

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE BRITISH VIRGIN ISLANDS**

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

Claim Number: **BVIHCV2019/0274**

Between

(1) **GLANVILLE PENN**
(2) **EDITH PENN**

Claimants/Respondents

and

(1) **CHRISTINA CORNIBERT**
(2) **VERNON JOHN**

Defendants/Applicants

Appearances:

Mr. David Penn of counsel for the claimants/respondents
Ms. Reynela Rawlins of counsel for the defendants/applicants

2020: June, 4th
2020: October, 1st

JUDGMENT

Introduction & Background:

[1] **SANDCROFT, M. [Ag.]**: This is an application for striking out the statement of case against the second defendant and in the alternative, the addition of an ancillary defendant. The claimants, Mr. Glanville Penn and Mrs. Edith Penn both of Road Town, Tortola claim against both defendants, Ms. Christina Cornibert and Mr. Vernon John for damages, for personal injuries caused to the 1st claimant, Mr. Glanville Penn; and the total loss (Write Off) of their vehicle, a Black, Four Door, Automatic Transmission, Suzuki Grand Vitara, Registration No. PV18251, caused in a vehicular accident on Tuesday 25th October, 2016. In the accident the 1st defendant negligently drove and or lost control of her vehicle and collided with the 1st claimant's vehicle causing him severe injuries.

- [2] The defendants applied to have the 2nd defendant removed from these proceedings, in essence that the statement of case of the claimants to be struck out as against the 2nd defendant. The defendants have also applied to have the Insurance Company added as an ancillary defendant in this matter. They supported their application with legal submissions.
- [3] The claimants on 22nd October, 2019 filed a claim against both defendants for damages as a result of the collision.
- [4] The claimants' claim is for special damages in the amount of USD\$104,844.97 along with general damages and interest to be assessed, and any other relief that the court deems fit in the circumstances.
- [5] The claimants' claim was for damages for Personal Injuries against both defendants, as specifically stated in the claim form filed on October 22, 2019. The claim against the 2nd defendant burgeoned out of the negligent driving of the 1st defendant, who at the time was said to be the driver of a vehicle belonging to the 2nd defendant. The claimants submitted that although no specific allegations were pleaded against the 2nd defendant, the claim however, specifically included him, by virtue of the relationship of agency as being liable for the personal injuries caused to the 1st claimant, as a result of the negligent driving of the 1st defendant.
- [6] The defendants responded by way of a defence filed on the 29th day of November 2019 on behalf of both the 1st and 2nd defendants, namely Vernon John and Christina Cornibert as the driver of the said motor vehicle.
- [7] The 2nd defendant stated in his defence that the claimants, by way of their claim did not make any allegations of negligence against him and therefore the claimant was not entitled to the relief claimed or to any relief at all as against him.

Claimants'/Respondents' Submissions

- [8] The claimants submitted that the 2nd defendant, as being the registered owner of the motor vehicle

registered PI 500, there was a 'presumption' that as the owner of the vehicle, the 2nd defendant was vicariously liable for the negligent use of his vehicle, by his employee or agent whom he had authorized or permitted the use of his vehicle.

[9] The claimant also posited that whether the owner was vicariously liable for the accident or not or whether the driver was the agent of the owner or not, are questions of fact to be determined at a trial.

[10] The claimant further posited that section 2 of **the Road Traffic Act. CAP 218** defines the owner of a motor vehicle to mean:

- (a) **in the case of a motor vehicle that is registered and licenced the person in whose name the vehicle is registered and licenced.**
- (b) ...
- (c) ...

[11] The claimant also submitted that section 40 (1) of the **Road Traffic Act. CAP 218**, provides that:

Where in any accident due to the use of any motor vehicle on a road any damage or injury is caused to any person, animal or property the driver of the motor vehicle shall –

- (a) ...
- (b) **upon request, give in writing to any person having reasonable grounds for so requesting or to any police officer or to any witness, his name and address, the registration marks of the vehicle and, if he is not the owner of the vehicle, the name and address of the registered owner of such vehicle and the company with which it is insured;**

[12] The claimant further submitted that section 7(2) of the Road Traffic Act. CAP 218 provides that:

(2) Where the driver is charged with an offence under subsection (1), it shall be lawful for the Magistrate to order that a summons be issued against any person alleged by the driver to be the owner of the motor vehicle, making such alleged owner a co-defendant in the case; and the Magistrate may, after hearing the evidence and witnesses of all parties, make such order in regard to the payment of any penalty and costs as [to] the Magistrate seems just.

Defendants' Submissions:

[13] The 2nd defendant submitted that he authorized the 1st defendant to use his vehicle, which was involved in the accident, for her personal use. That the 2nd defendant was not in the vehicle at the time of the accident.

[14] The 2nd defendant further submitted that the 1st defendant was an authorized driver under his insurance agreement and as such she was covered under the insurance policy. The vehicle was comprehensively insured with Real Legacy Assurance Company, Inc. through their agents Caribbean Insurers and therefore had comprehensive coverage from April 17th 2016 through to April 17th 2017.

[15] The 2nd defendant posited that he renewed his personal automobile insurance policy on March 24th 2016 for his vehicle to have comprehensive coverage from April 17th 2016 through to April 17th 2017 with Real Legacy Assurance, Inc of Puerto Rico through their agents, Caribbean Insurers Ltd. of Road Town, Tortola British Virgin Islands.

[16] The 2nd defendant further posited that Real Legacy Assurance Company, Inc has a contractual and statutory obligation under the **Motor Vehicles Insurance (Third Party Risks) Act), CAP 242** to indemnify persons covered under the insurance agreement between Real Legacy Assurance, Inc and the 2nd defendant.

[17] The defendants posited that the claimants' pleadings revealed no reasonable ground for bringing the claim and no real prospect of succeeding on this claim. The claimants asserted (at paragraphs 3 and 14 of their particulars of claim, that the defendants owed a duty of care to the claimants, as fellow users on the public road. Then they continued explaining and alluding to the wrongdoing of the 1st defendant throughout the said particulars of claim.

[18] The 2nd defendant further posited that the position was buttressed on the aforementioned principle emanating from **Hewitt v Bonvin** [1940] 1 KB 188 (at para 5.61), that an owner of a vehicle does not incur liability for damage caused by it, merely by being the owner. In that

case, a father lent his son his car to take the son's female companion home. The father was held not liable for the loss and injury caused by the son's negligent driving. In that case, Du Parq L.J. said:

"It is plain that the appellant's ownership of the car cannot of itself impose any liability upon him. It has long been settled law that where the owner of a carriage or other chattel confides it to another person who is not his servant or agent, he is not responsible merely by reason of his ownership for any damage which it may do in that other's hands."

It was held that, "the plaintiff has failed to show more than a bailment of the car by the appellant to the person responsible for driving it negligently. This is not enough to make the appellant liable, and I therefore agree that the appeal must be allowed."

[19] The 2nd defendant also submitted that in the judgment of Byron, C.J. [AG] as he then was, in **Baldwin Spencer v The Attorney General of Antigua and Barbuda, Lester Bryant Bird & Asian Village Antigua Limited** (CIV. APP. NO.20A OF 1997) the principles on which a court would remove a defendant from a claim and he outlines,

"Order 18 rule 19 of the Rules of the Supreme Court empowers the Court to strike out any pleading on the ground that it discloses no reasonable cause of action or is frivolous or vexatious is otherwise an abuse of the process of the court. ... In brief the court is empowered to dismiss an action in a summary way without a trial where the statement of claim discloses no cause of action, or is shown to be frivolous or vexatious or is otherwise an abuse of the process of the court. This summary procedure should only be used in clear and obvious cases, when it can clearly be seen, on the face of it, that a claim is obviously unsustainable, cannot succeed or in some other way is an abuse of the process of the court. In one of the cases from Canada on which reliance was placed the standard was expressed in terms that the claim should not be struck out if there is even a scintilla of a cause of action (Operation Dismantle v the Queen (1986) LRC (Const.) 421."

[20] The 2nd defendant submitted that Rawlins, J (as he then was) confirmed in **Caribe (Realties) Canada Limited/ Immeubles Caribe Ltee & Betts Realty Limited S.P.A.S v Wycliffe Baird**

(Civil Appeal No. 10 OF 2005), that **Baldwin** outlined the appropriate law for matters relating to removing defendants from claims, he says,

“The learned Master correctly stated the principle on which a court would dismiss a claim against a defendant because it discloses no or no reasonable cause of action against them. She extracted it from the statement of Sir Dennis Byron, CJ, in the case of Baldwin Spencer v The Attorney General of Antigua and Barbuda et al where it was stated that this summary procedure should only be used in clear and obvious cases, when it can be clearly seen on the face of the statement of claim that it is obviously unsustainable or is in some other way an abuse of the process of the court.”

[21] The 2nd defendant also posited that Master Mathurin’s (as she then was) position which Rawlins J (as he then was) referred to at paragraph 14 of his judgment in **Caribe (Realties)** was,

“.... the court must balance against giving effect to the overriding objective of the Rules which is to deal with cases justly by ensuring the most efficient use of the resources of the court and to save the parties unnecessary expense, through the case management process, by preventing a claimant who does not have a reasonably sustainable case from proceeding to trial.”

[22] The defendants further posited that the Statement of Claim merely spoke to Christina Cornibert as being the negligent driver of a motor vehicle owned by the 2nd defendant. This, the 2nd defendant submitted would be tantamount to the claimant pleading that the 2nd defendant had an insurable interest in the vehicle.

[23] The 2nd defendant submitted that the pleadings were woefully inadequate and revealed no claim founded on vicarious liability or on any basis at all in relation to him. The corollary of which was, that the claimant had no basis for bringing the claim and as such had no real prospect of succeeding on the claim.

[24] The 2nd defendant posited that in order for the claimant to have a real prospect of success or any prospect of success at all, it would have been necessary for the claimant to have pleaded

all of the facts of vicarious liability, which he intended to rely upon. That it was not sufficient to merely refer to the 2nd defendant as being liable without establishing the basis for the alleged liability. This is even more so as vicarious liability, on the basis of the existence of an agency relationship, was not a possible conclusion from the pleadings.

[25] The 2nd defendant further posited that the claimants' omission to, at the very least, plead the existence of an agency relationship between Ms. Christina Cornibert on one hand and himself on the other, ought to result in the dismissal of the claim against the 2nd defendant, with costs, as the claimants had no reasonable grounds for bringing the case and no real prospect of succeeding on the claim against the 2nd defendant.

[26] The 2nd defendant finally submitted inter alia that the authorities indicated that the Court should dismiss a claim against a defendant if it disclosed no reasonable cause of action against them. It was also submitted that it was clear and obvious that the claim was unsustainable in light of what is pleaded in the statement of claim. No basis had been presented as to any legal responsibility that the 2nd defendant had or that he breached. At all material times, the 2nd defendant ought to know what case he has to meet, and no reasonable cause of action was pleaded against him. The statement of claim outlined that the driver of the vehicle was the 2nd defendant and that's all that was averred by the claimants.

[27] The 2nd defendant also submitted that the insurance company be added as an ancillary party to the claim in the interest of natural justice and in fairness to him, especially in light of the ongoing liquidation, so that the Real Legacy Assurance Company, Inc. be added as an ancillary defendant.

Issues

[28] The main issue for me to determine is:

- (i) whether or not the claimants have a cause of action or reasonable cause for bringing the claim / whether the claimants' statement of case ('claim' for this purpose), discloses no reasonable grounds for bringing this particular claim against the 2nd

defendant?;

- (ii) whether the 2nd defendant, the owner of the said motor vehicle was vicariously liable to the claimants for the negligence of the 1st defendant? and
- (iii) whether Real Legacy Assurance Company should be added as an ancillary defendant to these proceedings in the place of the 2nd defendant?

Analysis & Findings:

[29] The Claim

8. As it pertains to the substance of the claim, one need not look any further than Parts 8.6 and 8.7 of the CPR which provides as follows:

- a) The claimant must include a short description of the nature of the claim; and**
- b) The claimant must include in the claim form or in the statement of claim a statement of all the facts on which the claimant relies.**

[30] Clearly, the court is exercising its case management powers in setting down this preliminary issue to be decided upon. The court is clearly, authorized by rules of court, so to do. See **rule 26.1 (2) (i) and (j)** in that regard.

The claimant's pleadings & Striking Out (or Removal of the 2nd defendant)

[31] Vicarious liability is a genius of strict liability that reflects the policy and legal attempts to balance the aim of providing innocent victims of torts with legal/financial recourse, against the desirability of protecting employers from having the net of responsibility for the consequences of their employees' unauthorized, unlawful conduct, being cast too widely.

[32] The law as it pertains to vicarious liability in motor-vehicular collisions, as cited by the erudite authors of **Halsbury's Laws of England (Vol. 97 (2015))** at paragraph 792 noted that:

"If the driver of a vehicle is an employee or independent contractor the general rules of vicarious liability apply. If the owner of the vehicle authorizes a person who is neither an employee nor an independent contractor to drive the vehicle for the owner's purpose, or partly for the owner's purposes and partly for his own purposes, the owner will be liable

for torts incidental to that use. Mere permission to use the vehicle is not enough.”

[33] In the case of **Princess Wright v Alan Morrison**, [2011] JMCA Civ. 14, Harris, JA in delivering the judgment of the Court of Appeal stated at paragraph 12:

“The law recognizes liability for negligence on the part of an owner of a motor vehicle, not only in circumstances where at the time of an accident, the vehicle was being driven with the owner’s consent but also where it is driven without consent. Where there is consent, liability on the part of the owner may be rebutted by evidence that although the driver had the owner’s general permission, the use of the vehicle was for his own purpose.”

[34] In the instant case, Mr. Penn submitted that the 1st defendant was an agent, as a driver; the reason she was driving the vehicle was known. Therefore, the absence of evidence of liability/purpose for the 2nd defendant should lead to a finding that the vehicle was being driven for the 2nd defendant’s purpose, as he had not rebutted the presumption that the vehicle was not so engaged.

[35] It also naturally follows from the afore-mentioned requirements of the **CPR 2000** that it must not be left to the defendant (or to this Honourable Court for that matter) to infer the nature of the claim and facts on which the claimants relies. The defendants ought to have received a clear indication as to the claim being made against them and the basis of that claim. Therefore, it was necessary for the claimants to provide the facts to support a claim for vicarious liability, consistent with the facts alleged in the claimants’ submissions.

[36] However, the purpose is to set out the case in sufficient detail, but it should not be so extensive as to lead to prolixity but comprehensive enough to allow the opposing party to answer the case. The dictum in **Davey v Garrett** where Lord Justice Baggallay stated that the statement of unnecessary facts tends to embarrass the defendants. In that case, Baggallay LJ found that the statement of claim presented was embarrassing both from the excessive length at which the statements of necessary facts were set out and from the statement of unnecessary facts.

[37] In **Eastern Caribbean Flour Mills v Ormiston St Vincent and the Grenadines** Civil Appeal No 12/2006 delivered 16 July 2007, Barrow JA at paragraphs 43 and 44 also endorsed the principles laid out by Lord Woolf –

“[43] ...to prevent surprise at the trial, the pleading must contain the particulars necessary to serve that purpose. But there is no longer a need for extensive pleadings, which I understand pleadings to mean with an extensive amount of particulars, because witness statements are intended to serve the requirement of providing details or particulars of the pleader’s case.

[44] It is settled law that witness statements may now be used to supply details or particulars that, under the former practice, were required to be contained in pleadings.

[38] Pleadings should not be approached in an untailored manner. The central point is that the material facts must be pleaded. This is in an effort for the opposing side to adequately respond to the claims. In **Boake Allen Ltd et al v HMRC** [2006] EWCA Civ 25, Mummery LJ stated:

“[131] While it is good sense not to be pernicky about pleadings, the basic requirement that material facts should be pleaded is there for good reason – so that the other side can respond to the pleaded case by way of admission or denial of facts, thereby defining the issues for the benefit of the parties and the court. Proper pleading of the material facts is essential for the orderly progress of the case and for its sound determination. “

[39] The most fundamental rule is that pleadings must contain the statement of the material facts upon which the claim rests but not the evidence which is to be relied upon. Therefore, it can be discerned from the authorities that only relevant facts must be pleaded. The Bahamian case of **Mitchell et al v Finance Corporation of the Bahamas Limited** (RBC FINCO) et al BS 2014 SC 036, which is distinguished by the fact that they are not governed by Civil Procedure Rules but very similar rules under the Rules of the Supreme Court, states –

“Every pleading must contain, and contain only, a statement in a summary form of material facts on which the party pleading relies for his claim or defence as the case may be, but not the evidence by which those facts are to be proved, and the statement must be as brief as the nature of the claim admits.”

[40] The English authority of **North Western Salt Co. Ltd v Electrode Alkali Co. Ltd.** [1913] 3K.B. 422 at 425, per Farewell J posed that the pleader must plead facts, not law, and must not plead the evidence in support of his facts. Further, counsel submitted that it is a fundamental principle of the pleading that a party know what allegations are made against him with precision so that he can decide how to respond to him. Counsel relied on **William v. Wilcox** (1838) 8 A and E 314 at 331 where Lord Denman, C.J. stated:

“It is an elementary rule in pleading, that when a state of fact is relied on, it is enough to allege it simply without setting out the subordinate facts which are the means of producing it, or the evidence sustaining the allegation... The certainty or particularity of pleadings is directed not to the disclosure of the case of the party, but to the informing of the court, the jury and the opponent, of the specific proposition for which he contends, and a scarcely less important object is the bringing the parties to issue on a single and certain point, avoiding that prolixity and uncertainty which would very probably arise from the stating all the steps which leads up to that point.”

[41] In the instant case the claimants did not plead neither in their statement of claim or claim form that the 1st defendant had the authority, expressed or implied, to drive the said motor vehicle belonging to the 2nd defendant as an agent or for his purpose. There was also no pleading that the 1st defendant was acting as an agent of the 2nd defendant when she drove the said motor vehicle registered PI500 in a negligent manner which caused the aforesaid collision and the subsequent injuries to the 1st claimant.

[42] The 2nd defendant's submissions raise issues that attack the claimants' pleadings. A party has the right to amend his pleadings to present the case he thinks best. Under the **Civil Procedure Rules, 2000 (CPR 2000)** a case should not fail due to technical error, as the court can apply its broad

case management powers to rectify these. In the case at bar, any defects in the pleadings can be brought to the notice of the case management or pre-trial judges by the defendants. At this stage, the defendants could be permitted to amend their statement of case to answer any amendments sought. Also, if sufficient particularity was not pleaded, then the other side could seek further and better particulars to know what case he had to meet at trial.

[43] The question now to be answered by this Court, is, as is clearly suggested by the wording of **rule 26.3 (1) (b) of the CPR 2000**, whether the claimants' statement of case ('claim' for this purpose), discloses no reasonable grounds for bringing this particular claim against the 2nd defendant? This is, as earlier stated, to be entirely distinguished from a consideration as to whether or not the claimants' claim is one which has a realistic prospect of success. A party's claim may disclose reasonable grounds for bringing a claim, but yet, may be one which has no realistic prospect of success, such as for instance, if that claim cannot be supported by the evidence expected to be relied on by either party, during a trial of that claim, or, if, for example, that claim is expressly contradicted by documentary materials – **Blackstone's Civil Practice 2014**, at para. 34.25.

[44] **Rule 26.3 of the CPR 2000** sets out the circumstances in which this Court may strike out a claim. The only one of those circumstances that is presently applicable for consideration by this Court, in the particular circumstances of this particular case, is the one which states that this Court may strike out a statement of case, or part of it, if it appears to the court, that **'the statement of case or the part to be struck out, discloses no reasonable ground for bringing or defending a claim.'**

[45] From the onset of this Court's consideration of whether or not the claimants' claim discloses, a 'reasonable ground' or 'reasonable grounds,' 'for bringing' the claim, it must firstly, be carefully noted by all, that what this Court is not now required to determine, is whether or not the claimants' claim has any reasonable, or realistic prospect of success. A claimants' statement of case, may not have even so much as a realistic prospect of success at trial, much less a reasonable prospect of success, but yet, this is not to be taken as automatically meaning or even leading to the implication, that there existed, as far as that statement of case is concerned, and more importantly, as far as is disclosed and the means of that statement of case is disclosed, no reasonable grounds for bringing the claim. The phrase – 'real prospect of successfully defending the claim,' as used in respect of applications for summary judgment (see **rule 13.3 of the CPR 2000**), ought not to be

equated with a statement of case disclosing no reasonable grounds for bringing or defending a claim.’ See: **Gordon Stewart and John Issa** – Supr. Ct. Civil Appeal No. 16 of 2009, on this point.

[46] The **Eastern Caribbean Countries’ CPR 26.3 (1) (b)** is the equivalent of England’s present **CPR 3.4 (2)**. There is no doubt that the court’s jurisdiction to strike out a party’s statement of case is a jurisdiction which ought to be exercised sparingly. It makes no difference, in that respect, whether or not the court is minded to the possibility of making such an order, upon a hearing scheduled as regards same, as a matter of its own motion, or upon written application to this court. Striking out should be done, in respect of either part, or the whole of a party’s statement of case, only in plain and obvious cases. The law in that regard, pre- CPR and post – CPR, remains the same. This point is made in the text – **Blackstone’s Civil Practice (2014)**, at para. 33.6 (p. 527). As such, as was made clear in the case – **Wenlock v Moloney** – [1965] 1 WLR 1238, it is generally improper to conduct what is, in effect, a mini-trial involving protracted examination of the documents and facts as disclosed in the written evidence on a striking – out application. The case: **Three Rivers District Council v Bank of England (No. 3)** – [2003] 2 A.C. 1, esp. at paras. 96-97, has applied the afore-mentioned principles.

[47] If the Court is hearing an application to strike out, pursuant to **CPR 26.3(1) (b)** of the **CPR 2000**. It is to be assumed that the facts alleged by the respondent, are true. See: **Morgan Crucible Co. plc v Hill Samuel and Co. Ltd.** – [1991] Ch 295. In the circumstances, adapting that legal approach to the present legal scenario, it is this Court’s view that it is not, at this time, entitled to disbelieve the claimants’ statement of case. Indeed, it is equally not entitled to disbelieve the defendants’ statement of case. The issue as to whether either of same ought to be believed, is one which will have to be determined at a trial, if this Court orders that this claim shall proceed to trial. In any event though, it must not be forgotten, that whilst the 2nd defendant will have an evidentiary burden at trial – that being a burden to lead sufficient evidence capable of supporting his defence, the legal burden to prove its claim, rests squarely and solely on the claimants’ shoulders.

[48] As long as the claimants’ case herein is therefore, one which raises some question fit to be tried by this Court, then, striking out of their case, would neither be appropriate in law, nor warranted. See: **Chan U Seek v Alvis Vehicles Ltd.** – [2003] EWHC 1238. The test is one as to whether as

far as the claimants' case is concerned, that case is not one which, as a matter of law, can properly constitute a case for the claim instituted by the claimant against the 2nd defendant. Even if the claimants' case were to be perceived by this Court, as being one which is, 'fraught with difficulty,' nonetheless, the claimants' statement of case should not be struck out, on that basis. See: **Smith v Chief Constable of Sussex** – [2008] EWCA Civ 39. As such, the apparent implausibility of a case on paper is not in itself, a sufficient basis to justify striking out that case. See: **Merelie v Newcastle Primary Care Trust** – [2004] EWHC 2554. Also, it would be improper for this Court to strike out a claim in circumstances wherein the central issues are in dispute. See: **King v Telegraph Group Ltd.** [2003] EWHC 1312.

[49] This is the legal difference in approach, between an application to strike out a claim, pursuant to rule **26.3 (1) (b) of the CPR 2000**, and an application pursuant to rule **15.2 of the CPR**, for summary judgment. This was made clear in para. 14 of the Court of Appeal's Judgment in the case - **Gordon Stewart and John Issa** – op. cit. It is not for this court to divine what will be the outcome of a properly filed defence. Such should be the primary consideration for this Court, if and when considering an application for summary judgment, since in that respect, it will be for this Court to determine, as the case may be, whether the claim or defence, has a realistic prospect of success.

[50] **CPR 15.2** gives the Court the power to grant summary judgment on the claim or on a particular issue if it considers that, either the claimant has no real prospect of succeeding on the claim or the issue, or that the defendant has no real prospect of successfully defending the claim or the issue. In dealing with evidence for the purpose of the summary judgment hearing **CPR 15.5** requires an applicant to file affidavit evidence in support of the application as well as it requires a respondent who wishes to rely on evidence to file affidavit evidence.

[51] This Court has not only given careful consideration to the primary issue as to whether the claimants' statement of claim, filed on October 22nd, 2019 should be struck out as against the 2nd defendant, but also, to the secondary issue as to whether any part thereof, should be struck out. This Court has given careful consideration to each of those issues, in accordance with the express wording and undisputable intendment of **rule 26.3 (1) of the CPR 2000**, which is the rule that permits this Court to strike out a statement of case or part of a statement of case. As such, even if

this court were to accede to the 2nd defendant's submissions and, while acting of its own motion, refuse to strike out the entirety of the claimant's statement of case, it would still be open to this Court to strike out any part thereof which discloses no reasonable ground for bringing the claims made by the 2nd defendant against them.

[52] The claim form and statement of the claim of the claimants were both filed on October 22nd, 2019 and also the notice of removal of the 2nd defendant filed hereafter. It is these documents that this Court has paid special regard to, in deciding as to whether the claimants' claim is one which 'discloses reasonable grounds for bringing the claim.' In other words, this Court has paid special regard to the issue as to whether the statement of claim, when considered in the context of the claimants' claim against the 2nd defendant, is one which can constitute, as a matter of law, a valid and reasonable basis for bringing the claim. This is precisely the approach adopted by another Judge- Mr. Justice David Batts, in a similar legal context, in the case – **City Properties Ltd. v New Era Finance Ltd.** – [2013] JSC Civ. 23.

[53] 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:

"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 which are frivolous and vexatious, that are likely to obstruct the just disposal of the proceedings.

[54] 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) (b), 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...”

[55] In discussing the Court's power to strike out pleadings, the learned authors of **Halsbury's, Laws of England**, 4th 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.”

[56] The claim at bar however, should not be struck out as against the 1st defendant since it discloses a cause of action. In **Baptiste v Attorney General** GD 2014 HC 15, and. in **Tawney Assets Limited v. East Pine Management Limited and Ors** Civ Appeal HCVAP 2012/007, Mitchell JA at paragraph 22 stated: -

“The striking out of a party's statement of case, or most of it, is a drastic step which is only to be taken in exceptional cases...The court must thus be persuaded either that a

party is unable to prove the allegations made against the other party; or that the statement of case is incurably bad; or that it discloses no reasonable ground for bringing or defending the case; or that it has no real prospect of succeeding at trial.”

[57] 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.’**

[58] 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.

[59] In determining whether the claimants’ statement of case or part thereof does not disclose any reasonable cause of action, it ought to first be recognized that rule 26.3 (1) (b) gives this court the power to strike out a statement of case or part thereof if it does not disclose any reasonable ground for bringing or defending the claim. 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.”

[60] This Court cannot though, at this stage of these proceedings, strike out the claimants’ claim as not disclosing a cause of action as against the 1st defendant. However, as against the 2nd defendant, the cause of action is tenuous.

[61] 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) (b) 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.”

[62] In considering the issue of whether the present claim does not disclose any reasonable ground for bringing or defending the claim against the 2nd defendant, I am guided by the authorities that 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.”

[63] Cause of action has been held to mean every fact which is material to be proved to entitle the plaintiff to succeed, or all those things necessary to give a right to relief in law or equity. See **Letang v Cooper** (1965) 1 Q.B. 232 at p.242. The foundation of the claimants’ action is the negligent driving on the part of the 1st defendant and causing injury to the 1st claimant by the commission of the tort. However, though there is a reasonable cause of action as against the 1st defendant, the statement of case seems to be as quiet as a cemetery on the issue of vicarious liability in relation to the 2nd defendant. Therefore, I have been persuaded that there is no cause of action in the case at bar as against the 2nd defendant.

[64] The essence of the claimants’ claim against the 2nd defendant is that which they allege was the negligence of the 1st defendant who had been driving a motor vehicle owned by the 2nd defendant. Accordingly, it is essentially being alleged that in the particular circumstances of this particular claim, if this Court were to conclude that the 1st defendant’s negligence resulted in injury and/or loss to the 1st claimant, then, the claimants are entitled to recover for such loss and/or injury, through this Court, from the 2nd defendant.

[65] However, the claimants’ claim is, it seems to me, perhaps deficient in certain respects, especially as it relates to the liability of the 2nd defendant. This does not mean though, that the claimants’ statement of case should be struck out as against the 1st defendant.

[66] The 2nd defendant in his defence admitted paragraph 2 of the statement of claim to the extent that the 1st defendant was at all material times the driver but not the owner of the said motor vehicle

registration number PI500, and that he was the owner of the said motor vehicle registration number PI500.

[67] I wish to reiterate for emphasis at this juncture that where a statement (amended statement of case) of case 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) (b) 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**”.

[68] In the final analysis, it is apparent to this Court, that the claimants’ statement of case does not disclose reasonable grounds for bringing this claim against the 2nd 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.

[69] I am also 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 a claimant bringing a claim which discloses no reasonable ground for bringing the claim.

[70] Additionally, unlike applications to strike out pleadings under **CPR 26.4**, where the court is concerned solely with the form of the pleading and where, if the application is successful, leave

may be granted to amend the pleadings to plead in proper form. In applications under this rule the court is not limited to a consideration of the form of the pleading but receives evidence to determine whether the claimants' claim has any prospect of success. If it has, but the claim is not adequately expressed in the pleading, the court should not dismiss the proceedings or the particular claim, but should grant leave to the plaintiff to file an amended statement of claim or cross-claim (in the case of an application in respect of a cross-claim).

[71] I have also borne in mind that while the claims, as filed, are only allegations at this stage and could be completely cleared away at a trial; there was the need for a full hearing on the merits, so it would be unwise to shut the claimant out at this stage as against the 1st defendant.

[72] 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 the merits by the Court. In light of the fact that there was no trial in the present claim, I am of the view that it would not be a draconian step to strike out the claim as disclosing no reasonable ground for bringing the claim as against the 2nd defendant.

[73] In any event the pleadings clearly particularize a claim in negligence against the 1st defendant as driver but not the 2nd defendant as owner of the said motor vehicle and agent of the 1st defendant. The claimant has cast liability at the feet of the 1st defendant but failed in asserting a relationship between the 1st defendant as the driver of the said motor vehicle PI500 and the 2nd defendant as either one of agency or one of service.

[74] In view of the foregoing I find that it would be unjust in all the circumstances to not strike out the claim as being an abuse of the process of the court and on grounds that it discloses no reasonable cause of action as against the 2nd defendant.

The Ancillary Claim Application

[75] The Ancillary Application is based on the provisions contained in Part 18 of the CPR, which relate to counterclaims, ancillary claims and other similar claims. It is therefore necessary to set out the relevant provisions.

[76] Rule 18.1 defines an ancillary claim to include a counterclaim by a defendant. It states:

- (1) An “ancillary claim” is any claim other than a claim by a claimant against a defendant or a claim for a set off contained in a defence and includes a —**
- (a) claim by a defendant against any person (whether or not already a party) for contribution or indemnity or some other remedy; and**
 - (b) claim by an ancillary defendant against any other person (whether or not already a party; and**
 - (c) counterclaim by a defendant against the claimant or against the claimant and some other person.**

[77] Thereafter, the Rules proceed to make provisions for ancillary claims and therefore, by the definition in Rule 18.1, counterclaims as well.

[78] Rule 18.2 provides that an ancillary claim is to be treated as if it were a claim for the purposes of the Rules. However, Rules 8.12 and 8.13 (which deal with the time within which a claim may be served), Part 12 (which deals with default judgment) and Part 14 (which deals with judgment on admission, subject to exceptions), do not apply.

[79] Rule 18.9 permits a person against whom an ancillary claim is made to file a defence, and further provides that the period for filing the defence is 28 days after the date of service of the ancillary claim. Rule 18.9(3) states that the rules relating to a defence to a claim apply to a defence to an ancillary claim except, as mentioned in Rule 18.2, Part 12 (default judgments).

[80] In the **Editorial Introduction to Part 20 of the UK CPR**¹, commonly referred to as the “White Book”, which deals with counterclaims and other additional claims, it is stated that the best known form of an additional claim is in “the form of a claim made against the claimant by the defendant.” This is known as a counterclaim.

¹ (White Book, Volume 1, 2014)

[81] However, as an example of other additional claims, which represent ancillary claims in our Rules, the **White Book** states:

“Another example of an additional claim procedure is the procedure that caters for the situation where, in response to the claimant’s claim, the defendant (whilst perhaps admitting liability in whole or in part) in effect points their finger at a third party alleging that they are obliged to indemnify them for any liability to the claimant, or to contribute to the satisfaction of any judgment.”

[82] CPR 18.4 sets out the procedure for making an ancillary claim and states:

(1) A defendant may make an ancillary claim (other than a claim falling within rule 18.3) without the court’s permission if in –

(a) the case of a counterclaim – it is filed with the defence; or

(b) any other case – the ancillary claim form is filed before the case management conference.

(2) Where paragraph (1) does not apply, an ancillary claim may be made only if the court gives permission.

(3) An application for permission under paragraph (2) may be made without notice unless the court directs otherwise.

(4) The applicant must attach to the application a draft of the proposed ancillary claim form and ancillary statement of claim.

(5) The court may give permission at the case management conference.

(6) The court may not give permission after the first case management conference to any person who was a party at the time of that conference unless it is satisfied that there has been a significant change in circumstances which became known after the case management conference.

[83] The **CPR 2000** (as amended) is very clear as to when no permission is needed to file an ancillary claim. It specifically exempts the situation where a defendant (under Rule 18.3) is claiming contribution or indemnity from a co-defendant; and the situation where a defendant is being added as a defendant to a counterclaim (under Rule 18.4).

[84] It must however be noted that the factors listed in the above rule are not exhaustive. In accordance with the overriding objective of dealing with cases “justly”, the CPR has provided that, so far as is

convenient, all issues between the parties should be resolved together. This would obviously save time and costs by avoiding multiplicity of claims and the risk of irreconcilable judgments.²

[85] It would also seem to me that the fact of having to seek permission to institute an ancillary claim after case management conference, cannot extinguish the right to bring such a claim where it arises under common law or otherwise. Further, an examination of Rule 18.10 would suggest that the Rules, by requiring permission in the specified circumstances, seem to set up a control mechanism in order to filter irrelevant and unconnected ancillary claims, in furtherance of the overriding objective of saving expense, dealing with cases justly, and ensuring that cases are dealt with expeditiously and fairly. This is clearly demonstrated by the Rules when it invites the court to adhere to certain criteria when deciding upon applications pertaining to ancillary claims:

18.10 (1) This rule applies when the court is considering whether to –

- (a) dismiss an ancillary claim;**
- (b) permit an ancillary claim to be made; or**
- (c) require the ancillary claim to be dealt with separately from the claim.**
- **Rules 26.1(d) and (e) deal with the court's power to decide the order in which issues are to be tried or to order that part of the proceedings be dealt with separately.**

(2) The court must have regard to all the circumstances of the case including–

- (a) the connection between the ancillary claim and the claim;**
- (b) whether the ancillary claimant is seeking substantially the same remedy which some other party is claiming from the ancillary claimant;**
- (c) whether the ancillary claimant wants the court to decide any question connected with the subject matter of the proceedings –**
 - (i) not only between the existing parties but also between existing parties and the proposed ancillary claim defendant;**
 - or**
 - (ii) to which the proposed ancillary defendant is already a party but also in some further capacity; and**
- (d) whether the facts in the ancillary claim are substantially the same, or closely connected with, the facts in the claim.**

² See Blackstone's Civil Practice, 2010, page 391.

[86] Rule 26.2 also gives the court the authority to exercise its powers on its own initiative. In this context the court's powers under Rule 18.10 are relevant. It should be noted that Rule 18.10 (1) contemplates that the Court will be in a position to permit an ancillary claim to be made, to dismiss the ancillary claim or require that the ancillary claim to be dealt with separately from the claim.

[87] I have had regard to all the circumstances of the case, including the factors required by Rule 18.10 (2) which have been set out at paragraph 85 above. That the 1st and 2nd defendants submitted that they had a sufficient basis to establish a cause of action for indemnity against Real Legacy Assurance Company Inc, flowing from the policy agreement which established a contract. The 2nd defendant, as well, can establish the same cause of action on the same basis, if he is not granted leave to be removed from the claim.

[88] The 2nd defendant renewed his personal automobile insurance policy on March 24th 2016 for his vehicle to have comprehensive coverage from April 17th 2016 through to April 17th 2017 with Real Legacy Assurance, Inc of Puerto Rico through their agents, Caribbean Insurers Ltd. of Road Town, Tortola British Virgin Islands , Real Legacy Assurance, Inc, it was submitted that the insurance company has a contractual and statutory obligation under **Motor Vehicles Insurance (Third Party Risks) Act**, **CAP 242** to indemnify persons covered under the insurance agreement.

[89] On the Certificate of Insurance numbered PAP2310394 of the 2nd defendant exhibited as VJ-2, it outlines at paragraph 5 that all persons authorized by the insured are entitled to drive.

[90] I also noted that Ms. Bernadine Wright, the Claims Manager at Caribbean Insurers confirmed in an email dated March 31st 2020 that the 1st defendant would have been covered under the insurance policy of the 2nd defendant once she was authorized by the 2nd defendant to drive his vehicle and she was over twenty-five (25), as was exhibited as VJ-4 to the Witness Statement and Affidavit of the 2nd defendant. Exhibit VJ-1 exhibited the driver's license of the 1st defendant which indicated her date of birth which evidenced that she was thirty-two (32) at the time of the accident.

[91] The Court noted that the 2nd defendant confirmed in his Witness Statement and Affidavit that he authorized the 1st defendant to drive his vehicle on October 25th, 2016, the day of the accident with the 1st claimant.

[92] The Court also noted that it was demonstrated in the policy wording of Real Legacy Assurance Company Inc, exhibited as VJ-3, the policy outlines under “Part A- Liability Coverage” the following:

“INSURING AGREEMENT”

A. We will pay damages for "bodily injury" or "property damage" for which any "insured" becomes legally responsible because of an auto accident. Damages include prejudgment interest awarded against the "insured". We will settle or defend, as we consider appropriate, any claim or suit asking for these damages. In addition to our limit of liability, we will pay all defence costs we incur. Our duty to settle or defend ends when our limit of liability for this coverage has been exhausted. We have no duty to defend any suit or settle any claim for "bodily injury" or "property damage" not covered under this policy.

B. "Insured" as used in this Part means:

- 1. You or any “family member” for the ownership, maintenance or use of any auto or "trailer".**
- 2. Any person using "your covered auto".**
- 3. For "your covered auto", any person or organisation but only with respect to legal responsibility for acts or omissions of a person for whom coverage is afforded under this Part.**
- 4. For any auto or "trailer", other than "your covered auto", any other person or organisation but only with respect to legal responsibility for acts or omissions of you or any "family member" for whom coverage is afforded under this Part. This provision (B.4.) applies only if the person or organisation does not own or hire the auto or "trailer".”**

[93] Finally, I wish to thank learned counsel for their written submissions in this matter.

[94] The 2nd defendant’s application to strike out the claimants’ statement of claim as against him is granted and these are the orders that follow:

Orders

[95] The Court's Orders are as follows:

- i. the 2nd defendant's application to strike out the claimants' statement of case as against him is granted and as such, the claimants' statement of case stands as struck out as against the 2nd defendant only;
- ii. the costs of the 2nd defendant's application to strike out are awarded to the 2nd defendant and such costs shall be assessed, if not sooner agreed.
- iii. the 2nd defendant is to be removed as the 2nd defendant and added as the ancillary claimant in the matter;
- iv. the application of the 1st and 2nd defendants to add as an ancillary defendant Real Legacy Assurance Company Inc, is also granted;
- v. the matter is referred to mediation proceedings for a period of sixty (60) days in light of the addition of the ancillary defendant and is adjourned to December 2nd, 2020;
- vi. the 1st defendant and 2nd defendant are permitted to amend the ancillary claim form and their ancillary statement of claim, in light of the addition of the ancillary defendant;
- vii. the ancillary claimant and the 1st defendant are to serve the ancillary defendant with the amended ancillary claim form and amended statement of claim within 21 days of this judgment in light of the ancillary defendant being added;
- viii. The ancillary claimant and the 1st defendant shall file and serve this order.

Ricardo Sandcroft
Master [Ag.]

By the Court

Registrar