BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

Civil Suit No: 148 of 2005

BETWEEN:

ABARCO LTD. **CLAIMANT**

AND

GRANT HOTELS INC. **DEFENDANT**

Before: The Hon. Madam Justice Shona O. Griffith, Judge of the High Court

Dates of Hearing:	**2020:**	**25th August**
		15th December
Date of Decision:	**2021:**	**18th January (Oral)**
		10th September (Written)

Appearances:

Ms. Zarina Khan in association with Mr. Ivan Alert for the Claimant.

Mr. Douglas Trotman for the Defendant.

Mr. Michael Hammelsmith QC in association with Ms. Andrea Simon and Mr. Christopher Hammelsmith for SLC Millenium Inc.

Mr. Michael Koieman of Clarke Gittens Farmer for CLICO Holdings (Barbados) Ltd.

Civil Practice and Procedure – Application for leave to intervene - CPR Part 19, Rules 19.2-19.4 – Addition of new party to Claim – Whether addition of new party amounting to new claim after expiry of limitation period – Application of section 57 Limitation Act, Cap. 231 and CPR 2008, Rule 19.4.

RULING

Introduction and Background

[1] This is a curious matter of some vintage, having been instituted in January, 2005. The initial primary parties seemed to have found resolution sometime in mid-2015, which unfortunately led to two sets of interested parties almost immediately thereafter, entering the fray. The substantive matter concerns a relatively innocuous claim based on breach of contract, namely, for return of a deposit paid under a contract for sale of land, and in answer thereto, a counterclaim for forfeiture of the deposit. These are the relevant facts of the substantive matter:-

The Claim

(i) The Plaintiff, Abarco Ltd. (Abarco), and Defendant Grant Hotels Inc. (GHI) are both companies incorporated under the Laws of Barbados. Abarco's claim as pleaded, is based on an agreement for sale made in July, 2004, for Abarco to purchase from GHI, land situate in St. Phillip, Barbados, in the sum of US12 million dollars;

(ii) Pursuant to that agreement, Abarco pleads that it paid the sum of 2.4 million dollars to an Attorney-at-Law stakeholder in July, 2004, and completion thereafter was to take effect in accordance with the terms of the agreement;

(iii) One such term was that the agreement was conditional upon GHI obtaining permission for the sale, from either the Supreme Court of Barbados or the Supervisor of Insolvency. Failure to obtain such permission, before the completion date of the sale, was to have resulted in the return of the deposit by GHI to Abarco, without interest or charges;

(iv) The sale was not completed in accordance with the terms of the agreement and Abarco sued for a return of the deposit.

Defence and Counterclaim

(v) The defence obliquely pleaded that the plaintiff was not the purchaser under the agreement but instead a nominee appointed to hold the conveyance due to the purchaser's inability to do so;

(vi) The completion date for the sale being 29th October, 2004, the purchaser failed to tender the balance of the agreed purchase price and as a result the defendant was entitled to and did rescind the contract;

(vii) Upon the rescission of the contract, the deposit of 2.4 million dollars was forfeited to the defendant.

Defence to Counterclaim

(viii) The plaintiff maintained that the agreement for sale failed due to the defendant's failure to obtain the required permission for the sale from

the Supreme Court or Supervisor of Insurance. The plaintiff accepted having not tendered the purchase price within the date fixed for completion but denied that the defendant was entitled to rescind the contract without notice to complete.

[2] Subsequent to the above pleadings, the matter progressed according to procedural formalities, to the stage of pre-CPR readiness for trial. That pre-CPR readiness for trial meant that a 'Trial Record' was filed, which consisted of the pleadings and other procedural documents filed after the close of pleadings and trial dates were issued. There were trial dates fixed on two occasions, neither of which materialized. The matter did not thereafter engage the attention of the court until 2015, when a series of applications were filed, two of which form the basis of this Ruling by the Court. The applications were filed on the one hand by the primary parties Abarco and GHI; and on the other hand by two separate, sufficiently termed for now, interested parties – SLC Recovery Ltd, now Millennium Investments Ltd. (SLC/Millenium) and Clico Holdings (Barbados) Ltd (CHBL).

The Applications

[3] For full appreciation of context, the applications filed are as follows:-

(i) On 29th June, 2015 plaintiff and defendant (Abarco and GHI) made a joint application to the court seeking an order that an agreement made

between them compromising the claim, be made an order of the court (‘**the settlement application**’);

(ii) That agreement was for the deposit paid under the agreement for sale, (paid into court by the stakeholder in the sum of approximately 2 million dollars), to be equally distributed between the parties with GHI’s share, less legal and other costs, to remain paid into court for the benefit of GHI’s creditors in other matters.

(iii) In November, 2015 SLC Recovery Ltd, applied in its asserted capacity as a secured creditor of GHI, (a) to be joined in the proceedings pursuant to CPR Rule 19.3; or (b) leave to intervene under the inherent jurisdiction of the Court (‘**the joinder application’**).

(iv) Upon such joinder, SLC Recovery Ltd. would seek (a) summary judgment dismissing the claim; or (b) the determination of several issues pertaining to the capacity of the GHI’s directors to have instructed or compromised the claim; or the legal standing of Abarco to have brought the claim.

(v) In December, 2015 Clico Holdings (Barbados) Ltd. applied for consolidation of claim no. 1328 of 2014 between Clico Holdings (Barbados) Ltd. v Thomas Grant et al with the current action 148 of 2005.

Alternatively, the application sought a stay of this matter pending determination of claim 1328 of 2014. Both limbs of the application are premised on the assertion made in claim 1328 of 2014 that the appointment of the defendants therein (Thomas Grant and Delcia Grant) as directors of GHI, was invalid ('**the consolidation/stay application**').

[4] It was agreed by the Court and respective Counsel that the interested parties' applications for joinder and consolidation should logically be determined before the main parties' application for the Court to accept their settlement of the claim. Recalling the Court's earlier description of the claim as 'relatively innocuous' and grounded in breach of contract, reference is made to the following collateral facts matters which significantly increase the complexity of the factual matrix. These collateral matters are either not in dispute or have been introduced as allegations made by the interested parties.

(i) At the time of institution of this action in 2005, GHI was subject to insolvency proceedings in action no. 4 of 2003. These proceedings remain in existence to date;

(ii) Abarco was not the purchaser under the agreement which is the subject matter of this suit, but rather the nominee appointed by the purchaser Griffin Real Estate Ltd., a company incorporated in England.

In this regard it is alleged that Abarco never possessed the standing to bring the action to recover the deposit under the agreement for sale;

(iii) Griffith Real Estate Ltd. no longer exists, having been wound up in September, 2010; and at the time of the agreement and institution of the action, Griffin had not been registered as an external company as required by the Companies Act of Barbados. As a result, it is alleged that Abarco's action would have been filed in breach of section 344(4) of the Company's Act of Barbados;

(iv) CBHL challenges the validity of the appointment of the directors of GHI under whose hand a change of attorney-at-law and subsequent negotiation of the subject agreement of the settlement application was directed. The authority of GHI to have entered into the settlement sought to be affirmed by the court is therefore disputed;

(v) The challenge to the validity of GHI's directors (claim 1328 of 2014) was commenced prior to the execution of the agreement sought to be affirmed by the Court, and has not yet been determined.

[5] The applications (namely for joinder and consolidation/stay) are predicated upon, but do not require the resolution of any of the above allegations or assertions.

Instead, the existence of such allegations or assertions could be considered as factors to which appropriate weight might be attributed, if relevant to the exercise of any discretion by the Court in its disposal of the applications. With respect to determination of the applications, there are discrete issues of law which are raised by the joinder application, whilst consideration of the consolidation/stay application, can be restricted to matters of record and the general circumstances appended to both claims.

SLC/Millenium's Application for Joinder

[6] SLC/Millennium's application to be added as a party is made pursuant to CPR Rules 19.2 and 19.3. SLC/Millennium submits that the Court's discretion under Rule 19.2, to add a party to a claim is a wide one, which is primarily exercised for the purpose of ensuring that all matters in dispute can be effectively dealt with and to diminish the cost of litigation which may arise as a result of multiple actions. Queen's Counsel for the SLC/Millennium relied on a number of authorities, most notably **Gulf Insurance Ltd v Creque's Insurance Ltd**[1] and the cases referred to therein.[2] Queen's Counsel also identified as equally important, an underlying public policy of enabling parties whose proprietary or pecuniary rights stand to be affected by a court's

[1] BVIHMT 2012/0256

[2] Viz***, International Distillers and Vintners Ltd v J.F. Hillebrand (UK) Ltd*** (2000) Times 25 January, 2000 – (pre CPR principles on joinder remain applicable); ***Treasure Bay (St. Lucia) Limited v Gaming Authority et al***, SLUHCV Claim No. 2011/0456 per Wilkinson J

decision, to be heard in relation to the matter.[3] SLC/Millennium grounds its entitlement to be joined as a party to the action on the basis of its position as a secured creditor of the GHI, which remains under the jurisdiction of the court in ongoing insolvency proceedings.

[7] From that position of its entitlement as a secured creditor of GHI, SLC/Millennium claims an interest in the subject matter of the claim, namely, the deposit paid under the agreement of sale which the parties to the claim have compromised. SLC/Millennium expands its position in relation to intervening in the proceedings by asserting that Abarco, as a non-party to the agreement for sale of land, was never in a position to have instituted the claim for the return of the deposit, much less compromise the action. Additionally, SLC/Millennium contends that GHI was not in a position to have compromised the claim, given that it remains subject to insolvency proceedings, as well as having been sold to CHBL. In this case therefore, SLC/Millennium identifies its pecuniary rights as a secured creditor of GHI, as those which would be directly affected should the Court approve the settlement releasing the deposit, as agreed between the parties.

[3] ***Wylie et al v Bolton et anor*** [2011] NIQB 2

[8] In response to these submissions, Abarco's position is that SLC/Millennium lacks the requisite interest to intervene, in that its right is properly regarded as a mere commercial and not proprietary or other direct interest. On this point Counsel for Abarco relied on **Sanders Lead Co. Inc v Entores Metal Brokers Ltd**.[4] and **National Commercial Bank Jamaica Ltd v International Asset Service Ltd**.[5] Queen's Counsel for SLC/Millennium refutes this submission relating to the insufficiency of their interest and points out that the circumstances in both the authorities cited were distinguishable. Instead, Queen's Counsel refers to **Jamaica Citizens Bank Ltd v Dyoll Insurance Co. Ltd**[6] which was referred to in ***National Commercial Bank***, as being more applicable to SLC/Millennium's position as a secured creditor of GHI. In particular, the fact therein that a mortgagee with no cause of action against any of the parties to the action was adjudged as having more than a mere commercial interest and allowed to intervene.

[9] Counsel for Abarco's response to SLC/Millennium's application for joinder further alleged that the applicable rule was Rule 19.4, given that the addition of SLC/Millennium to the action would amount to the addition of a new claim after the expiry of the applicable limitation period.

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[4] [1984] 1 All ER 857
[5] [2015] Civil Appeal No. 11/2013
[6] Civil Appeal No. 14/1991

In this regard, the requirements of joinder under Rule 19.4(2)(a&b), could not be satisfied within the circumstances of the case. Firstly, in respect of Rule 19.4(2)(b), the joinder must be necessary, as defined in Rule 19.4(3)(c), which provides that the claim cannot be properly carried on without the addition of the new party. Counsel for Abarco refuted that the now sole issue in the matter (that of approval of the settlement between the parties) could not be disposed of without SLC/Millennium, especially given that SLC/Millennium had no standing to seek to intervene in the matter. Any standing relative to GHI and the unrelated insolvency proceedings belonged with the Trustee in insolvency and all of GHI's creditors, as opposed to a single creditor as is SLC/Millennium.

[10] Further, neither the Trustee in insolvency nor other creditors have taken issue with the settlement; the issues underlying the claim did not involve SLC/Millennium who is not necessary for the just disposal of the matter. With reference to the issue of the proposed addition amounting to a new claim after the expiry of the relevant limitation period, Counsel for Abarco says the relevant limitation period, is that of the underlying action for breach of contract. SLC/Millennium's application for joinder has been filed 11 years after the institution of the underlying action rendering it plain that the relevant

limitation period has long expired. The application for joinder can therefore satisfy neither Rule 19.4(2)(a) nor (b).

With respect to Counsel for Abarco's point on limitation, Queen's Counsel considers that position to be misapprehended, as the addition of SLC/Millennium would not amount to the addition of a new claim. CPR Rule 19.4 says Queen's Counsel therefore, is not applicable to SLC/Millennium's application for joinder.

[11] The Court will pause at this juncture, whilst acknowledging that the submissions extracted above do not do justice to the length and breadth of Counsels' submissions. The Court truncates the submissions, on the basis that the ultimate determination of the application for joinder rested on the variance of position between Queen's Counsel for SLC/Millennium and Counsel for Abarco, in respect of the categorisation of the application for joinder as giving rise to 'a new claim' or not. The categorisation in this regard is critical to the determination of the issue, as it is clear, that the application for joinder is being made after the end of the limitation period (of the underlying action), thus if a new claim, CPR 19.4 will indeed be applicable. CPR Rule 19.4 is to be read in conjunction with section 57 of the Limitation Act, Cap. 231 and the effect of these provisions is stringent.

Categorisation of the Application for Joinder

[12] Counsel for Abarco adverts to the plain reading of section 57(1)(a)(ii)(B) of the Limitation Act, which defines a new claim as one involving the addition or substitution of a new party. Following from that definition, Counsel points to Rule 19.4 which applies to new claims filed after a limitation period, which are permissible only upon satisfaction of specified conditions, which SLC/Millennium would fail to satisfy. Queen's Counsel for the Applicant SLC/Millennium examined the nexus between section 57 of the Limitation Act, Cap. 231and CPR Rule 19.4. the latter of which is enabled by the provisions of section 57. Queen's Counsel also relied on authorities interpreting and applying section 35 of the UK's Limitation Act, 1980 along with UK's Rule 19.5, as providing direct guidance on the issue, given the parity between the relevant statutory provisions. Queen's Counsel submitted on the strength of such authorities, that the proposed addition of SLC/Millennium is not a new claim within the terms of section 57 of the Limitation Act, as further effected by CPR Rule 19.4.

[13] Queen's Counsel referred to **Yorkshire Regional Health Authority v Fairclough Building Ltd. et anor** in support of SLC/Millennium's position that its proposed addition as a party to the matter was not a new claim.

Particularly, reference was made to the dicta of the Court of Appeal which refuted the literal interpretation applied by Counsel for Abarco, that the substitution of a new party by itself, amounted to a new claim. The argument is not a straightforward one and the Court considers it most effective to examine the operation of Barbados' Limitation Act, section 57; CPR Rule 19.4 which was enabled thereunder; their UK Counterparts – UK Limitation Act, 1980, section 35 and UK CPR Rule 19.5 – the latter as illustrated in ***Yorkshire Regional Health***. A thorough reading and understanding of this (***Yorkshire***) decision (particularly the dictum of Hallett LJ), is critical to understanding the Court's determination of SLC/Millenium's application for addition as a new party.

[14] Section 57 of Cap. 231 is extracted in full as follows, with applicable provisions highlighted:-

> *"**57.** (1) In this section*
>
> *(a) **a "new claim" means***
>
> *(i) any claim by way of set-off or counterclaim, and*
>
> *(ii) **any claim involving***

(A) the addition or substitution of a new cause of action,

(B) the addition or substitution of a new party;

(b) "third party proceedings" means any proceedings brought in the course of any action by any party to the action against a person not previously a party to the action, 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;

(c) ***"rules of court" means rules made under***

(i) section 82 of the Supreme Court of Judicature Act*, or*

(ii) section 268 of the Magistrates' Courts Act.

(2) ***For the purposes of this Act, a new claim made in the course of any action shall be deemed to be a separate action and to have been commenced***

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

(b) ***in the case of any other new claim, on the same date as the original action****.*

(3) Except as provided by sections 52 and 53 and by rules of court, no court may allow a claim within subsection (2)(b), other than an original set-off or counterclaim, to be made in the course of any action after the expiry of any time limit under this Act which would affect a new action to enforce that claim.

(4) For the purposes of subsection (3), a claim is an original setoff or an original counterclaim if it is a claim made by way of

set-off or, as the case may be, by way of counterclaim by a party who has not previously made any claim in the action.

(5) Rules of court may provide for allowing a new claim to which subsections (3) *and (4)* ***apply to be made as therein mentioned, but if only if the conditions specified in subsection (6) are satisfied and subject to any further restrictions imposed by the rules.***

(6) The conditions referred to in subsection (5) are the following

(a) in the case of a claim involving 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 or any claim previously made in the original action*; and*

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

(7) The addition or substitution of a new party is not, for the purposes of subsection (6)(b), necessary for the determination of the original action unless

(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*.*

(8) Subject to subsection (5), 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.

(9) Subsection (8) does not affect any provision in rules of court for allowing a party to claim relief in a new capacity without adding or substituting a new cause of action.

(10) Subsections (3) to (9) apply 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.

[15] The Rules of Court referred to in section 57(1)(c)(i) would be as comprised in Part 19 of the CPR 2008. The relevant parts of Rule 19 are extracted in full as follows:

Change of parties – general

19.1 *This Part deals with the addition and substitution of parties after proceeding have been commenced.*

Change of parties – general

19.2 *(1) A claimant may add a new defendant to proceedings without permission at any time before the first case management conference.*

(2) Subject to rule 19.3 (6), the claimant may do so by filing at the Registry an amended claim form and statement of claim and Parts 5 (service of claim form within jurisdiction) and 7

(service of court process out of the jurisdiction), 9 (acknowledgment of service and notice of intention to defend), 10 (defence) and 12 (default judgments) shall apply to the amended claim form as they do to a claim form.

(3) The court may add a new party to proceedings without an application having been made to do so, where

(a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or

(b) there is an issue involving the new party which is connected to the matters in dispute in the proceedings and it is desirable to add the new party so that the court can resolve that issue.

(4) The court may order that any person shall cease to be a party where the court considers that the inclusion of that person is not conducive to the resolution of the issues in the proceedings.

(5) The court may order a new party to be substituted for an existing one where

(a) the existing party's interest or liability has passed to the new party; or

(b) the court can resolve the matters in dispute more effectively by substituting the new party for the existing party.

(6) An application to add or substitute a party is to be made as soon as practicable at a case management conference unless the court directs otherwise.

Procedure for adding and substituting parties

19.3 *(1) The court may add, substitute or remove a party on or without an application.*

(2) An application for permission to add, substitute or remove a party may be made by

(a) an existing party; or

(b) a person who wishes to become a party.

(3) An application for an order under rule 19.2(5) must be made with notice and must be supported by evidence on affidavit.

(4) No party may be added or substituted as a claimant unless

(a) the party has given his consent in writing; and

(b) that consent has been filed in the Registry.

(5) An order for the addition, substitution or removal of a party must be served on

(a) all parties to the proceedings;

(b) any party added or substituted; and

(c) any other person affected by the order.

(6) Where the court makes an order for the removal, addition or substitution of a party, the court may give consequential directions on

(a) filing and serving an amended claim form and statement of case on any new defendant;

(b) serving all pleadings and other relevant documents on the new party; and

(c) the management of the proceedings.

(7) Where

(a) the court makes an order for the addition or substitution of a new defendant; and

(b) the claim form is served on the new defendant,

these Rules apply to the new defendant as they apply to any other defendant.

Special provisions about adding and substituting parties after the end of a relevant limitation period

19.4 *(1) This rule applies to a change of parties after the end of a relevant limitation period.*

(2) The court may add or substitute a party only if the

(a) relevant limitation period was current when the proceedings were started; and

(b) addition or substitution is necessary.

(3) The addition or substitution of a party is necessary only if the court is satisfied that

(a) the new party is to be substituted for a party who was named in the claim form in mistake for the new party;

(b) the interest or liability of the former party has passed to the new party; or

(c) the claim cannot properly be carried on by or against an existing party unless the new party is added or substituted as claimant or defendant.

[16] Given the importance of the English position to the illustration of this issue, the following provisions of the Limitation Act, 1980 are matched with their Barbadian counterparts as follows:-

(i) UK's section 35(1) ≡ section 57(2)

(ii) UK's section 35(2) ≡ section 57(1)

(iii) UK's section 35(3) ≡ sections 57(3) & (4)

(iv) UK's section 35(4) ≡ section 57(5)

(v) UK's sections 35(5) & (6) ≡ sections 57(6) & (7)

(vi) UK's section 35(7) ≡ sections 57(8) & (9)

(vii) UK's section 35(8) ≡ section 57(10)

In relation to the rules enabled under section 57(4)/35(5), UK's CPR Rule 19.5 is in substance and for the purposes of this matter, equivalent to Barbados' Rule19.4, namely – addition or substitution of a party after the end of a relevant limitation period.

[17] Now that the statutory provisions have been set out, the case of ***Yorkshire Regional Health Authority v Fairclough Building Ltd. et anor*** is now examined in detail. The facts of this case are as follows:-

(i) The plaintiff, a regional health authority (Y) engaged a firm of architects (T) to design; and a building firm (F) to construct, additions to a National Health Service hospital run by Y. Works were completed

in 1987 and T issued a final certificate in September, 1990. Two years after final certificate but still within the limitation period, the plaintiff sued F for breach of contract, as well as T for breach of contract and negligence, in relation to defective rooves and floors in the hospital.

(ii) During all the above, the NHS was undergoing reorganization. Instead of the hospital (then rebuilt) being run by the NHS, a statutory trust had been created in November, 1990, for its ownership and management, and in January 1993, the plaintiff health authority's assets and liabilities were transferred to the trust by virtue of statutory instrument. That transfer included the action filed by the plaintiff against the designer (T) and contractor (F). The plaintiff (health authority) was thereafter abolished by statute, from April, 1994;

(iii) The trust, as successor to the now defunct plaintiff's assets and liabilities, made an application to be substituted as a party, under then RSC Ord 15 r 7, which provided for substitution of a party where the interest or liability in existing proceedings was assigned or transmitted to, or devolved unto some other person;[7]

(iv) The application was granted and the design firm (T) appealed, on the basis that Ord. 15 r 7 did not apply to a substitution after the expiry of

[7] The current UK CPR to Ord. 15 r 7 would be CPR 19.4(2)(a); Barbados' CPR Rule 19.2(5)(a)

a limitation period, given that section 35(3)[8] provided that no 'new claim' (defined in section 35(2)[9] as including the substitution of a new party) could be added after the expiration of the limitation period other than as therein provided in section 35.

[18] It was held that 'on its true construction', the definition of 'new claim' in section 35(2) did not include the substitution of a party who had succeeded to a claim or liability already represented in existing proceedings and which did not involve a new cause of action. Further, that the two limbs of section 35(2)[10] were assumed to be mutually exclusive having regard to section 35 as a whole. Therefore (the equivalent of 57(1)(a)(ii)A) applied to new causes of action but not the addition or substitution of a new party, whereas (the equivalent of 57(1)(a)(ii)B) applied to the addition or substitution of a new party which also involved a new cause of action. Queen's Counsel for SLC/Millenium relied on this aspect of the judgment given his contention that the proposed addition of SLC/Millenium did not give rise to a new cause of action. However, the Court draws attention to the final aspect of the decision which appears to have been disregarded, namely, that with respect to the plaintiff in ***Yorkshire's*** case itself, it was held that the type of substitution

[8] Barbados' section 57(3)&(4)
[9] Barbados' section 57(1)(a)(ii)(B)
[10] Barbados' section 57(1)(a)(ii)(A&B)

sought under the former Order 15 r 7 did not fall within either of those limbs and raised no question of limitation.

[19] As such, the substitution of the trust for the defunct plaintiff was not a new claim within section 35 of the 1980 Act, no question of the expiry of the limitation period arose, and T's appeal was dismissed. The Court's understanding of ***Yorkshire*** is further gleaned from the extract from the judgment of Millett LJ below, which was likewise extracted and relied upon by Queen's Counsel for SLC/Millenium. The Court's interpretation, is however, different. That extract with the Court's emphasis, is as follows:-

(i) Firstly, Order 15 r 7 provided that

> *(1) "Where a party to an action dies or becomes bankrupt but the cause of action survives, the action shall not abate by reason of the death or bankruptcy;*
> *(2) Where at any stage of the proceedings in any cause or matter the interest or liability of any party is assigned or transmitted to or devolves upon some other person, the Court may, if it thinks it necessary in order to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, order that other person to be made a party to the cause or matter and the proceedings to be carried on as if he had been substituted for the first mentioned party*"

(ii) Millett LJ immediately identified the situation in that case and the applicability of Ord 15 r 7, to those cases in which the interest of one party in existing proceedings devolves unto a third party whether by operation of law (such as in bankruptcy or death), or contractually, by means of assignment. Millett LJ said thus:-

> *"It will be observed that r 7(2) is specifically designed to cater for the situation which arose in the present case where in the course of subsisting proceedings the interest of the original plaintiffs, (YRHA), devolved upon another party, viz the trust. Universal succession is quite common, especially in other countries where it may be the consequence of a company reconstruction…But a similar situation arises whenever a plaintiff assigns the benefit of a contractual obligation after he has commenced proceedings; or a plaintiff or defendant dies or becomes bankrupt. In all these cases the substitution of a new party is necessary in order that a claim may be maintained in respect of an interest or liability already represented in existing proceedings. It is therefore not surprising that an order to enable substitution for this purpose to be effected has been in existence ever since the original rules were introduced under the Supreme Court of Judicature Act 1875 and can be traced back even before that to s 52 of the Chancery Procedure Act 1952…No system of law could view with equanimity the absence of some procedure to cater for the transmission or devolution of the*

cause of action or the liability in respect thereof during the course of subsisting proceedings and any contention that the court has been deprived of this necessary jurisdiction must be jealously scrutinized."

(iii) With respect to the jurisdiction of the court to cater for transmission or devolution of a cause of action or liability therefor, the context of ***Yorkshire*** has to remain in focus. That is, that the appeal against the trial judge's grant of an order of substitution in favour of the trust as against the defunct health authority after the expiry of the limitation period, asserted that the substitution of the trust as a new party was a 'new claim' within the definition of section 35, thereby not permissible except in accordance with the provisions for substitution after the expiry of a limitation period;

(iv) Millett LJ continued[11]:-

"Order 15 r 7 does not contain, and none of its predecessors ever has contained, any reference to limitation. This is as it should be, since the circumstances in which the rule may be invoked do not give rise to any question of limitation. Even though the rule permits a new party to be substituted for an original party, this does not involve a new cause of action; the new party is substituted because he has succeeded to a claim or liability already represented in the action and sues

[11] Yorkshire Regional Health Authority v Fairclough et anor @ 523

or is sued in respect of the existing cause of action. The substitution of the successor does not deprive the defendant of an accrued limitation defence. There is no good reason why the substitution should not be made at any stage of the proceedings and whether a relevant limitation period has expired or not; the expiry of the limitation period is completely irrelevant."

(v) Thereafter, Millett LJ states the basis of that appeal in the following terms[12], which in this Court's view, is the context within which the decision should be understood:-

"The appellants accept that the trust could have been substituted for YRHA at any time before the limitation period expired, but they contend that the jurisdiction to effect the substitution after the expiry of the limitation period has been removed by s 35 of the 1980 Act. If they are right, of course, the proceedings must abate, since there is no longer any party capable of maintaining them. The result is that the trust will have succeeded to a cause of action which is not statute-barred but which it cannot enforce because the adventitious reorganization of the National Health Service took place after the expiry of the relevant period of limitation but before judgment. If the argument succeeded it would make litigation even more of a lottery than it already is.

[12] Yorkshire, supra, @ 523

(vi) The question before that court, was whether the substitution of the trust on account of the devolution of the original plaintiff authority's interest by operation of law, was subject to section 35 of the Limitation Act, 1980. That application for substitution arose under Ord 15 r 7. Millett LJ then examined other provisions of the then rules (RSC) applicable to substitution[13]. His examination was couched in the relevant terms of 'misjoinder' and 'nonjoinder' of parties under Ord 15 r 6:-

> *"Rule 6(2) gives the court power at any stage of the proceedings in any cause or matter to order any party who has been improperly or unnecessarily made a party* [misjoinder] *or who has for any reason ceased to be a necessary or proper party to cease to be a party; and to order a party to be added as a party where it is necessary or just and convenient that he should be so added* [nonjoinder]. *The addition of a new party to existing proceedings is a convenient alternative to the bringing of a separate action and consolidating the two sets of proceedings*.

(vii) In the last three lines above (Court's emphasis), it is plainly deduced, that the addition of a new party is a new claim, as it is simply a solution to what would otherwise be a requirement to bring separate proceedings

[13] Yorkshire, supra, @ 523-524

and seek consolidation. Millett LJ continued as follows in relation to Ord 15 r 6:-

> *"Where the addition of a new party is combined with an order that an existing party to the proceedings cease to be a party, the new party is often described as being substituted for the existing party. This kind of substitution is, however, very different from that effected under Ord 15 r 7. It is available as an alternative to the bringing of a separate action when the new party has not succeeded to any claim or interest already represented in the existing proceedings. It necessarily involves a new cause of action.*

(viii) Once more, it is plainly stated by Millett LJ, that the addition of a new party (in effect, termed substitution where effected along with, and in order to replace an existing party who is removed), is an alternative to bringing a separate action. That kind of addition, generally termed substitution, is also a new cause of action.

(ix) With reference to the case at bar, the Court considers that the context and categorisation of the order to be added as a party which SLC/Millenium seeks, must now start to come into focus. At the moment however, the Court considers it necessary to continue its examination of Millett LJ's decision, particularly on the issue of the

application of s.35 of the Limitation Act to the issue of substitution which arose in relation to the trust therein.

(x) Millett LJ then adverted to the history of the Limitation Act 1980 and its relation to Order 15 r 6[14]:-

> *"Prior to the passing of the 1980 Act the rule contained no reference to any period of limitation. It was, however, the practice of the court to refuse leave to add or substitute a party after the expiry of a relevant period of limitation…Following the passing of the 1980 Act, paras 6(4) to (6)* [of Order 15 r 6] *were added in May, 1981. These give the court power to order the addition or substitution of a new party after the expiry of a relevant period of limitation in five specified situations. **These do not, of course, include those already covered by Ord 15 r 7**."*

Millett LJ also looked at Ord 20, dealing with amendments after a relevant limitation period, but that is not relevant to the case at bar.

(xi) The distinction between Ord 15 r 7 (substitution by means of devolution and succession of existing interest or liability) and Ord 15 r 6 (misjoinder/nonjoinder of party (ie. addition of a new party *simpliciter)*; and addition by means of substituting a new party in place existing party who is removed - must be clearly understood in order for Millet

[14] Yorkshire, supra @ 524

LJ's judgment to properly applied. Millett LJ deals with the specific contention of the appeal against the trust's devolution type substitution by defining the issue to be decided in the following way[15]:-

> *"The appellants' argument runs as follows. The substitution of the trust for YRHA is a 'new claim' as defined by s. 35(2) of the 1980 Act. It follows that it may not be made after the expiry of a relevant period of limitation unless expressly permitted by section 33 of the 1980 Act (which is not material) or by rules of court.[16] No such rule can be found. Neither Ord 15 r 6 nor Ord 20, r 5 permits the substitution of the trust for YRHA in the circumstances of the present case (the former because they are not within any of the five situations specifically provided for…) Nor is it permitted by Ord 15 r 7 because Order 15 r 6 and Ord 20 r 5 form an exhaustive code governing amendments after the expiry of the limitation period.*
>
> *Before us three questions have been argued: (1) is the substitution of the trust for YRHA a 'new claim' within the meaning of section 35 of the 1980 AC? (2) If so, is there power under Ord 15 r 7 to allow the substitution of the trust after the expiry of the limitation period? (3) If so, did the judge err in principle in exercising his discretion to order the substitution? I shall deal with each of these questions in turn."*

[15] Yorkshire Regional Health Authority v Fairclough Building Ltd., supra, @ 525
[16] In Barbados, we would substitute sections 52 and 53 of Cap. 231 in place of section 33 of the UK 1980 Act.

(xii) Again, it has to be reiterated that Millett LJ's inquiry was based on the specific circumstance of the *substitution of a party's interest in existing litigation by virtue of succession or devolution, whether by operation or law or contractually, pursuant to what was Ord 15 r 7*. In the case at bar, this is not the position of SLC/Millenium, whose application to be added as a party falls under what was Ord 15 r 6 and has been defined as a new claim by Millett LJ.[17] Queen's Counsel's reliance on ***Yorkshire*** extracted and sought to apply Millett LJ's dictum in respect of the answers to the 3 questions the latter posed, as arising out of the appellant's argument. These answers however, particularly to question 1, which Queen's Counsel cited at length, are not applicable to SLC/Millenium's position, given the nature of joinder they seek, namely, addition (simpliciter) as a new party to the claim.

(xiii) With the correct context in mind, the Court highlights Millett LJ's answer to question 1, which was '*is the substitution of the trust a 'new claim"*. It must however be clear, that this question was posed and answered with reference to the succession/devolution type substitution.

[17] Yorkshire, *supra* @ 523

In relation to whether the trust's application to be substituted for the defunct regional health authority was a new claim within the meaning of section 35(2), Millett LJ said:-

> *"As a matter of ordinary language, of course, the claim which the new party proposes to make (or defend) is not a new claim at all: it is an existing claim to which (or to the liability to which) it has succeeded. But the expression 'new claim' in s 35 is defined by s 35(2), and the question is whether the claim which the trust seeks to maintain is a 'new claim' within that definition."*
>
> *"The definition in s 35(2) is expressed to apply only to the expression 'new claim' in s 35 itself. Since the section is contained in a Limitation Act and is manifestly concerned with questions of limitation, and* ***since the maintenance of an existing claim does not give rise to any such problem****, I approach the definition with a strong predisposition to assume that it does not cover such a claim."*

(xiv) The 'such a claim' referred to by Millett LJ (the last words above), is an Ord 15 r 7 claim – i.e., the substitution of a party whose interest has devolved unto another – and not the addition of a party, already categorised by Millett LJ a convenient means to avoiding the requirement for filing a new claim (i.e. an Ord 15 r 6(2) claim).

Queen's Counsel for SLC/Millenium extracted the following passage[18], as the very basis of support for his contention that the addition of SLC/Millenium was not a new claim within section 57(2) of Cap. 231:-

> *"The appellants' argument is simplicity itself. The trust's claim, they submit, falls fairly and squarely within the second limb of s 35(2) as 'any claim involving…(b) the addition or substitution of a new party'. The trust is a new party. It is they submit, as simple as that.*
>
> *It is not however, as simple as that. Closer analysis shows that sub-s (2) cannot be construed literally. This is because the remainder of s 35 assumes that the two limbs of the subsection are mutually exclusive. A 'new claim' within the first limb is subject to the conditions imposed by sub-s (5)(a); a 'new claim' within the second limb is subject to the conditions imposed by sub-s (5)(b). But if sub-s(2) is literally construed, the two limbs are not mutually exclusive: a claim may involve the bringing of a new cause of action by the addition or substitution of a new party."*
>
> *"This difficulty cannot be resolved by the simple process of implying words into sub-s(2) so as to make the two limbs mutually exclusive, that is to say, by reading it as if it read:*
>
> '(2) In this section a new claim means (a) any claim involving a new cause of action [but not involving the addition or substitution of a new party] (b) any claim

[18] Yorkshire Regional Health Authority v Fairclough Building et anor, supra, @ 525-526

> involving the addition or substitution of a new party [but not involving a new cause of action].'
>
> *This would leave a claim which involved the bringing of a new cause of action by the addition or substitution of a new party unprovided for."*

In particular, Queen's Counsel emphasized the following, which continued directly after the above extraction. The emphasis commended to the Court by Queen's Counsel is highlighted.

> *"In my view the antithesis is between a claim which involves the addition or substitution of a new party and one which does not. The first limb must therefore be confined to claims which involve a new cause of action but which do not involve the addition or substitution of a new party. Claims which involve the addition or substitution of a new party as well as a new cause of action fall within the second limb."*
>
> *The question is whether the second limb also includes claims which involve the addition or substitution of a new party but which do not involve a new cause of action. In my opinion it does not.*

(xv) The Court finds the above words of Millett LJ to be just as important as does Queen's Counsel. However, the Court is entirely at variance with the interpretation attributed to those words. At that point in time, Millett LJ was speaking with reference to the question of the addition or substitution of a party in circumstances of devolution or succession of

a party's interest or liability in existing litigation, such as the substitution of the trust in place of the plaintiff authority therein – an Ord 15 r 7 claim. Where Millett LJ states that '*the antithesis is between a claim which involves the addition or substitution of a new party and one which does not*', one must be careful to differentiate between 'new cause of action' and 'new claim'. The former is one means by which the latter, 'a new claim' may be constituted and stands on its own.

(xvi) The 'new claim' may also be constituted by the addition or substitution of a new party, but only where it involved the addition or substitution of the Ord 15 r 6 type. The gravamen of Millett LJ's dictum is that the Ord 15 r 7 type of addition or substitution of a new party does not constitute a new claim. However, the Ord 15 r 6 type of addition or substitution does involve the making of a new claim. SLC/Millenium's application falls squarely within an Ord 15 r 6 type addition and Millett LJ's dictum supports that it is to be regarded as a new claim.

(xvii) Where Queen's Counsel for SLC/Millenium rested his extraction of Millett LJ's 'in my opinion it does not', the Court continues on and extracts the entire paragraph as well as the continuation in the following terms:-

> *"The question is whether the second limb also includes claims which involve the addition or substitution of a new party but which do not involve a new cause of action. In my opinion it does not.* ***As I have already pointed out, there are two entirely different kinds of substitution provided for by the rules, one where the party substituted has succeed to a claim or liability already represented in the action, and one where he has not. It would be outside the scope of the 1980 Act to alter the law relating to the former kind of substitution which involves no question of limitation****.*
>
> *That is sufficient reason for treating the definition of 'new claim' in s 35(2) as not including the kind of substitution which may be effected under Ord 15 r 7. But this construction is supported by other considerations…*
>
> *…These provisions make sense in relation to the addition or substitution of a new party which involves a new cause of action.* ***But they make no sense in relation to the substitution of a new party who has succeeded to a claim or liability already represented in the action****.*

(xviii) Millett LJ then delved into the legislative history of s 35 and the mischief it was intended to remedy, but the Court does not consider it necessary to extract this additional learning. The Court considers that by now the difference between the applicability of Ord 15 r 7 and Ord 15 r 6 relative to the nature of substitution in ***Yorkshire***, versus SLC/Millenium's application, ought to be well appreciated.

As such, even though the examination of the mischief of section 35 further reinforces the Court's reading of Millett LJ's judgment as establishing that SLC/Millenium's application for addition as a party to the matter is in fact a new claim, it is not necessary to extract that discussion save to illustrate the following, which is extracted from the concluding remarks at the end of Hallett LJ's judgment:-

> *"The appellants also submit that Ord 15 r 6(4) to (6) provides a complete and exhaustive code for the substitution of new parties after the expiry of the limitation period. So it does, but only in situations within Ord 15 r 6 in which the expiry of the limitation period is relevant, that is to say, when the joinder of a new party involves a new cause of action. It does not limit the operation of Ord 15 r 7 to the period before the expiry of the limitation period when that is irrelevant to the exercise of power conferred by the rule.*
>
> *In the end, the point is the same. Section 35 of the 1980 Act, Ord 15 r 6 and Ord 20 r 5, are all concerned with the addition and substitution of a new party which involves a new cause of action and which is capable of raising questions of limitation. Ord 15 r 7 is concerned with the substitution of a party who has succeeded to a claim or liability already represented in existing proceedings, which raises no question of limitation and is wholly outside the scope of s 35 and the code provided by Ord 15 r 6(4) to (6);*

(xix) At the risk of unnecessary repetition, these words have to be placed within the context that Millett LJ's inquiry concerned the question of whether the substitution of a party who had succeeded to an interest or liability in existing proceedings, constituted a new claim as defined in the UK's s 35(2), [Barbados' section 57(1)(a)(ii)(B)] and his answer was in the negative.[19] On the way to that answer Millett LJ clearly categorized the addition of a party, as a new claim; and the substitution of a new party in circumstances outside of succession or devolution of an interest in existing proceedings, as a new claim. SLC/Millenium's application to be added as a party to this matter, is of the Ord 15 r 6 type and as such is an application to add a new claim. The application is therefore governed by Rule 19.4 as enabled by section 57(1)(c)(i) and 57(3). Rule 19.4 is to be applied in conjunction with the cumulative effect of sections 57(5); 57(6) and 57(7).

SLC/Millenium's application to add a new claim after the expiry of the relevant limitation period

[20] Counsel for Abarco's submission was that CPR Rule 19.4 applied to SLC/Millenium's application for joinder and the Court has found this indeed

[19] See **Nemeti et al v Sabre Insurance Co. Ltd** [xxx] per Hallett LJ @ para 37 on the ratio of Millett LJ in *Yorkshire RHA v Fairclough Building*.

to be so. It is therefore now a question of whether SLC/Millenium's application can be granted having regard to the terms of CPR Rule 19.4. Counsel for Abarco had submitted that the application cannot satisfy Rule 19.4. The Rule is now extracted for consideration:-

> ***"Special provisions about adding and substituting parties after the end of a relevant limitation period***
>
> ***19.4*** *(1) This rule applies to a change of parties after the end of a relevant limitation period.*
>
> *(2) The court may add or substitute a party only if the*
>
> *(a) relevant limitation period was current when the proceedings were started; and*
>
> *(b) addition or substitution is necessary.*
>
> *(3) The addition or substitution of a party is necessary only if the court is satisfied that*
>
> *(a) the new party is to be substituted for a party who was named in the claim form in mistake for the new party;*
>
> *(b) the interest or liability of the former party has passed to the new party; or*
>
> *(c) the claim cannot properly be carried on by or against an existing party unless the new party is added or substituted as claimant or defendant.*

[21] Counsel submitted that the discretion exercisable by the Rule is preceded by two pre-conditions, namely – that the relevant limitation period was current when the proceedings started; and that the addition or substitution is

necessary. In relation to the relevant limitation period being current when the proceedings started, Counsel for Abarco submits that SLC/Millenium is unable to satisfy this aspect of the Rule as the relevant limitation period, being the cause of action of the original proceedings, expired quite some time prior to the making of the application for joinder. The relevant limitation period is correctly identified as that of the original action, however that requirement is indeed satisfied in the instant case. The Rule requires the relevant limitation period to have been current when the proceedings commenced, not when the application for addition or substitution is filed. The Rule in itself makes this clear inasmuch as it makes provision for an application for joinder after the expiry of the relevant limitation period. In this case, Rule 19.4(2)(a) is therefore satisfied[20].

[22] The second precondition identified by Counsel for Abarco is that provided by Rule 19.4(2)(c) which stipulates that the addition or substitution be necessary. Rule 19.4(3) thereafter defines the circumstances which qualify as 'necessary.' Rules 19.4(3) sets out that an addition or substitution is considered necessary (a) if to replace a party joined by mistake[21]; (b) where

[20] See Nemeti et al v Sabre Insurance Co. Ltd., [2013] EWCA Civ. 1555 per Hallett LJ @ paras 13-15 on UK's counterpart Rule 19.5(2)(a); see further Martin v Kaisary [2005] EWCA Civ 594 @ para 11.
[21] Substitution in the nature of 'misjoinder' (an Ord 15 R 6(2) substitution per Yorkshire Regional Health Authority, para 19 supra)

interest or liability of a former party passes to new party[22]; or (c) where the claim cannot be properly carried on without the addition or substitution of the new party. Only paragraph (c) would be applicable to SLC/Millenium's application for joinder. Counsel for Abarco submitted that the legal issue before the Court in this matter does not require SLC/Millenium to be joined as a party, and moreover that SLC/Millenium has no legal standing in the dispute before the Court which concerns the grant of approval or not, of the parties' agreement to compromise the matter. Further, objections being taken by SLC/Millenium regarding Abarco's standing as a party in the underlying agreement were never issues in the action which progressed as far as readiness for trial.

[23] Counsel for Abarco says that the matter has been settled between the parties and as such there is no issue before the Court which renders it necessary for SLC/Millenium to be joined as a party. In relation to this issue of the interpretation of Rule 19.4(3)(c) (the claim cannot properly be carried on without the substitution or addition of a party), the Court invited submissions from Counsel on the cases of **Merrett v Babb**[23] and **Martin v Kaisary**[24] for possible relevance to the case at bar.

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[22] Substitution in the nature of devolution of interest (Ord 15 r 7 which prior to the CPR would have been permissible in spite of the Limitation Act as held in Yorkshire Regional Health Authority.
[23] [2001] 1 WLR 22
[24] [2005] EWCA] Civ 594

The Court will examine these two decisions in considering whether SLC/Millenium's application for joinder should be allowed under Rule 19.4(3)(c). ***Merrett v Babb*** is a case which the Court considers very fact specific, but the decision can serve the purpose of illustrating the application of the UK equivalent rule and the provisions under their Limitation Act, on addition of a new party.

[24] This was a case for negligence against a defendant surveyor, in relation to a valuation produced for purposes of purchase of property. The claimant purchased the property along with her mother (as joint tenants), relying on the valuation issued by the defendant. The property manifested defects which ought to have been detected during the valuation and the claimant (alone), brought the action for negligence. The claimant was awarded damages for the defendant surveyor's negligence, amounting to the loss in difference of the value of the property between the purchase price paid and value after the defect. The defendant appealed on the basis that the claimant's joint ownership of the property with her mother had (prior to the claim) been severed in equity, thus he ought not to have been ordered to pay the full loss of value, but only one half thereof. At first instance, the judge in ***Merrett*** merely added the claimant's mother, in order to rectify what was assumed to be a mistake in failing to join her as a second claimant.

[25] This addition was effected pursuant to sections 35(3)-(6) of the UK Limitation Act, 1980 and their CPR Rule. 19.5(3),[25] as by the time of the trial of the matter, the relevant limitation period for the cause of action of negligence in producing the valuation, had already expired. On appeal, counsel for the defendant surveyor contended that the claims for negligence were individual claims, relative to the claimants' respective interests in the property. However, the Court of Appeal maintained that it was a single claim, which in order to be properly constituted, required the joinder of the claimant's mother. On that point the Court (herein) will leave the decision to its own facts, but what is gleaned from the decision with respect to joinder, is that for the addition or substitution of the new party to be considered 'necessary', the underlying dispute 'as is' must require the addition or substitution of the new party in order to proceed or continue. In other words, the underlying dispute must remain the same, when the necessary party is added or substituted.

[26] In ***Merrett***, the Court of Appeal reasoned[26] that the claim was always a joint claim for negligence for the entire loss in value of the property occasioned by the defendant's negligence, and in order to be effectively pursued, the claimant's mother, as joint purchaser of the property was a necessary party.

[25] These provisions on addition of a party and limitation, have already been shown to be substantively the same as Barbados' section 57 of Cap. 231 and Rule 19.4(3).
[26] ***Merrett***, supra, per May LJ @ paras 49-55.

In the case at bar, Queen's Counsel for SLC/Millenium has insisted that there is no new cause of action contemplated by the proposed joinder; and that the underlying subject matter remains the same. The Court however, maintains that the addition of SLC/Millenium, (simpliciter) results in a new claim and illustrates this point from the case of **Nemeti et al v Sabre Insurance Co. Ltd**.[27] In this case, the appellants, all nationals of Romania, sued the defendant insurance company in the UK, in respect of an accident which occurred in Romania. The tortfeasor, who perished in the accident, also Romanian, drove his father's car without permission and was uninsured. The insurance company was British, and relying on EU law, the appellants brought the action directly against the insurance company, in England.

[27] However, as the tortfeasor was not the insured person, the EU law giving the right of action directly against the insurance company was inapplicable. The appellants sought to remedy that mistake and applied to add or substitute the tortfeasor's estate (and thereafter seek to have the insurance company satisfy the judgment). The application for addition was made after the expiry of the three (3) year limitation period and was refused on the basis that (UK's) section 35(6)(b) and Rule 19.5(3)(b) were not satisfied.[28]

[27] [2013] EWCA 1555 per Hallett LJ @ para 4
[28] UK's counterpart to Barbados' Rule s.57(6)(b)&(7); Rule 19.4(3)(c)

On appeal, it was argued on behalf of the appellants that the trial judge failed to acknowledge that the underlying cause of action was that of the accident caused by the negligent driving of the deceased tortfeasor, and that the liability sought to be attached to the insurance company of which they had ample notice, remained the same. It was asserted by the appellants' counsel that the addition or substitution of the deceased's tortfeasor's estate was not a new cause of action, but was necessary for the maintenance of the existing action.

[28] The Court of Appeal disagreed. Hallett LJ firstly alluded to the purpose of the limitation regime in relation to personal injury claims being so that potential defendants and their insurers can be put on notice within a reasonable time, thereby allowing for effective investigation of such claims, and also to enable insurers to close their books within a reasonable time.[29] Hallett LJ went on to acknowledge, that in relation to that case, the appellants' application for addition of the deceased tortfeasor's estate would not offend against that objective, given that the respondent insurer's had ample notice of the claim and the addition of the estate would remain the ultimate beneficiary of the action. However, Hallett LJ had this to say[30] (emphasis mine):-

> *"…The claims have always been based on the alleged negligence of the driver of the vehicle insured by them and the Estate could*

[29] ***Nemeti et al*** per Hallett LJ @ para 40
[30] Ibid @ paras 40-44

have been joined to the action at any time within the limitation period. If this was simply a matter of "doing justice" and discretion, therefore, one might sympathise with Master Eastman's approach."

"However, at this stage of the process, this is not a matter of discretion. It is a matter of statutory construction. Absent s 35 and CPR 19 there is no power to substitute the deceased's Estate outside the limitation period. The Appellants must bring themselves within the section if their claim based on the driver's negligence is to proceed. In my view they cannot. There is a flaw in Mr Burton's analysis of the original cause of action. When he listed the essential ingredients of the original cause of action, he stopped at the negligence of the driver and the relief sought. He ignored the additional and vital element in the original claim for relief against the Respondents, namely the provisions of reg 3. The cause of action (the factual situation which entitles a person to obtain a remedy) against the Respondents may have been based on Mr Bura's negligence but it derived from statute. Had it not been for reg 3, there could be no claim against them…"

"The original claim was not, therefore, a claim for damages for personal injury against the Respondents, as Mr Burton insisted. It was not a claim in negligence. It was effectively a claim for an indemnity under statute (as the Claim Form made clear) limited to the Respondents' liability to their insured.

"By contrast, the new claim is a claim in negligence against the alleged tortfeasor. The claim for relief is a claim for damages for

> *personal injury allegedly caused by that negligence. Any judgment would be against the Estate. The fact that the Appellants, if successful, may be entitled to recover payment from the Respondents of "any sum" found due, under s 151 of the 1988 Act, is beside the point for these purposes."*
>
> *"**Thus, although the late Mr Bura's alleged negligence underlies both claims, the claims are not the same. It is not simply a matter of form. In substance these are two different causes of action**."*

[29] Returning to the issue now before the Court, the question for determination is whether Abarco's action against GHI, cannot properly be carried on without adding SLC/Millenium as a party (which in the circumstances has to be as a defendant). As pointed out by Queen's Counsel for SLC/Millenium in his submissions, the relevant language of Rule 19.4(3) and applicable parts of section 57 (Cap. 231), is the same as the UK's Rule 19.5(3) and applicable parts of section 35 (Limitation Act, 1980). The UK authorities cited are therefore directly relevant and applicable to the case at bar. In ***Nemeti***, counsel for the applicants therein sought to ground the addition of the party on the basis that the underlying event and remedy sought would remain the same. The Court of Appeal however dissected the circumstances of the matter to demonstrate that whilst the underlying event and ultimate remedy were the same, there would be a different cause of action arising from the proposed

addition of the party whose role in the matter was undeniable. The requirement however, is that the intended addition of the party must relate to the existing claim.

[30] In like manner, the Court examines SLC/Millenium's application to be added as a party, which application, is as the Court has determined, governed by Rule 19.4(3). Counsel for Abarco has plainly expressed that the existing matter before the Court, has nothing to do with SLC/Millenium. Albeit the submission was unsupported by authority demonstrating the true application of the Rule, the Court entirely agrees with Counsel for Abarco. The initial action before the Court was one of contract; the parties to the matter have compromised the action and seek the Court's approval of that compromise so that monies can be paid out of Court, in giving effect to the compromise. As a creditor of the Defendant GHI which remains subject to ongoing insolvency proceedings, SLC/Millenium may at the very least be considered an interested party in any asset owned by GHI. The Court is unable to see however, how it could be said, that the existing action before the Court, cannot properly be carried on if SLC/Millenium is not added as a defendant.

[31] Particularly, in this regard, the Court points out that SLC/Millenium's application to be added as a party also seeks an order for summary judgment dismissing the action; or a determination of issues pertaining to the authority

of a director of GHI to have given instructions to compromise the matter, and the legal standing of Abarco to have brought the suit against GHI in the first place. The question of the strength or relevance of the matters advanced by SLC/Millenium, is, based upon the dissection of the issues, beside the point, as there is no scope for SLC/Millenium to advance any such issues in this matter, without seeking to assert a position in law that amounts to anything other than a new cause of action against both parties. To obtain an order for summary judgment for the dismissal of the claim, SLC/Millenium must establish its own legal standing against Abarco and assert its argument that Abarco lacked the legal standing to have filed the claim against GHI – this is not the same cause of action. To claim against GHI, SLC Millenium would either have to seek to be added as a claimant or as an ancillary claimant. It is not considered in either case, that SLC/Millenium can possibly assert that the claim before the Court could not properly be carried on (in its original or existing state), without them being added as a party.

[32] Finally on this issue of whether the proposed addition of SLC/Millenium is necessary for the maintenance of the existing claim, the Court refers to **Martin v Kaisary.**[31] In this case, the UK Court of Appeal upheld a judge's refusal to add a hospital authority as a defendant to the claimant's action for

[31] [2005] EWCA Civ 594

personal injuries filed against the surgeon arising from a procedure carried out at the hospital's facility. The claimant was treated at the hospital but as a private patient of the surgeon. After being served with the defendant's defence which attributed liability to the nursing care the claimant received from the hospital's staff, the claimant made an application to join the hospital as a defendant. That application, made after the expiry of the limitation of the action, was refused on the basis that the existing action which alleged negligence against the doctor, did not require the hospital to be joined in order for the case against the doctor to be proved.

[33] Smith LJ carried out a similar exercise as the court ***Nemeti et al v Sabre Insurance Co. Ltd***, and forensically examined the claimant's case in terms of the allegations pleaded, and what was required to substantiate the allegations, relative to whether the party to be added was necessary in order to properly carry on the claim. Smith LJ acknowledged that the claimant's claim might have been stronger were the hospital added as a defendant; however, it was not necessary for the hospital to be added as a party in order to prove the case which had been pleaded by the claimant. In the circumstances, with reference to the case at bar, the Court concludes that it matters not whether there are

viable legal issues to be ventilated by or in relation to SLC/Millenium[32], the question is whether the proposed addition satisfies the stipulated requirements of Rule 19.4, which are derived from the Limitation Act. The Court considers it plain, that given that SLC/Millenium, is a stranger to the underlying contract to begin with, it cannot be established that the case at bar cannot properly be carried on without adding them as a party. SLC/Millenium's application to be added as a party to the action must therefore be refused.

Alternative Means of Intervention by SLC/Millenium

[34] In addition to seeking to be added as a party pursuant to Rule 19.3, SLC/Millenium's application also prayed to be granted leave to intervene under the inherent jurisdiction of the Court. It is the Court's view, that where as in this case, an applicant has failed to meet a standard imposed by a rule, there is no residual power under the inherent jurisdiction of the court to afford the applicant the specific relief sought. In this regard, the Court relies on Privy Council authority **Attorney-General for Trinidad & Tobago v Universal Projects Ltd**. in which Lord Dyson stated, in response to a plea for the court

[32] Subsequent to the hearing, the Court directed Counsel to file further submissions for the purpose of informing its consideration of the application of Rule 19.4 and section 57 of the Limitation Act. Albeit not reproduced in this Ruling, those submissions will remain relevant in determining the primary parties' application for approval of their compromise.

resort to its inherent jurisdiction to set aside a default judgment against the defendant therein[33]:-

> *"The territory* [setting aside a default judgment] *is occupied by the rules. The court's inherent jurisdiction cannot be invoked to circumvent the express provisions of the rules."*
>
> *"The modern tendency is to treat the inherent jurisdiction as inapplicable where it is inconsistent with the CPR, on the basis that it would be wrong to exercise the inherent jurisdiction to adopt a different approach and arrive at a different outcome from that which would result from an application of the rules."*

Based on the above, the Court is not of the view that any further consideration need be given to the alternative ground that SLC/Millenium be granted leave to intervene (to be added as a party), pursuant to the inherent jurisdiction of the Court.

[35] In its directions for further submissions however, the Court did request that Counsel consider whether if not joined as a party to the action, there was any other mechanism by which the Applicant could be heard in answer to the parties' application for the approval of their agreement made in settlement of the case. Counsel for Abarco was not of the view that it was the Court's function to seek mechanisms to assist or as he put it to pander, to SLC/Millenium's quest to be heard in the matter, much less the function of

[33] [2011] UKPC 37 per Lord Dyson @ paras 26-29

the other parties. It was a matter for SLC/Millenium to satisfy the Court that its jurisdiction to add them as a party should be exercised and having failed to do so, there was nothing further that they could properly be tasked to assist with. Queen's Counsel for SLC/Millenium, responded to this question by the Court by seeking resort to the Court's inherent jurisdiction. Based on the above authority of ***AG for Trinidad & Tobago v Universal Projects Ltd***., there is no resort to be had to the inherent jurisdiction of the court to permit SLC/Millenium to be added to the claim as a substantive party.

[36] The Court does however acknowledge its inherent jurisdiction to prevent its process from abuse, in the manner expressed by Lord Diplock in **Hunter v Chief Constable of West Midlands.**[34] The inherent jurisdiction therein described, refers to those inherent powers possessed by a court in order to safeguard its character as such. This case concerned a civil appeal from an application to strike out a claim for abuse of process. Lord Diplock opened his consideration of the appeal as follows[35] (emphasis mine):-

> *'My Lords, this is a case about abuse of process in the High Court. <u>It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules,</u> would nevertheless be manifestly unfair to a*

[34] **[1981] 3 All ER 727**
[35] Ibid @ 729

> *party to litigation before it, or would otherwise bring the administration of justice into disrepute among right thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power.'*

[37] In order to be clear, the Court is not contemplating making an order to add SLC/Millenium as a party to the matter, under its inherent jurisdiction. That order is not permissible within the terms of the Rules of Court. However, SLC/Millenium (as well as the second applicant Clico Holdings (Barbados) Ltd), allege matters which on their face, raise questions of the possible misuse of the Court's process by both substantive parties, in respect of the case before the Court, both as originally filed and now sought to be compromised. It is recalled, that SLC/Millenium has grounded its application for permission to be added as a party with allegations that:-

(i) Abarco was not a party to the agreement for sale which gave rise to the payment of the deposit in dispute. Instead, Abarco was merely a nominee appointed by the contracted purchaser, to hold the legal title under the conveyance, given the foreign status of the purchaser;

(ii) There was never any assignment of the purchaser's interest to Abarco and their status as nominee to hold the conveyance did not afford them the legal standing to commence an action to enforce the agreement;

(iii) The purchaser, a foreign company, failed to register as an external company, as required under the Companies Act and as such was precluded by law from entering into the agreement to purchase property, much less effect a lawful assignment of the agreement;

(iv) By the time the compromise was allegedly made, the contracted purchaser had been dissolved in 2010, and incapable of effecting the registration required by law;

(v) SLC/Millenium also points out that GHI remains subject to ongoing insolvency proceedings in the form of Action No. 4 of 2003, in which consideration remains before the court in respect of a proposal to govern the regulation and payment of the GHI's debts.

[38] These allegations made by SLC/Millenium were supported by documentation[36] and the Court notes that Abarco has never denied the existence of the factual circumstances regarding their nominee status under the agreement. Abarco instead refuted the effect in law and pointed out that the Defendant, GHI, declined at any point in its response to the claim, to take

[36] Bundle of exhibits to affidavit filed by Andrea Simon in August, 2015, containing 67 exhibits.

issue with any such circumstance. In addition to SLC/Millenium's allegations, Clico Holdings (Barbados) Ltd., submitted in their application, that the Defendant, GHI, could not legitimately have compromised the action in June, 2015, as there had already been filed, a challenge to the validity of the appointment of GHI's directors. As a consequence, CHBL alleges a serious issue in relation to the validity of GHI's ability to have compromised the claim and by virtue of Claim No. 1328/2014, the existence of a prior dispute on the issue.

[39] In light of the existence of these allegations made by SLC/Millenium and CHBL, the Court considers that both of those entities, ought to be permitted to place their material before the Court, in order for the Court to ascertain whether its process is being subject to abuse. The nature of the abuse foreshadowed is the possibility of parties having no legal standing or lawful authority, being able to advance and compromise a cause of action to their benefit, and to the detriment of others. In this regard, the Court considers the words of Lord Diplock in ***Hunter v Chief Constable of West Midlands et anor***, extracted above, to be apposite, namely - where faced with possible abuse of its process, the Court has a duty (as opposed to a discretion), to prevent such abuse.

[40] The Court is of the view that between the allegations made by SLC/Millenium and CHBL, there are matters raised which ought to form part of the Court's consideration of the substantive parties' application for approval of their compromise of the matter, so as to prevent any possible abuse of its process. For this specific purpose therefore, the Court would, in the exercise of its inherent jurisdiction to prevent its process from abuse, permit both SLC/Millenium and CHBL to be heard as interested parties, by making submissions and placing evidence before the Court, in response to the application of the substantive parties for approval of the agreement executed in settlement of the action before the Court. The interested parties are not being permitted to seek relief, they are being afforded an opportunity to be heard.

Application to Consolidate Claim 1328/2014 - CLICO Holdings (Barbados) Ltd.

[41] This Application filed by CHBL, seeks consolidation of Claim No. 1328/2014, itself filed by CHBL against Thomas Winston Grant, Delicia Grant and TG Holdings Ltd., with the instant matter no. 148/2005. CHBL's claim alleges that the first and second defendants therein ('the Grants'), as directors of the third defendant, TG Holdings, caused the latter to appoint them as directors of GHI, when there was no lawful authority to do so. On that basis, CHBL contends that GHI had no proper authority to instruct or enter

into the compromise for which the Court's approval has been sought in the instant matter. Counsel for CHBL contends that Claim No. 1328/2014, which concerns the dispute over the validity of the appointment of directors of GHI, must be determined before the Court in the instant case approves any settlement purportedly entered into by GHI. On the basis of this position, CHBL has applied for an order of consolidation of Claim 1328/2014 with Action 148/2005; or alternatively, for the latter to be stayed, pending determination of the former.

[42] Both Counsel for Abarco, and Counsel for GHI, resist CHBL's application, albeit submissions were filed only by Counsel for Abarco. Counsel for CHBL asserts that notwithstanding the failure of CPR Rule 26.2(a) to set out any guidelines or factors to guide the court in exercising its power to consolidate matters, the case of **Woodbank Investments Ltd and McHale v Sand Acre Ltd. et al**[37] provides good authority to the effect that the factors set out in the previous RSC (Ord 4 r 2) remained applicable. These factors, as set out by Worrell J, in ***Woodbank Investments***, were that (i) the same common questions of law or fact arose in the proceedings; (ii) the right to relief in the

[37] No. 14 of 2008 Woodbank Investments Ltd and McHale v Sand Acre Ltd. et al; No. 1802/2011 Woodbank Investments Ltd and McHale v Sand Acre Ltd. et al

matters arose out of the same transaction or serios of transactions; or (iii) an order for consolidation is desirable for some other reason.

[43] Counsel commends to the Court, the judgment of Worrell J, to the effect that the discretion available to the court in determining an order for consolidation is a wide one, with its objective being to avoid a multiplicity of proceedings thereby reduce costs and delays. This approach also accords, it is submitted, as held by Worrell J, with the overriding objective of the CPR. Counsel for CHBL submits in relation to the case at bar, that the consolidation of claim 1328/2014 with action 148/2005 is a necessary step given that the legal issue raised by the former, affects the ability of GHI to have lawfully entered into the agreement compromising the matter. Counsel for Abarco on the other hand submits that the application for consolidation is late in the day, and having been set down for trial on several occasions, the proceedings in the instant action are so advanced that an order for consolidation would delay and cause substantial prejudice to the parties therein. Further, that within the test for making an order for consolidation, the aim of 'conveniently' disposing of matters, means that the consolidation should be appropriate as opposed to expedient.

[44] Moreover, Counsel for Abarco contends that any issues pertaining to the directorship of GHI are internal to that company and can have no impact on the proceedings before this Court. The Court considers that the Application for Consolidation is not appropriate to the circumstances at bar. Consolidation should be ordered where there is an overlap of issues, parties or witnesses; and there is a risk of inconsistent judgments arising from different decisions on the separate matters involving the same facts. Additionally, that time and expense would be saved by effecting the consolidation. None of those factors are present between Claim 1328/2014 and action 148/2005. To the contrary, whilst the subject matter can be viewed as somewhat related through GHI's involvement, the parties are different, the issues are unrelated, witnesses may overlap as pertains to any evidence given about or by GHI, however the relevant evidence in the two matters would be unrelated. Further, as pointed out by Counsel for Abarco, the two matters are in completely different stages of progress.

[45] In this regard, 148/2005 was ready for trial on several occasions, whilst 1328/2014 has not advanced even to case management. The Court observes, that absent any excuse of a lack of hearing dates provided by the Court Office, the application for consolidation provided no information regarding the current status of the claim (which had been filed since 2014); nor was there

provided any explanation for the apparent inertia on the part of its claimant, to advance the matter. In these circumstances, the Court considers that a case for consolidation has not been made out, but this notwithstanding, there is still the question of whether the hearing of claim 148/2005 should be stayed pending the determination of claim no. 1328/2014. On this question of a stay of claim 148/2005, the situation is that the capacity of the Defendant GHI to have compromised the action is being impugned, on the basis of a challenge to the validity of the appointment of GHI's directors.

[46] Given that the filing of the proceedings challenging the appointment of GHI's directors predated the action taken by GHI in compromising the claim, this fact is certainly a relevant circumstance for the Court to consider. Whether this fact presents sufficient basis for the Court to stay the instant 148/2005 however, demands consideration of wider circumstances. Such wider circumstances would be, (i) the relative stages of each matter; (ii) the point in time at which the application for the stay was made; (iii) the degree of relevance of the matters in issue in the respective proceedings; and (iv) the prejudice to be occasioned by the respective parties in the event of the grant or refusal of the stay. In relation to the stages of each matter, action 148/2005 is patently the more advanced matter, having been set down for trial on at least two occasions.

The Applicant CHBL's matter has not even advanced to case management and there has not been any good reason provided to the Court for the failure to advance this proceeding.

[47] On the other hand, action 148/2005 sat untouched after trial dates fixed in 2007, until the parties' application for approval of their compromise filed in June, 2015, which in any event triggered the two applications (of SLC/Millenium and CHBL), now before the Court. The question of relevance of the issues at stake is one which is bound to the question of prejudice. Compared to CHBL, clearly there is greater prejudice to be had to the GHI given the stage of action 148/2005 and any further delay that would be occasioned by a stay of these proceedings. Further, the Applicant CHBL, has not demonstrated that the proceedings 1328/2014 are ready to be advanced with any dispatch and the Court does not consider a stay of action 148/2005 to be appropriate in these circumstances. CHBL's Application for consolidation as well as its alternative request for a stay of this matter are therefore refused.

Conclusion

[48] The Court has concluded its determination of both SLC's Application for leave to intervence by being added as a party, and CHBL's Application for consolidation of this matter with its Claim 1328/2014, or alternatively a stay

of this matter, to await determination of 1328/2014. The Court's ruling is that both of these applications are refused. The Court however, also considers that there is a wider context within which the issues raised by both Applications subsists particularly with respect to the following circumstances raised:-

(i) The underlying agreement which gave rise to the subject matter of the action namely the agreement for sale of property, was made within the specific context that GHI was before the court in connection with insolvency proceedings extant at the time;

(ii) Performance of the underlying agreement was subject to specific pre-conditions borne out of the existence of the insolvency proceedings – namely, the requirement for either the consent of the court, or the Supervisor of Insolvency;

(iii) The extent to which the above factors at (i) and (ii) impact upon GHI's capacity to have compromised the matter, is a question which must engage the Court's attention, given that the insolvency proceedings which were in existence at the time of the agreement, remained in existence at the time of the compromise and remain in existence to date;

(iv) The Court is now being asked to exercise its judicial power (to approve the settlement and cause the payment out of monies paid into court),

and the exercise of such power must be made with due regard and diligence to existing circumstances;

(v) Matters alleged by the Applicants SLC/Millenium and CHBL, raise on paper, issues which could amount to the Court's process being abused, as they speak to Abarco's and GHI's legal standing and capacity in relation to the underlying agreement and compromise;

(vi) In relation to the allegations made by both Applicants, without reference to any question of the strength of such allegations, the Court is able to say that the allegations made have been put forward not as bald assertions, but with documentary support;

(vii) Additionally, it is a fact that the proceedings numbered 4/2003 and 1348/2014 remain in existence, and any question as to the relevance of those proceedings to the disposal of action148/2005 is in light of the factors listed herein, a question in respect of which the Applicants ought to be heard.

Disposal

[49] The determination of the Applications filed by SLC/Millenium and Clico Holdings (Barbados) Ltd. are disposed of as follows:-

(i) SLC/Millenium's application to be joined as a party to suit 148/2005 is refused;

(ii) Clico Holdings (Barbados) Ltd's application for consolidation of suit 148/2005 with claim 1348/2014 or for a stay of suit 148/2005, is refused;

(iii) The Court affords both SLC/Millenium and Clico Holdings (Barbados) Ltd. the opportunity to make submissions as interested parties, in the hearing of the application filed by the Claimant and Defendant (Abarco and Grand Hotels Inc.) on the 29th June, 2015;

(iv) The issue of costs upon the determination of the instant applications is reserved pending determination of the remaining application of 29th June, 2015.

SHONA O. GRIFFITH
Judge of the High Court