IN THE HIGH COURT OF BELIZE A.D. 2023

CLAIM No. CV363 of 2023

BETWEEN:

[1] JASON SPRADLIN

Claimant/Respondent

and

[1] NATASHA STARSHINE JOHNSON

Defendant/Applicant

Appearances:

Mrs. Nazira Myles for the Claimant/Respondent

Mrs. Wendy Auxillou for the Defendant/Applicant

2024: March 19;

June 25.

RULING

Pleadings – Practice & Procedure – Counterclaim – Defence to Counterclaim Filed Out of Time – Application for Judgment on Counterclaim – Time Computation – Clear Days Rule – Admissions – Effect of Deemed Admissions on Claim – Breach of Contract – Misappropriation – Special Damages – Abuse of Process – Strike Out.

[1] **ALEXANDER, J.**: There are three applications before me. The defendant filed the first and second applications for judgment on the counterclaim, and to strike out the substantive claim. The third is the claimant's application for extension of time to file the defence to the counterclaim and relief from sanctions. Needless to say, parties have robustly contested all applications.

[2] There is no defence to the counterclaim, so I grant the judgment on the counterclaim, refusing the application for an extension of time and relief from sanctions for failure to file

the defence to counterclaim. The application for an extension and relief from sanctions was unduly late, coming long after an application for judgment to be entered was made. The threshold conditions for getting the order for relief for sanctions are not satisfied.

[3] I find the claim and counterclaim to be intimately connected. After considering the effects of the deemed admissions on the claim, arising from the failure to defend the counterclaim, I strike out the claim.

Background

[4] An unfortunate series of procedural missteps occurred in this matter that resulted in parties making several applications, some premature and others plainly erroneous. Time computation and the misapprehension of deadlines were at the crux of these procedural failings. The conundrum is discussed below.

[5] By notice of application filed on 28th August 2023 supported by an affidavit of the applicant ("Ms. Johnson") of even date, Ms. Johnson sought judgment on her counterclaim against the claimant/respondent ("Mr. Spradlin"). The application was made pursuant to the Civil Procedure Rules, 2005 ("CPR") 10.2, 18.1, 18.2, 18.4, 18.9 and 18.12. It is this application that is the present focus of this court, but I pause to give some context to it, as it was preceded and followed by other applications also before me.

[6] The claim was filed on 9th June 2023. The date of service of the claim is unclear as Ms. Johnson says in the acknowledgement of service that she was served on 28th June 2023, but the affidavit of service says she was served on 30th June 2023 at 1:09pm. For purposes of this application, parties have proceeded as if service of the claim occurred on 30th June 2023. I will adopt this date as the relevant date of service. Ms. Johnson filed an acknowledgement of service on 5th July 2023. She then filed and served a defence and counterclaim electronically on Mr. Spradlin on **27th July 2023**, and the hard copy was delivered at his attorney's office on 28th July 2023. She was well within the timelines of 14 and 28 clear days for her filings, respectively, from the date of service of the claim on her.

[7] A simple time computation, as provided for under the Rules, would have shown Mrs. Myles, counsel for Mr. Spradlin, that the defence to the main claim would have fallen due on 31st July 2023, factoring in the clear days rule (discussed below). Despite this, Mrs. Myles filed a Part 12.7 request for judgment in default of defence against Ms. Johnson on 27th July 2023. This request was premature and, rightly, was not granted by the Registrar of the High Court. It is not this procedural misapprehension or misstep that is in issue before me, albeit it was a precursor to others in this matter.

[8] Indeed, the procedural stumble by Mrs. Myles was followed by a similar request under Part 12, this time by Ms. Johnson and her counsel (Mrs. Auxillou), for judgment in default of defence of the counterclaim. Ms. Johnson's request was filed on 14th August 2023 and was clearly based on a misreading of the rule by Mrs. Auxillou that a Part 12 default judgment was available on a counterclaim. A default judgment is not available for an ancillary claim: see CPR 18.9(3). A counterclaim is an ancillary claim: see CPR 18.1(1). It was the wrong procedure. Mrs. Myles in a swift response dated the same 14th August 2023 wrote notifying the Registrar of the High Court that the counterclaim was served on 27th July 2023, time stopped running during the long vacation and, pinpointing CPR 3.5(1), stated that the defence "is properly to be filed by 9th October 2023". Her time calculation that identified 9th October 2023 as the due date for filing the defence was in error, but she was correct as to Mrs Auxillou's incorrect use of the Part 12 default procedure.

[9] On the heel of the objections raised by Mrs. Myles, the Part 12 request for default judgment was withdrawn by Mrs. Auxillou on 28th August 2023. However, on the same 28th August 2023, Mrs. Auxillou filed a notice of application pursuant to CPR 18.9 and 18.12 for judgment for failure to file a defence to the ancillary claim and, therein, sought an order for the claim to be struck out. This notice of application for judgment on the counterclaim was served on counsel for Mr. Spradlin on 19th September 2023. Mrs. Myles ignored this application, staunchly maintaining her position that the time for the 'filing' of the defence to counterclaim had not expired. At this stage, Mr. Spradlin still did not file his defence to counterclaim, nor did he file for an extension and for relief from sanctions.

Non-Filing of the Defence to Counterclaim

[10] Given the non-filing of the defence to the counterclaim during the long vacation, Mr. Spradlin was in jeopardy of having judgment entered against him on the counterclaim. This is clear when one examines the rules. Pursuant to the clear days rule under CPR 3.2(2), the defence to the counterclaim was due for *filing* on **25th August 2023**, but none was filed. To be noted is that it was the 'filing' and not the 'service' of the defence that was due, as at the given time the court's long vacation had commenced. This is made clear from a careful reading of CPR 3.5(1), "During the long vacation, time prescribed by these Rules for **serving** any statement of case other than the statement of claim does not run." [My Emphasis]. It was not until 10th October 2023 that Mr. Spradlin filed his defence to counterclaim. His defence to counterclaim was filed more than six weeks after it was due. It was out of time.

[11] To compound the matter, it was only after a hearing before me on 24th October 2023 that Mr. Spradlin filed an application for an extension of time to file his defence to counterclaim and for relief from sanctions. The application for extension of time was filed on 17th November 2023, some three weeks after the court hearing and more than a month after the defence to counterclaim was filed. This application will stand or fall based on the decisions in the applications filed by Ms. Johnson.

Issues

[12] The issues, as the court finds them, are:

i. Was the defence to counterclaim filed out of time and, if so, should judgment be entered on the counterclaim?

ii. Whether or to what extent does the judgment on the counterclaim affect the main claim?

iii. Whether the claim ought to be struck out?

iv. Should the defendant to the counterclaim be granted relief from sanctions?

The Legal Framework

[13] The present applications revolve around a counterclaim and the defence or delayed defence to it. I find it convenient to start by setting out certain rules that will frame the discussion. These are as follows:

CPR

10.2(1) A defendant who wishes to defend all or part of a claim must file a defence …

18.1(1) An Ancillary Claim is any claim other than a claim by a claimant against a defendant … and **includes** -
(a) **a counterclaim by a defendant against the claimant** …

18.2(1) An ancillary claim is to be treated as if it were a claim for the purposes of these Rules except as prescribed by this Rule.

18.9(1) **A person against whom an ancillary claim is made may file a defence**.

18.9(2) The period for **filing a defence is the period of 28 days after the date of service of the ancillary claim**.

18.9(3) The Rules relating to a defence to a claim apply to a defence to an ancillary claim except Part 12 (Default Judgment).

18.12(1) This Rule applies if the party against whom an ancillary claim is made fails to file a defence in respect of the ancillary claim within the permitted time.

18.12(2) The party against whom the ancillary claim is made –
(a) **is deemed to admit the ancillary claim, and is bound by any judgment or decision in the main proceedings in so far as it is relevant to any matter arising in the ancillary claim** … [My Emphasis].

Discussion

[14] The CPR make clear that a counterclaim is included in the definition of an ancillary claim. Also clear is that a party on whom a counterclaim is served may file a defence within the timelines set by the rules, that is, within 28 days after the date of service of the ancillary claim.

[15] Having set out the relevant rules above, I will address the issues that arise before me within those confines.

Issue No. 1: Was the Defence to Counterclaim Filed Out of Time and, If So, Should Judgment be Entered on the Counterclaim?

[16] The answer to this question lies in an examination of the rules on time computation including the concept of "clear days". The CPR stipulate how time is to be calculated and clearly define the concept of "clear days".

> 3.2(2) All periods of time expressed as a number of days are to be computed as clear days.
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> 3.2(3) In this Rule "**clear days**" means that in computing the number of days the day on which the period begins and the day on which the period ends are not included. [Original Emphasis].

[17] The CPR 3.3 sets out the three court vacations in each year and describes one as "the long vacation which begins on 1st August and ends on 15th September". The Rules make a clear distinction between the time for "filing" and the time for "serving" documents during the long vacation of the court. I have set out CPR 3.5(1) at paragraph 10 above and it clearly provides that during the long vacation, time does not run for serving a statement of case. It is a misreading of this provision to interpret this rule as being inclusive of stopping the time for 'filing' of the statement of case during the long vacation.

[18] In my view, CPR 3.5(1) does not exempt the defendant to a counterclaim from ***filing*** his defence during the long vacation but treats *only* with ***service*** of the statement of case. It only stops the time for "service" of the statement of case, not the time for "filing" it.

[19] At the risk of sounding rudimentary, it is important to include in this discussion what the Rules define as a statement of case. The statement of case is defined as "a claim form, statement of claim, defence, counterclaim, ancillary claim form or defence and a reply …": see CPR Part 2.4 **Definitions**. Clearly, the defence to a counterclaim is a statement of case. In the instant case, therefore, when the counterclaim was served on Mr.

Spradlin's counsel on 27th July 2023 by email (a hard copy after), this service was effected on the brink of the commencement of the long vacation. Mr. Spradlin was required to *file* his defence to counterclaim within 28 days clear days or latest on 25th August 2023. In computing clear days, the first and last days of the period are excluded. How clear days are to be calculated is provided at paragraph 16 above, which sets out CPR 3.2(3).

[20] In the circumstances, the rule for *service* during the long vacation was halted, time having been stopped under CPR 3.5(1), but not the requirement for filing. These words are not twinned in legalese nor are they used interchangeably and, in my view, need no further explanation. However, given the procedural stumbles in this matter, I will examine the caselaw on the issue.

[21] In **Alain Langlois v Alba Barahona**,[1] the court explained the difference between 'file' and 'serve' in the Belize rules. I will quote liberally from the explanation of Griffith J, as it answers in full the present issue before me on whether the defence to counterclaim was filed out of time. Undertaking an interpretation of CPR 3.5 at paragraphs 7 & 8, Griffith J stated:

> 7. It is considered that the difference between 'file' and 'serve', within the context of civil procedure generally ought to be accepted as uncontroversial… For the avoidance of doubt however, in Part II of CPR 2005 – Application and Interpretation of the Rules – 'filing' is defined with reference to **Rule 3.7 which sets out the various ways in which documents can be filed. These methods of course all concern the presentation, acceptance and recording of documents by the Court Office**. Various and sundry rules make provision for different modes of service of different kinds of court documents so that **'service' is clearly a matter of *how* notice of documents filed is provided to the other parties in proceedings**. Rule 3.8 for example makes a distinct reference to documents filed or served by fax, with the result that it is clear that the words are not used interchangeably. **On the face of Rule 3.5 therefore, the reference to serve must be taken to mean exactly that**…
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> 8. … It is therefore clear, that regardless of how the practice might have evolved in Belize, without legislative intervention, a judicial interpretation of 'serve' in Rule 3.5 can only mean serve.

[22] I have already stated at paragraph 19 above that a defence to a counterclaim is a statement of case as defined under CPR 2.4. I have also stated at paragraph 20 above

[1] Claim No. 395 of 2016.

that pursuant to CPR 3.5, there is no requirement for a party to a claim to serve a statement of case on any opposing party during the court's long vacation. However, there is a requirement to **file** the statement of case (except the statement of claim) within the prescribed time during the long vacation. My repetition here is merely to ground my conclusions below and by them, I mean no disrespect.

[23] Given the discussion above, Mr. Spradlin had until 25th August 2023 to **file** his defence to counterclaim. He, however, ignored the procedural requirements and filed his defence to counterclaim on **10th October 2023** (some 46 days after it was due). He then made an application for an extension of time to file his defence and for relief from sanctions on 17th November 2023. This relief from sanctions application came some **twelve weeks** from the deadline date.

[24] His defence to counterclaim was, therefore, filed out of time.

[25] Before proceeding further, I must address the submissions of counsel for Mr. Spradlin. Mrs. Myles submitted in reliance on the Jamaican case of **Ocean Chimo Limited v RBTT Bank Jamaica Limited et al**[2] that the defence to the counterclaim was not filed out of the prescribed time. In **Ocean Chimo**, the Jamaican CPR 3.5(1) speaks to time being stopped in the long vacation for "filing and serving" a statement of case. This rule is clear and unambiguous, so I decline to accede to counsel's argument. The Jamaican CPR 3.5(1) is not on all fours with ours in Belize. Counsel argued further that the court must apply the purposive approach in interpreting CPR 3.5 and not the literal approach adopted by Griffith J in **Alain Longlois**. According to Mrs. Myles, "It had to be the purpose of the law maker that during the vacation period, no filing nor service is done as having to do the necessary work to file but not serve is illogical." While I accept that the reason behind the long vacation[3] is to provide a respite to the court and its officers from the rigours of the court's regular business, this is not to be used to support a misreading of the Rules in Belize. I, therefore, reject Mrs. Myles' argument as fanciful and illustrating of a clear misunderstanding of the Rules. It does not change my ruling on this question.

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[2] Claim No. 2010 HCV 02413.

[3] Re Showerings, Vine Products and Whiteways Ltd [1968] 3 All ER 276 at page 277.

[26] To deal fulsomely with the first issue before me, I must now consider whether judgment should be entered against Mr. Spradlin on the counterclaim.

Judgment on the Counterclaim

[27] Is Ms. Johnson entitled to judgment on her counterclaim? I have already found at paragraph 24 above that the defence to counterclaim was filed outside of time. There is no getting around the clear timelines set in the Rules concerning the procedural steps governing an ancillary claim. There is also no disputing that an ancillary claim includes a counterclaim and is to be treated like a claim for purposes of these Rules: see CPR 18.2(1). Mr. Spradlin ought to have filed his defence to counterclaim, if he wished to defend *all* or *part* of the ancillary claim, within the prescribed timelines: see CPR 10.2(1) and 18.9(1). Mr. Spradlin did not file his defence to counterclaim within the 28 clear days after service (CPR 10.2(1)) of the ancillary claim (CPR 18.9(2)). Under CPR 18.12(1), if a party to an ancillary claim does not file the defence, he is **deemed to admit the ancillary claim** (discussed further below). At this point, the critical question for me is if judgment should be granted in default of the filing of the defence to counterclaim.

[28] Having found that Mr. Spradlin was entitled to file his defence to counterclaim during the long vacation, he should have done so by and/or no later than 25th August 2023. He did not do so. Ms. Johnson made her application for judgment in default of defence to counterclaim on 28th August 2023. Mr. Spradlin, who would have been put on notice by that filing that something was wrong, still refused to file his defence to counterclaim, doing so only on **10th October 2023**. It was not accompanied by any application for extension or relief from sanction, both coming long after the delayed defence to counterclaim.

[29] In my judgment, his defence was not only late but by the time of its filing, the counterclaiming Ms. Johnson had filed for and was already entitled to her judgment on her counterclaim. She has approached the court, correctly this time, by way of notice of application for the court to pronounce judgment in her favour. In **Miguel Angel Messitizo v Robert Gabourel et al**[4] at paragraphs 17 and 18, the court described the admission

[4] Claim No. 668 of 2016.

emerging from a non-filing of a defence to counterclaim as one that comes about by 'operation of law'. It, therefore, requires "a special judgment to be given to ensure a remedy. This entails the making of an application for judgment."[5]

[30] I grant Ms. Johnson judgment on her counterclaim as detailed below.

Issue No. 2: Whether or to What Extent Does the Admission of the Counterclaim Affect the Main Claim?

[31] The next question is what is the effect on the main claim, if any, of a judgment upon failure to file a defence to counterclaim within the prescribed timelines? The simple answer is that Mr. Spradlin's non-filing of the defence is **a deemed admission** of the counterclaim under the Rules (CPR 18.12.2), and it raises the question as to whether Mr. Spradlin's substantive claim stands?

Deemed to Admit the Ancillary Claim

[32] CPR 18.12(2) provides that the party against whom the ancillary claim is made **is deemed to admit** the ancillary claim and **is bound by any judgment or decision in the main proceedings** in so far as it is relevant to any matter arising in the ancillary claim (i.e. the counterclaim). In **John Palacio v Football Federation of Belize**[6], Griffith J stated that this 'admission' amounts to a sanction. Griffith J then proceeded to dissect the concept of 'deemed to admit'. I agree with and adopt her explanation as detailed below.

[33] In **John Palacio**, Griffith J rejected the argument that a counterclaiming defendant in a substantive claim has an automatic right to judgment on the counterclaim that is in the nature of a default judgment. I have already stated at paragraph 8 above that the CPR Part 12 default judgment procedure is not available to a counterclaiming defendant, so I will add nothing further here.

[34] Griffith J stated at paragraph 11 in **John Palacio** that:

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[5] Ibid., paragraphs 17 and 18.
[6] Claim No. CV546 of 2017 paras 10-13.

11. It is found that the characterisation of the effect of the deemed admission of the counterclaim as an automatic right to judgment moreover in the nature of a default judgment, is misplaced. Where an ancillary defendant fails to file a defence, the right afforded an ancillary claimant is by no means considered to be automatic. The Court has to determine [the] effect of the deemed admissions on the counterclaimant vis-à-vis the main claim. The approach in **Satnarine Maharaj**[7] which Counsel for the Defendant herself relied on is found to be most instructive. At paragraph 21 of the judgment, the Court of Appeal firstly acknowledged the plain wording of the rule in Trinidad to mean that the deemed admissions applied to the averments contained in the counterclaim in addition to the relief claimed. The Court therein described the question of the effect of the admissions, as the crux of the dispute and lying at (sic) heart of determining the appeal.

[35] Griffith J went on at paragraph 12 of **John Palacio** to describe the approach of the Court of Appeal in Trinidad to 'admissions' or how it will determine the effect of the deemed admissions of the counterclaim. Noting that the Trinidad CPR 18.12(2)(a) is identical to the Belize CPR 18.12(2)(a), she quotes liberally from **Satnarine Maharaj** thus:

12. "It is necessary for the court to carefully consider the admissions and ask itself whether any of the allegations in the claim can exist consistently with the deemed admissions. <u>If there are allegations that cannot stand in view of the deemed admissions the court must assess how that impacts on the claim.</u>" [Emphasis Original].

Additionally at paras 23-24 of the judgment (**Satnarine Maharaj**):

> "There of course need be no connection between the claim and the counterclaim … in such case it is unlikely that the failure to defend the counterclaim will have any significant impact on the claim. **Where however the counterclaim is wrapped up on the claim and intimately connected to it the position can be expected to be different** …" [My emphasis].
> "<u>We think it must be right that there would be cases where the deemed admissions arising from the failure to defend the counterclaim can result in the dismissal of the claim</u>. To permit the claimant to proceed with the claim in those circumstances would be an abuse of process." [Emphasis original].

[36] The above approach first urges a careful examination of the admissions to decipher if the allegations in the claim can co-exist or are consistent with the deemed admissions. On a plain reading of the rule, the deemed admissions applied to the averments in the counterclaim as well as the reliefs claimed. Secondly, are the allegations in the claim

[7] Satnarine Maharaj v The Great Northern Insurance Company Limited et al Civ. App. No. P198 of 2015.

disconnected from those in the counterclaim? Thirdly, if the allegations in the claim and counterclaim are packaged as one since there is an admission, should the claim be struck out? I agree with the sageness of the approach advanced by the Court of Appeal in **Satnarine Maharaj** (as adopted in **John Palacio**). By this approach, it would be an abuse of process to allow a claimant to proceed with his claim, where the claim and counterclaim are intertwined and there is a *deemed admission* by the non-filing of the defence to counterclaim.

[37] I have applied this approach to the facts of the instant case to determine if the claim and counterclaim are so twinned that the deemed admissions will lead to a dismissal of the substantive matter. If it does not, then the main claim remains viable and Mr. Spradlin must proceed.

Is There an Intersection of the Claim and Counterclaim?

[38] Mr. Spradlin claims damages for breach of contract (for an unspecified amount), damages for misappropriation in the sum of BZ$17,693.61, and special damages of BZ$47,000. He did not particularize or say what his claim for special damages relates to, so this remained unclear. Ms. Johnson's defence to the claim against her contained clear averments in denial of all claims, providing her own version of events in some cases. These are repeated and expressly included in her counterclaim. I have thoroughly examined the allegations and reliefs in the counterclaim.

[39] In the counterclaim, Ms. Johnson claims breach of contract in the sum of BZ$63,490.62. It would appear from this pleading that this plea in the counterclaim is wrapped up in and/or connected to the main claim. The breach relates to one contract not separate contracts. By the deemed admission, judgment is granted in favour of Ms. Johnson on her counterclaim. It means that the claim of breach of contract in the substantive claim falls away and is to be struck out as an abuse of process.

[40] Regarding the claims for misappropriation in the amount of BZ$17,693.61 and for special damages of BZ$47,000, the counterclaiming Ms. Johnson did not seek identical reliefs.

Ms. Johnson instead denies in her defence each allegation in the statement of claim and stated that she "is not accordingly liable to the Claimant as alleged or at all." In her counterclaim at paragraph 37, Ms. Johnson specifically addresses these claims by averments made in her defence to the main claim. She then repeated and expressly incorporated these averments in her counterclaim. Apart from denying every allegation and averment in the statement of claim, Ms. Johnson was emphatic that she is not liable to Mr. Spradlin for any of the alleged claims or for the reliefs sought against her.

[41] I find it helpful at this stage to insert here the averments as to misappropriation. As regards misappropriation, she stated at paragraphs 29 and 33 of her defence:

> 29. **In response to Paragraph 27, 28 and 34 of the Statement of Claim, the Defendant avers that any allegation of misappropriation on her part is vehemently denied**. Paragraphs 10, 12, 25, 26 of this document are repeated. The Defendant repeats that since the middle of October of 2022, the Claimant has been in dire financial straits and unable to contribute financially or any at all to the operations of Salty Crab. **Any allegation of misappropriation of funds is completely false and manufactured by the Claimant** and is just another tool the Claimant is using to harass the Defendant and chip away at her professional reputation."
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> …
>
> 33. … from the middle of October 2022, when his divorce failed to materialize, the Claimant has been financially strapped and unable to contribute much if anything to the operations of Salty Crab and when the accounting is completed, it is the Claimant who will end up owing the Defendant moneys. **Moreover, there was no misappropriation as claimed.** The Defendant stands ready to provide a full accounting to this honorable (sic) court of all the moneys spent and transferred on behalf of Salty Crab. The Defendant states that her two brothers, who together with her are the Landlords, collect their monthly rental payments via wire transfer, Venmo, Zelle, and cash. Moreover, the Defendant expended a lot of money to cover expenses for Salty Crab once it became apparent the Claimant was financially strapped and unable to complete his end of the bargain. **The Claimant himself has confirmed at Paragraph 27 of his Statement of Claim that he knew, was aware of, and had consented to the Defendant paying herself $1,000 per week from any profits as repayment for additional monies she was forced to advance to the business once the Claimant became unable to contribute financially in mid-October 2022.** [My Emphasis].

[42] The averments in her defence about misappropriation were expressly included in her counterclaim so stand as averments in the counterclaim. She stated that paragraphs 1 to 37 of her defence are included in her counterclaim. This satisfies the **Satnarine Maharaj**

approach that holds that the deemed admission applied to the averments contained in the counterclaim in addition to the reliefs claimed.

[43] With respect to the claim for special damages of BZ$48,302.47, it is not particularized or pleaded with any sufficient specificity. It finds expression first in the prayer for relief as special damages in that specified sum. This sum seems to be delinked from his pleadings. There is a glancing reference at paragraph 32 of the statement of claim to that sum of BZ$48,302.47 as covering losses for "investment, any profit due to him and funds misappropriated by the Defendant." It remains unclear if the prayer to recover misappropriation in the sum of $17,693.61 is to first be deducted or is delinked from the special damages, given the pleading. It is for Mr. Spradlin to set out his case clearly before the court, so that the issues are easily identified to both court and defendant. Despite the faulty pleading, Ms. Johnson still made averments in her defence that denied the claim for special damages. This denial of the allegations of special damages forms part of the averments in her counterclaim. Pursuant to the **Satnarine Maharaj** approach, Ms. Johnson's denial of any claim against her for special damages must stand. In the circumstances, the claim for special damages must be struck out as an abuse of process.

[44] It will be remiss of me not to address Mrs. Myles' position on the **Palacio** approach. Despite Ms. Johnson's clear averments as to the claim for misappropriation, Mrs. Myles submitted that the defence and counterclaim only dealt with the issue of the investment of approximately BZ$63,000 and was silent on the misappropriation and loss of profits/breach. She argued that these issues remain live issues to be determined by the court. Mrs. Myles was insistent that even if the factual allegations are deemed admitted, it applies only to Ms. Johnson's claim in the counterclaim for her investment. The claim and counterclaim are separate. The relief in the counterclaim is limited to her investment. The counterclaim does not claim misappropriation or loss of profits, so there is no intertwining of both parties' pleadings. Mrs. Myles stated that the court should proceed to determine the broader issues, outside of those deemed admitted in the counterclaim.

[45] She relies on the case of **Issac F. Dueck et al v Agripino Carillo dba "A. Carillo Fresh Fruits & Vegetables**[8] where the counterclaim related to a separate contract and separate remedies for delivery of eggs. In **Dueck**, Young J found that the deemed admissions on the counterclaim were not so intimately wrapped up in the defence to affect the claim beyond a possible set off if the defendant is found liable. Young J, therefore, found no reason to strike out or dismiss that claim. On this authority, Mrs. Myles argued that misappropriation is not addressed in the counterclaim, so it remains a live issue to be determined by the court.

[46] **Dueck** is distinguishable from the case at bar. I have found that the claim and counterclaim are intimately tied together and based on the same contract. Ms. Johnson's defence and counterclaim addressed the allegations of breach of contract, misappropriation and loss of investment so the claim cannot stand. I, therefore, did not accept Mrs. Myles' argument, as Ms. Johnson has frontally addressed misappropriation, stating that the funds claimed were actually payments approved by Mr. Spradlin to her, which he confirms in his pleadings. The claim for special damages (possibly for loss of profits) is also addressed by Ms. Johnson and, in any event, is not made with any specificity as required for such pleadings.

[47] In my view, this is one of those exceptional cases identified in **Satnarine Maharaj** where the deemed admission arising from the failure to defend the counterclaim can result in the dismissal of the claim. The deemed admission before me arising from the failure to defend the counterclaim rightly result in the dismissal of the claim. To permit the claimant to proceed with the claim in those circumstances would be an abuse of process.

[48] I find that the effect of the deemed admission of the counterclaim renders Mr. Spradlin's claim for breach, misappropriation and special damages unsustainable.

Issue No. 3: Whether the Claim Ought to be Struck Out?

[49] From the discussion undertaken above, it is clear that the claim is struck out.

[8] Claim No. 730 of 2019.

[50] Given the conclusion reached, I do not think it necessary to consider the final issue, as no relief from sanctions order could save the claim. Further and in any event, Mr. Spradlin's late application for relief from sanctions does not satisfy the threshold conditions of promptitude and good explanation for relief to be granted: see CPR 26.8(1)(a).

Costs

[51] Costs usually follow the event, and in the circumstances of this case, I will grant Ms. Johnson her costs in the matter.

Disposition

[52] It is ordered as follows that:

a. Pursuant to CPR 18.12(2)(a) the claimant is deemed to admit the counterclaim.
b. Consequent to the deemed admission of the counterclaim, the defendant is awarded summary judgment on the counterclaim and the claim is struck out as having no reasonable prospect of success.
c. The claimant's application for extension of time to file his defence to the counterclaim and relief from sanctions is refused.
d. Costs are awarded to the defendant to be agreed or taxed by the Registrar.

Martha Alexander
High Court Judge