

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(CIVIL DIVISION)**

CLAIM NO. BVIHCV2019/0232

**In the Matter of the Copyright (Virgin Islands) Order 1962
(UK SI 1962 No. 2185)**

Between

DAVID TURNBULL JR.

Claimant

and

**SHEHADEH ABDULSALAM
UNIQUE CELL AND VARIETIES
[a trading name]**

Defendant

Appearances: Mr. Jamal Smith appearing with Keah Glasgow of counsel for the claimant
Ms. Harriet Daisy Bovingdon of counsel for the defendant

2020: September 23rd

2020: December 3rd

JUDGMENT

Introduction

- [1] **SANDCROFT, M. [Ag.]**: This is an application by the defendants for the strike out and dismissal of the claimant's case on the basis that the claimant's case discloses no reasonable grounds for bringing the claim and is an abuse of process. The application is strenuously resisted by the claimant.

Background/Chronology

- [2] In accordance with the Affidavit of Service sworn by Shaniece T. Morgan, the application and the request for default judgment were served on the defendant on the 3rd day of March 2020, the day of the first hearing before the Master.

- [3] The only issue was the evidence in support, and as shown in the Notice of Application, the claimant was relying on the affidavit of David Turnbull, Jr. filed on 22 August 2019 which was served on the defendant on the 16th day of September 2019 in accordance with the Affidavit of Service sworn herein by Kendra E. Smith.
- [4] The defendant entered an appearance by filing an Acknowledgement of Service on November 13, 2019. According to the Privy Council decision arising from the BVI in **Texan Management Ltd et al v. Pacific Electric Wire & Cable Company Limited [2009] UKPC 46 at 68** in referring to the English Court of Appeal case of **Hoddinott v. Persimmon Homes (Wessex) Ltd [2—7] EWCA Civ 1203** where it was accepted that the court's jurisdiction also included the court's exercise of its jurisdiction to try a claim, and failure to file an acknowledgement of service meant that the claimant accepted that the court should exercise its jurisdiction to try the claim. That latter case was followed by our Court of Appeal in the BVI case of **Marty Steinberg et al v. Swisstor & Co et al [BVIHCVAP2011/0012, unreported, 12 March 2012]**.

Defendant's/Applicants' Submissions

- [5] Attorney-at-Law for the defendant, Miss Daisy Bovingdon submitted that the way the claimant elected to and continues to deal with his claim against the defendant amounts to an abuse of the Court's process, and is a contravention of the **Civil Procedure Rules, 2000** and the processes of the Court and the legal system. The way the Claimant has been dealing with its case contravenes the letter and the spirit of the Overriding Objective of the Civil Procedure Rules. In particular, the way the claimant has dealt with the case at bar contravenes:

- (a) CPR 1.1 (1) which requires the Court to deal with cases justly;
- (b) CPR 1.1 (2) which prescribes what dealing with cases justly means;
- (c) the conduct of the Claimant has been such since it filed its Claim on the 28th day of May 2015, that several of the factors prescribed in CPR 1.1 (2) have been and continue to be contravened. In particular, CPR 1.1 (b) which is saving expense; CPR 1.1 (d) which is ensuring that the case is dealt with in an expeditious manner, and CPR 1.1 (e) which requires the Court to ensure the allotment of a case for an appropriate share of the Court's resources, whilst taking into account the need to allot resources to other cases.

- [6] Counsel also submitted that the Court in its inherent jurisdiction can strike out a statement of case which discloses no cause of action, or parts of the case which are vague, immaterial, unknown to

law, or which is found to be abusive of the process of the Court or is frivolous or vexatious: **Hector John et al v The Attorney General of The Commonwealth of Dominica et al** DOMHCV 2016/0067 (**tab 3**) at para. 39, per the Honourable Justice Stephenson.

[7] At paragraphs 43-44 of **Hector John et al**, the Court says:

"The Court will therefore examine the pleadings to determine whether there is a 'scintilla of a cause of action' or whether the action is indeed frivolous, vexatious or an abuse of the process of the Court.

"A statement of case before the Court must disclose a reasonable cause of action which is simply stated as "a factual situation, the existence to which entitles a party to obtain from a Court a remedy against another person".¹

[8] Counsel further submitted inter alia that a claimant who succeeded in establishing copyright infringement could elect for either an account of profits or an inquiry into damages. That damages were intended to put the claimant in the position it would have been in if the infringing act had not occurred, while an account of profits is intended to make the defendant disgorge the profits made because of the infringing act.

[9] Counsel posited that in a copyright case, the fact that infringement has not caused the claimant/copyright owner any damage is not of course, on its own, determinative of whether there is a finding of liability. The right in copyright is a proprietary right. However, a financial claim which is so small in value that "the game is not worth the candle" may be struck out as an abuse of the process of the court.

[10] Counsel also posited the case of **Victor George Lilley v DMG Events Limited (formerly DMG World Media (UK) Limited)** [2014] EWHC 610 (IPEC) the Claimant's case was struck out on the basis. At para 62, per Judge Hacon:

"I do not believe [this] would be an appropriate use of the court's resources when the maximum which could ever be at stake is around £83. It would be an abuse of the process. I must consider other litigants with more serious and possibly more pressing claims, the resolution of which would necessarily be delayed by the

¹ Letang -v-Cooper [1965] 1Q8 232 at p242, per Lord Diplock

hearing of the trial of this action and any preliminary hearings in advance of the trial."

[11] Counsel further posited that Judge Hacon refers to the leading case of **Sullivan v Bristol Film Studios Ltd** [2012] EWCA Civ 570. In that case, the Master of the Rolls took the view that the potential value of a claim to a claimant could be too meagre to justify committing the resources of the court to the action.

"[69] If the claimant succeeds in this action and is awarded a small amount of damages, it can perhaps be said that he will have achieved vindication for the damage done to his reputation in this country, but both the damage and the vindication will be minimal. The cost of the exercise will have been out of all proportion to what has been achieved. The game will not merely have been worth the candle, it will not have been worth the wick.

[70] ... It would be an abuse of process to continue to commit the resources of the English court, including substantial judge and possibly jury time, to an action where so little is now seen to be at stake."²

[12] Counsel submitted that the measure of damages is the sum of money that will put the injured party in the same position, so far as possible, as he would have been in if he had not sustained the wrong (**Livingstone v Rawyards Coal Co** (1880) 5 App. Cas. 25). The burden of proof lies on the claimant to prove that the infringing act has caused the damage it claims. Since the defendants are wrongdoers, damages should be liberally assessed but the object is to compensate the claimants, not to punish the defendants (**Pneumatic Tyre Co Ltd v Puncture Proof Pneumatic Tyre Co Ltd** (1899) 16 RPC 209).

[13] Counsel further submitted that the leading UK authority on the assessment of damages in the context of intellectual property infringement is the House of Lords decision of **General Tire & Rubber Co Ltd v Firestone Tyre & Rubber Co Ltd** (No.2)1975 1 W.L.R 819. That the claimant's purported cause of action falls within what has become known as the General Tire 2 group. According to the General Tire 2 analysis, if an infringer uses a right without a license, the measure of damages is the amount he would have had to pay by way of royalty instead of acting illegally.

² See extract as set out in *Victor George Lilley v DMG Events Limited (formerly DMG World Media (UK) Limited)* [2014] EWHC 610 (IPEC) at para. 26

[14] Counsel also submitted that pursuant to CPR 26.3 (1) (b), where the claimant's statement of case does not disclose reasonable grounds for bringing a Claim, the Court may strike out the Claim. With reference to Eastern Caribbean Court of Appeal authority, Master Taylor – Alexander, as she then was, summarised the principles in the High Court case of **Kenneth Burns and June Burns v Redman Limited** SLUHCV 2010/0678, as follows:

[14] In *Baldwin Spencer v The Attorney General of Antigua and Barbuda et al* Civil Appeal No. 20 A 1997 a case that preceded the CPR and concerned the interpretation of Order 18 rule 19 of the old rules³, but which reasoning in my view continues to bear relevance in the interpretation of part 26.3 (1), Byron CJ said: – "...the operative issue for determination must be whether there is '*even a scintilla of a cause of action*'. If the pleadings disclose any viable issue for trial, then the court should order the trial to proceed but if there is no cause of action the court should be equally resolute in making that declaration and dismissing the appeal." and at page 5 of the judgment: – "This summary procedure should only be used in clear obvious cases, when it can be seen on the face of it, that the claim is obviously unsustainable, cannot succeed or in some other way is an abuse of the process of the court" The court is not concerned at this stage with the truth or otherwise of the pleadings".

[15] More modern authorities remain consistent with the reasoning in *Baldwin Spencer*. The claimant relied on the following unreported authority of *Julian Prevost v Rayburn Blackmore* DOMHCV2005/0177, where Rawlins J (as he then was) reasoned: – "The court has always had jurisdiction to strike out actions on this ground if having examined the claim it finds that the action will have no chance of success even if the pleading process were to continue and the matter goes to trial. This is a jurisdiction which the court exercises very sparingly and only in the most clear and obvious cases, for example when it is clear that the case has no legal basis. This is because the court errs on the side of having trials on the merit of cases."

[15] Counsel posited that the case of **Rock Jean v 1st National Bank of Saint Lucia** SLUHCV2010/0934 Master Taylor-Alexander, as she then was, endorsed the clarification provided by the accompanying notes to the English provision that is identical to CPR 26.3 (1) (b), being Rule 3.4 (2) (a) of the English Civil Procedure Rules (the **English CPR**), as to when such a rule may be invoked. The notes say that this ground applies inter alia to:

- a. statements of case which raise an unwinable case where continuance of the proceedings is without any possible benefit to the respondent and would waste resources on both sides; or

³ The old rules refer to the former Rules of the Supreme Court that prevailed prior to the enactment of CPR 2000.

- b. a claim or defence which is not a valid claim or defence as a matter of law.⁴**

[16] Counsel further posited that the basis that Rule 26.3 (1) (b) mirrors the English CPR, it is instructive to also consider paragraph 3.4.1 of the 2020 White Book, which begins:

"Grounds (a) (being the equivalent to CPR 26.3 (1) (b)) and (b) (being the equivalent to CPR 26.3 (1) (c)) cover statements of case which are unreasonably vague, incoherent, vexatious, scurrilous or obviously ill-founded and other cases which do not amount to a legally recognisable claim or defence."⁵

[17] Counsel also posited that in determining whether to strike out a Claim, the Court:

- a. assumes that the facts set out in the statement of case will be proved at the trial, and**
- b. decides whether, if the facts are so proved, the claimant has a realistic prospect of obtaining the relief claimed against the defendant.**

[18] Counsel submitted that the claimant did not plead that there was any goodwill in his music. He did not plead anything about any purported value of his music. He pleaded nothing about its market share; or any royalties the claimant may receive for his music when it was played.

[19] Counsel submitted that the claimant did not plead that any of his music files had been sold or otherwise distributed by the defendant whether in the Territory of the Virgin Islands or elsewhere. That there was nothing pleaded to suggest that the defendant has or could have profited in any way from the claimant's music files.

[20] Counsel also submitted that the de minimus value of any damages that could hypothetically be awarded to the claimant, no injunction of value would be obtained by the claimant either, if he succeeded in his claim.

[21] Counsel further submitted that an injunction is an equitable remedy, and equity does nothing in vain. That granting the claimant an injunction on the claimant's own pleaded case would be pointless, and an abuse of the process of the court.

⁴ Rock Jean v 1st National Bank of Saint Lucia SLUHCv2010/0934, para. 11.

⁵ White Book 2020, Thomson Reuters, Part 3.4.1 Notes; p 2 para. 4 of enclosed extract.

[22] Counsel posited that allowing the Claim to proceed would be to allow the claimant to continue to abuse the process of the Court. It would not, in any way, comply with the spirit of the overriding objective in Part 1 of the CPR.

[23] Counsel further invited the Court to strike out the claimant's statement of case in its entirety, and award costs to the defendant.

Claimant's/Respondent's Submissions

[24] Mr. Jamal Smith for the claimant, submitted that the locus classicus on the process to be adopted in seeking to strike out a claim before filing a Defence was outlined in **St. Kitts Nevis Anguilla National Bank Limited v. Caribbean 6/49 Limited** (SKNCVAP2002/0006, unreported, 31 March 2003).

[25] Counsel submitted that the defendant did not make any of those applications, but have sought to strike out the claim, not as an abuse of process, which could fundamentally be sustained as an application pursuant to CPR 9.7 in accordance with **St. Kitts Nevis Anguilla National Bank Limited v. Caribbean 6/49 Limited (supra)**. This is a fundamental failure of the strike out process in this situation, because in the normal course of things any allegations made would form part of the Defence, and it appears to be an abuse of process to obtain an extension of time. At best, the strike out application, if it were properly made, applying the rule in **St. Kitts Nevis Anguilla National Bank Limited v. Caribbean 6/49 Limited (supra)** could have been an application for a declaration under CPR 9.7.

[26] Counsel further submitted that the overriding objective of the rules of the CPR (as amended 2000) is to ensure that cases are dealt with justly, ensuring that justice is done by all the parties involved, that if the claim is struck out at this stage, the claimant would be the one to be prejudiced, the claimant would have been deprived of the right to a hearing on the merits of the case before the Court. The claimant therefore submitted that the present Application be dismissed to further the overriding objective of the CPR, that costs be granted to the claimant and that further directions be given for the matter to proceed to trial.

[27] Counsel also submitted where the court converted a Strike Out Application to an application for a declaration under CPR 9.7 in accordance with **St. Kitts Nevis Anguilla National Bank Limited v. Caribbean 6/49 Limited (supra)** then the Defendant runs up against a further hurdle, since the application is not supported by evidence on affidavit as required by CPR 9.7(4) then there is in effect no proper application before the court, and, therefore, CPR 9.7(7) does not come into play for the court to make an order as to the period for filing a defence and CPR 9.7(8) also is of no consequence.

[28] Counsel finally posited that CPR 12.10(3) had been complied with as the relevant documents, including the appropriate application upon which the Claimant relies, was served on the Defendant. Additionally, there is no appropriate ground for a strike out application in this matter and the time within which the Defendant may have brought an application to strike out before filing a defence has already lapsed.

Issue

[29] Whether this Court should strike out the claim and dismiss the claim based on an abuse of process.

Court Analysis

[30] The Civil Procedure Rules rule 26.3 (1) provides:

“26.3(1) In addition to any other power under these Rules the court may strike out a statement of case or a part thereof if it appears to the court that –

(a) ...

(b) ...

(c) the statement of case or the part to be struck out is an abuse of process of the court or, is likely to obstruct the just disposal of the proceedings; or

(d) ...

[31] On rule 26.3(1) in **Baldwin Spencer v. The Attorney General of Antigua and Barbuda et al**⁶ the Court of Appeal explained that the approach is not a factual investigation on the truth of the pleadings, but whether taken at its highest there is disclosed a cause of action. Byron JA said:

“This summary procedure should only be used in clear obvious cases, which it can be seen on the face of it, that the claim is obviously unsustainable, cannot succeed or in some other way is an abuse of the process of the court. The court is not concerned at this stage with the truth or otherwise of the pleadings.”

[32] In the early days of **CPR 1998** in the United Kingdom, in **McPhilemy v. Times Newspapers Ltd.**

⁷Lord Woolf MR gave guidance upon the statements of case (and the Court dares to add similarly where an affidavit is used to support a fixed date claim instead of a statement of claim) under the CPR 1998 regime when he said:

“The need for extensive pleading including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of the party’s witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader.”

[33] The court’s power to strike out statements of case is exercisable under its inherent jurisdiction and is also governed by rules of court. In **Biguzzi v Rank Leisure Plc** [1999] 4 All ER 934, the English Court of Appeal noted that the English Rules of Civil Procedure, 1999, confer a very wide discretion upon judges to strike out statements of case. According to Lord Woolfe MR:

⁶ Antigua & Barbuda Civil Appeal No.20A of 1997

⁷ [1999] 3 AER 775, p.792-793.

“The fact that a judge has the power does not mean that in applying the overriding objectives the initial approach will be to strike out the statement of the case. The advantage of the CPR over the previous rules is that the Court’s powers are much broader than they were. In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out.”

However, the Court has frowned upon statements of claim or defence or parts therein that are frivolous and vexatious, that are likely to obstruct the just disposal of the proceedings.

[34] In **Blackstone’s Civil Practice, 2010**, the learned authors in commenting on Rule 3.4(2) (a) of the English Civil Procedure Rules, which is the equivalent of our CPR Rule 26.3(1) (c), state at paragraph 33.7 that:

‘Applications... may be made on the basis that the statement of case under attack fails on its face to disclose a sustainable claim or defence. Traditionally, this has been regarded as restricted to cases which are bad in law, or which fail to plead a complete claim or defence...’

[35] In discussing the court’s power to strike out pleadings, the learned authors of Halsbury’s, Laws of England, 4~ Edition, at paragraphs 430-435, stated, inter alia, that:

“... the powers are permissive...and they confer a discretionary jurisdiction which the court will exercise in light of all the circumstances concerning the offending pleading. . . Where a pleading discloses no reasonable cause of action... it would be ordered struck out or amended, if it is capable of amendment. . . No evidence including affidavit evidence is admissible on an application on this ground and since it is only the pleading itself which is being examined, the court is required to assume that the facts pleaded are true and undisputed. . . .However, summary procedure... will only be applied to cases which are plain and obvious, where the case is clear beyond doubt, where the cause of action or defence is on the face of it obviously unsustainable, or where the case is unarguable. . .Nor will a pleading be struck out where it raises an arguable, difficult or important point of law.”

[36] In **Johnson v Gore Wood & Co (a firm)**, [2002] 2 AC 149, Lord Bingham of Cornhill indicated that the approach to be adopted in assessing abuse of process should be a broad, merits-based judgment which considers the public and private interests involved, as well as the facts of the case. He also stated [that it is not necessary before abuse is found, to identify any additional element, such as a collateral attack on a previous decision, or dishonesty, and noted that the presence of these elements will make the later proceedings more 'obviously abusive'.

[37] Lord Kilbrandon, in giving the advice of the Board in **Yat Tung Investment Co. Ltd. v Dao Heng Bank** [1975] AC 581 at 590, noted that the court has a duty not to deny a litigant his or her right to bring a claim before the court '**without scrupulous examination of all the circumstances**'.

[38] Striking out of a claim, should always be a matter of last resort and thus, should only be ordered by a court in plain and obvious cases: **Three Rivers District Council v Bank of England** (No. 3) – [2003] 2 AC 1, esp. at [96] – [97].

[39] In determining whether the claimant's statement of case constitutes an abuse of process, it ought to first be recognized that rule 26.3 (1) (b) gives this court the power to strike out a statement of case which is an abuse of the court's process. As stated in **Hunter v Chief Constable of the West Midlands Police**, by Lord Diplock – [1982] AC 529, at 536,

this is a power, 'which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people.'

[40] This court cannot though, at this stage of these proceedings, strike out the claimant's claim as being an abuse of process. That is so because, as stated by the authors, in the text – **Blackstone's Civil Practice, 2014**, at paragraph 33.12 – '**Applications to strike out for abuse of process should be made shortly after service.**'

[41] Rule 26.2 stipulates that a court may strike out a statement of case or part of a statement of case in specific instances. One such instance is as alleged in this matter where the statement of case discloses no grounds for bringing or defending a claim (see rule 26.2(c)). Traditionally, this ground has been restricted to cases which are bad in law or which fail to plead a complete claim. Therefore, a statement of case ought to be struck out if the facts set out do not constitute the cause of action or if the relief sought would not be ordered by the court. A statement of case may be hopeless not only where it is lacking a necessary factual ingredient but also where it advances an unsustainable point of law.⁸

[42] It is well settled however that the court's power to strike out should be used sparingly. It is to be used sparingly because the exercise of the jurisdiction deprives a party of its right to a trial and of its ability to strengthen its case through the process of disclosure and other court procedures such as requests for further information.⁹ In the case of **Belize Telemedia Limited v Magistrate Usher** (2008) 75 WIR 138 Abdulai Conteh CJ warned:

"It is important to bear in mind always in considering and exercising the power to strike out, the court should have regard to the overriding objective of the rules and its power of case management. It is therefore necessary to focus on the intrinsic justice of the case from both sides: why put the defendant through the travail of full-blown trial when at the end, because of some inherent defect in the claim, it is bound to fail, or why should a claimant be cut short without the benefit of trial if he has a viable case?"

[43] Further, A. Zuckerman suggests that:

"It would be wrong to strike out a statement of case that presents an arguable claim or defense or where the claim raises complex issues of fact or law. Accordingly, a statement of case should not be struck out if it raises an issue in an area of law that is in a state of uncertainty or development."¹⁰

⁸ See Civil Practice, A. Zuckerman at para 8.24.

⁹ See *Hector v Joseph* (Dominica Civil Appeal No. 6 of 2003); Blackstone's Civil Practice 2011 at para 33.6.

¹⁰ See Civil Practice, A. Zuckerman at para 8.25.

[44] In fact, unless it is certain that a case is doomed to fail, such a case is inappropriate for striking out (see **Barrett v Enfield London Borough Council** [2001] 2 AC 550 at p. 557 per Lord Browne-Wilkinson). Lord Browne-Wilkinson went on to add:

"[I]n an area of the law which was uncertain and developing (such as the circumstances in which a person can be held liable in negligence for the exercise of a statutory duty or power) it is not normally appropriate to strike out. In my judgment it is of great importance that such development should be on the basis of actual facts found at trial not on hypothetical facts assumed (possibly wrongly) to be true for the purpose of the strike out."

[45] Though the court must be cautious in the exercise of this jurisdiction there are identifiable instances where the court may exercise its discretion to strike out and the most straightforward case for striking out is a claim that on its face fails to establish a recognizable cause of action.¹¹ In **Baldwin Spencer v The Attorney General of Antigua and Barbuda et al** Civil Appeal No. 20 A 1997, Sir Dennis Byron opined:

"...the operative issue for determination must be whether there is 'even a scintilla of a cause of action'. If the pleadings disclose any viable issue for trial, then the court should order the trial to proceed but if there is no cause of action the court should be equally resolute in making that declaration and dismissing the appeal." The court may also exercise its discretion to strike out where it is satisfied that the statement of case is incurably bad.¹²

[46] The Court of Appeal has identified what a claimant is required to include in its statement of case and the purpose behind such inclusion. In the case of **Real Time Systems Limited v Renraw Investments Limited & Ors** Civ. App. No. 238 of 2011, Jamadar JA articulated at paragraphs 8-12:

"8. Part 8, Rule 8.6 requires a claimant to set out "a short statement of all the facts on which he relies" to establish his claim. This rule establishes an objective standard. It is not what a claimant wants (subjectively) to set out that is required; but rather it is what a claimant is required (objectively) to set out in order to establish his claim. However, even this formulation of a claimant's responsibility

¹¹ Ibid at para 8.24.

¹² See *Lennox Linton et al v Anthony W. Astaphan et al* Claim No. DOMACV 2008/0436.

may be somewhat understated. Clearly fairness and justice require, that if a defendant is to be able to discharge the duty on him to also set out all of the facts on which he relies to dispute a claim made against him, then a claimant must set out fully (without being prolix) the facts which underpin his case so as to have the legitimate and relevant issues that he reasonably knows will arise on his claim raised and responded to. Such an approach is consistent with the purpose and mandate for the use of pre-action protocols under the CPR, 1998.

9. The thrust of the CPR, 1998 is towards litigation with full disclosure at the earliest opportunity and against tactical non-disclosure for the purposes of gaining strategic advantages in the conduct of litigation.

10. Moreover, the duty on both claimant and defendant to set out fully all facts which ought to be stated in the statement of case and defence respectively, is also so as to allow a judge to properly manage a matter in the context of the CPR, 1998, with its court driven mandate and the extensive case management powers and responsibilities bestowed on judicial officers. Thus, a court is responsible for “identifying the issues at an early stage,” and “deciding promptly which issues need full investigation and trial ...”, and “ensuring that no party gains an unfair advantage by reason of his failure to give full disclosure of all relevant facts ...”. The first two of these duties are given priority by placement in the order of responsibilities set out at Rule 25.1, CPR, 1998. Discharging this duty is only possible if both a claimant and a defendant set out fully all relevant facts in support of and in denial of a claim and of the issues that they reasonably know will likely arise.

11. In my judgment, and in agreement with the trial judge, the appellant did not fully comply with the requirements of Rule 8.6 in the circumstances of this case.

12. Books of precedents, such as Bullen and Leake and Jacob’s Precedents of Pleadings, are only guides to assist practitioners, by pointing to what may be necessary to be set out to establish a claim or defence. Reliance on such precedents cannot be used as a basis to avoid the responsibilities that Rule 8.6 mandates and the entire CPR, 1998 demands.”

[47] Jamadar JA also concluded that where a statement of case inadequately sets out all of the facts which ought to have been stated the court ought to first consider whether an appropriate order for 'further and better particulars' of what was set out in the statement of case could facilitate the disclosure of what was required. This process is to allow the claimant to continue pursuing its claim and allow the respondent a fair opportunity to know the case it has to answer and be able to state all the facts necessary to admit, explain and/or dispute the claims made against it.¹³

[48] In the UK Privy Council case of *Real Time Systems Limited v Renraw Investments Limited & Anr* [2014] UKPC 6 it was also reiterated that:

"The court has an express discretion under rule 26.2 whether to strike out (it "may strike out"). It must therefore consider any alternatives, and rule 26.1(1) (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. As the editors of *The Caribbean Civil Court Practice* (2011) state at Note 23.6, correctly in the Board's view, the court may under this sub-rule make orders of its own initiative. 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, and that the appropriate course is to order the claimant to supply further details, or to serve an amended statement of case including such details, within a further specified period. Having regard to rule 26.6, the court would quite probably also feel it appropriate to specify the consequences (which might include striking out) if the details or amendment were not duly forthcoming within that period."¹⁴

[49] The court, then, is mandated to consider alternatives to striking out but must balance the interests of the claimant with that of the defendant: the claimant should not be prematurely barred from pursuing its claim, but the defendant has a right to know the case it has to answer.

¹³ See para 7 of that judgment.

¹⁴ In the Jamaican consolidated cases of *Haughton and Haughton executors of the estate of Alexander Haughton v Yvonne Haughton* G476/2001 and HCV 1445/2003, the strike out procedure was described as "the nuclear weapon in the court's arsenal and should not be the first and primary response of the court..."

[50] In considering the issue of whether the present claim is an abuse of process, I am guided by the authorities which show that a litigant ought not to be denied his or her right to bring a claim before the court “without scrupulous examination of all the circumstances”.

[51] Wooding CJ in **Baptiste v. Supersad** 1967 12 WIR 140 p. 144, which was cited in the Montserrat case of **Kevin Weste et al v. Shamrock Industries Ltd.** by Redhead J stated:

“The law is not a game nor is it an arena. It is the function and duty of a judge to see that justice is done as far as may be according to the parties.”

Redhead J also said in that case that the attainment of true justice is **“over the highway of reality and not through the alley of technicalities.”**

[52] The CCJ in 2006, Saunders J in CCJ CD 2 of 2006 **G Watson v. Fernandes** at paragraph 39 said:

“Courts exist to do justice between litigants, through the balance of interest, an individual litigant against the interest of litigants as a whole. Justice is not served by depriving parties of the ability to have their cases decided on the merit because of a technical procedure breach committed by their attorney. With the greatest of respect to the court below we disagree that anything in the rules suggest that there is a time limit on the court’s ability to excuse non-compliance with the rules or permit to be remedied if the interest of justice so required. The Court retains that jurisdiction at all times.”

Discussion

[53] The court must first consider whether the statement of case, as amended, meets the criteria of rule 8.6 of the CPR and whether it contains sufficient facts to find a cause(s) of action.

[54] All limbs of the claimant’s case rest on its ability to establish copyright infringement. The ingredients that are necessarily required to be pleaded in a statement of case to establish this cause of action are identified at para 67-08 of Bullen & Leake & Jacobs Precedents and Pleadings 16th Ed. Vol II where the authors outline that the particulars of claim must contain:

54.1. The title of the claimant to sue;

54.2. The subsistence of copyright in the work, which must be identified with precision;

54.3. The infringement by the defendant; and

54.4. The relief claimed. Further, relevant documents such as the copyright work should be attached to the claim.

[55] As noted in the case of **Real Time**, the text, **Bullen & Leake & Jacobs Precedents and Pleadings**, operate as a guide and is not conclusive of what is required to be pleaded. However, the court accepts the learning in the text as copyright is a property right which can only subsist in specific works as identified by the Copyright Act. To successfully claim that one's copyright has been infringed it must first be established that (1) copyright subsists in the works in question and (ii) the copyrighted works **were used** without the consent of the owner of that copyright. These particulars are also required to be able to claim the remedies established by the Copyright Act as the court can only take an account if the extent of the infringement could be ascertained.

[56] Accordingly, the failure of the claimant to particularize the extent of the breach by identifying the breaches puts the court and the defendants at a disadvantage if even the claimant is successful in its claim and the court is minded ordering an account be taken. As previously noted in the case of **Copyright Music Organisation of Trinidad and Tobago v Columbus Communications Trinidad Limited** CV2009-04722, the failure of a claimant who pursues copyright infringement to particularize the breaches complained of handicaps the court's process of taking account.

[57] The court has taken the aforementioned factors into consideration, and though hesitant to do so, there is no other option available to this court at present based on the established principles but that the amended statement of case and claim form must be struck out. As it stands, the statement of case has not sufficiently made out the cause of action alleged, that is, copyright infringement.

[58] The claimant had a responsibility to properly set out the necessary facts to support its case and has failed to do so. The purpose of the CPR 2000 is to enable the identification of the issues to be done at an early stage. By its failure to provide these particulars the claimant has exhibited to this court that, even up to now, they are unaware of the true nature and extent of the case which they have brought before the court and are now seeking to identify the elements to construct its case while the court processes are taking place. At present, this is more than merely attempting to strengthen the case in distinction to the case of **Real Time Systems Ltd**. Quite frankly the court is not sure that the claimant knows the extent of the breaches at this stage and it would be unfair to the defendant now to have to try to meet a case which seems to be, yet, undefined and unidentified. At the very least, the defendant must know what the alleged breaches are, when the breaches took place and where and it is obvious that the claimant is still in the process of securing that information.

[59] The court cannot allow this case to proceed. This cannot be fair to the defendant. The claimant had a fair opportunity to present the pertinent information and was unable to do so.

Conclusion

[60] The defendant is contending that the present claim is an abuse of the process of the court and that there are no reasonable grounds for bringing the claim. The court is therefore being asked to examine the conduct of the claimant in filing the instant claim. The claimant on the other hand is asking the court to consider that the issues raised in the claim have not been litigated.

[61] In considering the issue of whether the present claim is an abuse of process, I am guided by the authorities which show that a litigant ought not to be denied his or her right to bring a claim before the court "without scrupulous examination of all the circumstances".

[62] It is well established that striking out on the ground of abuse of process is a discretionary power, and that material consideration in exercising the discretion is the conduct of the parties so far. Ms. Bovingdon and the defendant may be of the view that to strike out the claimant's claim would be a fair and just way to dispose of the claim, without this matter proceeding to trial. It would only

though, be fair and just to do so, if this is a plain and obvious case, in respect of which, the claimant's claim should be struck out. I tend to agree with Counsel.

[63] In conclusion, it is therefore not appropriate for present purposes, for this court to give any consideration to either the defendant's defence for the purpose of determining whether the claimant's statement of case discloses any reasonable grounds for bringing the claim. It is either that the claimant's statement of case discloses reasonable grounds for bringing the claim, or it does not. The answer as to whether the same does so or not, must be found from a careful consideration of only that which is, to use a descriptive phrase, 'within the four (4) corners of the claimant's statement of case.'

[64] I wish to reiterate for emphasis at this juncture that where a statement discloses no reasonable grounds for bringing or defending it, it will be ordered struck out or amended, if it is capable of amendment. Rule 26.3 (1) (c) however, will only be applied to cases which are "plain and obvious, where the case is clear beyond doubt, where the cause of action or defence is on the face of it obviously unsustainable, or where the case is unarguable".

[65] In the final analysis, it is apparent to this court, that the claimant's statement of case does not disclose reasonable grounds for bringing this claim against the defendant. I have borne in mind that the Court should only exercise its power to strike out in "plain and obvious" cases. This power is to be exercised with caution, as striking out will have the effect of depriving a litigant of the opportunity to have his claim tried by the court: **Kwa Ban Cheong**, citing **North West Water Ltd v Binnie & Partners** [1990] 3 All ER 547 at 553. I am fully cognisant that the role of the Court at this stage is not to carry out a minute and protracted examination of the documents and the facts of the case: see **Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin and others** [1997] 3 SLR(R) 649 at [18] and **The "Osprey"** [1999] 3 SLR(R) 1099 at [6]. Otherwise, the Court hearing the striking out application would effectively be usurping the proper function of the trial court and conducting a trial of the case in chambers on affidavits only, without discovery and without evidence tested by cross-examination in the ordinary way: see **Ko Teck Siang and another v Low Fong Mei and another and other actions** [1992] 1 SLR(R) 22 at [15], citing **Wenlock v Moloney** [1965] 2 All ER 871 at 874. Instead, the correct question for the Court to ask is whether the

commencement of the present suit constitutes a plain and obvious case of an abuse of the process of the Court.

[66] Additionally, I have considered, as Bingham and Millett LL stated in the case of **Johnson v Gore Wood**, that a court must hesitate, think deeply and carefully before turning away a litigant who has not had his claim heard on the merits. I therefore accept that striking out is a draconian measure which a court should be reluctant to take and should only take in the clearest of cases as the consequence is that a party who has had his claim struck out is barred from proceeding and I find that the claimant's statement of case discloses no cause of action and does not raise questions fit to be decided by the court and it therefore ought to be struck out.

[67] I have also borne in mind that while the claim as filed are only allegations at this stage and could be completely cleared away at a trial, there is the need for a full hearing on the merits so it would be proper to shut the claimant out at this stage.

[68] The courts exist to adjudicate and determine disputes between parties and therefore litigants ought not to be denied the opportunity of having their issues decided on their merits by the court. Since there was no trial in the first claim, I am of the view that it would not be a draconian step to strike out the claim as disclosing any reasonable grounds for bringing the claim.

[69] In view of the foregoing I find that it would be just in all the circumstances to strike out the claim on the grounds that it discloses no reasonable cause of action.

[70] Having looked at the facts and circumstances of this case and examined the issues and allegations before the court in the claim, and having considered the submissions of both Counsel, I will adopt the approach of the Court of Appeal in **Rudd v Crowne Fire Extinguishers Services**, SCCA 48/89, unreported, delivered December 20, 1989, where Downer JA, while referring to the case of **Dyson v The Attorney General**, stated, inter alia, that:

“Even if the case is not a strong one, it merits an examination of the law and facts...”

[71] Finally, I wish to thank learned Counsel for their submissions in this matter.

[72] The defendants' application to strike out the plaintiff's statement of case is granted, and these are the orders that follow:

[73] **Order**

- (i) The defendant's application to strike out the Claimant's statement of case is granted and as such, the claimant's statement of case is struck out.
- ii) The costs of the defendant's application to strike out are awarded to the defendant and such costs shall be in the sum of US\$2,000.00.
- iii) The defendant shall file and serve this order.

Ricardo Sandcroft
Master [Ag]

By the Court

Registrar