[2013] JMCA Civ 7

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 97/2009

BETWEEN	RAYMOND CLOUGH	1ST APPELLANT
AND	CLOUGH LONG & CO	2ND APPELLANT
AND	GAYLE NELSON	3RD APPELLANT
AND	GAYLE NELSON & CO	4TH APPELLANT
AND	WINSTON SPAULDING	1ST RESPONDENT
AND	ANTHONY ABRAHAMS	2ND RESPONDENT

SUPREME COURT CIVIL APPEAL NO 103/2009

BETWEEN	WINSTON SPAULDING	APPELLANT
AND	RAYMOND CLOUGH	1ST RESPONDENT
AND	CLOUGH LONG & CO	2ND RESPONDENT
AND	GAYLE NELSON	3RD RESPONDENT
AND	GAYLE NELSON & CO	4TH RESPONDENT

SUPREME COURT CIVIL APPEAL NO 135/2009

BETWEEN	RAYMOND CLOUGH	1ST APPELLANT
AND	CLOUGH LONG & CO	2ND APPELLANT
AND	GAYLE NELSON	3RD APPELLANT
AND	GAYLE NELSON & CO	4TH APPELLANT
AND	WINSTON SPAULDING	1ST RESPONDENT
AND	ANTHONY ABRAHAMS	2ND RESPONDENT

Lawrence Haynes instructed by Clough Long and Company for Raymond Clough, Clough Long & Co, Gayle Nelson and Gayle Nelson & Co

Charles Piper, Garth McBean and Miss Nadine Amos for Winston Spaulding

19 January 2010 and 5 March 2013

PROCEDURAL APPEAL

IN CHAMBERS

HARRIS JA

[1] Before me were three appeals: namely, appeal no 97/2009, appeal no 103/ 2009 and appeal no 135/2009. The 1st, 3rd and 4th appellants in appeals nos 97 and 135 are attorneys-at-law while the 2nd appellant is a firm of which the 1st appellant is a partner. The 1st respondent is an attorney at law and the 2nd respondent was a client of the 1st respondent. In appeal no 103/2009, the 1st respondent is the appellant, while the appellants in appeals nos 97/2009 and 135/2009 are the respondents. For convenience reference will be made to the appellant in appeal no 103/2009 as the respondent and the respondents as appellants.

[2] The appeals emerge as a consequence of a dispute between the parties concerning a contingency agreement as to legal fees, arising from proceedings which had been initiated by the 2nd respondent. On 23 September 1987, an action in libel was brought by the 2nd respondent against the Gleaner Company and its editor, Dudley Stokes, in which an award of $80,700,000.00 in damages was made in the court below in the 2nd respondent's favour. On 31 July 2000, this court reduced the award to $35,000,000.00. The award by the Court of Appeal was subsequently upheld by the Privy Council. The parties, having failed to settle the dispute, this propelled the appellants, on 3 June 2004, to commence an action against the respondents, by way of fixed date claim form, claiming the following:

"(1.) That a Contingency Agreement as to costs dated the 7th day of July 1995 made between the First Defendant in his personal capacity and or as agent for the Second Defendant and the First and Second Claimants which later by Agreement between all the parties included the Third and Fourth Claimants relative to proceedings in Suit No. C.L.A-196 of 1987 - ERIC ANTHONY ABRAHAMS v THE GLEANER CO LTD et al be enforced.

(2.) That the Defendants be made to pay the Claimants the sum of Ten Million, One Hundred and Sixteen Thousand, One Hundred and Eight Dollars ($10,116,108.00) together with interest thereon at the rate of Twelve percent (12%) per annum from the 14th day of July, 2003 until payment.

(3.) That the costs of these proceedings be borne by the Defendants."

[3] The claim was supported by an affidavit of Raymond Clough. Paragraphs 4-18 read:

"4. That by letter dated the 7th July, 1995 the Defendants engaged the services of myself and my Firm to instruct the First Defendant in prosecuting the Action referred to in paragraph 2 upon terms expressed in the said letter which is hereto attached and marked **Exhibit 'RC1.'**

5. That by letter dated the 10th July, 1995 I wrote the Defendants accepting the terms contained in Exhibit 'RC1' and in accordance with those terms nominated Mr. Enos Grant as Counsel who would be assisting me in the matter along with the First Defendant. (That attached hereto and marked **Exhibit 'RC2'** is a copy of that said letter).

6. That I duly undertook the matter on behalf of myself and my Firm with Mr. Grant acting as Counsel along with the First Defendant.

7. That sometime thereafter and shortly before his death, Mr. Grant ceased to act as Counsel and wholly withdrew from the matter. With the approval of the Defendants, Mr. Gayle Nelson was appointed to replace him and it was understood and accepted by the Defendants that all terms

and conditions contained in Exhibit 'RC1' would apply to Mr. Gayle Nelson, the Third Claimant herein.

8. That my Firm continued to act as instructing Attorney and was on the record up until the Assessment of Damages in the High Court and thereafter when the matter was appealed before the Court of Appeal and set down for hearing in the week of the 25th October 1999. (That attached hereto and marked **Exhibit 'RC3'** is the CAUSE LIST of the Court for that said week). That subsequently a change was made and the Fourth Claimant was substituted as instructing Attorney on the Record.

9. That it was under 'RCI' covered costs up to and inclusive of the Assessment of Damages and no further.

10. That damages were successfully assessed on the 17th day of July I996 in the Supreme Court in the sum of Eighty Million, Seven Hundred Thousand Dollars ($80,700,000.00) but the Defendants therein appealed.

11. That after the Assessment the Claimants were retained by the Defendants to continue the provision of legal services for the Appeal in the Court of Appeal. The Second Claimant was retained as instructing Attorney on the Record and then substituted by the Fourth Claimant sometime before the Appeal commenced. The Appeal was heard between October 1999 and February 2000 and Judgment handed down on the 31st July 2000.

12. That the work done by the Claimants in preparation of the Appeal is set out in two Bills of Costs which are hereto attached and marked **Exhibit 'RC4' and 'RC5'** and are in the sum of One Million, Three Hundred and Sixty-Four Thousand, Five Hundred and Fifty-Eight Dollars and Thirty-Four Cents ($1,364,558.34) and Two Million, One Hundred and Thirteen Thousand, Seven Hundred and Eight Dollars and Eleven Cents ($2,113,780.11) [sic] respectively.

13. That on Appeal to the Court of Appeal the Assessed Damages were reduced to the sum of Thirty-Five Million [sic] ($35,000,000.00).

14. That a further appeal to the Privy Council was dismissed and as of the 14th day of July 2003 the Defendants here were liable to pay the Claimants twelve and a half percent (12½%) of the total damages, interest and costs recovered in Suit No. C.L.A – 196 of 1987.

15. That I am reliably informed and verily believe that the total damages, interest and costs recovered by the Defendants is in the sum of Sixty-Two Million and Twenty-Two Thousand, Seven Hundred and Thirty-Nine Dollars ($62,022,739.00).

16. That the Defendants are therefore now indebted to the Claimants under the terms of Exhibit 'RC1' in the sum of Seven Million, Seven Hundred and Fifty-Two Thousand, Eight Hundred and Fifty-Two Dollars and Thirty Cents ($7,752,842.30) [sic] inclusive of General Consumption Tax (GCT).

17. That the Defendants are further indebted to the Claimants as per paragraph 11 herein as follows:

    (i.) In relation to the First and Second Claimants $1,364,558.34

    (ii.) In relation to the Third and Fourth Claimants $2,113,708.11

    The total indebtedness of the Defendants to the Claimants is therefore in the sum of Eleven Million, Two Hundred and Thirty-One Thousand, One Hundred and Eight Dollars ($11,231,108.00) less the sum of One Million, One Hundred and Fifteen Thousand Dollars ($1,115,000.00) already paid on account by the Defendants.

18. That notwithstanding a Formal demand made by the Claimants to the Defendants for payment the Defendants have refused and or neglected to make any payments save and except the sum of One Million, One Hundred and Fifteen Thousand Dollars ($1,115,000.00) paid between 1996 and November 2000."

[4] The letter of 7 July 1995 reads:

"Mr Raymond Clough
Attorney–at-law
Clough Long & Company

Dear Raymond,

Re: Suit No. C.L.A - 196 of 1987
Eric Anthony Abrahams v The Gleaner Company et al

Reference is made to Anthony Abraham's letter to me of the 20th day of June, 1995 which was copied to you.

This matter has had a long history after initial pleadings which included:

1. Obtaining default judgment against the defendants.

2. A long stint before Edwards J, to successfully resist the efforts of the defendants to set aside the judgement [sic].

3. The hearing in the Court of Appeal of the defendants' appeal against Edwards J's judgement [sic].

4. The hearing of the plaintiff's application for leave to the Privy Council.

5. The effort to obtain further and better particulars including the hearing before Bingham J who refused it.

6. The hearing in the Court of Appeal against Bingham J's refusal to order the particulars due.

7. The filing on that appeal of a notice of oral motion for judgement [sic] based on developments in the Court itself.

8. The obtaining of Judgement [sic] for Abrahams and for the matter to proceed as an action to which there is no defence.

9. The hearing before Ellis J to have the Master's order joining Associated Press set aside.

10. The hearing before Orr J on the Summons for Direction to resist the defendant's application for a special jury.

I have not gone into the other various areas already covered including innumerable conferences and other issues.

I am happy that the plaintiff has acceded to my request to have you again in the action at this stage when we go to assessment. At this stage it is not an issue of damages but how much.

In the circumstance as discussed today I confer [sic] that we have an arrangement for you and Enos (or any Counsel we may otherwise have instead) to share, as you will determine between you 12½ of the amount received inclusive of costs despite the fact that most of the costs are due to me at this stage and despite the fact that we have no uncertainty about judgement [sic].

Despite the fact that we are at the point of assessment and your motive is not essentially a financial one it is felt that such percentage at this stage will however be a motivation for you and any other person collaborating with us at this time.

It is important to note that I wish you to be not merely part of the instructing team but part of a team comprising me, other Counsel and you instructed by Clough Long & Company.

Best wishes.

Yours, Sincerely,

Winston Spaulding"

[5] The letter of 10 July 1995 reads:

"Mr Winston Spaulding, Q.C.
Attorney-at-law,
21 Balmoral Avenue,
Kingston 10.

Dear Winston,

Re: Suit No. C.L.A-196 of 1987
Eric Anthony Abrahams v The Gleaner Co. et al

Thank you for your letter dated the 7th July 1995.

The Counsel with me is Mr Enos Grant.

The fee of 12½% of the amount of damages awarded is accepted and will be split equally between Mr. Grant and ourselves. i.e. 6¼% each.

Yours sincerely,

Raymond A. Clough"

[6] In paragraph three of his defence, the 1st respondent stated that he acted in his personal capacity and not as servant or agent of the 2nd respondent when he effected the arrangements with the appellants and this, the appellants knew.

[7] Paragraphs 9-11, 14,17,18,22, 27 and 36-42 read:

"(9) The 1st Defendant denies paragraph 9 of the Affidavit of Raymond Clough dated 3rd of June, 2004. The 1st Defendant repeats that the agreement was a contingency agreement for the recovery of fees and that the agreement was so understood and acted upon at all material times before being breached by the 1st Claimant and subsequently the 3rd Claimant in relation to entitlement from [sic] money which would be ultimately received by the Plaintiff Anthony Abrahams as assessment of damages, judgment liability not being an issue at the time of the arrangements with the 1st Claimant.

(10) The 1st Defendant admits paragraph 10 of the Affidavit of Raymond Clough, dated the 3rd of June, 2004.

(11) The 1st Defendant denies paragraph 11 of the Affidavit

of Raymond Clough dated the 3rd of June, 2004 and states that there was no new arrangement made with the 1st Defendant after the Assessment since the Contingency Agreement was a continuing contingency agreement and at all relevant times the parties acted on that basis and no such issue has ever arisen until the filing of the Claim herein by the Claimants.

...

(14) In respect of paragraph 14 of the Affidavit of Raymond Clough dated the 3rd of June, 2004 the 1st Defendant admits that the appeal by the Appellant Gleaner Company to the Privy Council was dismissed, but denies that the Claimants or any of them is entitled to any percentage of the damages, interest and costs received in the action for the reasons set out below in this Defence relating to the breach of the arrangements which would have entitled the Claimants to any participation in the contingency agreement effected with them.

...

(17) The 1st Defendant denies paragraph 17 of the Affidavit of Raymond Clough dated the 3rd of June, 2004 relating to his alleged indebtedness to the Claimants or anyone in this matter as alleged or at all by the 1st and 3rd Claimants or either of them.

(18) The 1st Defendant in respect of paragraph 18 [sic] the Affidavit of Raymond Clough dated the 3rd of June, 2004 states that the Claimants or either of them made wrongful, inconsistent and speculative demands for sums not due and that such demands were not entertained by the 1st Defendant.

...

(22) Despite this, the Claimants who had deliberately breached their obligations and removed themselves from the Claim at different stages surprisingly contacted the 1st Defendant about a week after the Judgment had been announced in Jamaica, the 1st Defendant having been informed by Abraham

Dabdoub, Attorney-at-Law that the 3rd Claimant would be in touch with the 1st Defendant.

...

(27) The 1st Claimant's firm had previously been involved with the matter at one stage in the Court of Appeal before judgement [sic] for the 2nd *Defendant*, Anthony Abrahams had been obtained. However, that firm's representative suddenly withdrew from the matter while the matter was before the Court. This forced the 1st Defendant to make immediate arrangements as a matter of exigency and urgency to bring Mr. B.J. Scott, Attorney-at-law of B.J. Scott and Company into the case to assist in Court at that important stage. Mr. Scott subsequently replaced Mr. Clough's firm on the record.

...

(36) [A]fter the assessment in the Supreme Court and pending appeal to the Court of Appeal the arrangements were broken in deliberate ways involving even a conflict of interest prejudicial to the 2nd Defendant and to the 1st Defendant involving breaches of inescapable professional obligations and duties to the 1st Defendant and to the Plaintiff, Abrahams. These include the fact that the 1st Claimant not only non-performed his agreement with the 1st Defendant but further stated that he could not perform the agreement any longer since he had to downsize his office and was under pressure in his work.

(37) In an attitude of accommodation and supportiveness, the 1st Defendant offered, in a meeting with the 1st Claimant, the 2nd Defendant and the 3rd Claimant, the option for the 1st Claimant to continue as a member of the legal team on an altered basis to facilitate him. However, having agreed to do so in the meeting the 1st Claimant repudiated that agreement within minutes of accepting it on leaving the office by communicating his repudiation to the 3rd Claimant, Nelson who was seeing him from the 1st Defendant's office and who communicated this to the 1st and 2nd Defendants at the 1st Defendant's office.

(38) This issue was referred to in a letter by the 1st Defendant to the 3rd Claimant dated the 2nd day of November, 2000 after the 3rd Claimant had replaced the 1st Claimant on the record for Mr. Abrahams. This letter was written because of reports of false assertions by Mr. Clough which made it desirable to set out the history of the matter in the letter to Mr. Nelson copied to Mr. Clough, Mr. Abe Dabdoub whom Mr. Clough had consulted after withdrawing from the case and also to Mr. Abrahams. This letter is among correspondence annexed below in this defence and counterclaim marked **'WS 1'** for identification.

(39) The 1st Claimant's withdrawal led to the 3rd Claimant replacing him and the 3rd Claimant himself going on to breach the arrangements and repudiating his obligations despite countless telephone calls and many oral appeals and letters to him urging him to respond and to perform the agreement.

(40) When the 3rd Claimant Nelson agreed to replace the defaulting 1st Claimant, who had withdrawn in breach of the contingency agreement, he was offered the 12 ½% which had been previously agreed with the 1st Claimant for assisting the 1st Defendant. This amount of 12½% could not reasonably have been altered since until the uncertain determination of the assessment became final, any money under the contingency agreement between the 1st Defendant and the 2nd Defendant Abrahams and the 1st Defendant and any attorney with whom he had made a contingency agreement, would not be due or realizable. Further, the scope of work to be done in the continuing process was considerable, demanding and at a critical stage which required significant input to prepare properly for the appeal to the Privy Council.

(41) The development in which the 1st Claimant claimed he could no longer cope with the work and his rejection of the 1st Defendant's offer to still be a member of the team on a basis which would accommodate the alleged difficulties, took place in the presence of the 3rd

Claimant. This had been preceded by conduct by him which constituted a conflict with his role as attorney on the Record and a member of the 2nd Defendant's legal team. It was also a specific breach of professional duties owed ultimately to the plaintiff Abrahams which in itself warranted termination of the agreement with him, but was not so acted upon by the 1st Defendant.

(42) This specific breach of duty, conflict and unethical conduct arose form [sic] the fact that the 1st Claimant while acting for the 2nd Defendant with his firm the 2nd Claimant, Clough Long and Company on the record gave advice to a member of a political party regarding the contents of a statement. The statement constituted an attack on the 2nd Defendant's reputation in a manner which was calculated to hurt the 2nd Defendant's reputation but escape any liability for defamation. The 1st Defendant raised this matter with the 1st Claimant as being wrong, unethical and unprofessional and a breach of fundamental duties owed to the 2nd Defendant by him and his firm. Although the 1st Defendant had not disclosed it to the 2nd Defendant it was mentioned to the 2nd Defendant Abrahams by the 3rd Claimant resulting in the 2nd Defendant Abrahams becoming aware of the situation belatedly. "

[8] Additional particulars of breach on the part of the 1st appellant and 3rd appellant were stated in paragraphs 44-47 as follows:

"(44) The Claimants in breaching the agreements did so by clearly acting in solidarity with each other. This included the issue which arose when the 1st claimant (Clough) ceased to be on the Record and there was money in an escrow account ordered by the Court to be held by his firm jointly with the Attorneys-at-Law for the Gleaner Company and Dudley Stokes. The 1st Claimant broke the, professional duty owed to the Court and by extension to the 1st and 2nd Defendants in not taking steps to ensure the paying out of the money in the account due to the Gleaner Company through its attorneys, Dunn Cox. Dunn Cox needed the funds to satisfy a condition for the

Gleaner Company to appeal to the Privy Council. Despite this, the 3rd Claimant, Nelson, who was then on the Record did not inform the 1st Defendant or endeavour to take any steps to have the 1st Claimant release the funds. On the contrary, the 3rd Claimant, Nelson refused to write to the 1st Claimant about it. The Gleaner Company was forced to file an Application to have the money released and only after such Application was the money released after being wrongfully withheld in breach of obligations to the Honourable Court and to the 1st Defendant.

(45) When the Application by the Gleaner to have Mr. Clough take steps to have the money' paid out was filed, the 3rd Claimant did not inform the 1st Defendant of the Application and refused to send the 1st Defendant a copy of the Application. The 1st Defendant only became aware of the development by being informed in a conversation with an attorney from Dunn Cox, the Gleaner's Attorney-at-Law.

(46) The 3rd Claimant Nelson even indicated subsequently that the 1st Defendant knew he would not have written to the 1st Claimant about the 1st Claimant default in meeting his obligations to pay over the money held by the 1st Claimant arising from an Order of the Court. This is despite communication on the matter and the necessity for steps to have been taken by Mr. Clough to comply with his legal and professional duties including those to the Court.

(47) The amount claimed by the 1st and 3rd Claimants for money were at different times linked to the need to meet certain alleged obligations and also the fact that the 1st Claimant, Clough deserved sympathy and assistance in the face of difficulties as is adverted to in correspondence included in the documents annexed herein marked **'WS1'** for identity. "

Further particulars of breach on the part of the 3rd appellant are stated in paragraphs 49 - 53 as follows:

"(49) The 3rd Claimant continued to non-perform important functions relating to his role as Attorney on the Record in respect of which he had supplanted the 1st Claimant when the 1st Claimant breached his arrangement and

withdrew from the team. Indeed, the 3rd Claimant had not sent papers to the 1st Defendant relating to the Gleaner's application for Conditional Leave to Appeal to the Privy Council and had casually informed the 1st Defendant of it orally a few days before the Application in the Court of Appeal and himself had made no appearance in the application which had resulted by [sic] the request to [sic] the Gleaner Company to have payment out of the funds referred to above.

(50) Despite numerous messages, unreturned telephone calls and letters from the 1st Defendant and from the Gleaner's attorneys, the 3rd Claimant, Nelson continued to repudiate the duties owed by him with deliberate indifference and contempt after having promised the 1st Defendant that he would do better and apologized for his non-performance and non-communication. Accepting his assurances as sincere, the 1st Defendant did not remove him from the Record despite his conduct and the concerns about the various developments and their implications for the 2nd Defendant, Abraham's cause.

(51) Despite pleading with the 3rd Claimant, the 1st Defendant became aware, by mere chance from the attorneys for the Gleaner Company, that the Gleaner Company had been to the Court of Appeal and had obtained Final Leave to Appeal to the Privy Council and were taking steps to prosecute their Appeal. The 3rd Claimant, Nelson had not informed the 1st Defendant of this critical development which the 2nd Defendant Abrahams and the 1st Defendant were awaiting anxiously, for obvious reasons.

(52) At this stage, the 1st Defendant had no alternative, but to remove the 3rd Claimant from the Record as a matter of urgency and out of desperation put himself as the Attorney on the Record contrary to his practice in the Supreme Court, particularly as Queen's Counsel.

(53) Notwithstanding the 3rd Claimant's repudiation of his obligations, after the 1st Defendant served the Notice of Change of Attorney on him, he invited the 3rd Claimant in a spirit of magnanimity and supportiveness to discuss the broader matter of the case with him. The 3rd Claimant however refused to do so. Consequently, the 1st

Defendant had to pursue the protection of the 2nd Defendant Abraham's interest in the case as was inevitable and necessary in the circumstances against the background of what had happened. In so doing, the 1st Defendant had to do the instructing work as well [sic] that of his role as senior Counsel in the case in Jamaica and with the input of various persons to acquit his responsibilities in the case and to the 2nd Defendant Abrahams in relation to the significant scope of work involved at that vital stage."

[9] The counterclaim reads as follows:

"1. The 1st Defendant repeats the facts set out in paragraphs 1 to 61 of the Defence and incorporates them by reference as part of this Counterclaim herein.

2. The Defendant further states that the 1st and 3rd Claimants were paid money by him on the good faith basis that they would have performed the contingency agreement which would entitle them to the money which was being advanced in the preparation [sic] agreed.

3. The 1st Defendant repeats that the total amount paid to the 1st and 2nd Claimants was $937,500.

4. The 1st Defendant states that by virtue of the breach of the contingency agreement by the Claimants, the Claimants are not entitled to keep the amount advanced to them in good faith and that this sum is to be returned to the 1st Defendant.

5. The 1st Defendants [sic] further states that by virtue of the breach of the agreement, the 1st Defendant incurred loss by virtue of the impact of having to have a larger legal team in England for the Appeal to the Privy Council than had been intended because of the broader significance of the level of award for general damages in addition to the implications for the 2nd Defendant, Abrahams.

6. By virtue of the matters aforesaid, the 1st Defendant has suffered loss and damage

The 1st Defendant claims against the Claimants jointly and/or severally for:-

1. Damages for breach of contract.

Particulars of Special Damage

The amount of $937,500 advanced to the Claimants **in** good faith on the representation that they would complete the contingency arrangements.

2. Such further or other relief which the Court deems just and appropriate.

3. Costs including Attorneys-at-Law costs

And the 1st Defendant claims damages."

[10] A defence was filed by the 2nd respondent in which he denied engaging the services of the appellants. The fact that the 1st respondent admitted acting independently in retaining the services of the appellants, the issues raised in the appeals essentially touch and concern the appellants and the 1st respondent.

[11] On 15 March 2005, an application made by the 1st respondent to strike out the claim was refused. Following this, the court ordered that the fixed date claim form be treated as if the action had begun by a claim form and that the appellants' affidavits be regarded as their pleadings. On 11 November 2005, the 1st respondent filed and served a defence and counterclaim. At the case management conference, several orders were made and the trial was fixed for 28, 29 and 30 July 2009. At the pretrial review, it was brought to the appellants' attention that a reply to the 1st respondent's defence and counterclaim had not been filed. Upon the request of the appellants, time was granted for them to make an application to file the requisite document. The trial dates were vacated. New dates, namely 9, 10 and 11 November 2009, were fixed.

[12] An application to file the reply to the defence and counterclaim out of time, as well as an application to file further witness statements, were fixed for hearing on 19 January 2009. These applications were not heard on that date. The application for the extension of time to file the pleading was made on 14 January 2009. It being short served, was adjourned to 5 June 2009 but was further adjourned and was subsequently heard on 15 July 2009. On that date, Mr Justice Williams (Ag), as he then was, heard submissions from the appellants on the application for the extension of time to file the reply to the defence and counterclaim and dismissed same, for the reason that the application was not accompanied by a supporting affidavit.

[13] The refusal of the application for the extension of time to file the reply to the defence and counterclaim gave rise to appeal no 97/2009. Upon the determination of the application, the 1st respondent made an oral submission for the entry of judgment on the counterclaim against the appellants, pursuant to rule 26.1(2)(j), but this, the learned judge declined to entertain. This gave birth to appeal no 103/2009 by way of a counter notice of appeal. Appeal no 135/2009 has its genesis in an application brought by the appellants on 21 August 2009 in which they sought the following orders:

> "1. That the **DEFENCE AND COUNTERCLAIM** filed herein by the 1st Defendant be dismissed as disclosing no real prospects of success or grounds for bringing same and therefore have no basis in law.
>
> 2. **That the Counterclaim be dismissed for not being in the proper form in** contravention of the mandatory requirements of Rule 18.1(2) and 18.2(2)
>
> ALTERNATIVELY

3. That the Claimants be granted leave to file the attached **REPLY AND DEFENCE TO COUNTERCLAIM** out of time.

4. That the Claimants be granted leave to file the said **REPLY AND DEFENCE TO COUNTERCLAIM** within one week of the granting of this Application."

This application was refused on 3 October 2009, by Campbell J.

Grounds of Appeal

[14] The grounds of appeal filed in appeal no 97/2009 read:

"That His Lordship erred in dismissing the Application in-

(1) Finding that an Application to file a Reply and Defence to Counterclaim out of time required the Applicant to give evidence.

(2) Finding that an Application to file a Reply and Defence to Counterclaim out of time must be supported by evidence contained in an Affidavit.

(3) Finding that the absence of an Affidavit was fatal to the Application.

(4) Failing to appreciate that the Application in writing complied with Rule 11.6(1) and that even the Application itself was one in which the court pursuant to Rule 11.6(2) could dispense with the requirement for it to be in writing.

(5) Failing to appreciate that the application was one which did not require evidence in support as there is no rule, practice direction or Court Order requiring evidence to be given in Support of the said application. (Rule 11.9(1))

(6) Failing to order that the Claimants file an Affidavit and adjourn the hearing to a later date, if he was of the opinion that he required Affidavit evidence in order to consider the Application. In failing to do so, he failed to give effect to the Civil Procedure Rules 2002 as the overriding objective of enabling the Court to deal with cases justly required that the Learned Judge:

(i) ensure that, so far as practicable the parties are on an equal footing and are not prejudiced by their financial position.

(ii) ensure that the application is dealt with expeditiously and fairly

(iii) take into consideration the amount of money involved, the importance of the case, the complexity of the issues and the financial position of each party.

7. Failing to consider that on the face of the pleadings the claimants have a real prospect of successfully defending the Counterclaim since the sums of money claimed were paid after the Assessment of Damages in the case of **ABRAHAMS v THE GLEANER CO. LTD** et al which occurred on the 17th July 1996 and must have been paid in satisfaction of the Defendants' obligations under the contingency agreement which was clearly in effect up to the Assessment of Damages. That such failure would enable the 1st Defendant to enforce a Default Judgment for the repayment of monies which he is clearly not entitled to; and that is a result which would be inimical to the ends of justice.

8. In not finding that the Counterclaim filed by the 1st Defendant was not a Counterclaim in that it failed to comply with the mandatory requirements of Rule 18.1(2)(a) and 18.2(2) and consequently was invalid as a result of which a Defence to Counterclaim would therefore not be necessary as there is no valid counterclaim filed."

[15] The grounds of appeal in counter notice of appeal no 103/2009 are in the following terms:

"(i) Having dismissed the Respondent's application for permission to file a Defence to the Appellant's Counterclaim out of time, the Learned Judge erred in law or wrongfully exercised his discretion in declining to rule on the Appellant's oral application for Judgment on the counterclaim pursuant to Rule 26.1(2)(j).

(ii) The Learned Judge erred in law in failing to grant the Appellant's application for judgment on the Counterclaim, when there was default on the part of the Respondents in defending the Counterclaim thus entitling the Appellant to judgment thereon."

[16] In appeal no 135/2009 the grounds are stated as follows:

"That His Lordship erred in dismissing the Application in

1. Finding that this was not a plain and obvious case on the pleadings for the Defence and Counterclaim to be dismissed.

2. Failing to consider that the 1st Defendant in his defence and counterclaim admitted that the document referred to as RC1 formed the basis of the contract between the parties for the provision of legal services; that having so admitted he failed in his Defence to refute the claim made by the Claimants that they had successfully discharged their obligations under the contract.

3. Failing to consider that upon a proper construction of the document RC1 the period of performance was up to the Assessment of Damages. That the 1st Defendant nowhere in his Defence and Counterclaim made any allegation that breach or breaches by the Claimants took place before or at the Assessment of Damages. That to the contrary in paragraph 36 of the Defence the Defendant clearly states ... 'after the assessment in the Supreme Court and pending appeal to the Court of Appeal the arrangements were broken in deliberate ways...'

4. Failing to consider that the 1st Defendant throughout his lengthy Defence and Counterclaim failed to give any particulars of the breach or breaches committed by the Claimants. That this failure belies the 1stDefendant's allegations of breach of contract.

5. Failing to consider that the claim of breach notwithstanding, the 1st Defendant throughout his lengthy Defence and Counterclaim made numerous references to having refrained from acting on these breaches. As such having raised on his own pleadings the issue of waiver the 1st Defendant could not now rely upon these same breaches to ground a Defence."

Appellants' submissions

Appeal nos 97/2009 and 103/2009

[17] It was contended by Mr Haynes that the appellants had complied with the requirement of rule 11.6 (1) of the Civil Procedure Rules ('CPR'), which requires that an application should be in writing and the learned judge did not appreciate that the court could have dispensed with the requirement that an application should be in writing. Pointing to rule 11.9 (2), it was submitted by counsel that there is no rule, practice direction or order in place which requires the appellants to give evidence supporting the application and this the learned judge failed to consider.

[18] He argued that the appellants' failure to advance a reason for delay was not fatal to the application and this the learned judge failed to appreciate. Citing ***Finnegan v Parkside Health Authority*** [1998] 1 WLR 411, he submitted that the court ought to have considered all the circumstances of the case within the context of the overriding objective to ensure that justice was done.

[19] Counsel further submitted that no serious prejudice was occasioned by the delay and on the face of it, the default was that of the 1st respondent and not of the appellants. In support of this submission, he cited ***IBS Technologies (PVT) Ltd v APM Technologies SA (No 2)*** (2003) LTR 17 April 2003. The dismissal of the application, counsel argued, shows the learned judge's lack of appreciation of the fact that this could result in the 1st respondent being at liberty to enforce a default

judgment on the counterclaim, although, on the face of the pleading, he is not entitled to the money which was paid after the assessment of damages in July 1996.

[20] It was further submitted that the appellants have a real prospect of succeeding on their defence to the 1st respondent's counterclaim and in denying them the opportunity to file their reply to the defence and counterclaim would be inimical to the interests of justice. The case of ***Law v St Margarets Insurances Co Ltd*** [2001] 1All ER (D) 97 was cited to support this submission.

[21] The learned judge, he contended, ought to have taken into account the provisions of rules 18.1(2) and 18.2(2). Rule 18.1, he submitted, describes an ancillary claim as including a counterclaim by a defendant against a claimant and it is clear that the counterclaim is not in accordance with Form 10 which, as stipulated by rule 18.2 (2), is mandatory.

[22] In his written submissions, Mr Haynes submitted that the appellants placed reliance on the letter dated 7 July 1995 from the 1st respondent to the 1st appellant in respect of the terms of the contingency fee agreement and that the terms therein incorporated costs up to and inclusive of the assessment of damages on 17 July 1996, which costs are due to the appellants. The 1st respondent, he submitted, stated that he had acted independently, having denied that he was acting as agent for the 2nd respondent.

[23] In his written submissions counsel again referred to the appellants placing reliance upon the letter of 7 July 1995 reiterating that the terms contained therein included costs up to the assessment of damages in the Supreme Court on 17 July 1996. It was further stated that the 1st respondent: denied that any agreement other than that relating to the contingency fee existed; denied that any fees are payable on a quantum meruit basis; and stated that the appellants are in breach of the arrangement.

[24] It was also submitted that:

> "The 1st Defendant's allegations of breach in the context of the admitted agreement before us raises an issue of sufficiency of performance. The Court must construe the contract in order to ascertain the nature of the obligations. This is a question of law. Both the 1st Claimant and the 1st Defendant rely on the written agreement expressed in the letters exchanged between them **(See exhibits labeled RCI and RCII)**
>
> The object of all construction of the terms of a written agreement is to discover the intention of the parties to the Agreement. The cardinal principle is that the parties are presumed to have intended what they have in fact said. Their words must be construed as they stand. The meaning of the document or of a particular part of it is to be sought in the document itself. 'One must consider the meaning of the words not what one may guess to be the intention of the parties' ***Smith v Lucas*** (1881) 18CL @ P542...Jessel M.R.
>
> See also ***Prenn v. Simmonds*** 1 W.L.R. 1381 at 1383-(Per Lord Wilberforce @ G to H) 'As to the circumstances and the object of the parties, there is no controversy in the present case. The agreement itself as its face, almost supplies enough without the necessity to supplement it by outside evidence'.

See further ***Hyundai Merchant Marin*** [sic] ***Co. Ltd v. Gesture Chartering Co. Ltd*** (1990) 1 Lloyds Law Report P100 @ 102-103.

(vi) The 1st Defendant's allegation of breach in the context of what he terms; 'a continuing contingency agreement' (paragraph 11 of his Defence) flies in the face of the plain wording and meaning of the contract which clearly indicates a time of performance. 'This stage when we go to the assessment' and again '... despite the fact that most of the costs are due to me at **this** stage,' and again '... despite the fact that we are at the point of assessment;' '...such percentage at **this** stage;' all show that the 1st Defendant and indeed by their acceptance the 1st and 3rd Claimants must have intended a period of performance up to the Assessment of Damages in the Supreme Court.

The Learned Judge failed to take this into consideration in determining that this was not a plain an [sic] obvious case to strike out the Defence. A proper construction of the contract would show that there were no obligations imposed on the Claimants after the Assessment of Damages and since the defence made no allegations of breach before or at the assessment, then the defence plainly fails to join issue with the Claimants on the claim and is wholly without merit. In particular the learned Judge failed to consider the impact of paragraph 36;'...after the assessment in the Supreme Court and pending appeal to the Court of Appeal'. This clearly indicates that the fulcrum of the defence is that **after** the assessment problems began to arise as regards the performance of the Claimants. This presupposes the Claimants being under obligation after the Assessment under this contract".

[25] It was also submitted by counsel, that upon a proper construction of the agreement, the defence is not an answer to the claim. ***Price Meats Ltd v Barclays Bank plc*** [2000] 2 All ER Crim 346 was cited to support this submission. Counsel went on to submit that the defence, being in breach of rules 26.3(1) (e) and 8.9(2), ought to be struck out.

[26] It was further submitted that the learned judge did not consider the 1st respondent's failure to advance any particulars of the appellants' breaches as alleged by him. The case of ***Sivanandan v Executive Committee of Hackney Action for Racial Equality*** [2002] EWCA Civ 111 was cited in support of this submission. It was also contended that although the 1st respondent made several references to the breaches, his restraint from acting on them, raises the issue of waiver, and he therefore could not rely on the breaches as a defence. ***Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India*** [1990] 1 Lloyd's Rep 391 and ***Kammins Ballroom Co Ltd v Zenith Investments (Torquay) Ltd*** [1971] AC 850 were cited to bolster this submission.

1st Respondent's submissions

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[27] Mr Piper submitted that the counterclaim filed is valid and is in accordance with rule 18.5(1)(a) which makes provision for the 1st respondent to file a counterclaim, if it is filed with the defence There is no requirement, he contended, that in order to counterclaim, an ancillary claim should be filed. Rule 18.5(1) (b), he submitted, makes reference to an ancillary claim while rule 18.5 (1) (b) does not. The counterclaim is in Form 5, the prescribed form for a defence and counterclaim.

[28] In written submissions Mr Piper submitted that rule 10.3 (9) contemplates that on an application for extension of time, the court is required to consider several factors, including the failure of a defendant to adhere to the time table prescribed by the rules, and particularly where there has been a delay for approximately four years

there must be evidence in the form of an affidavit. In the circumstances of this case, he submitted, rule 11.9 emphasizes the necessity for evidence to be furnished. Counsel further submitted that the provision of rule 11.9(2) that an applicant for court orders need not give evidence in support of his application unless required by a rule, practice direction or court order gives rise to the meaning of the word "required" which means "needed for the purpose" of satisfying the rule, practice direction or court order.

[29] Additionally, the general conduct of the appellants in their approach in making the application to file the reply and defence to counterclaim shows that they have not acted in good faith and their unexplained conduct is an abuse of the court's process, counsel submitted.

[30] Counsel further submitted that the appellants' proposed reply to the defence and counterclaim does not comply with rule 10.5 as it does not deal with the issues raised in the 1st respondent's defence and counterclaim and therefore has no value.

[31] A further submission of Mr Piper was that rule 26.1(j) empowers a judge, on case management, to "dismiss or give judgment on a claim after a decision on a preliminary issue". It was also submitted that rule 38.3 makes provision for the applicability of case management rules at the pre-trial review and that in the case at bar, the counterclaim being a separate claim, on an application for request for judgment under rule 12.5, the 1st respondent would have been entitled to judgment as of right on the counterclaim, in that, almost four years have elapsed. The learned

judge, having refused the appellants permission to file the reply to the defence and counterclaim, ought to have entered judgment in favour of the 1st respondent.

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[32] Mr Piper argued that paragraph 9 of the defence seeks to put parameters on the contingency fee agreement. This paragraph, he submitted, refers to that agreement and also speaks of the breach but the appellants sought to have the learned judge disregard the evidence of the breach and find that the letter of 7 July 1995 has such meaning as ascribed to it by them, without regard to the monies received at the stage of the assessment. The learned judge was requested to construe the letter without evidence as to how the agreement was understood and acted upon by the parties, he submitted, however, both this court and the court below are precluded from hearing facts and dealing with such allegations appearing in the letter.

[33] Counsel further submitted that the authorities raised by the appellants are unhelpful. The case of ***Smith v Lucas*** is of little or no assistance to the appellants as that case demonstrates the literal approach to construction of documents while the case at bar is not concerned with interpretation of documents, he contended. The appellants, he argued, quoted from the speech of Lord Wilberforce in ***Prenn v Simmonds*** which does not aid them, as that was not a case to strike out a statement of case; further, a part of the claimant's pleadings related to construction of a document in cases where construction of a document is not the only issue, reliance must be placed on oral evidence. ***Hyundai Merchant Marine Ltd v Creative***

Chartering Co Ltd is also unhelpful, it merely supports the principle in ***Prenn v Simmonds,*** he submitted. ***Sivanandan v Executive Committee of Hackney Action for Racial Equality,*** he contended, emphasizes the need for evidence in cases relating to construction of documents and therefore does not afford the appellants any assistance.

[34] It was also counsel's submission that the appellants raised the issue of waiver in circumstances where they are contending that the 1st respondent's statement of case should be struck out by construing the letter of July 1995, without other evidence. However, this approach, it was submitted, is unsupported by either ***Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India*** or ***Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd. Price Meats Ltd v Barclays Bank plc,*** and is also distinguishable from the present case, in that, taken at its highest, it is an authority in support of the proposition that where as a matter of law a ground of a defence is untenable, it will be struck out by the court, counsel further submitted.

[35] Citing the cases of ***Gordon Stewart v John Issa*** SCCA No 16/2009, delivered on 25 September 2009 and ***S&T Distributors & Anor v CIBC & Anor*** SCCA No 112/2004 delivered on 31 July 2007, counsel argued that the principles laid down in these cases, as to striking out, is applicable to a properly filed defence and the appellants, in asking the court to construe the agreement without reference to the surrounding facts, would be in contravention of those principles.

[36] The appellants, he submitted, in stating that the defence offends rules 26.3 (1)(e) and 8.9 (2), failed to have made any application to Campbell J for such an order so as to include same in their grounds of appeal, in addition a rule 26.3(1)(e) does not exist.

The issues

[37] The issues in the appeals are interrelated and should be considered together. The principal issues arising are:

1 Whether the learned judge was wrong in refusing to extend time in the absence of evidence.

2. Whether any prejudice would have been suffered by the appellants by the refusal of the application to file a reply to the defence and counterclaim.

3. Whether the 1st respondent's counterclaim was in compliance with Part 18 of the CPR.

4. Whether the 1st respondent would be entitled to judgment on the counterclaim.

5. Whether the 1st respondent defence and counterclaim should be struck out.

6. Whether ignoring the breaches of the appellants would be a waiver rendering the defence and counterclaim valueless.

Analysis

[38] I will now turn to the question relating to the extension of time. The appellants submitted that rule 11.6 (1) requires an application to be in writing and sought to rely on rules 11.6(2)(b) and 11.9(2) to bolster their submissions that the learned judge should have favourably considered their application. It is necessary to outline rules 11.6, 11.9(1) and 11.9(2). These rules read as follows:

"11.6 (1) The general rule is that an application must be in writing.

(2) An application may be made orally if-

(a) this is permitted by a rule or practice direction; or

(b) the court dispenses with the requirement for the application to be in writing."

"11.9 (1) The applicant need not give evidence in support of an application unless it is required by-

(a) a rule;

(b) a practice direction; or

(c) a court order.

(2) Evidence in support of an application must be contained in an affidavit unless-

(a) a rule

(b) a practice direction; or

(c) a court order;

otherwise provides."

[39] As specified by rule 11.6 (1), an application for a court order should be in writing and the appellants had complied with this rule. Therefore, there would have been no necessity for the learned judge to have addressed his mind to rule 11.6 (2) (b). It is accepted that rule 11.9 (1) dictates that evidence need not be given in support of an application unless a rule, practice direction or order so requires. However, rule 11.9 (2) makes provision for evidence in support of an application to be adduced by way of an affidavit unless a rule, practice direction or order otherwise dictate. The question now arising is whether in light of the inordinate delay, the appellants ought to have

advanced evidence on affidavit supporting the application. In other words, in the circumstances of this case would an affidavit be a highly requisite feature? Undoubtedly, the answer is in the affirmative. There is great force in Mr Piper's submissions that: in the present case, evidence by way of an affidavit was an essential requirement, and that and that the word "required" in rule 11.9(1) means "needed for the purpose" of satisfying the rule, practice direction or court order, and where there has been a delay in complying with the timetable of the rules, there would be need for evidence by an applicant, explaining the failure for doing so. I agree entirely with these submissions.

[40] It would not have been the intention of the framers of the rules that in every case, upon an application for extension of time, there would be no necessity for evidence by way of affidavit to be placed before the court. It is of significance that this court, has on many occasions, ruled that, where there has been a delay, on an application for an extension of time, the court, in exercising its discretion, should take into consideration several factors. Panton JA (as he then was), in ***Strachan v Gleaner Company Ltd and Stokes,*** Motion 12/1999 delivered on 6 December 1999 stated the legal position to be as follows:

> "(1) Rules of court providing a time-table for the conduct of litigation must, prima facie, be obeyed.
>
> (2) Where there has been a non-compliance with a timetable, the Court has discretion to extend time.
>
> (3) In exercising its discretion, the Court will consider –
>
> (i) the length of the delay;

(ii) the reasons for the delay;

(iii) whether there is an arguable case for an appeal and;

(iv) the degree of prejudice to the other parties if time is extended.

(4) Notwithstanding the absence of a good reason for delay, the Court is not bound to reject an application for extension of time, as the overriding principle is that justice has to be done."

[41] This case was cited with approval, by Morrison JA, in ***Jamaica Public Service Company Ltd v Samuels*** [2010] JMCA App 23.

[42] It is clear from the foregoing that where there is a delay, there must be material on which the court can act. A court would only be in a position to exercise its discretion, if it has before it, evidence, furnished by an applicant, explaining the delay. In this case, the delay in making the application to file the requisite document is excessive. The defence and counterclaim was filed and served on 11 November 2005. The application for extension of time was filed on 14 January 2009. Despite the appellants' initial tardiness in making the application, the court was generous in giving them the opportunity to seek to comply with the rule, yet, there was a further delay. Undoubtedly, this is a case which demands that the appellants ought to have advanced reasons by way of evidence in an affidavit explaining the failure to have made the application timeously. Accordingly, rule 11.9(1) would not offer the appellants assistance as they have suggested.

[43] The appellants' submission that the absence of reasons for the delay, in itself, would not have been fatal to the application, as the learned judge ought to have given consideration to all the circumstances of the case within the context of the overriding objective, is clearly devoid of merit. In ***Vinos v Marks & Spencer plc*** [2001] 3 All ER 784 Peter Gibson LJ, speaking to the effect of the overriding objective, said, among other things, that delay is the mischief which the overriding objective seeks to guard against. At paragraph 26 he said:

> "The court must seek to give effect to that objective when it exercises any power given to it by the rules or interprets any rule. But, the use in rule 1.1(2) of the word 'seek' acknowledges that the court can only do what is possible. The language of the rule to be interpreted may be so clear and jussive that the court may not be able to give effect to what it may otherwise consider to be the just way of dealing with the case, though in that context it should not be forgotten that the principal mischief which the CPR were intended to counter were excessive costs and delays."

[44] Delay in itself is inimical to the good administration of justice. The overriding objective is not designed to correct the flagrant lapses of a litigant. Nor is the overriding objective furthered by applicants ignoring time limits and using the court as a means of unnecessarily protracting litigation. The appellants sat back for an excessively long period before seeking to comply with the relevant rule and, importantly, have failed to advance an excuse for their tardiness in filing the relevant document. They cannot now pray in aid, the overriding objective in order to remedy the default. In the circumstances, the case of ***Law v St Margarets Insurance Co Ltd*** does not assist them.

[45] The cases of ***Finnegan v Parkside Health Authority*** and ***IBS Technologies (PVT) Ltd v APM Technologies SA No 2*** are both unhelpful to the appellant. In these cases, unlike the present case, in considering applications for extension of time, there was evidence in support of the applications which offered the courts the chance of assessing and determining the relevant factors by which they should be guided.

[46] I will now address the complaint of prejudice raised by the appellants. The element of prejudice is a factor which can operate against an applicant who seeks an extension of time to comply with a rule, an order, or to do an act. Ordinarily, a court is loathe to grant an extension of time where there is delay on the part of an applicant, unless it is shown that in granting the application the other party will not suffer undue prejudice. It is undisputable that, by the rule 10.9(1), the appellants are accorded a right, to file a reply to the defence within 14 days of service of the defence and counterclaim. This they did not do. In assessing the degree of prejudice suffered, the focus is not on the appellants' right to file a reply to the defence and counterclaim but such focus must be with reference to the extent to which the delay in filing the requisite document would have resulted in hardship to the 1st and 2nd respondents.

[47] The appellants' failure to act within the prescribed time is as a result of their negligence. Significantly, there has been an inordinate delay on their part in seeking to remedy the default and having not supplied the court with evidence upon which their application could have been considered, they, being the authors of their own

misfortune, cannot legitimately claim that they would suffer prejudice by the refusal of their application.

[48] The appellants, having not placed before the learned judge any evidence for him to have given consideration to the application for an extension of time to file a reply to the defence and counterclaim, he was correct in refusing the application. Having not filed an affidavit in compliance with rule 11.9(2), they have no justifiable complaint.

[49] In view of the finding in the foregoing paragraphs, it will not be necessary for me to give consideration to the 1st respondent's submissions that the averments in the appellants' draft defence do not traverse the issues raised in the defence and counterclaim as required by rule 10.5.

[50] I will now give consideration to the assault by the appellants on the validity of the counterclaim. Their attack on the pleading is misconceived. Rule 18.1(1) deals with ancillary claims. Rule 18.1(2) (a) provides:

> "An '**ancillary claim**' is any claim other than a claim by a claimant against a defendant or a claim for a set off contained in a defence and includes -
>
> (a) a counterclaim by a defendant against the claimant or against the claimant and some other person;
> (b) ..."

It is without doubt that they have overlooked the provisions of rule 18. 1(2)(a) that an ancillary claim includes a counterclaim. The appellant have also neglected to pay due

regard to rule 18.5(1) (a) which provides that a defendant may make an ancillary claim, without the court's permission, if a counterclaim is filed with the defence. As rightly submitted by Mr Piper, the counterclaim having been filed with the defence it is in the prescribed form, namely form 5, as required by rule 8.16 (1) (b) and, in rule 18, the references to a counterclaim, are demonstrative of the fact that a counterclaim is a specie of an ancillary claim, but when filed with a defence there is no requirement for it to be in the form prescribed for making an ancillary claim.

[51] I will now advert my attention to the question whether the learned judge should have entered judgment on the counterclaim. It is well settled that a claim and counter claim are two separate actions. In ***Amon v Bobbett*** [1889] 22 QBD 548 Bowen LJ said that "A counterclaim is to be treated for all purposes for which justice requires it to be so treated as an independent action." Where a counterclaim has been raised, the party in the cross action must defend himself to show that he has a good answer, or suffer judgment on which execution may issue in respect of the cause of action in the counterclaim (see ***Amon v Bobbett***).

[52] It cannot be disputed that rules 26.1(2)(j) and 38.3 grant to a judge, case management powers to give judgment on a claim subsequent to a decision being made on a preliminary issue. Nor can it be disputed that by rule 12.5, where a request for judgment is made, the registry must enter judgment for failure to defend, provided that certain conditions are satisfied. The rule states:

> "The registry must enter judgment at the request of the claimant against a defendant for failure to defend if-

(a) the claimant prove service of the claim form and particulars of claim on that defendant; or

(b) an acknowledgment of service has been filed by the defendant against whom judgment is sought; and

(c) the period for filing a defence an any extension agreed by the parties or ordered by the court has expired;

(d) that defendant has not –

(e)

(i) filed a defence within time to the claim or any part of it (or such defence has been struck out or is deemed to have been struck out under rule 22.2 (6));

(ii).....(iii)

(f) there is no pending application for an extension of time to file the defence."

[53] The circumstances surrounding the appellants' failure to defend cannot be treated as a preliminary point falling within rule 26.1(2) (j). However, the matter would have been one which falls within the purview of rule 12.5. Accordingly, there being no defence to the counterclaim, it would have been fit and proper for the learned judge to have acceded to the 1st respondent's application for the entry of judgment on the counterclaim.

[54] I will now address the issue as to the striking out of the 1st respondent's defence and counterclaim. When the appellants' application of 21 August 2009 came on for hearing before Campbell J on 3 October, it is apparent that the learned judge, by his order, dismissed the entire application; however, only the relief for the dismissal of the 1st respondent's defence and counter claim was argued.

[55] The appellants, in seeking to strike out the 1st respondent's pleadings, contended that the contingency fee agreement ended at the time of the assessment of damages and monies are due and owing to them under the agreement. The 1st respondent, in his defence, has raised issues in his defence and counterclaim relating to the agreement.

[56] The appellants claim that they are entitled to a fee of 12% under the contingency fee agreement on the date of the assessment of damages in the Supreme Court. The 1st respondent states that they are not entitled to any fees as they were in breach of the agreement. The central issue is whether the appellants are entitled to 12% of the sum awarded upon the assessment of damages, at the date of the judgment of the Court of Appeal.

[57] The 1st respondent admits that a contingency fee agreement was entered into by the appellants and him. He denies the following: that he was the 2nd respondent's servant or agent; that any agreement other than the contingency agreement existed between the parties; that monies were owed to the appellants; that the contingency fee agreement was not a continuing agreement and that it ended at the date of assessment; that there was no agreement for the appellants to carry out work on a quantum meruit basis. He also alleged breaches of the contingency fee agreement by the appellants and alleged that the sums received by the appellants were advances given to them and he has counterclaimed for these amounts.

[58] It cannot be said that the averments of the 1st respondent do not advance answers to the appellants' claim. The allegations in the defence clearly traverse the

issues raised in the appellants' claim. However, two paragraphs of the defence are prolix and ought to be struck out. These are paragraphs 25 and 30. This would not affect the validity of the defence.

[59] I am in agreement with Mr Piper that the cases of ***Smith v Lucas***, ***Prenn v Simmonds***, ***Hyundai Merchant Marine Co Ltd v Gesturi Chartering Co. Ltd***, ***Sivanandan v Executive Committee of Hackney Action for Racial Equality***, ***Price Meats Ltd v Barclays Bank*** and ***Kammins Ballrooms Co Ltd v Zenith Investments, (Torquay) Ltd*** cited by the appellants, offer no assistance to them.

[60] It is my view that the learned judge was wrong in declining to make a ruling upon the 1st respondent's application for judgment. Having pronounced on the validity of the defence and counterclaim and having not granted the appellants leave to file the reply to the defence and counterclaim, he ought to have entertained the application that judgment be entered on the counterclaim.

[61] I will now turn to the question of waiver. The 1st respondent has averred in his defence that the appellants are in breach of the contingency fee agreement and are indebted to him. It has been contended by the appellants that the 1st respondent has waived the breaches and is thereby precluded from relying on his defence. The question as to whether the contractual relationship remained after the 1st respondent permitted the appellants to continue being a part of the legal team in the case despite breaches on their part, would be the matter to be resolved at a trial. The cases of ***Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India*** or

Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd cited by the appellants in support of the question of waiver do not assist them. These are cases in which the issue of waiver was dealt with at trial.

[62] The case of ***Price Meats Ltd v Barclays Bank***, which was cited to support the submission that the 1st respondent's defence is not in compliance with the rules, does not offer any aid to the appellants. That is a case which demonstrates that the court will strike out an untenable averment in a defence. This is not so in this case. A valid defence has been filed.

[63] The appeal nos 97/2009 and 135/2009 are dismissed. Appeal no 103 is allowed. Paragraphs 25 and 30 of the defence are struck out. Judgment is awarded to the 1st respondent against the appellants on the counterclaim in the sum of $937,500.00. It is further ordered that damages be assessed against the appellants in appeal no 103/2009. Costs are awarded to the 1st respondent to be agreed or taxed.