IN THE SUPREME COURT OF BELIZE, A.D. 2001

CLAIM NO. 185

PROPHECY GROUP, L.C. Claimant

BETWEEN AND

SEABREEZE COMPANY LIMITED Defendant

—

BEFORE the Honourable Abdulai Conteh, Chief Justice.

Mr. Fred Lumor S.C. for the applicant/defendant.
Mr. Vernon H. Courtenay S.C. for the respondent/claimant.

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DECISION

I must confess at the outset that the applications in this matter present some difficulties of procedure and substance.

2. A brief background to the present state of play between the parties, that is, Prophecy Group L.C. (the claimant/respondent) and Seabreeze Company Limited (the defendant/applicant), would, I think, be helpful for a resolution or disposal of the applications now before me. I shall from now on refer to them as Prophecy Group and Seabreeze respectively.

3. But first a word on the applications themselves. On Wednesday, 29th March 2006, Mr. Lumor S.C. for the defendant, tried in Chambers to impeach the decision of the Registrar given on 3rd March 2006 in which she refused the defendant leave to further amend its Defence filed in Claim or "Action" No. 185 of 2001 dated 25th March 2002; and her refusal for Seferino Paz Jr. to be added as a new party or defendant to Claim No. 185 of 2001. It became quite clear early in the proceedings in Chambers that the procedure to impeach the Registrar's decision by way of leave to appeal (presumably to the Court of Appeal) was not quite in place or proper. This is for the simple reason that though Rule 2.5 of the new Civil Procedure Rules invests the Registrar generally, except where any enactment, rule or practice direction provides otherwise, with the power of the Supreme Court but expressly states that the functions of the Court may be exercised in accordance with the Rules by, among others, "the Registrar sitting as a Registrar … of the Court." Moreover, by section 5 of the Supreme Court of Judicature Act, the Registrar is given power and jurisdiction of a judge sitting in Chambers; and subsection (2) provides that any person affected by an Order or decision of the Registrar with respect to the exercise of any such power or jurisdiction may appeal to the Court. That is, to the Supreme Court itself, which shall have power to hear and determine such appeal.

4. Faced with this procedural and substantive provisions regarding Mr. Lumor's client's dissatisfaction with the Registrar's decision, Mr. Lumor very sensibly applied before me to discontinue the application for leave to appeal that decision. That was granted.

But this was not the end of the matter. Mr. Lumor then turned to address me on Claim No. 1 of 2006. This time it was to change the format of his application to appeal the very same decision of the Registrar of 3rd March 2006. The application was dated 21st March 2006 and it was brought as headed pursuant to **Civil Procedure Rule 60.2(1)**. I pointed out to Mr. Lumor that **Part 60** of the Civil **Procedure Rules** deals with appeals from *"Tribunals or persons under any enactment other than an appeal by way of case stated."* In particular, the definition of "tribunal" to mean *"any tribunal other than a court of law established under an enactment"*, in my view, made the format of Mr. Lumor's applications against the Registrar's decision inappropriate. He demurred, perhaps rightly so, about the absence of provisions for pursing appeals against the Registrar's decisions or orders.

5. Therefore, in an endeavour to apply and advance the overriding objective of the Civil Procedure Rules as provided for in **Part 1.1**, in particular, to **enable the Court to deal with cases justly**, which

in this context includes, … (b) saving expense … d) ensuring that the case is dealt with expeditiously; and (e) allotting to the case an appropriate share of the Court's resources while taking into account the need to allot resources to other cases, Mr. Lumor's application was entertained, and with Mr. Vernon Courtenay S.C. for the claimant/respondent, Prophecy Group, not objecting, I decided to hear Mr. Lumor on his applications on behalf of Seabreeze to further amend its Defence which, as I have already said, was filed since 25 March 2002; and on the application of Mr. Seferino Paz Jr. to be added as a defendant to the claim by Prophecy Group on the foreign judgment in its favour.

6. This time around, Mr. Lumor has utilized the provisions of **Part 11** of the **Civil Procedure Rules** which relate to the general rules about applications for court orders. This part, it must be said, is generous, flexible and in skillful hands, can be versatile and useful to meet the exigencies that do frequently arise in the course of litigation. As provided in **Part 11.1** it deals with applications for court orders made before, during or after the course of proceedings, The ambit of Part 11 is indeed wide and varied, capable of meeting the needs of litigants or even prospective litigants, in cases where a court order is necessary.

7. **Form 6** of the Civil Procedure Rules is stated generally to be the format of such applications.

8. I now turn to the background of the state of play as it were, between the parties in these applications before me. These applications are in respect of Action or Claim (as they are now called) No. 185 of 2001. The principal, indeed only claim, is by Prophecy Group in a **specially endorsed writ** on 19 April 2001 against the defendant, Seabreeze, claiming the sum of US $2,417,273.62 on a judgment in its favour given by the Circuit Court of Okaloosa County, Florida, U.S.A. dated 4th January 2001.

9. Seabreeze filed a Defence on 14th May 2001. An attempt by Prophecy Group to have the Defence struck out came to grief on 4th March 2002 when the Court refused it but allowed Seabreeze to file an amended Defence. This was duly done on 25th March 2002.

10. There was some lull in the battle between the parties. But on 3rd June 2003, Seabreeze then took the fight into Prophecy Group's camp by applying to the Court for an order that all further proceedings on Prophecy Group's action be stayed.

11. In all, seven arrows were in Seabreeze's bow aimed at Prophecy Group's claim. After full argument by Mr. Lumor S.C. who represented Seabreeze at what may be called "application to stay

action" stage and Mr. Vernon Courtenay S.C. for Prophecy Group, and after much deliberation by me (as I had the burden of presiding over the trial of Prophecy Group's claim or action on the judgment of the Okaloosa County Court in Florida, to which Seabreeze objected and sought a stay of all proceedings), I concluded that I was unable to accede to the objections of Seabreeze and to order a stay of further proceedings on the claim.

12. With the benefit of hindsight, I am sure, Seabreeze could have kept its powder dry or held back its arrows in check, instead of letting them off by way of objections seeking a stay of further proceedings. Instead, those points raised in the application to stay stage, could well, both in the interest of savings and time, have been taken as part of a substantive Defence to Prophecy's claim on the foreign judgment. In truth, however, those objections were presaged in the amended Defence of Seabreeze filed on 25th March 2002.

13. Litigation strategy, of course, varies infinitely. But it is always, I think, salutary to bear in mind costs, and the needs for a speedy resolution of a case, whether as a claimant or defendant. There is now in so far as the courts themselves are concerned, the overriding objective of the Civil Procedure Rules stipulated for in Part 1.1 of the Rules.

14. In the meantime, the decisive battle between Prophecy Group and Seabreeze regarding the enforcement of the foreign judgment by way of an action on it is yet to be waged or fought. This is so for the simple reason that Prophecy Group's claim has yet to be pressed home.

15. However, Seabreeze in Appeal No. 15 of 2004, took the Supreme Court's ruling of 5 March 2004 dismissing its application to stay further proceedings on Prophecy Group's claim, to the Court of Appeal. Evidently, Seabreeze did not fare well in that forum as it was allowed to discontinue its appeal on terms by paying costs to Prophecy Group.

16. Still, all was seemingly quiet on the frontline between the parties regarding Prophecy Group's claim against Seabreeze on the foreign judgment.

17. Then applications were made by Seabreeze late in 2005 for two orders: i) to change its Statement of Case by further amending its amended Defence and ii) to have Mr. Seferino Paz Jr. join the proceedings as a defendant. These applications were heard by the Registrar and were refused. I have already referred to this at paragraphs 3 and 4 above.

18. This was the state of affairs when Mr. Lumor, in effect, repeated the same applications before me on 29th and 30th March 2006. But this time around using provisions of **Part 11** for applications for Court Orders and conjoining the applications with the relevant provisions of the Civil Procedure Rules. That is to say, the rules for changes to Statement of Case (Part 20) and for the addition and substitution of parties (Part 19) of the Civil Procedure Rules.

19. I now turn to a consideration of Mr. Lumor's applications in the light of the provisions of the Civil Procedure Rules themselves and in the context of this case. I have attempted to state succinctly, I hope, the latter in paragraphs 8, 9, 10, 11, 14 and 15 **supra**.

The application by Seabreeze to change its Statement of Case (Defence)

20. This is the first of two applications Mr. Lumor had unsuccessfully argued before the Registrar (see paragraphs 3, 4, 17 and 18 **supra**). He has, again, re-agitated it before me as I have stated in paragraph 18 **supra**.

21. The application is supported by an affidavit of Mr. Seferino Paz Jr. sworn to on 23rd January 2006. He described himself as a shareholder and director of Seabreeze (the defendant and applicant) with whose authority he says he makes the affidavit.

There is annexed to this affidavit as **"SP 6"** and entitled: **"Second Amended Defence"**. This is what is now sought, to have Seabreeze put forward as its Statement of Case (Defence) to meet Prophecy Group's action on the foreign judgment against it. It must be noted that it is substantially the same application which did not find favour with the Registrar (as I have mentioned in paragraph 3 above).

22. Part 20 of the Civil Procedure Rules headed **"Changes to Statements of Case"** contains provisions as to how and when a party to litigation may change a statement of his case (which includes a Statement of Claim, Defence, Counterclaim, ancillary claim form or defence and reply). By the new Civil Procedure Rules, Statements of case now replace pleadings and a whole new process of pleading is now introduced by the Statement of case itself. By O.20.1(1) a party may change its statement of case at anytime before case management conference generally without the Court's permission. By sub-rule (2) an application for permission to change a statement of case may be made at the case management conference.

Sub-rule (3) however provides in terms that:

"(3) The court may not give permission to change a statement of case after the first case management conference unless the party wishing to make the change can satisfy the court that the change is necessary because of some change in the circumstances which became known after the date of that case management conference."

23. The Court in considering to allow an application by a party to change its Statement of Case is, of course, exercising a discretion. It must therefore, in line with Part 1.2 of the Civil Procedure Rules, in such an exercise seek to give effect to the overriding objective of the Rules, that is, to deal with cases justly. Rule 1.2 in paragraphs (a) to (e) sets out what dealing with cases justly includes. Paragraph (d) says **this is to ensure that a case is dealt with expeditiously**.

24. Delay in making application to change a Statement of Case is certainly at odds with the objective to deal with the case justly by ensuring that it is dealt with expeditiously. The longer it takes since the inception of the case and the application to change a party's Statement of case, the more ordinarily the Court should be disinclined to grant the application. I say "ordinarily" because each

case and application may be different and governed by their own facts and circumstances.

25. Here the facts or timeline for this application to change the applicant/defendant's Statement of case since the inception of the action are as follows: i) Judgment was obtained against Seabreeze on January 4th 2001 in Florida, U.S.A.; ii) 19th April 2001 Prophecy Group took out a specially endorsed writ in Belize seeking to have the amount awarded in the judgment in Florida enforced; iii) 15 May 2001, Seabreeze filed a Defence; iv) On 12th November 2001, Prophecy Group took out summons to have the Defence struck out; v) On 4 March 2002 the application to strike out that Defence was refused and Seabreeze was allowed or ordered to serve an amended Defence; vi) On 24 March 2002, Seabreeze's amended Defence was filed; vii) On 3rd June 2003, Seabreeze took out a summons to stay all proceedings on Prophecy Group's action; viii) On 5th March 2004, Seabreeze's application for stay was refused by the Court; ix) On 21 July 2004, Seabreeze in Civil Appeal No. 15 of 2004, appealed to the Court of Appeal the decision dismissing its application for stay of proceedings; x) On 8th October 2004, Seabreeze was allowed on terms, to discontinue its appeal; xi) On 7th February 2006, Seabreeze made two applications (the same two applications that are the subject of this decision) before the Registrar including one to change its

Statement of case and the other to have Mr. Paz joined as a defendant. This was refused in a written decision by the Registrar on 3rd March 2006.

26. By the applications now moved before me Mr. Lumor S.C. on behalf of Seabreeze is having a second bite at the same cherry, as it were.

27. I have set out at length the timeline surrounding the substantive issue between the parties. It is readily apparent that there has been manifest delay on Seabreeze's part to make the application, now over four years, since Prophecy Group took action and Seabreeze filed its Defence and was later ordered to file an amended Defence to seek to further amend its Defence. Unarguably, a lot of water has flown under the bridge!

28. I am mindful that a paramount consideration in addressing applications by parties to change their statements of case is whether the proposed amendment is needed in order to determine the real issues in dispute between the parties in light of all the relevant circumstances. It is, however, an equally important consideration to ensure in the amendment process that the changes in the Statements of case will assist the efficient, economic and expeditious disposal of the case. The statements or any proposed change thereto should as well provide the Court with

an intelligible account of the issues to be tried – **Clerk v Marlborough Fine Art (London) 49 (Amendment) (2001) 1 W.L.R. 1731 (Ch.)**.

29. I have considered the proposed amendments that are sought to be put forward as the new Statement of case for Seabreeze. These are contained in **Exhibit SP 6** to Mr. Paz's affidavit and headed "Second Amended Defence". When put alongside the already Amended Defence filed on 25 March 2002, it is not in my view, substantially different from the latter. The latter however has eight pleaded paragraphs including particulars of fraud; particulars of why Seabreeze says the foreign judgment is not final and conclusive, and particulars of how the foreign judgment is illegal and contrary to public policy. The proposed "Second Amended Defence" however contains thirteen pleaded paragraphs. But it contains more elaboration in the particulars. It however abandons the defence that the foreign judgment was or is contrary to public policy. It avers instead, that the foreign judgment was obtained in a manner or proceedings which offend against the notion of substantial justice or natural justice and or it amounted to manifest error arrived at without full application of a judicial mind.

30. It is to be noted that the plea that the foreign judgment was contrary to public policy and illegal, cut very little ice, if any, with the Court

when it dismissed Seabreeze's application to stay further proceedings on 5th March 2004. Could this be a factor in this plea being jettisoned now?

31. It must be remembered that the present proceedings relate to an action on a foreign judgment obtained by Prophecy Group against Seabreeze in 2001. I am therefore of the considered view that to allow the proposed change of Seabreeze's case so late in the day would not advance but rather defeat the overriding objective of the Civil Procedure Rules and undermine the just resolution of the dispute rather than advance it, because it may delay the final resolution, cause confusion and waste litigant and court resources in terms of time allocated to this case.

32. This conclusion is fortified by a consideration of the fact that Seabreeze had already had a dress rehearsal, as it were, of its case by running its proposed Second Amended Defence in the form of its objections, if not all, but a substantial part of them in its earlier unsuccessful application to stay further proceedings.

33. I am, of course, mindful of the indulgent and permissive attitude of the Courts towards late amendments to pleadings before the days of the Civil Procedure Rules. This attitude was, for example, captured in a dictum by Brett MR as far back as the 19th century in

Clarapede & Co. v Commercial Union Association (1883) WR 262 when he said at page 263:

> *"However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs".*

This attitude,, I dare say, would not sit well today with the overriding objective of the Civil Procedure Rules and the ethos of the rules themselves: now the Court is required to have regard not only to the need to arrive at correct decisions but also for the need for expeditious resolution and the need to spare litigant and court resources – see **Charlesworth v Relay Roads Ltd. (in liquidation) (1999) 4 All E.R. 394 (Ch.)** and the useful discussion by Neuberger J.

34. Yes, it is early days yet for the Civil Procedure Rules in Belize but some insight could be found in decisions from the English Courts, especially the Court of Appeal, in the interpretation and application of the provisions of our own Civil Procedure Rules which are, in a sense, informed and inspired by the English Civil Procedure Rules.

35. Moreover, it must be noted that the action between Seabreeze and Prophecy Group is really about enforcing the foreign judgment obtained in Florida, U.S.A. since 2001 in favour of the latter against the former. In my view, in an action on a foreign judgment, the domestic or national Court before whom the action is brought does not sit as an appellate or a retrial Court on the foreign Court's judgment. In this connection, I respectfully adopt the statement of the law in **Halsbury's Laws of England, Vol. 8 4th ed.** at para, 724:

> *"Subject to* ***three exceptions****, a judgment in personam of a foreign court of competent jurisdiction which is final and conclusive on the merits is conclusive…between parties and privies as to any issue upon which it adjudicates. It is not impeachable or examinable on the merits, whether for error of facts or of law".* (emphasis added: the **three exceptions** being **fraud**, **contrary to public policy** or the **foreign judgment was obtained in proceedings that were contrary to natural justice** – **Halsbury's Laws ibid** at para. 726).

36. A perusal of the Second Amended Defence together with the Amended Defence would readily show that all these exceptions are pleaded in the latter. They are also featured substantially in

Seabreeze's unsuccessful application in 2003 to stay all proceedings on Prophecy Group's action.

37. For all the reasons I have stated, I find myself unable at this late hour to exercise any discretion and allow the second amended defence of Seabreeze.

The long history of the proceedings in the case should disincline me to exercise my discretion to allow the second Amended Defence. To do otherwise would be unfair and seriously undermine the orderly and expeditious conduct of this case – **Christofi v Barclays Bank PLC (2001) 1 WLR 937**.

38. Finally on this point, Mr. Paz in his supporting affidavit to the application to permit Seabreeze to change its Statement of case by allowing it to file the "Second Amended Defence" discloses in my view, no relevant or worthwhile reason. He simply states in paragraph 14 of his affidavit -

> *"14. The Defendant/Applicant wishes to amend its Defence to include the matters dealing with the manner and procedure adopted in obtaining the judgment which the Plaintiff seeks to enforce in this action."*

This, of course, is a far cry from the case that the Second Amended Defence *"has become necessary because of some change in the circumstances which became known after the date of the case management conference"* (sub-rule (3) of Part 20.1 of the Civil Procedure Rules).

On the contrary, the sum of US $2,417,273.62 stated in the foreign judgment was known to Seabreeze by the time it filed its Defence in May 2001 and, certainly, by the time it filed its Amended Defence in March 2002.

In any event, the fact that it is now being said that Seabreeze became aware of how the sum in the foreign judgment was arrived at only after correspondence between the attorneys of the parties sometime in 2003 (see paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13 of Mr. Paz's affidavit) does not, in my view, advance the matter any further to warrant permission to Seabreeze to now change its Statement of case (Defence) by pleading these matters in its proposed Second Amended Defence. I am fortified in this conclusion by the position that barring the three exceptions on which the foreign judgment can be impeaches as I have mentioned in paragraph 36 above, **"it is not impeachable or examinable on the merits, whether for error of facts or of law"** – **Halsbury's Laws ibid, paragraph 724**.

39. I now turn to the other application.

Application by Mr. Seferino Paz Jr. to be added as a defendant

Mr. Paz Jr. in his affidavit dated 23rd January 2006 in support of his application to be added as a party to these proceedings (in effect the second defendant) says in paragraph 16 that –

> *"16. I make this application to be added as a new party so as to give the Court an opportunity to resolve the issue whether the Defendant owes the Plaintiff the sum of US $2,417,273.62 claimed in this action. Further, it will also give the Court an opportunity to resolve all matters pertaining to the foreign judgment which the Plaintiff seeks to enforce, including the matters dealing with the various arguments made in connection with the judgment.*

40. Part 19 of the Civil Procedure Rules provides for the addition and substitution of parties. A claimant may add a new defendant without permission at anytime before the case management conference – 19.2(1). The Court itself may add a new party (either as claimant or defendant) without an application if: 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 – 19.2(3) (a) and (b). The Court also has a wide discretion by **19.3** to add, substitute or remove a party on or without an application. An application for permission to add, substitute or remove a party may be made either by: a) an existing party or b) a person who wishes to become a party – **19.3(1) and (2)**. It is under the later provisions Mr. Paz's application was urged on me by Mr. Lumor S.C.

41. Litigation is almost invariably as expensive and worrisome and stressful exercise whether as claimant or defendant, if only because of its uncertain outcome. But Mr. Paz wants to run this hazard voluntarily. Should he be permitted to do so in the circumstances of this case? Is it necessary that he should do so? The rules provide for the situations when the Court itself can, without an application, add a new party to the proceedings: a) it is desirable to do so as to enable it to 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 – **19.2(3)**.

There is however, no indication in the rules when on application to join the proceeding, the factors the Court may take into account. I am however of the view that this is a matter of discretion and the provisions in **19.3** expressly confer this discretion on the Court. It is discretion however whose proper exercise must be informed by the overriding objective of the Civil Procedure Rules and bear in mind the factors mentioned in either paragraph (a) or (b) of **19.2(3) (a) and (b)**, that is, when the Court of its own motion decides to add a new party to the proceedings without any application.

42. I have carefully considered Mr. Paz's affidavit and given anxious consideration to Mr. Lumor's submissions as to why Mr. Paz should be joined in this instance as a party. I am however not convinced that it is necessary either for the purposes of **19.3(2)(b)** or for resolving the issue of the action on the foreign judgment against Seabreeze. I don't think it is fair, although he is volunteering by his application, to let Mr. Paz Jr. bear this particular cross of litigation as a defendant, with all its associated expense, stress and inconvenience. On the issue of costs, I cannot be unmindful of the fact that if Mr. Paz were to be allowed to join as a defendant and Prophecy Group were to eventually fail, they will have two sets of bills instead of one – that is for Seabreeze and Mr. Paz as a defendant.

43. More fundamentally however, on the materials before me, including Mr. Paz's affidavit, I do not think it is necessary for him to be joined since all he attests to in his affidavit can be adduced in evidence which he is better and safely (as a witness) placed to give. He need not enter the arena himself – see **Martin v Kaisary (2005) EWCA Civ. 594**, a decision of the English Court of Appeal delivered on 16th March 2005.

44. I have also reflected on the case law authority Mr. Lumor urged on me in support of the application. This is the case of **Gurtner v Circuit (1968) 2 QB 587**. My perusal of this case shows that the Court will add as a party a person who is bound to satisfy any judgment that may be given in a claim (as the U.K. Motor Insurance's Bureau in that case). Surely it is not for one moment suggested that it is necessary to add Mr. Paz Jr. as he is bound to satisfy the foreign judgment in favour of Seabreeze! But the Court will not add as a party a person who runs the risk of being ordered to pay costs, as clearly Mr. Paz would be if he were allowed to be added as a defendant and his side were to lose eventually – **Hamilton v Al Fayed (2000) The Times 13 October 2000.**

45. *In fine,* I must record my appreciation to Mr. Lumor S.C. for drawing to my attention in his written submissions, that in exercising its

discretion on an application to join proceedings as a defendant, the Court must bear in mind the **nature of the proceedings** in which joinder is sought. This was stated by Lord Oliver in the Privy Council case of **Marley v Mutual Security Merchant Bank and Trust Co. Ltd. (1991) 3 All E.R. 198** at p. 201. A view which found favour with Carey P. (Ag) in the Jamaican Court of appeal in **Mutual Security and Trust Co. Ltd. v Marley (1991) 28 J.L.R. 670** at p. 673 in which he stated that on an application to join proceedings by the members of the late Body Marley's band, 'The Wailers', the judge *"had failed to appreciate the nature of the proceedings in which joinder was sought and focused entirely on the applicants' alleged interest, that is the best price, which could not settle the very important question of their entitlement to the assets, the best price of which was the sole question before the Court … I think … that there is merit in the appellants' submission that the applicants' intervention could be futile as it would not put an end to the claim."*

46. The nature of the present proceedings in which Mr. Paz seeks to join is **an action on a foreign judgment** given in favour of Prophecy Group against Seabreeze and not Mr. Paz. The Deed of Assignment, **Exhibit SP 2**, in Mr. Paz's affidavit in support of his application reads as tripartite arrangement between Mr. Paz,

Prophecy Group and St. Mathew's University School of Medicine Ltd., Seabreeze is not a party. Whether the terms and conditions of this arrangement have been met or discharged, I am none the wiser and there is no averment to this. Be that as it may, I don't think, given the nature of the present proceedings between Prophecy and Seabreeze, Mr. Paz should volunteer or be allowed to join, Prophecy's bone is with Seabreeze on the **foreign judgment** in its favour against the latter. It is not against Mr. Paz personally.

47. For all these reasons, I find myself unable to accede to the application to have Mr. Paz Jr. added as a party to the proceedings.

A. O. CONTEH
Chief Justice

DATED: 6th April 2006.