

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE
CIVIL

FEDERATION OF SAINT CHRISTOPHER AND NEVIS
NEVIS CIRCUIT

CLAIM NO.: NEVHCV2019/0020

BETWEEN:

EUSTACE NISBETT

Claimant

and

[1] ALEXIS JEFFERS

[2] MARK BRANTLEY

[3] TROY LIBURD

[4] NEVIS BROADCASTING COMPANY LIMITED

Defendants

Appearances: Patrice Nisbett for the Claimant;
Terence V. Byron for the First Defendant; and
Elizabeth Harper for the Second, Third and Fourth Defendants.

2021: July 05, 19;
August 19 – via email

DECISION

Claimant's application for permission to amend; and
First Defendant's application to strike out;

[1] **PARIAGSINGH, M. [Ag.]**: There are two applications before the Court. The First Defendant has applied to strike out the Claimant's case¹ and the Claimant has applied to amend his case for a second time². The application to amend was filed before the application to strike out. The general rule is that applications are heard in order of priority of its filing.

¹ Filed on April 22, 2021

² Filed on January 15, 2021

APPLICATION TO AMEND:

[2] By Claim Form and Statement of Claim filed on February 13, 2019 the Claimant jointly claimed against the Defendants for damages for libel arising out of statements made on February 13, 2013, April 16, 2014 and February 13, 2015. All of these alleged causes are not caught by limitation.

[3] PART 20 Rule 20.1 of the Civil Proceedings Rules 2000 as amended³ sets out the matters the Court has to take into account in exercising its discretion to allow amendments. The first case management of this case has long passed. Rule 20.1 CPR states:

20.1 – (1) A statement of case may be amended once, without the court's permission, at any time prior to the date fixed by the court for the first case management conference.

(2) The court may give permission to amend a statement of case at a case management conference or at any time on an application to the court.

(3) When considering an application to amend a statement of case pursuant to Rule 20.1(2), the factors to which the court must have regard are –

(a) how promptly the applicant has applied to the court after becoming aware that the change was one which he or she wished to make;

(b) the prejudice to the applicant if the application were refused;

(c) the prejudice to the other parties if the change were permitted;

(d) whether any prejudice to any other party can be compensated by the payment of costs and or interest;

(e) whether the trial date or any likely trial date can still be met if the application is granted; and

(f) the administration of justice

[4] Broadly stated on an application to the amend after the first case management conference the Court has to consider, the promptitude, the prejudice to both parties, if the prejudice can be remedied in costs, trial certainty and the administration of justice.

³ After referred to as CPR

[5] The 20.2CPR factors apply when the changes are being made after the end of the limitation period. My interpretation is that these factors apply when the application to amend is made after the limitation period has passed. Surely after the limitation period has passed the Claimant would be in a different position and certainly suffer a greater degree of prejudice if an application is refused. In this case the application to amend was made after the limitation period expired in one cause of action. In respect of this causes, allowing the amendment would fall into one of the he categories specified in 20.2 CPR as it would substitute a new claim.

Promptitude:

[6] The application to amend was filed on January 15, 2021 before the end of the limitation period for each of the causes pleaded in the original claim.

[7] This claim was filed on February 13, 2019. At the time it was filed there was pending an application for a Norwich Pharmacal order by the Claimant against the Fourth Defendant in this claim. In this application an order was made that the Fourth Defendant disclose to the Claimant transcripts or recordings of the broadcasts he complains were defamatory. This order was made on February 29, 2019 after this claim was filed.

[8] On March 11, 2019 the Fourth Defendant did deliver to the Claimant the recordings as ordered. These recordings were delivered by cassette a medium the Claimant complains he was not without delay and difficulty able to access a device to listen to same.

[9] The claim was served on the eve of the life of the claim form expiring. This was followed with the Claimant's first application to amend. At the hearing of this application in September, 2020 a procedural deficiency (among other objections) were taken to the application. An order was made for a draft of the proposed amended claim to be provided to the Defendants.

[10] It appears that the Claimant did not comply with this order in so much as he proceed to file the amended claim, without permission being granted. On the adjourned date fixed for the hearing of the first application to amend, the application was dismissed as the Claimant had not complied with the order to provide the draft. He was also ordered to pay the Defendants costs. The application was not heard on its merits. Shortly after, the Claimant then filed the application now before me.

[11] The Claimant complains that the Respondents in the Norwich Pharmacal application did not comply with the order of the learned Judge and so his application to amend was filed late. I find this argument difficult to follow as the learned Judge did not order disclosure of a transcript as the Claimant has contended in his application. The Judge ordered disclosure of a recording or transcript. The Respondent provided copies of the recording on March 11, 2019, within the time specified in the order. There was no obligation in the order for the Respondent to provide a transcript.

[12] At paragraph 9 of his affidavit the Claimant indicates that the learned Judge dealing with the Norwich Pharmacal application made a certain comment during the hearing of that application. It would have been more appropriate for counsel to refer to a transcript especially when the comments are in dispute. It is preferred in future that this is the practice adopted.

[13] The Claimant contends that he was unable for several months to convert the recordings delivered to him on cassette to a form which he could listen to. That is the extent of his evidence on this issue. His evidence condescends to no particulars of what attempts were made, when they were made and what were the responses. His evidence also does not say when he was able to listen to the recordings.

[14] The Claimant makes reference to his first application to amend being dismissed by a previous Master. He contends that promptitude ought to be taken in the context of the first application having been dismissed not on its merits. I see some merit in this argument. The first application was certainly more prompt than the one now before me.

It was dismissed with costs because the Claimant's application did not comply with the rules. That fact cannot be overlooked in assessing promptitude. It was not heard on its merits. The first application was dismissed as the Claimant had not provided a draft of the proposed amendment but rather in error, filed the amended claim.

[15] The time lapse after the delivery of the tapes to the Claimant to him making the first application must be taken in the context of the first application having been filed in July 2019.

[16] The time lapse in making this application is 1 month and 1 day after the first application was dismissed. I do not find this period to be inordinate in light of the factual context of this case.

Prejudice:

[17] The Claimant has an obligation to plead all the material facts to his claim pursuant to 8.6CPR and 69.2CPR. The Claimant is in my view in clear breach of rule 8.6CPR. The proposed amendment will cure the pleading defect in my view.⁴

[18] The obligation on the Claimant is to set out all the material facts and identify or annex any document which he considered relevant to his claim. I do however the practical need for a transcript or listening to the recordings before the application to amend was made. Without either there would be no way to capture the exact words complained of. It is worth pointing out that even in this application to amend, the Claimant has not said that he is in possession of this transcript nor has he annexed it to the application. He has however purported to reproduce verbatim from the broadcasts he alleges defamed him in the draft of the amended claim he seeks to now file.

⁴ Without the need to plead damages as the Claimant submits that the defamation is in the nature of libel

[19] **Gatley on Libel and Slander (12th Edition)** at page 981 provides the following learning on statements of case in defamation actions:

26.1 Generally. Statements of case in an action for defamation are extremely important. Due in part to the ambiguity of words and their capacity for inference and implication, pleadings, particularly in relation to the issues of meaning and reference to the claimant, can on occasion become tortuous and complex. The increasing tendency has been to require the parties to set out their respective cases with as much clarity and openness as possible.

26.2 Material Facts: The particulars of claim must contain a concise statement of the material facts on which the claimant relies, but not the evidence by which they are to be proved. The claimant should state all the facts necessary for the purpose of formulating a complete cause of action. These facts are the publication by the defendant, the words published, that they were published of the claimant, (where necessary) the facts relied on as causing them to be understood as defamatory or as referring to the claimant and knowledge of these facts by those to whom the words were published, and, where the words are slander not actionable per se, any additional facts making them actionable, such as that they were calculated to disparage the claimant in an office held by him or that they have caused special damage.

26.3 Particulars. The degree of particularity required will of course depend upon the facts of each case. However, as a general rule, as much certainty and particularity must be insisted on as is reasonable having regard to the circumstances and to the nature of the acts alleged. The CPR contain express requirements that particulars be given of certain allegations. While particulars usually set out specific matters intended to be proved, a party may, in an appropriate and proper case, also aver that he intends to rely on an inference from facts which he can prove. The court may at any time order a party to clarify any matter which is in dispute in the proceedings or give additional information in relation to any such matter.

[20] In **Best v Charter Medical [2001] EWCA Civ 1588**, Lord Justice Keene at paragraph 7 stated:

A crucial question in defamation actions is always whether the words have a defamatory meaning, and it is therefore impermissible to plead the meaning but not to plead the words used.... It follows that it is not enough for a Claimant to plead the gist of what was allegedly said or written; he must set out the words with reasonable certainty, a test long established: see *Collins v Jones* 1955) 1 QB 564, per Denning, LJ, at 571 H – 572 A.

[21] In **Real Time Systems Limited v Renraw Investments Ltd, CCAM and Company Limited, Austin Jack Warner** [2014] UKPC 6 the Board underscored that the Court has a discretion whether to strike out a statement of case for noncompliance with a rule, direction or order, however, it must also consider whether there are other appropriate remedies available to it which are more proportionate.

[22] In **George Alert et al v Joshua Matheson et al** GDAHCVAP2014/0007 Blenman JA stated:

[63] There is no denying that the court of first instance is clothed with the ability to strike out a statement of case or part of a statement of case due to the non-compliance with the rules, practice direction or order of court. It was therefore clearly open to the trial judge to grant the strike out application that was sought by the Allerts. The question is however whether such a relief was proportionate to the Mathesons breach in not seeking the court's permission in order to be able to amend their defence and counterclaim.

[64] This question of proportionality was decisively answered in *Citco Global Custody NV v Y2K Finance Inc.* and it was held that it is open to the court in which there has been a breach of an order, rule or direction to impose a sanction other than to strike out the statement of case.

[65] Indeed, the court is enjoined by CPR 26.1(2)(w) to take any other steps, give any other direction, or make any other order for the purpose of managing the case and furthering the overriding objective.

[66] It is true that the Mathesons have not filed an application to be relieved from sanctions. However, what must be borne in mind is that the Allerts filed an application to strike out the impugned sentence. This brings into sharp focus the question of whether it was open to the trial judge to impose another sanction on the Mathesons for their breach short of the ultimate sanction of striking out as was prayed for by the Allerts. Against all of this background it is imperative to take into account that CPR 2000 enables a court to put matters right, even though there are certain procedural dictates to which a court must adhere to in so doing.

[67] Also, Her Majesty's Board in *Real Time Systems Limited v Renraw Investments Ltd, CCAM and Company Limited, Austin Jack Warner* held that the court has an express discretion whether to strike out. It must therefore consider any alternatives and CPR 26.1(2)(w) enables it to give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective, which is to deal with cases justly. Their

Lordships held that there is no reason why the court, faced with an application to strike out, should not conclude that the justice of the particular case militates against this nuclear option. In that case, the Privy Council held that the Court of Appeal was quite correct in deciding that the trial judge had erred in striking the claim on the basis that it was an abuse of process. The Board felt that there were other appropriate options available to the trial judge since the proceedings had not even reached the case management conference stage.

[23] The prejudice to the Claimant if the amendment is not allowed would be that the claim will be struck out as without the amendment sought the claim is fatally deficient in my view. If the application is refused the Claimant will lose the opportunity to vindicate himself from the statements made about him by the Defendants. The resulting prejudice to the Defendants is that they may all need to amend their defences. There is also the fact of the hearing of this application they attended and all documents and submissions filed.

[24] The Defendants can hardly complain that the propose amendments have taken them by surprise, or that it fundamentally alters the nature of the case.

Prejudice remedied by costs:

[25] The prejudice can be cured by costs. The Defendants can be compensated for their time and efforts spent on this claim this far including this application.

Trial date certainty:

[26] One of the pillars of the new CPR regime is the need for trial certainty. In this claim, the pleadings are not yet closed owing to the two applications by the Claimant to amend in excess of two years since the claim was filed. This is not how the rules are meant to work. Whilst one of the aims of the new regime is to discourage the laissez-faire approach to litigation, the disposition of these applications were by no means wholly attributed to the Claimant.

[27] The matter can be actively case managed to ensure that further delays do not inhibit the progress of the claim.

Administration of justice:

[28] The administration of justice favours cases being heard and determined on its merits as opposed to them being determined summarily except in the most obvious of cases. What features heavily in my mind in this case is the fact that the proposed amendments which can cure the defect has been disclosed to the Court and the other parties, long before the first application to amend was dismissed.

[29] When considered in the round, the justice to the parties; the legitimate expectation that the basis of a claim will not be fundamentally changed at the last minute; the adverse effect on other litigants of lost judicial time; the stage reached in the proceedings; whether the other side can be adequately compensated in costs; and whether the amendment will serve any useful purpose.

Fresh allegation of defamation:

[30] The Claimant complains that after this claim was issued there was a further defamation suffered by him in February 2020. No pre-action protocol letter was sent in relation to this incident. When considered in the light of no pre-action letter being sent in this claim, the trial judge would have to consider the same issue in relation to the existing claim. In my view therefore, the overriding objective favours all causes being tried in a single claim as far as possible. In this regard, I am of the view that the inclusion of this instance of defamation in the amended claim to be in keeping with the overriding objective, saving costs and the resources of the parties.

[31] For these reasons I will grant permission to the Claimant to amend his claim in terms of the draft annexed to this application.

APPLICATION TO STRIKE OUT:

[32] The main thrust of the application to strike out is that the defamation alleged in this claim, being words spoken in a radio broadcast, if proven, is in the nature of slander and not libel as pleaded. The First Defendant contends that slander is not actionable per se without proof of damage, no such damage having been pleaded, that this claim ought to be struck out.

[33] The Court's power to strike out a statement of case or a part is contained in Part 26 Rule 26.3 of the Civil Proceedings Rules 2000 (as amended) (CPR). This rule states:

26.3 (1) In addition to any other power under these Rules, 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;
(c) the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings; or
(d) the statement of case or the part to be struck out is prolix or does not comply with the requirements of Part 8 or 10.

[34] The First Defendant's challenge is pegged in sub- rule (b) and (d) above.

[35] The approach to an application to striking out a party's statement of case has been stated in a number of decisions from the apex courts. Thom JA in **Agnes Danzie et al V Cecil Anthony SLUHCVP2015/0009** at paragraph 13 articulated the Court's position as follows:

13. It is a well-established principle that the court's power to strike out a statement of case should only be used sparingly (Real Time Systems Limited v Renraw Investments Limited and Others [2014] UKPC 6) . Also, in *Salfraz Hussain v Birmingham City Council* and *Othersthe English Court of Appeal*, in considering the exercise of discretion to grant relief from sanctions where judgment was entered in default, stated: 'it must be kept in mind that discretionary powers are not to be exercised in order to punish a party for incompetence—they must be exercised in order to further the overriding objective'. In exercising his discretion, the learned

judge was required to consider what was the appropriate response having regard to all of the circumstances, including whether there were other alternatives available that would be just in the circumstances.”

[36] The Claimant has confined his claim to damages for libel in his prayer. The Claimant's claim against the First Defendant relates to his alleged defamatory words spoken on February 13, 2013 and April 16, 2014. The claim against the Second Defendant is that he allowed the First Defendant to use his radio program to make the defamatory statements on the same two days. The Claimant's claim against the Third Defendant is for his alleged defamatory words spoken in the same radio program as the First Defendant on April 16, 2014. The claim against the Fourth Defendant is in relation to it facilitating the broadcast on which the alleged defamatory words were spoken on February 13, 2013, April 16, 2014 and further on February 13, 2015. The Claimant also claimed against the Fourth Defendant in relation to an alleged re-broadcast which occurred on April 16, 2014 and February 17, 2014.

[37] The First Defendant has referred me to the authorities of **Jones v Jones [1916] 2 AC 506**, **Hellwig v Mitchell [1910] 1 KB 613**, **Thorley v Lord Kerry [1812] 4 Taunt. 366**, **Archbishop of Tuma v Robeson [1825] 5 Bing 21**, **Roberts v Roberts [1864] 5 B&S 384** and **Ratcliff v Evans [1892] 2 QB 524**. The First Defendant also referred me to the 1948 Report of the Committee on the Law of Defamation and the Defamation Act, 1952 of the UK. The First Defendant contends that a radio broadcast spoken extempore which is not scripted, is slander and as such is not actionable without proof of damage. There being no pleading of damage, I should exercise my discretion to strike out the claim.

[38] In answer the Claimant contends that statements which are recorded are libel and not slander. Reference is made to **Gatley on Libel and Slander (12th Edition)** at page 108. The Claimant did not provide a copy of this extract to the Court. Neither were the authorities referenced by the Claimant properly cited. In future this practice should be avoided as it is more courteous to provide to the court and the other Attorneys with

copies of the documents referred to in submissions. I intend to treat with this issue in costs later in my decision.

[39] **Gatley on Libel and Slander (12th Edition)** at para 3.6 and 3.6 states at page 102 states:

- 3.6 The consequences of the distinction.** Libel is committed when defamatory matter is published in a “permanent” form or in a form which is deemed to be permanent. Defamation published by spoken word or in some other transitory form is slander. In English law libel is always actionable per se, that is to say the claimant is not required to show any actual damage, and substantial rather than merely nominal damages may be awarded even in the absence of such proof, whereas in slander, with four exceptions, the cause of action is not complete unless there is “special” damage, i.e. some actual, temporal loss. The four exceptional cases are:
- (1) Where the words impute a crime for which the claimant can be made to suffer physically by way of punishment.
 - (2) Where the words are calculated to disparage the claimant in any office, profession, calling, trade or business held or carried on by him at the time of publication.
 - (3) Where the words impute to the claimant a contagious or infectious disease.
 - (4) By the Slander of Women Act 1891,⁴⁹ where the words impute adultery or unchastity to a woman or girl.
- 3.9 The distinction at common law.** Not only does the distinction between libel and slander rest on unsatisfactory grounds, but how the distinction should be drawn is rather unclear at a number of points, even leaving aside modern technology. There is no doubt that to publish written or printed words by showing them to another is to commit libel. Similarly it is libel to issue or display a defamatory picture or effigy. Equally to speak defamatory words to another is slander. This might suggest that libel is that which appeals to the eye and slander that which appeals to the ear, but this cannot be so because it has never been doubted that gestures are slander. Further, the current English view is that to read out a defamatory letter or script to an audience is libel, and this is so regardless of whether the audience realises that the defamatory matter is being read, though in Australia it was said that the perception of the audience is decisive. Either view might perhaps be justified on the basis that the document was a potential libel and any method of disseminating it should carry the same liability, but this seems inconsistent with the fact that the gist of defamation is publication. It can hardly be the law that if one learns a defamatory message by heart from a document and repeats it, one commits libel.

Where the defendant dictates a defamatory statement to another, who takes it down, the defendant publishes a slander to that other: although a writing then comes into existence, it was not a writing when it was published. So too, it has been held that the recording of defamatory words on a voicemail is plainly a libel. It cannot, however, be wholly true to say that a libel must exist before it is published (though this will commonly be the case) for it must be libel to chalk defamatory matter on a blackboard or send it as an SMS or text message. Where dictated words are read back in the presence of a third party by the person who took them down then, in view of the position where a letter is read to an audience, that should logically be the publication of a libel but there are dicta that it is slander. Of course where the dictated material has been transcribed and sent out there will be a publication of a libel to the recipient by the originator of the material, provided that is intended or authorised by him.

There can be little doubt that in the present law publication of the defamatory matter in a “permanent” form is libel, if only because that was the view of Parliament when it provided that broadcast defamation was to constitute libel and, while that may not be decisive as to the common law, the courts are not likely to treat the legislation as ineffective in that context and are likely to pay deference to the view of Parliament in others. “Permanent” here does not necessarily signify long-lasting: it is defamatory to chalk a defamatory message on a wall and the nature of the tort cannot depend on whether it remains there for weeks or is washed away by the rain a few minutes later.

Possibly the residual test of the Restatement is better: is the matter embodied in a physical form? It does not, however, follow that there may not be additional tests of libel at common law, for example the transient publication of matter which is embodied in a permanent form, so that it might be libel to play a record or audio-tape or to call up on screen words or images from a computer memory. The showing of a defamatory cinema film is libel at common law and this cannot turn on the fact that the images are permanently visible on the film, so the same should apply to the showing of a DVD. Hence it is thought that the showing of a film or DVD on television would (even apart from statute) be libel at common law and perhaps the same is true of a recorded radio broadcast.

[40] The Claimant has referred me to the authorities of **Shefton Crosse v Victor Williams SKBHCV2013/0116**, **Charles Hunte v Loretta Phillip et al ANUHCV2014/0449** and **Lester Bird v Winston Baldwin Spencer et al ANUHCV2009/0485** in support of his contention that defamatory statements made on radio were libellous. Having considered these authorities, I am of the view that:

- a. **Shefton Crosse** is not an authority of the proposition that a radio broadcast is libel and not slander. In this case there was in fact a default judgment obtained and what the learned judge considered was an application to set aside the default judgment. There was no pronouncement on the issue at hand. Reliance on this authority by the Claimant is heavily misplaced;
- b. **Lester Bird** contains no discussion on the issue at bar. It was however a case that involved defamatory statements made on radio and damages were awarded on the consideration of the judge of authorities based in libel; and
- c. **Charles Hunte** is of no assistance to the Claimant in this application. In this case the Master conducted an assessment of damages following a default judgment. In any event, the relief sought was both for libel and slander, unlike in the case at bar.

[41] In resolving this issue, I also took into account the evidence before me on the application to amend. It is undisputed that the Claimant received copies of four (4) tapes of some of the broadcasts pursuant to a **Norwich Pharmacal order** made in separate proceedings between the Claimant and the Fourth Defendant to this claim. At the very least it means therefore that some if not all of the broadcasts were recorded.

[42] In the case of **Jwala Rambarran v Dr. Lester Henry (Trinidad and Tobago) CV2014-03990**, Rampersad J in treating with a similar issue stated that:

14. In any event, the claimant's attorney argued that the nature of the broadcast was such that it was recorded, as stated by the claimant himself and as referred to by the defendant who claimed to have heard an "official copy" of the program. Therefore, the program took on a permanent nature and amounted to libel (See Mohammed J in CV2008-00225 Jude Neil Ready and ors v Caribbean Communications Network Limited and ors at paragraph 31, Moosai J (as he then was) in the case of Eden Shand v Caribbean Communications Network Ltd and ors HCA 1782 of 1994 and CV2016-04456 Junior Sammy and ors v More FM Ltd and ors per Seepersad J at paragraph 7).

15.....

16. The court has no hesitation in holding that the defamatory words would have been calculated to disparage the claimant in his office as Governor of the Central Bank, a position which the defendant admitted in cross examination that he felt the claimant was not the best qualified for . As a result, the second exception stated above quite clearly applies.
17. The court finds favour with the claimant's attorney at law's submission that the issue is one of libel rather than slander. There is no doubt that the words used in the program have not been lost in the breeze but have been retained for posterity in the permanent form of a recording in at least three places:
 - 17.1. On the servers or hard drives or recorded memory apparatus of the radio station; from which
 - 17.2. The "official" CD recording referred to by the defendant in cross examination which was "burnt"; along with
 - 17.3. The "burnt" CD presented to the court in evidence by the claimant. Obviously, this last recording, which forms part of the official record of the court, is a recording which is available to the public as part of the court record.
18. It is probably possible for other copies of the CD to be obtained "officially" from the radio station barring any time restriction with respect to them retaining recorded programs.
19. The time has long passed for the categorization of the transient nature of slander in the modern era to be revised. To my mind, especially in circumstances where radio stations are no longer limited by the strength of their broadcasting signal but now extend over the internet to an international audience via a multitude of online live streaming software , apps and other technology, all with the capability of recording such programs, along with the requirements of the law and or lawful procedure for the maintenance of recordings of radio programs, the court would be hard-pressed to accept that radio broadcasts are the sole domain of the category of slander. The transience of the spoken word in the golden age of radio has been replaced by the relative permanence in the current era of global information and technology. Therefore, the court finds that in this case the cause of action lies in libel and not in slander (See Cooper & Or v Turrell [2011] EWHC 3269 (QB) in which Tugendhat J held a recording of a voicemail was libel and not slander)

[43] I have not been referred to any specific authority in this jurisdiction on this issue. To my mind therefore, the position of our Court on whether radio broadcasts and rebroadcasts

are libel or slander is a live triable issue. At minimum, arguments are equally weighted by both parties on this issue making this an unsuitable case for striking out summarily.

[44] The other limb of the striking out application, the non-compliance with 8.6CPR has been encompassed and dealt with in the application to amend above.

COSTS:

[45] On the issue of costs, the general rule is costs follows the event. The application to strike out has been dismissed. On the issue of costs on this application, the general rule is costs follows the event. Costs is however at the discretion of the Court. In the exercise of my discretion, I am particularly mindful of the facts that; the Claimant has caused the Court and the other Counsel to have to conduct its own research on the text relied on, the Claimant's Counsel did not appear when this application was originally fix and the hearing was adjourned to facilitate Counsel; the Claimant's Counsel's submissions were sent to the Court and the other side on the morning of the hearing itself; the Court extended an invitation to Counsel to indicate to the Court via email if he needed to make any further oral arguments having put his submissions in writing and only then would a hearing be convened on short notice to all Counsel. The Claimant's Counsel indicated that he wished to make oral arguments, a hearing was convened and at the hearing, Counsel for the Claimant indicated that he did not wish to make further oral submissions and he stood by his written submissions; and the Claimant has never sent a proper electronic bundle to the Court ahead of the hearing of this claim as required by the Practice Direction. To this end, I requested Counsel for the Second, Third and Fourth Defendant to do so, and it was done. I have therefore decided to exercise my discretion and made no order as to costs on the First Defendant's application.

[46] On the application to amend, the prejudice caused by allowing the amendment can only be remedied by an order for costs. The Claimant must therefore pay the Defendants costs of the application to amend.

ORDER:

[47] For the reasons set out above, it is hereby ordered that:

- a. Permission is granted to the Claimant to amend his claim form and statement of claim in terms of the draft attached to his application filed on January 15, 2021;
- b. Unless the Claimant files and serves an amended claim form and amended statement of claim in terms of the draft annexed to his application to amend filed on January 15, 2021 on or before 4:00pm on September 24, 2021, this claim is struck out with liberty to the Defendants to apply in relation to costs;
- c. The Claimant shall pay the Defendants costs of the application filed on January 15, 2021 to be assessed by this Court in default of agreement; and
- d. The First Defendant's application to strike out filed on April 22, 2021 is dismissed with no order as to costs;

Alvin Shiva Pariagsingh
Master (Ag.)

By the Court,

Registrar
Supreme Court