that the cause of action accrues not when the damage is suffered but when the breach occurred. Consequently, the limitation period runs from the time the contract is broken and not from the time that the resulting damage is sustained by the plaintiff.

[6] Where there is a contract for the sale of goods, the buyer's right of action for breach of an implied or expressed warranty relating to goods accrues when the goods

are delivered and not when the defect is discovered or damage ensues. This principle is confirmed by **Battley v Faulkner** (1820) 3 B & Ald 288. In the instant case, time started running from 23 March 2003, when the chairs were delivered, and the claim would expire six years from that date on 23 March 2009. The application was heard by Master George (Ag) on 5 October 2009. Judgment was reserved and was handed down on 16 November 2009, so this makes the period in excess of six years.

[7] In the tort of negligence the cause of action arises when the damage is suffered and not when the act or omission complained of occurs. It is alleged that the claimant in this matter suffered damage on 3 June 2005, when a chair on which she was sitting in the appellant's place of business suddenly collapsed. The cause of action in tort would therefore expire on 3 June 2011.

[8] It was held in **Henderson v Merrett Syndicates Ltd**. **and Ors**. [1995] 2 AC 145 that where a person undertakes to perform professional or quasi-professional services for another, this commitment, where relied upon by the person on whose behalf these services are performed, may be sufficient to give rise to a duty of care in tort, regardless of the contractual relationship between the parties. The court also accepted that a claimant is entitled to pursue whichever action will give him a practical advantage on the question of limitation. At page 184 of the judgment, Lord Goff of Chieveley stated inter alia:

> "All systems of law which recognise a law of contract and a law of tort (or delict) have to solve the problem of the possibility of concurrent claims arising from breach of duty

> under the two rubrics of the law. Although there are variants, broadly speaking two possible solutions present themselves: either to insist that the claimant should pursue his remedy in contract alone, or to allow him to choose which remedy he prefers…"

In my judgment, the appellant in this case would not be barred from bringing concurrent claims in tort and contract.

[9] Mr Dabdoub for the proposed ancillary defendant argued quite strenuously however, that the proposed ancillary claim filed by the appellant is based on contract as in paragraph 10 of the ancillary claim form it states that *"The defendant relies on the provisions of the Sale of Goods Act"*. He argued that the "entire fact scenario" pleaded, leads one to conclude that this is a breach of contract claim. He relied on and referred to **Bagot v Stevens Scanlan & Co. Ltd**. [1966] 1 QB 197. He further submitted that the proposed claim form did not conform with the provisions of the Civil Procedure Rules 2002, as it relates to a claim in negligence particularly in relation to a claim in personal injuries. He argued that the particulars of negligence would have to be pleaded and that although the appellant had included them in the ancillary claim, the word "particulars" was not stated in the claim form.

[10] The appellant contended on the other hand, that not only is there a contractual relationship existing but there is also liability arising in tort in circumstances where goods are put out in the public for general consumption and they turn out to be defective, thereby leading to injury to a third party. Mr Chen argued that there were sufficient facts set out in the proposed ancillary claim form to embrace an action in tort.

[11] I do believe that there is merit in the arguments made by the appellant that a claim in negligence could arise. I agree with my sister Phillips JA when she stated, "… the appellant as ancillary claimant has a viable cause of action in negligence which is not statute barred". Of course, there could be the need to make some form of amendment to the proposed claim form with regards to the particulars of negligence.

[12] This appeal should therefore be allowed on the ground that the interests of justice demand that the appellant be allowed to file its ancillary claim and join Timos Trading Ltd as an ancillary defendant.

PHILLIPS JA

[13] This is an appeal from the judgment of Master George (Ag) delivered on 16 November 2009 wherein she dismissed the appellant's application for permission to file an ancillary claim and to join an ancillary defendant in proceedings in the Supreme Court. The Master (Ag) made no order as to costs and gave permission to appeal. The appellant challenges the finding of fact of the learned Master (Ag) that the claim is founded only in contract, and the findings in law that in this case the statute of limitations commences to run upon delivery of the goods, and the filing of the application for permission to file the ancillary claim is statute barred.

[14] The appellant relied on four grounds of appeal which are set out below:

> "a. The principal claim as against the proposed Ancillary Defendant is that goods bought from him had caused

personal injury to a third party, the Claimant and the loss if any, sustained by the Claimant was recoverable from the manufacturer of the chair through the Ancillary Defendant;

b. The accrual of the cause of action in respect to the injuries was on the happening of the event giving rise to the claim of the Claimant to wit, on the 3rd, June 2005 when the chair in question collapsed and caused injury to the Claimant;

c. The claim is principally in tort and not in contract. The contractual portion of the claim relates to the purchase of the chairs and is limited to the Defendant/Ancillary Claimant and the proposed Ancillary/ Defendant. The claim in tort relates to the Claimant, the Defendant, the propose (sic) Ancillary Defendant and through the line of distribution up to (sic) (the manufacturer); and

d. The period of limitation in relation to the sale of the chairs is different from the tort. Time commences to run at the delivery of the goods in relation to the sale of goods but at the happening of the event giving rise to the cause of action in relation to the tort."

Based on these grounds the appellant asks this court to reverse the orders of the Master (Ag) by giving permission for the ancillary defendant to be joined in the action and for all necessary documentation including the ancillary claim form to be properly served on the ancillary defendant.

The proceedings below

[15] This matter has had a very unusual history, and non compliance with the rules, delays in the process of adding a proposed party to the action, and an inattention to specific dates and the rights of parties, have resulted in this matter being in the

situation that it is, and ending up before this court. The appellant had helpfully set out a chronology of the passage of this matter through the courts with which the proposed ancillary defendant did not take issue, so we have for convenience, ease of reference, and brevity, reproduced the same as provided for us in sequential numbering.

Chronology of events

"(i) Chairs purchased from Timos Trading Limited by the [appellant] on the 23rd March, 2003 and delivered to the [appellant] on the same day;

[ii] Upon receipt of the chairs they were placed in the [appellant's] waiting room at 43 Fletcher's Avenue, Linstead and used for the appellant's clients to sit on;

[iii] On the 3rd June 2005 one of the chairs suddenly collapsed whilst the claimant was sitting on it causing her to fall to the ground and suffering injury;

[iv] On the 9th November 2006 the Claimant commenced this action;

[v] On the 17th January 2007 the [appellant] filed an acknowledgement of service of the Claim Form;

[vi] On the 20th February 2007 the [appellant filed] it's (sic) Defence and Ancillary Claim Form;

[vii] On the same day, the 20th February 2007, the [Appellant's] Attorney- at-Law, delivered a copy of the Ancillary Claim Form to a Mr. Azan at the Ancillary Defendant's place of business and registered office of the company at 15 Old Hope Road, Kingston 5;

[viii] On the 12th April 2007, the Registrar of the Supreme Court referred the matter to mediation under the automatic referral provisions of the CPR 74.3 (3);

[ix] On the 16th May 2007, the [Appellant's] attorneys, wrote to the Ancillary Defendant's then Attorney-at-Law (Wong Keng & Co.) indicating that Mr. Azan had advised that that firm represented the Ancillary Defendant and enquiring whether they would accept the ancillary claim form;

[x] Wong Ken & Co having responded that they could not accept the Ancillary Claim Form, a letter was sent on the 17th May 2007, serving the ancillary claim form pursuant to section 397 of the Companies Act;

[xi] On the 31st May 2007, Wong Ken & Co wrote to the [Appellant's] Attorneys-at–law acknowledging receipt of the Ancillary Claim Form by Registered Mail and requesting copy of any proof of purchase of the chair in question;

[xii] On the 31st May, 2007 the [Appellant's] Attorneys-at- Law sent proof of purchase in the form of Ticket No. 272744;

[xiii] On the 8th June, 2007 the Ancillary Defendant's Attorneys-at-Law filed an acknowledgment of service of the Ancillary Claim Form;

[xiv] On 13th June 2007 Milad Azan filed an affidavit in support of an application to strike out the Ancillary Clause Form;

[xv] On 18th September 2007 the matter came on for mediation but was adjourned as the Ancillary Defendant or his attorney [did] not attend;

[xvi] On the 25th September 2007, the Ancillary Defendant's Attorney- at-Law [sent] the affidavit of Milad Azan filed on the 13th June 2007, to the [Appellant's] Attorney-at-law;

[xvii] Mediation set for the 19th February 2008, but adjourned as the proposed Ancillary Defendant did not attend;

[xviii] On the 18th June 2008, the Claimant [filed] an application supported by affidavit to dispense with the mediation;

[xix] On 27th October 2008 Master Lindo made an order dispensing with mediation and set the 30th January, 2009 as the case management date;

[xx] On 30th October 2008 formal order dispensing with mediation and fixing date for case management filed;

[xxi] Order served on 10th December 2008;

[xxii] On 30th January 2009, order made by Mr. Justice Roy Anderson, at case management conference striking out the Ancillary Claim Form and granting permission to file application with supporting affidavit to join Timos as Ancillary Defendant;

[xxiii] Order on case management was filed on the 12th February 2009, and served on 13th February 2009;

[xxiv] On 27th February 2009, application for permission to file Ancillary Claim Form with supporting affidavit of Eunice Griffiths filed;

[xxv] On 16th June 2009 Messrs Dabdoub, Dabdoub & Co [wrote] to the Appellant's attorney-at-law to say that they represent the Ancillary Defendant;

[xxvi] Application set for 12th May 2009, but adjourned to 16th July 2009, but not heard on that day and further adjourned to the 5th October 2009;

[xxvii] On 5th October 2009 the application heard by Master George(Ag) and judgment reserved; and

[xxviii] On the 16th November 2009 Master George (Ag) delivered her written judgment in which she

> dismissed the application (to join Timos in the action) for the reasons stated in her judgment."

[16] On 24 November 2009 the notice and grounds of appeal were filed.

[17] In her reasons for judgment the learned Master (Ag) indicated that the application before her was governed by the provisions of Part 18 of the Civil Procedure Rules (CPR) and referred specifically to rules 18.1 and 18.5 thereof. She set out the basis for the application, in that the appellant was seeking permission to file an ancillary claim and to join the proposed ancillary defendant (Timos) to the suit. The background to the application was that although the appellant had filed the ancillary claim form at the time of filing its defence, Timos was able to obtain an order from Anderson J successfully striking out that claim form. The bases for that action were that the claim form was served more than 14 days after the filing of the defence, contrary to rule 18.6(1) of the CPR, and there was no accompanying acknowledgement of service or statement of case in respect of the case between the claimant and the appellant as required by rule 18.6(2). Permission was required as the defence of the appellant had by then been filed just under two years before Anderson J had given permission when granting his order to strike out the claim form for the application for permission to file the said claim form to be made.

[18] The Master (Ag) set out in some detail the objections to the application taken by Timos below. The position adopted by Timos in this litigation thus far has been curious to say the least. Before the learned Master (Ag), Timos raised four objections which, as

they are contrary in some respect to what was argued before us, I will set out as they appear in the reasons for judgment of the learned Master (Ag):

> "(i) The proposed ancillary claim is for indemnity not contribution. Indemnity does not arise as there is no contract and the Defendant is seeking to sue for an indemnity. In any event any indemnity would have to be expressly provided for in a contract.
>
> (ii) The remedy which the Claimant claims against the Defendant is a different legal remedy than that which it is seeking to claim against the proposed Ancillary Defendant.
>
> (iii) The facts which give rise to the Claimant's claim are different from those which give rise to the Defendant's claim against the proposed Ancillary Defendant.
>
> (iv) The Limitation of Actions Act limits any claim in contract or tort to six years. The ancillary claim form is not yet issued and six and three quarter years have passed, therefore the claim is statute barred."

[19] The learned Master (Ag) dealt with the said objections comprehensively and I will endeavour to summarise accurately her ruling with regard thereto.

(i) **indemnity or contribution**

[20] Under this head it was the contention of counsel for Timos that the proposed ancillary claim was for an indemnity and not contribution, that as indemnity arises by way of contract, and there was no contract between the appellant and Timos then the remedy of indemnity could not arise. Counsel, it seems, made much of the difference between indemnity and contribution as a remedy in this case. The learned Master

(Ag) found that this was not a valid ground for opposing the application for joinder as, in her view, the issue of whether contribution was applicable was a matter for the determination of a trial judge after hearing all the evidence. Further, any difficulty could be cured by an application for amendment if necessary. Additionally, she was not of the view that an indemnity could not arise in the circumstances of this case. She stated:

> "…an indemnity is nothing more than an obligation to compensate or reimburse for loss suffered by another usually to restore that other party to the same position as before the loss. This may arise by way of an express clause in a contract or it may arise by implication from the circumstances of a particular claim or the relationship between the parties, hence it is possible to have "implied indemnity". The concept of indemnification involves making a distinction between "equitable" or" implied" indemnity claims from "contracted indemnity" claims as indemnification can arise from a multitude of factual situations. Equitable or implied indemnity involves a claim where the law implies a right to indemnification. Contractual indemnification is, on the other hand in contrast to indemnification implied by law, based on agreement of the parties. Indemnity, she continued, can be defined as:
>
> (1) A compensation to make a person whole from a loss already sustained.
>
> (2) A contract or assurance by which one engages to secure another against an anticipated loss."

The learned Master (Ag) took the view that the definition at (1) above was applicable to the instant case. If a chair is purchased and does not meet expectations, it is defective, and one should be able to obtain compensation from "the chain of claim".

[21] She also stated that claims of indemnity are allowed when a contract of indemnity is implied. In this case, in the contract for the purchase of chairs, she said that at the very least, there would be an implied term that it was fit for its purpose – to be sat on, and if that proved not to be the case, then if sued, one ought to be able to recover the money paid, as one would have purchased a defective product. The Master (Ag) rightly said however, that she was not required to make any pronouncement on the validity of the claim, and did not intend to do so, although the merit of the claim and its chances of success may have been relevant to the exercise of her discretion.

[22] With regard to contribution, the learned Master (Ag) indicated that it was clear on the basis of the information before the court that the appellant was not accepting any responsibility for the incident and therefore was not prepared to make any contribution to the loss. Whether this was so however, she said, was a matter for trial, and the appellant should not be precluded from claiming an indemnity at this stage, and pursuing the chain of distribution ultimately to the manufacturer. Timos could do the same. Then the Master (Ag) made this statement:

> "In a case such as this, where the claim is that the chair was defective, if in fact there is an inherent hidden defect, the manufacturer is often the culpable tortfeasor as a result of conduct associated with designing or manufacturing a defective product. However, strict liability in tort relieves the plaintiff from proving the manufacturer was negligent and instead permits proof of the defective condition of the product as the basis for liability. The product manufacturer is often remote from the plaintiff and so the law allows for strict liability to extend to those in the product's chain of distribution. Therefore, an innocent seller can be subject to liability simply by virtue of being present in the chain of distribution of the defective product. In extending liability to

> those in the chain of distribution in this manner the law extends the equitable proposition that an injured party should not have to bear the cost of his injuries simply because the manufacturer is not within his direct ambit."

She relied on a quotation which suggested that the liability attached through the relationship with the product, and not through any negligence or misfeasance, and why there is therefore an acknowledgement of an implied indemnity. The Master (Ag) appeared to be merging the principles relating to the claim of the injured party (the plaintiff) against a potential manufacturer with the claim of the innocent buyer against the seller in respect of a defective product. This is of importance, particularly as, (which may be relevant in this case) a plaintiff cannot obtain damages from a third party who is not a party to the claim. Suffice it to say that question which would appear to arise here is, "Are the issues raised, claims between possible culpable tortfeasors?"

(ii) **The remedy sought against the appellant is different from that sought by the appellant against the proposed ancillary defendant**

[23] The Master (Ag) had no difficulty in rejecting this objection. The remedies sought were both monetary in nature. In her view, money in the form of damages for personal injuries sustained, and money in the form of an indemnity for breach of contract were similar. The causes of action may be different, she concluded, but the remedies sought were essentially the same (rule 18.9(2) (b)).

(iii) **The facts which give rise to the claimant's claim are different from those which give rise to the appellant's claim against the proposed ancillary defendant**

[24] Counsel for Timos argued that the facts were different as the substantive claim was based on personal injuries, that is, negligence via the Occupier's Liability Act, whereas the ancillary claim was not. The Master (Ag) found that the connecting thread was the chair, particularly the state of the chair, as the claimant was hurt by the collapse of the chair, and the appellant had purchased the chair which was in the same condition as at purchase, and not being fit for its purpose, was defective. She ruled that the claim and the ancillary claim were therefore closely connected (rule 18.9 (2)(a)&(c). The Master (Ag) in fact concluded that in the exercise of her discretion, she considered "that the third party is connected with the claim through the product liability chain subject to the test of proof at trial", and in an effort, *inter alia*, to safeguard against different results, and to ensure that the parties are bound by the decisions made, the issues being fairly simple and uncomplicated, she ruled that the claims should be tried together, over a short period of time, which she said would achieve the interests of justice.

(iv) **Statutory Limitation/Statute Barred**

[25] Timos had submitted that the Limitation of Actions Act stipulated that any action in contract or tort must be taken within six years. He submitted that the ancillary claim sounded in contract, and as 6 ¾ years had passed since the chair had been bought and the claim form had not yet been issued, then the action was statute barred. He relied on an excerpt from Blackstone's Civil Practice which states:

> "Time runs from the point when facts exist establishing all the essential elements of the cause of action."

The Master (Ag) agreed with the submission of counsel that the ancillary claim relates to a claim in contract which must be brought within six years of when the contract arose. She concluded that the cause of action arose from the date of the sale and delivery of the goods on 23 March 2003 which would mean that as the claim form had not yet been issued, it would be statute barred. She also stated that although the statutory defence of limitation ought to be raised at trial, it is a consideration in the exercise of her discretion. She further commented on the unfortunate history of the matter, and the fact that the delays could not necessarily be the fault of the appellant which had filed and served this claim so long ago, although not in accordance with the rules. She finally ruled that the court had no discretion when the matter was statute barred, except in certain situations which she said did not exist here. She dismissed the application and made the orders set out in paragraph 1 herein.

The Appeal

[26] On a perusal of the grounds of appeal and the appellant's submissions, it is clear that the appellant is contending that the claimant is entitled to recover, in respect of injuries sustained, from the ultimate manufacturer of the product through Timos, the proposed ancillary defendant. The claim by the appellant against Timos, the appellant states, is primarily in tort, and the cause of action therefore arises on the happening of the event. The claim would therefore not yet be statute barred.

[27] So the main issue on this appeal is whether the ancillary claim is also one which exposes Timos, the seller of the chairs, to a tortious liability based on duties arising from the proximity and character of the relationship between the parties, co-existing with duties and terms in their contractual relationship. There does not seem to be any real dispute that if the claim sounds in contract only, then the cause of action would arise at the time of the breach of the contract (***Nykredit Mortgage Bank plc v Edward Edman Group Ltd***. 1997 UKHL 53; [1998] 1 All ER 305). In this case, the breach would have been on the delivery of the goods, which took place in March 2003, and the action not yet having been filed, would be statute barred, which the Master concluded. So the issue would be, whether the cause of action is grounded in tort as the appellant contended and was therefore not statute barred. The second issue on appeal is whether the procedural irregularities which beset the application in 2007 resulting in the striking out of the ancillary claim form in January 2009 can be addressed on this appeal.

[28] I will confine my recounting of the submissions of both counsel to the above issues which arise on this appeal.

The appellant's submissions

[29] Counsel for the appellant had actually indicated to this court, that in the main, he did not take issue with the position adopted by the learned Master (Ag) with regard to objections (i), (ii) and (iii) taken by Timos below. However, counsel submitted that the Master (Ag) fell into error with regard to her application of her findings in respect of

objection (iv) when dealing with the statute of limitations. The Master (Ag), he said, understood that the appellant was through the application, only endeavouring to recover damages from the legal entity at fault, the ultimate manufacturer, which could only be effected through the ancillary defendant, by way of, as he put it, the "product liability chain". Counsel referred to and relied on the seminal case of ***M'Alister (Donoghue) v Stevenson*** [1932] AC 562, indicating that the claim was founded in tort to recover damages as set out in that case, but he submitted the case also sounded in contract to recover the price of the goods. Counsel relied on the decision in ***Donoghue v Stevenson*** essentially for the principle that a manufacturer of food, medicine or the like, sold by him to a distributor or ultimate purchaser or consumer, in circumstances which prevent each or any of them from discovering by inspection any defect, is under a legal duty to them to take reasonable care that the article is free from any defect likely to cause injury to health. It was submitted that once the duty of care is established, the cause of action is one in tort.

[30] Counsel referred us to the proposed ancillary claim form and argued that there were sufficient facts set out therein to embrace an action in tort. The cause of action does not have to be specifically stated, it was argued. Counsel relied on the leading text by Bullen & Leake & Jacob, Precedents of Pleadings, 15th edn, paras 1-15 -1-19 in support of this submission.

[31] In the event however, that the above submission did not find favour with the court, counsel asked this court, without having filed any application to that effect, to

exercise its discretion under rule 1.7 (2) (b) of the Court of Appeal Rules (CAR) and extend the time for the filing of the notice of appeal from the order of Anderson J, which, he said, gave rise to the situation which currently obtains. Counsel argued that Timos has been aware of the claim and all the details from as far back as 2007, when it was properly served on the same day that it was filed, although the learned judge was not of that view. Indeed the real travesty, argued counsel, was that the ancillary claim form having been filed with the defence, the permission of the court was not required for issue of the same. Additionally, Timos' attorneys had filed an acknowledgment of service indicating an intention to defend the claim. It would therefore be a grave injustice for the ancillary claim to be thrown out of court, as it were, in such circumstances. The appellant therefore requested that this court exercise its powers under rule 26.9 of the CPR and rules 2.15 (a) and 1.7(8) of the CAR to permit the joining of Timos to the action, or alternatively to allow the ancillary claim form filed and served on 20 February 2007 to stand. Counsel relied on two cases in support of these submissions: ***Hannigan v Hannigan & Ors*** [2000] EWCA Civ 159 and ***Hertsmere Primary Care Trust et al v The Estate of Balasubramanium Rabindra-Anandh & Another*** [2005] EWHC 320 (Ch) in which procedural irregularities had occurred and the court permitted the respective cases to proceed, and directions to be given in spite thereof, pursuant to the overriding objective as outlined in their Civil Procedure Rules.

The submissions of Timos

[32] Counsel submitted with much force, in terms somewhat dissimilar to that which was initially argued below, that the proposed ancillary claim was a claim which arose

solely in contract. Counsel referred us to the ancillary claim form and submitted that on any review of all the matters pleaded therein, the claim was one relying on the provisions of the Sale of Goods Act as stated therein, and particularly Part V which refers to remedies for breach of contract. The claim was, he submitted, one for breach of contract, and not one in tort. There were no particulars of negligence as would be required. There was also no claim made in the alternative, so the damages would be the contract price. Before this court, counsel submitted that the purchase of the chairs gave rise to the contract between the parties, and that no indemnity could arise, as there was no written contract. In his written submissions however, counsel had submitted, that a remedy in the form of an indemnity for an aggrieved buyer could arise under section 52 of the Sale of Goods Act. He further submitted that, in any event, since the cause of action was in contract, the action was statute barred and he relied on two cases in support of this submission: ***Battley v Faulkner*** [1820] 106 ER 668 and ***Bagot v Stevens Scanlan & Co. Ltd*** [1966] 1QB 197.

[33] ***Battley & Another v Faulkner & Another*** related to the sale and delivery by A of winter wheat to B instead of spring wheat, which was on sale as spring wheat. This resulted in B having to pay damages to the vendee and then suing to recover the same. Counsel relied on the ruling of the court to the effect that although the special damage occurred within six years of the commencement of the action by B against A, the breach of contract had occurred and been known to B for more than that time and was therefore barred in time. In ***Bagot v Stevens Scanlan & Co Ltd***. the issue concerned a contract between a building owner and architects and whether the action

had expired when it was filed six years after the date when the duty of the architects to supervise the contract had arisen. The builder conceded that if the cause of action was founded solely on contract then the cause of action would have arisen from the date of the breach of the architects' warranty to use reasonable skill and care in the supervision of the contract, and the last time on which they could have broken that warranty was the expiry date of the same, and the action would have been statute barred. He claimed however that the cause of action was founded in negligence or alternatively on both contract and tort. Counsel relied on the dicta of Diplock, LJ who made it clear in his judgment that what he had to decide in the action was whether the action was founded on contract only, or tort only or on both contract and tort. He ultimately ruled that the relevant law was accurately set out as follows in the judgment of Greer L. in ***Jarvis v Moy, Davies, Smith, Vandervell and Co.*** [1936] 1 KB 399 :

> "The distinction in the modern view, for this purpose, between contract and tort may be put thus: where the breach of duty alleged arises out of a liability independently of the personal obligation undertaken by contract, it is tort, and it may be tort even though there may happen to be a contract between the parties, if the duty in fact arises independently of that contract. Breach of contract occurs where that which is complained of is a breach of duty arising out of the obligations undertaken by the contract."

The respondent relied heavily on Diplock LJ's conclusion which was as follows:

> "It seems to me that, in this case, the relationship which created the duty of exercising reasonable skill and care by the architects to their clients arose out of the contract and not otherwise. The complaint that is made against them is of a failure to do the very thing which they contracted to do. That was the relationship which gave rise to the duty which was broken. It was a contractual relationship, a contractual duty, and any action brought for failure to comply with that

> duty is, in my view, an action founded on contract. It is also, in my view, an action founded upon contract alone."

[34] In the instant case counsel argued that the duty arose in contract alone and the duty was breached on the delivery of the chairs in 2003, and the action was therefore statute barred.

[35] He submitted that the three authorities relied on by counsel for the appellant were not helpful. In ***Donoghue v Stevenson*** the ruling was that the injured party had a cause of action against the manufacturer, but in the instant case it was not known who that was, as Timos was not the manufacturer, but merely a re-seller, which is why the cause of action must arise in contract, particularly when there are no visible defects. Counsel argued that in the ***Hannigan*** case the irregularities, although several, were minor, and the proceedings were issued one day before the limitation period expired, and not as in the instant case, where the time has expired and the claim has not yet been issued. With regard to the ***Hertsmere Primary Care Trust*** case, counsel submitted that the ruling seemed to have been made on the basis of the court accepting that certain information withheld by attorneys had prejudiced the other side. In the instant case however, counsel for the appellant appeared to be submitting that information relating to the manufacturer was needed and had not been forthcoming. He said he objected to that submission, on the basis that there was no such evidence or any such request for information before the court. Had that been the case, Timos could have supplied the same and avoided all the unnecessary expense which had occurred. Instead, he submitted, the appellant had brought this action and Timos had a right to

defend the same. Further, counsel submitted, if the purpose of the litigation was solely to obtain information from the proposed ancillary defendant, that was not the proper procedure to do so, as there were other avenues which could have been pursued.

[36] With regard to the arguments relating to the procedural irregularities, counsel made the following points:

(i) The order of Anderson J was not before this court and could not be placed before the court at this late stage.

(ii) Anderson J did not accept that the service was good service as the accompanying documents required by the CPR were not attached.

(iii) Anderson J said that service should have been by registered post and therefore when effected, would have been out of time.

(iv) The service of the documents was not effected within 14 days of the filing of the defence, but 2½ months after the filing of the same and so the learned judge was correct.

(v) When Anderson J made his order in January 2009, the matter was going to be statute barred in less than two months and it required the appellant to act speedily. Instead the application for permission was filed on 27 February 2009, which was only six days before the matter was to become statute-barred, (this was incorrect as it was nearly a month away) and the application was not heard until later in the year.

[37] Counsel therefore requested that the appeal be dismissed.

Analysis

Issue 2 - Whether the procedural irregularities which beset the application in 2007 resulting in the striking out of the ancillary claim form in January 2009 can be addressed on this appeal

[38] As indicated, I have formulated this issue in this way and have decided to treat with it first as it can be disposed of easily. What is of importance also is that although I have set out the arguments of both counsel relating to the same, this issue was not a ground of appeal, nor could it have been, as no appeal had been filed with regard to the order made by Anderson J on 30 January 2009. At the time that order was made no permission to appeal was sought as was required by section 11 of the Judicature (Appellate Jurisdiction) Act, and none was therefore granted. When the appeal from the order of Master George (Ag) was filed, it related to the order made by her, which was an order refusing permission to issue the ancillary claim form against Timos, and not an order striking out an ancillary claim form previously filed. On appeal, therefore, the review by this court is to ascertain whether the learned Master (Ag), in the exercise of her discretion, was plainly wrong. To do so, we must examine the application, the evidence and the submissions which were before her and not those which were before Anderson, J on appeal.

[39] According to rule 1.7(2) (b) this court may:

> "extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed."

And rule 1.7(8) states:

> "In special circumstances on the application of a party the court may dispense with compliance with any of these Rules."

It is clear that these rules do give the court the power to extend the time for compliance with the rules even after the time has passed. The court can, in special circumstances, even dispense with compliance with the rules. Here, however, the appellant had not even filed an application requesting permission to appeal, and/or extension of time for the same, or to be excused completely from relying on any written documentation explaining the delay, nor did it explain why any such forbearance should be given to it. The ancillary claim form which was struck out was filed in February 2007 and the order was made in January 2009. The appeal was being heard in June 2010, so some reasonable explanation ought to have been proffered for the failure to file an appeal in the required time frame. Additionally, the respondent would have been entitled to a reasonable time to respond to such an application and to object to the same if thought necessary. One cannot access the Court of Appeal in that way, "through the back door", as counsel for the respondent put it, but I would say, by way of further non compliance with the rules. That application, such as it was, is therefore refused. That would dispose of issue 2.

[40] I wish however to make some comments about certain features of this case which are cause for concern.

[41] There is much guidance which can be obtained from two of the authorities supplied by counsel for the appellant although they may not have assisted him on this occasion. In the ***Hannigan*** case the attorneys had made numerous errors: they had commenced the case using the wrong form; the statement of case was not verified by a statement of truth; there was a failure to include the Royal Coat of Arms; the first defendant was inaccurately stated; one of the main witness statements was signed by the firm, rather than the witness personally, and even then not by a member of the firm, in his own name; the witness statement lacked the requisite legend in the top right hand corner and did not have marginal notes or the required 3.5 cm margin; the exhibits did not have the legend on the top right hand corner and the front page setting out the list of all the documents and the dates of all exhibits; the documents included were not paginated; and finally, there was a failure to serve the acknowledgement of service form. The judge acceded to an application to strike out the action and was extremely critical of the claimant's solicitors, particularly as there had been such a long preparation of judges and practitioners for the introduction of the new rules. His decision was overturned on appeal and the court made some crucial comments, which were so well said and which have general application, that I have reproduced them in detail below. In finding that the manner in which the judge had exercised his discretion was seriously flawed, the court found that in his focus on the above matters, the learned judge "lost sight of the wood from the trees". The court mentioned that the Civil Procedure Rules were "drawn to ensure that civil litigation was brought up to a higher degree of efficiency". However, it said the following:

> "But one must not lose sight of the fact that the overriding objective of the new procedural code is to enable the court to deal with cases justly, and this means the achievement of justice as between the litigants whose dispute it is the court's duty to resolve. In taking into account the interests of the administration of justice, the factor which appears to me to be of paramount importance in this case is that the defendants and their solicitors knew exactly what was being claimed and why it was being claimed when the quirky petition was being served on them. The interest of the administration of justice would have been much better served if the defendants' solicitors had simply pointed out all the mistakes that had been made in these very early days of the new rules and Mrs Hannigan's solicitor had corrected them all quickly and agreed to indemnify both parties for all the expense unnecessarily caused by his incompetence. CPR 1.3 provides that the parties are required to help the court to further the overriding objective, and the overriding objective is not furthered by arid squabbles about technicalities such as have disfigured this litigation and eaten into the quite slender resources available to the parties."

[42] In the ***Hertsmere Primary Care Trust*** case, Lightman J commented on the behaviour of attorneys, who withheld certain information with regard to non-compliance by their opponents, thus not affording their opponents the opportunity to rectify it and then subsequently attempting to take advantage of the same and trying to justify that conduct on the basis that there was no duty to give their opponents an opportunity to rectify the error. Lightman J thought it necessary to advise counsel of their role under the "new rules" particularly with regard to the application of the overriding objective. As we are now nearly a decade into the use of the CPR, I thought it may be a useful reminder to set out that guidance here (para 11):

> "That may have been the law prior to the CPR, but it is not the law today. CPR 1.2 provides that the court must seek to

> give effect to the overriding objective when exercising any power or interpreting any rule. CPR 1.1 provides that the overriding objective is to enable the court to deal with cases justly, and dealing with cases justly includes saving expense and ensuring that they are dealt with expeditiously and fairly. CPR 1.3 provides that the parties are required to help the court to further the overriding objective. In this context, that must include assisting the court to further the objective by cooperating with each other. It is to be noted that CPR 1.4 [25.1(e) [the Jamaican equivalent of which is rule 25.1(e)] provides that the court must further the overriding objective by actively case-managing cases and active case management includes encouraging the parties to cooperate with each other in the conduct of the proceedings."

[43] I mention all of this to say that in this case, the ancillary claim form was filed with the defence, without permission of the court, pursuant to rule 18.5 of the CPR. It was served at the registered office of Timos or certainly at an office with which Timos had a real connection, on an officer of the company, pursuant to rule 5.7 of the CPR, within 14 days after the date of the filing of the defence, pursuant to rule 18.6 (1) of the CPR. The attorneys for Timos however, were not in receipt of (1) a form of acknowledgement of service, as required under rule 18.6(2)(b), and (2) the statement of case between the claimant and the appellant, pursuant to rule 18.12(a) of the CPR. In my view, that could easily have been remedied by the attorneys on record calling the attorneys for the other side and requesting to be supplied with the same. An application to strike out the ancillary claim form, followed by a further application for permission to issue the same, and followed yet further by this appeal are, in my view, a complete waste of judicial time, counsel's time and an unnecessary increase of costs for the clients. The CPR must not be used as an avenue for difficult stances to be taken and a

means to increase litigation. Rule 1.2 of our CPR states clearly that the court should when interpreting the rules, seek to give effect to the overriding objective, and rule 1.3 states that it is also the duty of the parties to help the court to further the overriding objective.

[44] That being said, this is not a case which warrants the intervention of the court under rule 2.15 (a) of the CAR and or rule 26.9 of the CPR as incorporated therein. In my view therefore, the court ought not to seriously entertain any argument in relation to the order made by Anderson J at this time.

Issue 1: Was the cause of action grounded in tort as the applicant contended and therefore not statute barred?

[45] As indicated previously, the appellant appeared to be couching its claim in tort on the basis of liability for defective products, relying on the case of ***Donoghue v Stevenson***. Counsel for the appellant pointed out that the learned Master (Ag) recognized that the ancillary claim was an attempt by the appellant to get to the manufacturer by joining the seller through product liability although she held that the matter was statute barred. It seems that the learned Master (Ag) did consider the concept of liability for a defective product as has already been mentioned in this judgment (see paragraph 10 above). This was first within the context of whether the appellant's claim was one for an indemnity or a contribution. The learned Master (Ag) embarked on a short discourse in which she examined the chain of distribution and expressed the view that it was surely open to the appellant to claim an implied indemnity as a result of the chain of distribution from manufacturer to the user. Then

later, she said, "In exercising my discretion, I consider that the third party is connected with the claim through the product liability chain." However, she concluded that it was an action founded in contract. It is a bit curious that she seemed to rely on the chain of distribution implicit in the tort to establish the possibility of an entitlement to an indemnity or contribution but later rejected it as a cause of action.

[46] Although not expressly given the label of product liability, the principle of there being liability for a defective product as established by ***Donoghue v Stevenson*** is to be found in the following words of Lord Atkin:

> "A manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care."

Although the principle began with manufacturers, it is not limited to them. The authors of Clerk & Lindsell on Torts 1995 17th edn at page 491 para 9-13 state:

> "Not only are those involved in production covered; so also are those in the distribution chain. Thus a wholesaler must take reasonable steps to check the safety of what he distributes….Retailers, who are of course liable in contract, may also be liable in tort, for example, if they sell goods they have reason to know may be defective, or if they disregard instructions issued by manufacturers or distributors, or if they sell goods with reason to know they are likely to be used to harm others, at least where they do not make it clear to the buyer that the goods are sold with faults and hence that they should not be used without prior checking."

[47] It should also be noted that the liability is not strict, as the learned Master (Ag) seems to have thought, when she relied on the American case of ***Dunn and Dunn et al v County Board of Education et al*** Supreme Court of Appeal, West Virginia (1995) No. 22550. In ***Carroll v Fearon & Ors*** [1998] EWCA Civ 40, the Court of Appeal considered the issue of whether the tort as established by ***Donoghue v Stevenson*** was one of strict liability. Judge LJ had this to say on that issue:

> "In what was then perceived (and is still recognised) as a dramatic development of the tort of negligence Lord Macmillan was seeking to underline that his support for this development did not extend to the creation of a tort of strict liability. In a claim based on product liability negligence had to be proved by the plaintiff."

It seems then that product liability or liability for defective products is a part of the general tort of negligence but may be regarded as *sui generis* in that it specifically concerns liability for defective products. This is to be compared with the situation in the United States where, because it involves strict liability, it is regarded as a wholly separate tort from negligence.

[48] On the issue of who is entitled to bring a claim, the authors of Clerk & Lindsell on Torts state:

> "Anybody who suffers personal injury or damage to property can sue on principle, whether buyer, hirer, user, bystander or anyone else."

So then, the fact that the proposed ancillary claimant in these proceedings is the buyer does not preclude it from relying on liability for defective products to establish its claim. Nor does it matter that the proposed ancillary defendant is a retailer and not the

manufacturer. What must be established is the requisite proximate relationship from which a duty of care may arise. In ***Richard Grant v Australian Knitting Mills Ltd & Ors*** [1936] AC 85, Lord Wright said:

> "All that is necessary as a step to establish the tort of actionable negligence is to define the precise relationship from which the duty to take care is to be deduced. It is, however, essential in English law that the duty should be established."

[49] Using Lord Atkins' formulation in ***Donoghue v Stevenson,*** it seems to me that a seller may be held in certain circumstances to have reasonably had in its contemplation, that a purchaser in buying a chair for use in its sitting area could have been affected if that chair was defective. The seller in those circumstances would have a duty of care to sell and deliver a chair in good condition. This duty is of course subject to certain qualifications such as whether the defect was detectable on reasonable examination by the seller. However, at this stage, it is not necessary to define the parameters of this duty. Further, even if this were done, the question of whether the duty of care was discharged would be a matter of evidence to be determined at trial. It follows that it would be open to the buyer to argue that the seller was liable for the defective chair sold, provided that it can prove that it was in the same condition as at purchase, and that it had no knowledge of the defect and was not providing a defective chair for persons to sit on in a public place.

[50] Even in a case where the claimant has suffered pecuniary loss only, in my view, damages for pecuniary loss suffered may be recoverable in an action for negligence.

There is dictum from the House of Lords in ***Lambert and Anor v Lewis & Ors*** [1981] 1 All ER 1185, which indicates that it is open for the law to develop in the direction of allowing compensation for purely economic loss in these circumstances. In that case, a defective coupling that had been used to attach a Land-Rover to a trailer caused the trailer to break away, with the result that the trailer hit the plaintiff's car. The plaintiff and her husband were injured and she brought proceedings against the owner of the Land-Rover (a farmer), the dealer who supplied the coupling and the manufacturer of the coupling. The farmer brought third party proceedings against the dealer and the dealer in turn brought fourth party proceedings against the manufacturer. Their Lordships held that the farmer would not be entitled to recover in third party proceedings because though there had been a defect in the coupling, the accident was caused by the negligence of the farmer. At page 1192 of that judgment, Lord Diplock said:

> "While in the absence of argument, it could not be right to express any final view, I should not wish the dismissal of the dealers' appeal to be regarded as an approval by this House of the proposition that where the economic loss suffered by a distributor in the chain between the manufacturer and the ultimate consumer consists of a liability to pay damages to the ultimate consumer for physical damages suffered by him, or consists of a liability to indemnify a distributor lower in the chain of distribution for his liability to the ultimate consumer for damages for physical injuries, such economic loss is not recoverable under the ***Donoghue v Stevenson*** principle from the manufacturer."

[51] Further, there is authority from the House of Lords where damages were awarded for loss that was economic in nature only. In ***Junior Books Ltd v Veitchi Co. Ltd*** [1982] UKHL4, the appellants were specialist sub-contractors who had

negligently laid flooring that had to be replaced by the respondents. There was no contractual relationship between the appellants and the respondents, and the respondents did not take legal proceedings against the main contractors with whom they had a contractual relationship. The respondents claimed damages which consisted mainly of the direct and indirect cost of replacing the floor. It was held that, where the relationship between the parties was sufficiently close, in delict or tort, the scope of the duty of care, which was owed by the person performing work, extended to a duty to avoid causing pure economic loss, arising as a consequence of the defects in the work. The respondents were therefore allowed to recover their financial loss for repairing the floor. At page 3, Lord Keith of Kinkel said:

> "There undoubtedly existed between the appellants and the respondents such proximity of relationship, within the well-known principle of ***Donoghue* v. *Stevenson*** [1932] A.C. 562, as to give rise to duty of care owed by the former to the latter. As formulated in ***Donoghue* v. *Stevenson,*** the duty extended to the avoidance of acts or omissions which might reasonably have been anticipated as likely to cause physical injury to persons or property. The scope of the duty has, however, been developed so as to cover the situation where pure economic loss is to be foreseen as likely to be suffered by one standing in the requisite degree of proximity: ***Hedley Byrne & Co. Ltd v. Heller & Partners Ltd*** [1964] A.C. 465."

And at page 13 of the judgment, Lord Roskill said:

> "I see no reason why what was called during the argument "damage to the pocket" *simpliciter* should be disallowed when "damage to the pocket" coupled with physical damage has hitherto always been allowed. I do not think that this development, if development it be, will lead to untoward consequences."

[52] Additionally, the entitlement to enforce this duty of care is not affected by the rule in ***Tai Hing Cotton Mills v Liu Chong Hing Bank*** [1985] 3 WLR 333 and the fact that there is a contractual cause of action under the Sale of Goods Act. ***Tai Hing Cotton Mills***, as I understand it, is not authority for the principle that if there is a contract, a claimant is precluded from bringing a claim in tort where the action in tort is grounded on the same set of facts. It has been pointed out by the House of Lords in ***Henderson and Others v Merrett Syndicates Ltd*** that the oft-cited words of Lord Scarman in that case should be viewed within the context of the issue in that case, which was, whether a tortious duty of care could be established which was more extensive than that which was provided for under the relevant contract. In ***Henderson***, Lord Browne Wilkinson said (page 544):

> "The existence of an underlying contract (e.g. as between solicitor and client) does not automatically exclude the general duty of care which the law imposes on those who voluntarily assume to act for others. But the nature and terms of the contractual relationship between the parties will be determinative of the scope of the responsibility assumed…"

Lord Goff, in a masterly canvassing of the development of the law over the years, endorsed the reasoned analysis of the same by Oliver J in ***Midland Bank Trust Co Ltd v Hett Stubbs & Kemp (a firm)*** [1978] 3 All ER 571 and stated:

> "…liability can, and in my opinion should, be founded squarely on the principle established in ***Hedley Byrne*** itself, from which it follows that an assumption of responsibility coupled with the concomitant reliance may give rise to a tortuous duty of care irrespective of whether there is a contractual relationship between the parties, and in

> consequence, unless his contract precludes him from doing so, the plaintiff, who has available to him concurrent remedies in contract and tort may choose that remedy which appears to him to be the most advantageous."

So, unless inconsistent with its terms or specifically excluded, I agree with Lord Goff when he also said:

> "…the common law is not antipathetic to concurrent liability, and that there is no sound basis for a rule which automatically restricts the claimant to either a tortious or a contractual remedy."

It is clear then that the law has moved on from the statement of Lord Diplock in ***Bagot v Stevens Scanlan & Co Ltd.***

[53] I also do not think the appellant is precluded from pursuing the claim in negligence because its ancillary claim as pleaded seemed to rely on the Sale of Goods Act only and did not explicitly refer to negligence as an alternative cause of action. Once the facts establishing the cause of action have been pleaded, it is not fatal that the claimant has not identified the cause of action. In ***Karsales Ltd v Wallis*** [1956] 2 All ER 866, Lord Denning said:

> "I have always understood in modern times that it is sufficient for a pleader to plead the material facts. He need not plead the legal consequences which flow from them. Even although he has stated the legal consequences inaccurately or incompletely, that does not shut him out from arguing points of law which arise on the facts pleaded."

Indeed, the principle has been endorsed by Lord Wolfe MR in ***McPhilemy v Times Newspaper Ltd*** [1999] 3 All ER 775, 792 where he set out the functions of statements

of case, stating specifically that "the need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged". So, the authors of the leading text Bullen & Leake & Jacob's Precedents of Pleadings 15 edn Vol 1 state:

> "…the statement of case defines the ambit of the dispute… must state facts which if correct give rise to a valid legal claim or defence. If it does not do so, it is liable to be struck out."

However, the reliance as existed under the old regime on every possible material fact being pleaded is no longer so under the CPR.

[54] I see no difficulty in the fact that the appellant appears to be claiming an indemnity in the absence of an express contract. It is not necessary that there should exist a contract between the parties for the appellant to be indemnified. An indemnity may arise expressly, by law or in equity. In ***Eastern Shipping Co. v Quah Beng Kee*** [1924] AC 177, Lord Wrenbury delivering the judgment of their Lordships' Board said (at page 182):

> "A right to indemnity generally arises from contract express or implied, but it is not confined to cases of contract. A right to indemnity exists where the relation between the parties is such that either in law or in equity, there is an obligation upon the one party to indemnify the other. There are, for instance, cases in which the state of circumstances is such that the law attaches a legal or equitable duty to indemnify arising from an assumed promise by a person to do that which, under the circumstances, he ought to do. …it may arise (to use Lord Eldon's words in ***Waring v Ward;*** a case of vendor and purchaser) in cases in which the Court will "independent of contract raise upon his (the purchaser's)

> conscience an obligation to indemnify the vendor against the personal obligation" of the vendor."

I agree with the views of the Master (Ag) as was outlined in paragraph 9 of the judgment, that an indemnity could arise in these circumstances. Furthermore, it seems to me that it is open to the court to find that the appellant is entitled to a contribution instead of an indemnity.

[55] It is my view therefore that the appellant as ancillary claimant has a viable cause of action in negligence which is not statute-barred. The learned Master (Ag) ought therefore to have granted permission for the appellant as ancillary claimant to serve its ancillary claim, which would dispose of issue 1.

Conclusion

[56] In light of all of the above, I would allow the appeal and grant permission to the appellant to issue the ancillary claim against Timos Ltd., the ancillary defendant. Costs to the appellant to be taxed, if not agreed.

BROOKS JA (Ag)

[57] I have had the privilege and pleasure of reading the comprehensive judgment of my learned sister, Phillips JA. I note that my learned brother Harrison JA has agreed with her conclusions. I respectfully agree with her reasoning and conclusions reached therein and have nothing that I could usefully add.

HARRISON JA

ORDER

Appeal allowed. Permission granted to the appellant to issue the ancillary claim against Timos Trading Ltd, the ancillary defendant. Costs to the appellant to be taxed if not agreed.