

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

COMMONWEALTH OF DOMINICA

DOMHCVAP2018/0005

BETWEEN:

**[1] PHILOMEN NIXON
[2] ANNETTE TURNEY**

Appellants

and

**[1] JOSEPH NIXON aka PASWOE
[2] JASON NIXON (in his personal capacity and as the
Personal Representative of the Estate of Giraud Nixon)
[3] STEVEN NIXON (in his personal capacity and as the
Personal Representative of the Estate of Gabriel Nixon)
[4] JOHNNIE NIXON**

Respondents

Before:

The Hon. Mr. Mario Michel
The Hon. Mde Gertel Thom
The Hon. Mr. Paul Webster

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. Mark Douglas for the Appellants
Mrs. Kathy Buffong-Royer for the 1st and 3rd Respondents
Mr. Ronald Charles for the 2nd and 4th Respondents

2021: November 24;
2022: September 21.

Civil appeal — Striking out of defence — Defendant's duty to set out case — Rule 10.5 of the Civil Procedure Rules 2000 — Whether the judge erred when she denied the appellants' application to strike out the defence for non-compliance with rule 10.5 of the Civil Procedure Rules 2000 and for failure to disclose any reasonable grounds for defending the claim — Rule 26.3(1) of the Civil Procedure Rules 2000 — Exercise of judge's discretion — Whether

the judge's exercise of her discretion by denying the strike out application was an improper exercise of discretion which exceeded the generous ambit of reasonable disagreement

Giraud Nixon (the deceased) died testate in November 1970, leaving a will by which he devised all of his property to his 2 daughters and 2 sons. His son, Joseph Nixon, was named as the executor of the will of the deceased. He, however, died in April 1976 without probating the will, and there has since then been contention and discord among the parties to this appeal over the estate of the deceased.

On 22nd July 2016, the appellants filed a claim against the respondents in relation to the estate of the deceased, seeking various orders, declarations, injunctions, damages, interest and costs. On 19th August 2016, the respondents filed an application to dismiss the appellants' claim on the ground that the claim is res judicata and an abuse of the process of the court. Then on 26th August 2016, the respondents filed a defence to the claim, and on 26th September 2016 the appellants filed an application to strike out the respondents' defence on the basis that the defence was not in compliance with rule 10.5 of the Civil Procedure Rules 2000 (the "CPR") and it did not disclose any reasonable grounds for defending the claim. By an order and judgment dated 18th April 2018, the learned judge dismissed the respondents' application to dismiss the claim against them, but also dismissed the appellants' application to strike out the defence.

Being dissatisfied, the appellants appealed against the learned judge's dismissal of their application to strike out the defence on several grounds of appeal which may be summarised into two main issues: (i) whether the judge erred when she denied the appellants' application to strike out the defence for non-compliance with rule 10.5 of the CPR and for failure to disclose any reasonable grounds for defending the claim; and (ii) whether the judge's exercise of her discretion by denying the strike out application was an improper exercise of discretion which exceeded the generous ambit of reasonable disagreement.

Held: allowing the appeal and making the orders set out in paragraph 37 of this judgment, that:

1. Rule 10.5 of the CPR sets out the requirements which must be complied with to render a defence valid. All of the requirements are expressed in mandatory terms by the use of the word 'must' and are set out in separate provisions, leaving no doubt that they are both mandatory and conjunctive requirements.

Rule 10.5 of the **Civil Procedure Rules 2000** considered.

2. The defence filed by the respondents does not say which allegations they admit, deny, neither admit nor deny, or which they require the appellants to prove in accordance with rule 10.5(3). The fact that paragraphs 1 to 49 of the appellants' statement of claim may not be pleadings in support of any of the 5 stated causes of action does not mean that they can be ignored. In any event, paragraphs 50 to 76 of the statement of claim set out specific allegations and claims in support of what the respondents state are the 5 causes of action, and they should have been specifically admitted, denied or proof of them should have been specifically required

from the claimants/appellants. This was not done by the respondents in their defence and this renders the defence non-compliant with rule 10.5. Therefore, the learned judge erred in her failure to have struck out the defence when there was such obvious and egregious non-compliance by the respondents with the mandatory requirements of rule 10.5 of the CPR.

Rule 10.5(3) of the **Civil Procedure Rules 2000** applied.

3. Furthermore, the absence of reasonable grounds for resisting the claim was exposed when the learned judge rejected the locus standi argument - that the first appellant, as the first claimant in the court below, did not have the locus standi to bring the claim; and the res judicata argument- that the parties and issues in dispute were the same as the parties who disputed and the issues which were disputed in previous proceedings before the court. The respondents did not deny the allegations of breach of fiduciary duty, conversion, embezzlement and fraud advanced against them by the appellants and did not therefore present any reasonable grounds for resisting the appellants' claims. The learned judge accordingly erred when she failed to strike out the respondents' defence for this reason also.

Rule 10.5(5) of the **Civil Procedure Rules 2000** applied.

4. The court has a discretion whether or not to strike out a party's statement of case under rule 26.3(1). However, the overriding objective of the CPR, which is to enable the court to deal with cases justly, cannot be achieved by leaving in place the non-compliant defence of the respondents. Moreover, the respondents' case, as can be gleaned from the defence, is manifestly weak, containing no more than a prayer that the appellants' claim be dismissed as it is an abuse of process and the matter is res judicata; which issue was canvassed in the application by the respondents to dismiss the appellants' claim, and which application the learned judge found had no merit. This case is one, therefore, where striking out without the intermediate step is the appropriate order.

Rule 26.3(1) of the **Civil Procedure Rules 2000** applied; **Saint Lucia Furnishings Limited v Saint Lucia Co-Operative Bank Limited and another** [2003] ECSCJ No. 82 (delivered 24th November 2003) followed.

5. In the exercise her judicial discretion not to strike out the respondents' defence, the learned judge erred by giving too little weight to the seriousness of the breaches of rule 10.5 of the CPR and in giving too much weight to other litigation involving the land forming part of the estate of Giraud Nixon, especially after having found that the appellants' claim was not res judicata. As a result of these errors, the learned judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong. Accordingly, the learned judge's order made in the exercise of her discretion declining to strike out the defence and giving directions for the making of

submissions or the giving of evidence by affidavit, whichever was intended by her order, is set aside.

Dufour and Others v Helenair Corporation Ltd and Others (1996) 52 WIR 188 followed.

6. Having set aside the orders made by the learned judge in the exercise of her judicial discretion, this Court is entitled to make its own decision as to whether or not to strike out the defence and to make any consequential or accompanying orders. The case before this Court is one where the striking out of the defence is appropriate, given the respondents' egregious non-compliance with the CPR and the fact that the defence discloses no reasonable ground for defending the claim.

JUDGMENT

[1] **MICHEL JA:** This is an appeal against a judgment wherein the learned judge dismissed an application filed by the appellants (who were the claimants in the court below) to strike out the defence filed by the respondents (who were the defendants in the court below).

[2] In the course of this judgment, the appellants may sometimes be called 'the claimants' when referring to the High Court proceedings, whilst the respondents may similarly be called 'the defendants'.

Background

[3] The subject matter of this appeal has a long history, originating from the death of Giraud Nixon (the deceased) in November 1970. The deceased died testate, leaving a will by which he devised all of his property to his 2 daughters, Philomen Nixon and Annette Turney, and to his 2 sons, Joseph Nixon and Heskeith Nixon. Joseph Nixon was named as the executor of the will of the deceased. He, however, died in April 1976 without probating the will, and there has since then been contention and discord among parties to this appeal over the estate of the deceased, leading to no less than 5 sets of proceedings instituted in the High Court concerning the estate of the deceased.

[4] In terms of the matter now before this Court, on 22nd July 2016 the appellants filed a claim against the respondents in relation to the estate of the deceased, seeking various orders, declarations, injunctions, damages, interest and costs. On 19th August 2016, the respondents filed an application to dismiss the appellants' claim on the ground that the claim is res judicata and an abuse of the process of the court. Then on 26th August 2016, the respondents filed a defence to the claim, and on 26th September 2016 the appellants filed an application to strike out the respondents' defence on the basis that the defence was not in compliance with rule 10. 5 of the **Civil Procedure Rules 2000** (the "CPR") and it did not disclose any reasonable grounds for defending the claim.

[5] By a judgment and order dated 18th April 2018, the learned judge dismissed the respondents' application to dismiss the claim against them, but also dismissed the appellants' application to strike out the defence. The respondents did not appeal the dismissal of their application, but the appellants have appealed the judge's dismissal of their application to strike out the defence.

The appeal

[6] In their notice of appeal dated 8th August 2018, the appellants set out several statements which would be more appropriately located in the submissions in support of the appeal rather than in the notice of appeal.

[7] The appellants also filed submissions dated 8th August 2018 in support of their appeal. A little more than a year later (on 27th September 2019) a document titled "SUBMISSIONS" was filed by Mrs. Singoalla Blomqvist Williams praying for a dismissal of the appeal. Mrs. Williams did not appear at the hearing of the appeal. Another year later (on 28th September 2020) a document titled "FURTHER WRITTEN SUBMISSIONS ON BEHALF OF THE 2nd AND 4th RESPONDENTS" was filed by Mr. Ronald Charles, who appeared at the appeal hearing as counsel for the 2nd and 4th respondents. Then on 16th April 2021, a document titled "WRITTEN SUBMISSIONS AGAINST INTERLOCUTORY APPEAL ON BEHALF

ON (sic) THE 1st AND 3rd RESPONDENTS” was filed by Mrs. Kathy Buffong-Royer, who appeared at the appeal hearing as counsel for the 1st and 3rd respondents.

[8] At the hearing of the appeal, Mr. Mark Douglas appeared on behalf of the appellants and relied on the submissions filed by him on behalf of the appellants, which he elaborated on in his oral submissions. Mrs. Buffong-Royer appeared on behalf of the 1st and 3rd respondents and relied on the submissions filed by her on behalf of the 1st and 3rd respondents on 16th April 2021, which she elaborated on in her oral submissions. Mr. Ronald Charles appeared on behalf of the 2nd and 4th respondents but did not rely on, or even mention, the submissions filed by Mrs. Singoalla Blomqvist Williams on 27th September 2019, or the submissions filed by him on 28th September 2020. Instead, Mr. Charles informed the court in his oral submissions that he was adopting the written and oral submissions of Mrs. Buffong-Royer.

[9] Having perused the notice of appeal and the submissions relied on by counsel appearing on behalf of the parties to the appeal, and having listened to the oral submissions of counsel, it would appear that the issues in this appeal are really twofold. Firstly, whether the judge erred when she denied the appellants’ application to strike out the defence for non-compliance with rule 10.5 of the CPR and for failure to disclose any reasonable grounds for defending the claim. Secondly, whether the judge’s exercise of her discretion by denying the strike out application was an improper exercise of discretion which exceeded the generous ambit of reasonable disagreement.

Issue 1

[10] With respect to the first of the two issues in the appeal, the appellants submit that rule 10.5 of the CPR requires that a defendant must state which allegations in the claim form or statement of claim that he admits, denies, or neither admits nor denies and which allegations he wishes the claimant to prove. They submit too that the rule requires that if the defendant intends to prove a different version of events from the one given by the claimant, he must set out his own version in his defence.

[11] The appellants submit that in their defence, the respondents neither admitted nor denied any of the allegations in the statement of claim and also failed to put forth a different version of events to the one alleged by the appellants. They submit that since the defence did not comply with the mandatory requirements of rule 10.5 of the CPR, it must be struck out. They say too that the respondents' defence raised no reasonable grounds for defending the claim; it was based on a plea of *res judicata*, which plea was rejected by the court, and so, for this reason also, the defence should have been struck out.

[12] The respondents submit in response that in order to determine whether their defence contravenes rule 10.5 of the CPR or fails to disclose reasonable grounds for defending the claim, the court must examine the statement of claim filed by the appellants. The respondents contend that the manner in which the various allegations and claims are made in the statement of claim makes it difficult to respond to the allegations and claims. They contend that paragraphs 1 to 49 of the statement of claim contain the introduction and factual background to the claim and are not pleadings in support of any of the 5 stated causes of action and therefore do not attract a response. They contend too that the appellants' pleadings are almost entirely defective, comprising non-existent and/or unsupported causes of action. They say that, notwithstanding these defects, the respondents made a discernible attempt to comply with rule 10.5 'viz a viz the pleaded causes of action'. They say that, despite the fact that the defence does not expressly use the words 'admit' or 'deny' or refer to numbered paragraphs in the statement of claim, they have set out a different version of events and have stated reasonable grounds for defending the allegations set out in the statement of claim.

Analysis and conclusion on Issue 1

[13] Rule 10.5 of the CPR contains 8 sub-rules which set out the requirements which must be complied with to render a defence valid. All of the requirements are expressed in mandatory terms by the use of the word 'must' and are set out in

separate provisions, leaving no doubt that they are both mandatory and conjunctive requirements. I will set out in full rule 10.5 of the CPR.

[14] Rule 10.5 provides that:

- “(1) The defence must set out all the facts on which the defendant relies to dispute the claim.
- (2) Such statement must be as short as practicable.
- (3) In the defence the defendant must say which (if any) allegations in the claim form or statement of claim –
 - (a) are admitted;
 - (b) are denied;
 - (c) are neither admitted nor denied, because the defendant does not know whether they are true; and
 - (d) the defendant wishes the claimant to prove.
- (4) If the defendant denies any of the allegations in the claim form or statement of claim –
 - (a) the defendant must state the reasons for doing so; and
 - (b) if the defendant intends to prove a different version of events from that given by the claimant, the defendant's own version must be set out in the defence.
- (5) If, in relation to any allegation in the claim form or statement of claim, the defendant does not –
 - (a) admit it; or
 - (b) deny it and put forward a different version of events;the defendant must state the reasons for resisting the allegation.
- (6) The defendant must identify in or annex to the defence any document which is considered to be necessary to the defence.
- (7) A defendant who defends in a representative capacity must say –
 - (a) what that capacity is; and
 - (b) whom the defendant represents.
- (8) The defendant must verify the facts set out in the defence by a certificate of truth in accordance with rule 3.12.”

[15] The most significant of the sub-rules in terms of the issues in contention between the parties in this appeal is sub-rule 3, which is clearly mandatory and is just as clearly not complied with by the defence in this case. Sub-rule (3) provides that in the defence, the defendant must say which (if any) allegations in the claim form or

statement of claim are admitted, denied, neither admitted nor denied, or which the defendant wishes the claimant to prove.

- [16] The defence filed by the respondents on 26th August 2016 does not say which allegations they admit, deny, neither admit nor deny, or which they require the appellants to prove.
- [17] Since the defence does not comply with sub-rule 3 by stating which allegations in the statement of claim are admitted or denied, or are neither admitted nor denied, then compliance with sub-rule 4 becomes impossible.
- [18] Compliance with sub-rule (5) may have been achieved, even without having admitted or denied the allegations in the claim form or statement of claim, if the respondents had stated in the defence the reasons for resisting the allegations, but this was not done.
- [19] The respondents' contention that the manner in which the various allegations and claims are made in the statement of claim makes it difficult for them to respond does not avail them. The allegations are made, the claims are made and, in accordance with rule 10.5 of the CPR, they must be admitted, denied or expressly not admitted or denied, or proof of them must be required from the claimants/appellants. The fact that paragraphs 1 to 49 of the statement of claim may not be pleadings in support of any of the 5 stated causes of action does not mean that they can be ignored. In any event, paragraphs 50 to 76 set out specific allegations and claims in support of what the respondents state are the 5 causes of action, and they should have been specifically admitted, denied or proof of them should have been specifically required from the claimants/appellants. This was not done by the respondents in their defence and this renders the defence non-compliant with rule 10.5. It is noteworthy that, in the submissions filed on behalf of the 1st and 3rd respondents on 16th April 2021, the respondents attempt to respond to the

allegations made in the statement of claim, nearly 5 years after the filing of their defence.

[20] In the court below, the learned judge, stated (at paragraph 20 of the judgment) that, having reviewed the matters filed by both parties, she is declining to strike out the defence because she has come to the conclusion 'that there have been a number of pieces of litigation involving the land forming the estate of Giraud Nixon'. In paragraph 26, the learned judge then states that, in furtherance of the overriding objective, to ensure that this matter which is long outstanding is dealt with expeditiously and fairly, the matter should be mediated after some questions are answered by the parties by affidavit. Unfortunately, the learned judge did not achieve that time-saving objective, because over 5 years after she heard the matter on 18th April 2017, it still lingers.

[21] The learned judge clearly erred in her failure to have struck out the defence when there was such obvious and egregious non-compliance by the respondents with the mandatory requirements of rule 10.5 of the CPR.

[22] Then too, the absence of reasonable grounds for resisting the claim was exposed when the learned judge rejected the locus standi argument - that the first appellant, as the first claimant in the court below, did not have the locus standi to bring the claim; and the res judicata argument- that the parties and issues in dispute were the same as the parties who disputed and the issues which were disputed in previous proceedings before the court. The respondents did not deny the allegations of breach of fiduciary duty, conversion, embezzlement and fraud advanced against them by the appellants and did not therefore present any reasonable grounds for resisting the appellants' claims. The learned judge accordingly erred when she failed to strike out the respondents' defence for this reason also.

Issue 2

- [23] The decision by the learned judge not to strike out the defence and to direct the parties to file affidavits for the trial of the matter, by calling into service the overriding objective, was the exercise by her of a judicial discretion. So, notwithstanding my finding that the judge ought to have struck out the defence, which would then allow the matter to proceed from there with or without directions from the judge, the question still arises as to whether this Court ought to interfere with the judge's decision, by setting it aside and substituting its own decision for that of the judge.
- [24] On this issue, the appellants submit that the blatant non-compliance of the respondents' defence with the clear and mandatory requirements of rule 10.5 of the CPR by the failure of the respondents to admit, deny or neither admit nor deny the allegations made in the statement of claim or to require the claimants to prove specific allegations, necessitated the striking out of the defence by the learned judge. The appellants submit too that the absence of any reasonable grounds in the defence for resisting the claim also necessitated the striking out of the defence by the learned judge. They contend that the overriding objective ought not to have been invoked to refuse to strike out the defence and to direct the parties to file affidavits to identify the disputed issues in the case. The appellants say that the learned judge relied on the overriding objective to 'fill the gap', contrary to recent decisions of this Court in **Saint Lucia Furnishings Limited v Saint Lucia Co-Operative Bank Limited and another**¹ and **Sandra Ann-Marie George (Administratrix of the Estate of Karlos George) v Nigel Don-Juan Glasgow**² where, as in the present case, there had been repeated non-compliance with the rules of procedure or non-compliance combined with a weak case. The appellants say too that, having concluded that the respondents' plea of res judicata was not viable, there was nothing left in the defence on which the overriding objective to do justice could be engaged. Accordingly, the appellants contend that the learned judge's exercise of discretion to allow the defence to stand was clearly erroneous.

¹ [2003] ECSCJ No. 82 (delivered 24th November 2003).

² [2015] ECSCJ No. 89 (delivered 5th May 2015).

[25] The respondents submit that the striking out of a party's statement of case has been described as draconian, as it deprives the party of an opportunity to present its case at trial. They contend that the striking out of a statement of case is ordered in very rare circumstances where the court is convinced that the claim is unsustainable. The respondents submit that there is nothing in the learned judge's judgment that suggests that the learned judge did not take into consideration relevant factors or that irrelevant factors were taken into account. They say too that it is evident that due regard was paid by the judge to the overriding objective of the CPR which is to deal with cases justly. The respondents conclude that the decision of the learned judge to refuse to grant the application to strike out the defence was, therefore, well within the ambit of which reasonable disagreement was possible and it was plainly within the exercise of the learned judge's discretion to refuse to strike out the pleadings and to direct the filing of affidavits by the parties answering questions posed by the judge.

Analysis and conclusion on Issue 2

[26] The power of the High Court to strike out a statement of case of a party to proceedings before the court is contained in part 26 of the CPR. The power may be exercised under rule 26.3(1) or 26.4(7). The exercise of the power to strike out a party's statement of case under rule 26.4(7) is contingent on the failure of the party to comply with the terms of an 'unless order' made by the court. The striking out of a statement of case under rule 26.4(7) is mandatory upon failure of the party to comply with the 'unless order'. This is the effect of the unambiguous wording of rule 26.4(7) which provides that – 'If the defaulting party fails to comply with the terms of any 'unless order' made by the court that party's statement of case shall be struck out'. The court, however, has a discretion whether or not to strike out a party's statement of case under rule 26.3(1), which provides that –

“... the court may strike out a statement of case or part of a statement of case if it appears to the court that –

- (a) there has been a failure to comply with a rule, practice direction, order or direction given by the court in the proceedings;
- (b) the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim”

[27] On the facts of the present case, there was no ‘unless order’ made by the court and the application by the claimants in the court below to strike out the defence of the defendants was grounded on the fact of the defence not being in compliance with the mandatory requirements of rule 10.5 of the CPR and on the fact that the defence did not disclose any reasonable grounds for defending the claim. The strike out application therefore invoked the exercise of a judicial discretion by the learned judge.

[28] The starting point of any discussion on the exercise of judicial discretion by a judge of our Court is the oft-quoted words of Floissac CJ in the case of **Dufour and Others v Helenair Corporation Ltd and Others**:³

“We are thus here concerned with an appeal against a judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate court is satisfied (1) that in exercising his or her judicial discretion, the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; and (2) that, as a result of the error or the degree of the error, in principle the trial judge’s decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.”

[29] In the case of **Saint Lucia Furnishings Limited v Saint Lucia Co-Operative Bank Limited and another**, this Court upheld the decision of a master to strike out a party’s statement of case in the exercise of his powers under rule 26.3(1)(a) of the CPR. In delivering the unanimous judgment of the Court, Byron, CJ said:

“The main concept in the overriding objective of the new rules set out in CPR Part 1.1, is the mandate to deal with cases justly. Shutting a litigant out through a technical breach of the rules will not always be consistent with this, because the Civil Courts are established primarily for deciding cases on their merits, not in rejecting them through procedural default. The flexible approach that should be adopted by the Court was discussed in the case of *Biguzzi v Rank Leisure Plc* (1999) 1 WLR 1926. The Court has wide powers for imposing appropriate sanctions. It is therefore possible to formulate suitable sanctions for breach of rules and directions without immediately resorting to draconian responses such as striking out. I

³ (1996) 52 WIR 188.

particularly mention the provisions relating to 'unless orders' which are intended to be used as a preliminary step to the imposition of sanctions."

[30] Byron, CJ went on to say though that:

"There will be situations, however, where striking out without the intermediate step is an appropriate order. There are two relevant concepts in the overriding objective. One is saving the litigant's expense and the other allotting an appropriate share of the Court's resources. The ultimate solution would, therefore, be a proper exercise of discretion where failure to strike out would cause a waste of expenses and resources. This means that repeated non-compliance with a rule or non-compliance combined with a weak case would justify the striking out of the case."

[31] It is abundantly clear that the overriding objective of the CPR, which is 'to enable the court to deal with cases justly', cannot be achieved by leaving in place the non-compliant defence of the respondents. Moreover, the respondents' case, as can be gleaned from the defence, is manifestly weak, containing no more than a prayer that the appellants' claim be dismissed as it is an abuse of process and the matter is res judicata; which issue was canvassed in the application by the respondents to dismiss the appellants' claim, and which application the learned judge found had no merit. This case is one, therefore, where – in the words of Byron CJ in **Saint Lucia Furnishings Limited v Saint Lucia Co-operative Bank Limited and another** – 'striking out without the intermediate step is the appropriate order'.

[32] It is also the case that in the purported exercise of her discretion not to strike out the defence, the learned judge gave too little weight to the seriousness of the breach of rule 10.5 of the CPR. On the other hand, the learned judge gave too much weight to what she described as 'a number of pieces of litigation involving the land forming the estate of Giraud Nixon', which she appeared to be saying (at paragraph 20 of her judgment) was a principal reason for declining to strike out the defence; this moreover after saying in paragraph 18 of her judgment that:

"The matter as pleaded before the Court on behalf of the first named Claimant is not res judicata. It is noted that there has been litigation involving the estate of Giraud Nixon, however there is no evidence that the matters which this Claimant is seeking to bring before the Court was litigated before the Court beforehand."

And in paragraph 19 that:

“As it regards the Defendants’ claim that the second named Claimant attempted previously to litigate the identical issues in the case at bar. The Defendants have not placed anything before the Court that would support this claim.”

[33] I am satisfied that in the exercise her judicial discretion not to strike out the respondents’ defence, the learned judge erred by giving too little weight to the seriousness of the breaches of rule 10.5 of the CPR. I am satisfied too that the learned judge erred in giving too much weight to other litigation involving the land forming part of the estate of Giraud Nixon, especially after having found that the appellants’ claim was not res judicata. I am also satisfied that, as a result of these errors made by the learned judge, her decision ‘exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.’

[34] Being satisfied that the learned judge erred impermissibly, I will accordingly set aside the order made by her in the exercise of her discretion declining to strike out the defence and giving directions for the making of submissions or the giving of evidence by affidavit, whichever was intended by her order.

[35] Having set aside the orders made by the learned judge in the exercise of her judicial discretion, this Court is entitled to make its own decision as to whether or not to strike out the defence and to make any consequential or accompanying orders.

[36] Having regard to paragraphs 31, 32 and 33 above, I am satisfied that the case before this Court is one where the striking out of the defence is appropriate, given the respondents’ egregious non-compliance with the CPR and the fact that the defence discloses no reasonable ground for defending the claim.

Disposition

[37] My order is as follows:

- (i) The appeal is allowed.

- (ii) The defence filed by the respondents on 26th August 2016 is struck out and the appellants shall make such application or take such other course of action as they may be advised for the continuation or conclusion of this matter.
- (iii) Costs to the appellants here and in the court below to be assessed by a judge or master of the High Court, unless agreed to by the parties within 21 days.

I concur
Gertel Thom
Justice of Appeal

I concur
Paul Webster
Justice of Appeal [Ag.]

By the Court

Chief Registrar