IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

Cause No.: G 209 of 2012 (RMJ)

BETWEEN:	**KEVIN ERROL CLAYTON**	**PLAINTIFF**
AND:	**JEFFREY DACOSTA t/as PAINT PROS**	**FIRST DEFENDANT**
AND:	**PAINT PROS LTD**	**SECOND DEFENDANT**
AND:	**DOLPHIN ARCHITECTURAL PRODUCTS LTD**	**FIRST THIRD PARTY**
AND:	**CONSTRUCTION EQUIPMENT SERVICES LTD**	**SECOND THIRD PARTY**

Appearances: **Mr. Paul Keeble and Ms. Suleka Tummala of Hampson & Company for the First Third Party**
Mr. Ian Huskisson of Travers Thorpe Alberga for the Second Third Party
Ms. Yvonne Mullen of Broadhurst for the Plaintiff
Mr. Zachary Hoskin of Mourant for the First Defendant and the Second Defendant

Before: **The Hon. Mr. Justice Robin McMillan**

Hearing & Delivery of Decision: **8 May 2019**

Formal Reasons: **14 August 2019**

HEADNOTE

The interpretation and application of Section 12 and Section 41 of the Limitation Law (1996 Revision) – The intent and purpose of the Limitation Law- The need for a thematic approach to statutory construction.

REASONS FOR JUDGMENT DELIVERED ON 8 MAY 2019

1. This Ruling concerns a Summons issued by the First Third Party dated 24 January 2019 pursuant to GCR Order 18, rule 19 (1) (a), (c) and/or (d) for striking out the claim advanced by the Second Third Party against the First Third Party at paragraph 22 of the Counterclaim filed on 28 July 2017, and duplicated at paragraph 22 of the Counterclaim filed 1 September 2017, claiming damages inter alia from the First Third Party on account of the alleged loss of and damage to its boom lift sustained on 16 May 2009. The grounds are that the said pleading discloses no reasonable cause of action, is frivolous or vexatious, and/or is an abuse of process of the Court, being statute barred as pleaded by the First Third Party under the Limitation Law (1996 Revision).

2. On 8 May 2019 the Court accepted that the Application to strike out was properly established and it found in favour of the First Third Party and directed accordingly.

The Limitation Law (1996 Revision)

3. Section 41 of the Limitation Law (1996 Revision) states:

41. (1) For the purposes of this Law, any new claim made in the course of an action shall be deemed to be a separate action and to have been commenced in the case of-

a) a new claim made in or by way of third party proceedings, on the date which those proceedings were commenced; and

b) any other new claim, on the same date as the original action.

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(2) In this section-

"new claim" means a claim by way of set-off or counterclaim, and a claim involving the addition or substitution of either a new cause of action or of a new party; and

"third party proceedings" means proceedings brought in the course of an action by any party to the action against a person not previously a party, other than proceedings brought by joining any such person as defendant to any claim already made in the original action by the party bringing the proceedings.

(3) Except as provided by section 39 or by rules of court, a court shall not allow a new claim within paragraph (b) of subsection (1), other than an original set-off or original counterclaim, to be made in the course of an action after the expiry of any time limit under this Law which would affect a new action to enforce that claim. For the purposes of this subsection, a claim is an original set-off or an original counterclaim if it is a claim made by way of set-off or counterclaim by a party who had not previously made any claim in the action.

(4) Rules of court may provide for allowing a new claim to which subsection (3) applies to be made as therein mentioned, but only if the conditions specified in subsection (5) are satisfied, and subject to any further restrictions the rules may impose.

(5) The conditions referred to in subsection (4) are in the case of a claim involving-

a) a new cause of action, if the new cause of action arises out of the same facts or substantially the same facts as are already in issue on any claim previously made in the original action; and

(b) a new party, if the addition or substitution of the new party is necessary for the determination of the original action.

(6) The addition or substitution of a new party shall not be regarded for the purposes of paragraph (b) of subsection (5) as necessary for the determination of the original action unless either-

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(a) the new party is substituted for a party whose name was given in any claim made in the original action in mistake for the new party's name; or

(b) any claim already made in the original action cannot be maintained by or against an existing party unless the new party is joined or substituted as plaintiff or defendant in that action.

(7) Subject to subsection (4), rules of court may provide for allowing a party to any action to claim relief in a new capacity in respect of a new cause of action, notwithstanding that he had no title to make that claim at the date of the commencement of the action. This subsection shall not be taken as prejudicing the power of rules of court to provide for allowing a party to claim relief in a new capacity without adding or substituting a new cause of action.

(8) Subsections (3), (4), (5), (6) and (7) apply in relation to a new claim made in the course of third party proceedings as if those proceedings were the original action, and subject to such other modifications as may be prescribed by rules of court in any case or class of case.

(9) In this section-

"rules of court" means rules made under section 19(3) of the Grand Court Law (1995 Revision) or section 53 (1) of the Summary Jurisdiction Law (1995 Revision)."

4. Section 12 of the Limitation Law, dealing expressly with contribution as distinct from counterclaim, states:

"*12. (1) Where, under section 6 of the Torts (Reform) Law (1996 Revision), a person is entitled to a right to recover contribution in respect of any damage from any other person, no action to recover contribution by virtue of that right shall be brought after the expiration of two years from the date on which that right accrued.*"

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5. These provisions are by common agreement extremely difficult to construe, and for that reason as the Court stated in its original Judgment it is necessary to adopt and apply a broadly thematic approach to their interpretation.

6. The overarching principle is that time limits should apply to a wide range of legal proceedings, as distinct from them not applying. It is with this clear perspective firmly in mind that the Court has approached the issue raised in these proceedings.

The Background

7. A broadly helpful outline of the background is provided at paragraphs 5-8 of the First Third Party's Submissions dated 4 May 2019:

> *"5. In summary, Dolphin and CES have been brought into this action by the Defendants as third parties. For present purposes both Mr DaCosta and Paint Pros will be referred to as "the Defendant". There is an issue (as between the Plaintiff and Mr DaCosta and Paint Pros and with which the Court is not presently concerned) as to whether one or the other was the employer of the Plaintiff. Each of them (Mr DaCosta and Paint Pros) has accordingly issued third party notices against Dolphin and CES in identical form. For present purposes it does not matter which was the employer and accordingly reference here will be made only to Mr DaCosta and Paint Pros collectively as "the Defendant".*
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> *6. The Plaintiff claims against the Defendant damages for personal injury suffered as long ago as May 16, 2009 ("the main action"). On that date the Plaintiff and one other employee were operating a Terex TB 110 telescopic boom lift ("the boom lift") owned and supplied by CES but through Dolphin in order to gain access to the upper stories of a building where they were working. The boom lift toppled over and the Plaintiff was*

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injured. The Plaintiff issued proceedings against the Defendant just within the limitation period on 26 April 2012 [2]. The Defendant served a Defence dated 25 May 2012 [3] but took no steps in relation to Dolphin or CES for almost five years, when a third party notice was issued on 16 February 2017 [5] and served on Dolphin and CES almost 8 years after the accident.

7. Dolphin issued and served a contribution and indemnity notice on CES dated July 21, 2017 [8] and CES issued and served a contribution and indemnity notice on Dolphin dated July 27 [9]. By Grand Court Rule Order 16 r.9 (1) a contribution and indemnity notice given by a third party is effectively to be treated as a third party notice, with the giver of the notice treated as a defendant. By Grand Court Rules Order 16 r. 3 (4) on service of third party notice, the Rules apply as though

(a) the third party notice were a writ and the proceeding begun thereby an action; and

(b) the defendant issuing the third party notice were a plaintiff and the person against whom it is issued a defendant in that action.

8. By s. 41(1) of the Limitation Law (1996 Revision) ("the Law") (5), a claim made in third party proceedings is deemed to be a separate action and to have been commenced on the date on which those proceedings were commenced. On this basis, the Defendant's third party notice and also Dolphin's and CED' contribution and indemnity notices would be deemed to have commenced on the days that they were issued – i.e. respectively in February 2017 (the Defendant) and July 2017 (Dolphin and CES) – and would be wildly out of time, whether the indemnity and contribution claims contained therein were based in contract or in tort."

8. The Second Third Party, on the other hand, claims that its counterclaim is preserved by section 12, which it argues upon its face applies to third party proceeding and provides

that the limitation period in the case of contribution and indemnity (widely interpreted) in such proceedings does not expire until two years after a judgment in the main action.

9. The Court, however, has pointed out that steps are covered by the collective provisions which are not merely steps in third party proceedings, but rather more widely steps "*in the course of third party proceedings*", and therefore not included within the "*relation back*" principle itself available *per se* to a defendant for contribution.

10. In this context, the Court carefully notes the following statement of the Second Third Party in its Skeleton Argument dated 24 April 2019 at paragraph 9:

> "9. *CES agree that S.41 makes a distinction between "claims in or by way of third party proceedings" and "other new claims/original counterclaims". The former are deemed to be commenced when the applicable third party notice was served and the latter on the date the original action was commenced (the relation back rule). CES accept that if its counterclaim is a "claim in or by way of third party proceedings" then it will be time barred. If it is a "new claim" on other hand, and arises out of the same facts of the original action (making it an "original counterclaim") then it will be in time. This is because S. 41 will deem it to have been commenced at the date of the original action in 2012. This would place it in time."*

11. This assertion amply demonstrates the fundamental misconception that the time-barring of new claims does not extend to those brought in the course of third party proceedings as distinct from new claims brought simply in or by way of third party proceedings themselves. It is the case that here is a new claim which is out of time and one that is also outside the narrow "*relation back*" principle. The claim here is brought not in third party proceedings themselves but in the course of third party proceedings. That is a material and indeed crucial distinction which extends the scope of the time-barring rather than providing an exemption from it.

The Findings of the Court

12. The Court has accepted that paragraphs 7, 8 and 11 of Mr Keeble's Response to the Second Third Party's Submissions, dated 7 May 2019, represent a good statement of the law.

13. Paragraphs 7, 8 and 9 proceed as follows:

> *"7. The question the Court had to answer in Khan v Al Rawas was precisely the question posed in this case, set out by the Court of Appeal at paragraph 3 of the judgment as follows:*
>
> *"3. The question of construction that arises is this. C brings a claim against D, which is in time. D (not having previously made any claim in the proceedings) wants to counterclaim against C, but a fresh action to advance that counterclaim would be out of time at the time when C's claim is brought. Does section 35 of the Limitation Act, in particular subsections (1) and (3) of section 35, nevertheless allow D to bring the counterclaim, as a matter of right?"*
>
> *The trial judge Elisabeth Laing J. and a unanimous Court of Appeal held that D was not allowed in the circumstances to bring a counterclaim as a matter of right. Precisely the same applies here.*
>
> 8. *The facts in Khan v Al Rawas were as follows: Khan was a firm of solicitors who acted for Mrs Al-Rawas and another in proceedings against a company called Pegasus. In July 2006 Mrs Al-Rawas obtained ex parte injunctions were discharged and the court made orders for damages and costs against Mrs Al-Rawas. The retainer continued and on August 1, 2013 Khan commenced proceedings claiming disbursements of £354,151 and interest against Mrs Al-Rawas. The claim was made within six years of the commencement of Khan's cause of action. On April 4, 2014 Mrs Al-Rawas served a defence and counterclaim asserting that Khan had been guilty of professional negligence in relation to the claim against Pegasus. It is to be noted that at the time of issue of*

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Khan's claim (August 1, 2013) Mrs Al-Rawas claim in professional negligence would already have been statute barred. The professional negligence of which she complained occurred prior to September 2006 so that her claim would have been statute bared by September 2012. Nevertheless her counsel asserted that s.35 of the English Limitation Act (s.41 of the Limitation Law) entitled her to bring the counterclaim even though, if brought as an original action, it would have been out of time.

9. *The Court of Appeal held for reasons which are set out fully in Dolphin's Outline Submissions that this was wrong. Section 35 enabled the counterclaim to be treated as though it were issued on the date of the claim against Mrs Al-Rawas i.e. August 1, 2013. However, since at this date her counterclaim was already statute barred, s.35 was of no assistance. Similarly, s. 41 would allow CES present claim to be backdated to February 16, 2017, the date of the Defendant's third party notices. That does not avail CES; at that date CES against Dolphin would already have been statute barred for over two years.*

14. Paragraph 11 then states:

"11. CES apparently also relies on GCR Order 16 r. 1 (3) which states:

"Where a third party notice is served on the person against whom it is issued, he shall as from the time of service be a party to the action (in this Order referred to as a third party) with the same rights in respect of his defence against any claim made against him in the notice and otherwise as if he had been duly sued in the ordinary way by the defendant by whom the notice is issued".

CES' rights in respect of its defence are such rights as it would have had if the Defendant had sued it on February 16, 2017. At this stage its claim against Dolphin was clearly statute barred."

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Conclusion

15. In specific relation to a third party counterclaim there is no case directly on point. Nevertheless whether one examines the prescriptive rights claimed and their clear thematic limitations, the authority of *Khan v. Al – Rawas* [2017] 1 WLR 2301 (CA) is helpful and illuminating. The Court in particular makes reference to what is set out in paragraphs 15, 31, 38, 39 and 41.

16. The Court especially emphasises paragraph 38, where Sharp LJ states:

> *"As Ms Mulcahy submits, it is difficult to discern any intelligible legislative policy behind a provision which would enable a counterclaim of any age, and no matter how stale, to be pursued, merely because, as a matter of happenstance, the party raising such a new claim, had been sued. The judge pointed to the absence of clear words mandating such a surprising result; and she charcterised such an intention as "capricious" and productive of legal uncertainty."*

17. Sharp LJ also refers at paragraph 39 to the careful and nuanced approach to be found in the English Limitation Act, and for the need to protect a party who might otherwise have a course of action hanging over him like a sword of Damocles for an indefinite period. In summary, this Court considers that in this area of law any exceptions should be narrow ones rather than wide ones.

18. I support such an approach. Despite having listened carefully if perhaps challengingly to what Mr Huskinsson says, I am unable to perceive any legal authority that supports his position. I have found in favour of Mr Keeble's client in light of the arguments which he put forward.

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19. The Court would only add that notwithstanding the apparent difficulty of the language in section 41, it is important to approach the construction of the section with an appropriate logic, bearing fully in mind the mischiefs which the Limitation Law is comprehensively designed and intended to prevent.

Roli McMillan

THE HON. MR. JUSTICE McMILLAN
JUDGE OF THE GRAND COURT