

**EASTERN CARIBBEAN SUPREME COURT
ANGUILLA**

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

Claim Number: **AXAHCV 2020/0023**

Between:

MOKE INTERNATIONAL LIMITED

Claimant/Respondent

and

SANPHERS TRADING & INDUSTRY LIMITED

Defendant/Applicant

Appearances: Ms. Tara Carter of Counsel for the Claimant/Respondent
Mr. Thomas Astaphan Queen's Counsel for the Defendant/Applicant, and with him
Mrs. Tona Simpson Whyte

**2020: June 8;
July 20.**

JUDGMENT

Introduction

[1] **SANDCROFT, M. [Ag.]**: Presently serving before this court, under the judicial scalpel, is a critical application for determination, viz the defendant/applicant, Sanphers Trading and Industry Limited, is requesting that the Statement of Case of the claimant be struck out because it discloses no reasonable grounds for bringing the claim (or no cause of action). The claimant/Respondent, Moke International Limited, vociferously maintains that the claim is brought pursuant to Sections 12 and 36 of the Trademarks Act, R.S.A. c. T30, and that there is a viable action for passing off to be tried by this Honourable Court.

[2] It was Lord Woolf who pointed out in **Kent v Griffith** [2001] 1 QB 36 that it is not accurate to say that a court should be reticent about striking out a statement of case that has no real prospect of success

when the legal position is clear and when investigation of the facts would be of no assistance. Indeed His Lordship said that the Courts are now being encouraged to take issues that have been or can be identified at an early stage and deal with them so that time and expense can be saved. Active case management is an ongoing process; it does not stop because this or that applications have been made to be determined by the court. It may be that during the application the issues become more sharply defined. The applicable law becomes evident. If that is the case, it makes no sense to say that because there is this particular application then that application alone is an end in itself and the court should not take all opportunity to resolve other issues. Once the parties have the opportunity to make their case then there can be nothing wrong with using case management powers to deal with the case justly and save expense regardless of the application being made.

- [3] The novel concept of saving expense, conserving resources and achieving expedition is an appealing one, even more so today when trial dates are far away and the cost of going to trial can be significant. In striving to achieve this concept many litigants apply for summary judgment in instances where it appears that the other party has no reasonable prospect of success.
- [4] The point being made by this Court is that the CPR 2000 is a new procedural code (it is not an updated version of the old) with expanded powers to manage cases in such a manner that cases that should not go to trial are identified and disposed of early. Striking out is not the only way of stopping cases from going forward. The power of active case management exists at all times the case is within the court system. It is time we left behind the notion of trying to fit the old Civil Procedure Code with all its defects into the CPR 2000. New definitely means new and we should not attempt to put old wine into new wineskins.

Background/Chronology

- [5] The claimant/respondent is an international corporation which operates from Buckinghamshire, United Kingdom, and is the proprietor of a registered trademark in Anguilla with the Trade Mark No. 5268 registered in Class 12 in respect of the word: MOKE (the "Trademark"). MOKE is the mark for a vehicle which was engineered in Britain and which is currently manufactured in France. MOKE vehicles are sold by the claimant/respondent.
- [6] The claimant/respondent obtained proprietorship in the Trademark on 23rd November 2016. At all material times, the said Trademark has been subsisting in Anguilla.

- [7] The defendant/respondent is an Anguillian incorporated company that owns and operates several local ventures including a car rental business. The defendant/respondent, in about January 2020 imported into Anguilla three motor vehicles which were manufactured in China and Case Number: AXAHCV2020/0023 bear the words: **MOKE**.
- [8] The Defendant/applicant, **SANPHERS TRADING & INDUSTRY LTD.** operated, among other things, a car rental business, specifically dealing in up-market vehicles.
- [9] In the month of January, 2020, the company purchased three electric **MOKE** vehicles from a company named "**Sixt Car Rental**" located in St. Barths, French West Indies. The vehicles arrived in Anguilla on 13th January, 2020. On the front of each vehicle the word "**MOKE**" was mounted and on the back was the logo "**MOKE OF AMERICA**". Once cleared from Customs, the vehicles were brought to the premises that **SANPHERS** operated from. They were said to have been purchased for personal use and for rental to individuals in Anguilla.
- [10] Letters dated the 20th and 29th January, 2020, were received by **SANPHERS** from Carter & Associates written on behalf of the claimant/respondent. Both letters indicated that the vehicles were not manufactured by the claimant/respondent and that the defendant/applicant (**SANPHERS**) did not have permission to use, hire, or otherwise drive any vehicle marked "**MOKE**", which was not manufactured by them.
- [11] The letters indicated that the trade-mark was protected by registration in Anguilla and that if the defendant/applicant, **SANPHERS**, failed to submit to the demands of the claimant/respondent legal proceedings would be commenced against it.
- [12] A response was sent on behalf of the defendant/applicant (**SANPHERS**), by way of email, on 3rd February, 2020. Thereafter, a third letter dated 6th February, 2020, was sent by Carters & Associates setting out what is alleged to be an additional infringement of the claimant's/respondent's "intellectual property rights and ownership", namely the importation of vehicles bearing the word/mark "**MOKE**".

[13] A letter dated 12th February, 2020, was sent by J.M. Dyer & Co., on behalf of the defendant/applicant in response to said letter. That as an act of good faith, defendant/applicant withdrew the said vehicles from its rental fleet.

[14] On 2nd April, 2020, the claimant/respondent brought a claim against the defendant, pursuant to sections 12 and 36 of the **Trademarks Act R.S.A.c T30** of the Laws of Anguilla, alleging infringement of the registered trademark “**MOKE**”, confusion or likelihood of confusion and passing off.

[15] An Application to Strike out the claimant’s claim and for Security of Costs was filed on 17th April, 2020 on behalf of the defendant/applicant.

Defendant’s/Applicant’s Submissions

[16] Mr. Astaphan Q.C. for the defendant/applicant, submitted inter alia that:

- i. The claimant/respondent had no real prospect of succeeding on the claim and that the claim did not disclose any reasonable cause of action.
- ii. The matter in dispute is a matter of law. The claimant could only succeed on the claim if there was a legally binding trademark between the claimant/respondent and the defendant/applicant. The claimant/respondent was seeking to rely on confusion and passing off as the underlying cause of action.
- iii. To find passing off of a trademark this Honourable Court must find that the elements of passing off existed at the material time.
- iv. The claimant/respondent sought to establish the passing off in paragraph 10 of the Particulars of Claim wherein they said that notwithstanding the defendant’s/applicant’s undertaking to remove the vehicles from hire temporarily, the defendant/applicant subsequently used and placed the vehicles on the market for commercial hire. The vehicles have, from a date unknown, been rented to residents and visitors of Anguilla. While the claimant/respondent is unable to give specific dates of the acts of infringement, the claimant states that by reason of the vehicles bearing the Trademark, being identical to the claimant’s/respondent’s vehicles and being offered to the public for hire by the defendant/applicant, there is sufficient cause to find infringement of Trademark pursuant to the **Trademarks Act, R.S.A. c. T30**, and in paragraph 16 where in respect of the claimant/respondent and defendant’s/applicant’s vehicles being identical and considering that the Anguilla market is small,

the continued use and/or hire of the Defendant's vehicles will cause confusion and lead ordinary members of the public to believe that the Claimant's and Defendant's vehicles are the same.

- v. The court should consider that the trademark '**MOKE**' is registered, by the claimant/respondent, in respect of Class 12 [Automobiles, Automotive Parts and the like] of the Nice Agreement concerning the International Classification of Goods and Services for the purposes of the Registration of Marks. Class 12 of the Agreement is limited to the registration of marks on goods/products and does not include services.
- vi. In its pleadings, the claimant/respondent asserted that the defendant/applicant infringed upon its trademark "**MOKE**", by purchasing and placing on the market for commercial hire, in Anguilla, vehicles that bore the mark "**MOKE**", that were identical in design to that of the claimant's/respondent's vehicle; and that it did so without having authorization to 'use' said mark on its vehicles.
- vii. That to bolster the claim of Infringement of the trademark "**MOKE**", the claimant/respondent further asserted that one of the defendant's/applicant's principals, Mrs. Sandra Richardson, posted on the 15th of March, 2020, a promotion for their "Electric or EMokie"
- viii. The claimant/respondent, in an attempt to establish there being confusion or the likelihood of confusion in the market, bases its claim on (a) the design of both vehicles being identical; and (b) an allegation that the owner of M Rentals is being asked whether the vehicles that he purchased from the Claimant/Respondent for rental in Anguilla, are the same as the vehicles being rented by the Defendant/Applicant, to individuals in the jurisdiction.
- ix. In an act of good faith, in immediate response to the Claimant/Respondent's lawyer's letter, the defendant/applicant removed the letters 'M' and 'E' from the three vehicles, resulting in the word, now being 'OK'. It is submitted that the average consumer instinctively distinguishes the letters of the Roman alphabet and, in the present case they would perceive the differences between those letters, especially as the signs at issue are relatively short. This would prevent there being any likelihood or actual confusion resulting from the Marks being similar, in the market. The removal of the letters was known to the Claimant prior to the filing of its claim. **See: Volvo Trademark Holding AB v Office for Harmonisation in the Internal Market (Trade Marks and Designs) OHIM.**
- x. The claimant/respondent in the Statement of Case relied on a social media post by Mrs. Sandra Richardson as the basis of its claim of the "passing off" of the vehicles. The post that was shared by Mrs. Richardson originated from MOKEAmerica's Facebook page and can be found on their website.

It is not a picture of any of the vehicles in the Defendant's fleet. Further, it is submitted that sharing a post on Facebook cannot amount to "use" of the trademark and it is not "passing off" because not only is she not the creator of the advertisement, but from the source of the information- MOKEAmerica- it is clear that what is being spoken of is a product of MOKEAmerica. Thus, this cannot be the basis upon which the cause of action can rest.

[17] Mr. Astaphan Q.C. also submitted that the law relating to trademark was clear in that there was no absolute ban on the importation of pirated or counterfeit goods alleged to bear a trademark registered in Anguilla. The Act provided for said goods to be imported if they are for private and domestic use. They are only considered to be "prohibited goods" if they are proposed to be traded by the person importing same.

[18] **Section 12 of the Trademark Act, provides that:**

- (1) **"The use of a registered trademark in relation to any goods and services for which it has been registered, by any person other than the registered owner shall require the agreement of the registered owner.**
- (2) **The Registered Owner of a trademark shall, in addition to any other rights, remedies, or actions available to him, have the right to institute court proceedings against any person who infringes the trademark by using, without his agreement, the trademark or who performs acts which make it likely that infringement will occur. The right shall extend to the use of a similar mark to those for which the trademark has been registered, where confusion may arise in public." [Emphasis added]**

Section 36 provides that:

- (3) **"Subject to the provisions of Section 12(3) [use with consent, or by the owner of the mark], the performance of any of the acts referred to in Section 12 in Anguilla by a person other than the owner of the title of the trademark and without the agreement of the latter, shall constitute an infringement". [Emphasis added]**

Section 40 provides that:

- (1) **"The proprietor or licensee of a registered trademark or Community trademark may give notice in writing to the Comptroller of Customs-**

- (a) That he is the proprietor or a licensee of that trademark, as the case may be;
 - (b) That, at a time and place specified in the notice, goods which are, in relation to the trademark, infringing goods being counterfeit and pirated goods are expected to arrive in Anguilla; and
 - (c) That he requests the Comptroller of Customs to treat them as prohibited goods.
- (4) **Where a notice is in force under this section, any goods which the notice relates which are imported otherwise than by a person for his private and domestic use shall be treated as prohibited.” [Emphasis added]**

[19] Counsel respectfully submitted that from the foregoing, that for the claimant/respondent to bring and maintain a claim against the defendant/applicant for the infringement of the rights of MOKE International Limited, it would have to plead in the Statement of Claim facts which can amount to the “use” of the registered trademark “in relation to any goods and services for which it has been registered” i.e. Class 12: automobiles and its parts.

[20] Mr. Astaphan Q.C. further contended inter alia, that the pleadings before this court were deficient. The “Use” of a trademark by an alleged infringer must be established as a threshold matter in the claimant’s/respondent’s pleadings. Failure to have done so should result in the Statement of Claim being struck out, for failing to disclose any reasonable ground(s) for bringing the action.

[21] Counsel also posited that the essence of the claimant’s case is that of passing off the trademark of the claimant/respondent. The claimant’s/respondent’s position was not complex on the law or the facts. The essence of the case is for the court to determine whether this claim rises to the level of creating a reasonable prospect of winning at trial.

[22] Mr. Astaphan Q.C. further submitted that it would be impossible to make this argument at trial and the overriding objective should be to determine the claim summarily on the basis that the claimant/respondent did not plead with any particularity, a factual basis which can amount to “use” of the mark “**MOKE**” by the defendant/applicant, within the context of sections 12 and 36 of the Act, and appears to have a misconceived notion as to what constitutes “use” of a trademark.

[23] Mr. Astaphan Q.C. additionally posited that the correct interpretation of the word “use”, in the context of trademark infringement, had been established in settled case law, namely that use of a sign must be located **“in the context of a commercial activity with a view of economic advantage. For the reasons of legal certainty, where the concept is found in different provisions, it must be interpreted in the same way in each of them”**. See *Anheuser-Busch Inc. v Budejovicky Budvar and others* [2011] EUECJ C-96/09.

[24] Counsel also posited that both the definition of “Infringing goods” as provided in section 1 of the Trademark Act, and the principles of what constitutes “use” of a trademark in connection to goods in the case of *Macia v. Microsoft Corp.*, 152 F. Supp. 2d 535, 539 (D. Vt. 2001) **page 3 at paragraph 6 of the copy judgment**, it is provided that:

“In connection with goods, a mark will be considered in use in commerce if it is placed on the goods or their containers or on documents associated with the goods or their sale, and the goods are sold or transported in commerce.” [Emphasis added]

[25] Mr. Astaphan Q.C. further contended that there was no allegation that the defendant/applicant applied the trademark in Anguilla, or at all. There was no allegation that wherever and by whomever they were applied, that the goods were at the time of the application of the mark, “proposed to be used in Anguilla”.

[26] Counsel also contended that the purchasing of goods bearing the Mark, or the offering for rental any vehicles by the defendant/applicant that in design are conceptually similar to that of the Claimant’s, does not and cannot amount to an infringement of any Mark registered under Class 12., that the defendant/applicant did not manufacture, assemble, label or sell motor vehicles or motor vehicle parts, and that if it did so, it had not been pleaded in the claim.

[27] Mr. Astaphan Q.C. submitted that the defendant/applicant purchased the said vehicles, as is, from a company in St. Barts named **Sixt Rent a Car**, who informed the defendant/applicant that they purchased the said vehicles from the manufacturer, **MOKEAmerica**, a company incorporated under the laws of the United States of America. At the time the defendant received the motor vehicles the mark **“MOKE OF AMERICA”** was on the back of each vehicle and the word **‘MOKE’** was mounted on the front. It is not alleged in the pleadings and indeed it cannot be alleged that the

defendant/applicant has mounted the Mark “**MOKE**” on said vehicles, offered for sale any goods bearing the Mark “**MOKE**”, or that it is putting on the market for sale to consumers goods infringing on the Mark.

[28] Mr. Astaphan Q.C. also submitted that if there has been any “use” of the Mark, it would be on the part of the manufacturers, **MOKEAmerica**, and not the Defendant/Applicant. That it was not an infringement of a registered trademark merely to import a good into Anguilla, which good is alleged to bear a trademark registered to the proprietor. **(See section 40 of the Act)**

[29] Mr. Astaphan Q.C. further submitted that in a trademark infringement claim, the claimant must show, by a preponderance of evidence that a likelihood, and not the mere possibility, of confusion in the market existing, as a result of the Defendant/Applicant unauthorized “use” of the Mark. The facts pleaded in paragraph 13 of the Statement of Claim is that Moke International Limited sold its product exclusively to one car rental company, M Rentals (Morlens Ltd.).

[30] It was also submitted that the pleading, even if it was taken to be true, could not be relied upon to maintain a claim for confusion or likelihood of confusion in the market. The claimant/respondent would have to first establish actual use of the Mark by the defendant/applicant, which is not pleaded, then plead facts upon which a case for ‘likelihood of confusion’ can be based. The pleadings disclose no factual basis for either.

[31] Counsel further submitted that the claimant/respondent could not validly base any allegation on the rental of vehicles (a service), which are supposedly similar in design to their goods/products, as creating any confusion amongst the consumers, as they have not and cannot claim any infringement of their rights to the design of the vehicles, by the defendant/applicant. There is no trademark of the design registered in Anguilla, and the Claim did not disclose that there was any such registration.

[32] Counsel posited that both the particulars of confusion or likelihood of confusion and the particulars of Passing Off fail to plead any likelihood of confusion or actual passing-off of the vehicles as being those of the claimant/respondent. Both particulars were predicated on the vehicles apparently being identical in appearance, which is not a factor to be considered in the case at bar, as there is no pleading of registration of a Mark covering “design”, as well there cannot be, because no such thing is registered.

[33] Mr. Astaphan Q.C. further posited that the Statement of Claim did not plead any of the foregoing. It was devoid of any such allegations. That the law of passing off could be summarized in one short general proposition - no man may pass off his goods as those of another. The claimant/respondent in its action has to establish that **“a goodwill or reputation attached to the goods or services which he supplies in the mind of the purchasing public by association with the identifying “get-up” (whether it consists simply of a brand name or a trade description, or the individual features of labelling or packaging) under which his particular goods or services are offered to the public, such that the get-up is recognised by the public as distinctive specifically of the plaintiff's goods or services. Secondly, he must demonstrate a misrepresentation by the defendant to the public (whether or not intentional) leading or likely to lead the public to believe that goods or services offered by him are the goods or services of the plaintiff. Whether the public is aware of the plaintiff's identity as the manufacturer or supplier of the goods or services is immaterial, as long as they are identified with a particular source which is in fact the plaintiff. For example, if the public is accustomed to rely upon a particular brand name in purchasing goods of a particular description, it matters not at all that there is little or no public awareness of the identity of the proprietor of the brand name. Thirdly, he must demonstrate that he suffers or, in a quia timet action, that he is likely to suffer damage by reason of the erroneous belief engendered by the defendant's misrepresentation that the source of the defendant's goods or services is the same as the source of those offered by the plaintiff.”**. See dicta of Lord Oliver of Aylmerton in *Reckitt and Coleman Products Limited v Borden Inc. and Others* [1990] 1 WLR 491 at page 5 of the copy judgment, last paragraph lines 8-24.

[34] Counsel also contended and submitted that any claim for “passing off” must include the essential element of misrepresentation by the Defendant/Applicant, as a result of selling goods which are falsely described by the trade name, which has caused or is likely to cause damage to the business or goodwill of the plaintiff in the action in Anguilla. There is no such pleading in the Statement of Claim, that the pleadings in the Statement of Claim do not disclose any misrepresentation on the part of the Defendant that would create the false impression that the vehicles were made by **MOKE** International Limited. The post that the Claimant/Respondent relies upon had

“GO.MOKEAMERICA.COM” and “Electric and EMOKIE”, which distinguishes it from the claimant/respondent’s make and discloses the maker of the vehicles as being **MOKEAmerica**.

[35] Counsel also cited in support of his submission:

In *Erven Warnink BV v J Townend & Sons (Hull) Ltd* [1979] 2 ALL ER 927 (the “Advocaat” case) at TAB 8, page 932 of the copy at, paragraph h, Lord Diplock identified five characteristics in the absence of which no valid cause of action for passing off could arise. These were:

- (1) *a misrepresentation*; there was no misrepresentation by the Defendant/Applicant, merely by offering the Electric Mokes/EMOKEs that it purchased for rent, that these Electric MOKEs were vehicles manufactured by MOKE International, and none is pleaded;
- (2) *made by a trader in the course of trade*; The Defendant/Applicant was not trading any vehicles but was merely renting vehicles, that is to say, was providing a service to potential customers, and no trading using the Mark is pleaded;
- (3) *to prospective customers of his or ultimate consumers of goods or services supplied by him*; the word/mark MOKE is not registered in Anguilla in respect of services, such as rental services; The trademark is not registered in Anguilla to cover services-rental or otherwise-and it is not pleaded that it has been so registered;
- (4) which is calculated to injure the business or goodwill of another trader (in the sense that this is a reasonably foreseeable consequence); there is no pleading that the rental of the vehicle by the Defendant/Applicant was calculated to injure the business or goodwill of MOKE International, and there is no pleading from which it can be inferred; and
- (5) which causes actual damage to a business or goodwill of a trader by whom the action is brought or (in a quia timet action) will probably do so”; there has been no pleading of actual damage to the business or goodwill of MOKE International Limited, and indeed there cannot be such, as MOKE International Limited is not in the business of renting vehicles in Anguilla. On the Claimant/Respondent’s pleadings there are nine (9) other MOKE vehicles here. In fact, if any person or business in Anguilla is negatively impacted by the presence, in Anguilla, of the Defendant/Applicant’s three (3) vehicles, it is M Rentals (Morlens Ltd.), as they are competitors in Anguilla, and M Rentals is not the registered proprietor of the word/mark in relation to the provision of services in Anguilla. So the question that must be asked is whether this action brought by Moke: (a) is instigated by M Rentals; and (b) to protect their rental business; as it appears that

the photograph taken of the Defendant/Applicant's vehicles at customs, in Anguilla, was taken by M Rentals. [Emphasis added]

Lord Fraser in the *Advocaat* case at pages 943-944 paragraphs h and j expressed these essentials slightly differently and from a plaintiff's point of view, saying:

" . . . It is essential for the plaintiff in a passing off action to show at least the following facts:- (1) that his business consists of, or includes, selling in England a class of goods to which the particular trade name applies; (2) that the class of goods is clearly defined, and that in the minds of the public, or a section of the public, in England, the trade name distinguishes that class from other similar goods; (3) that because of the reputation of the goods, that is goodwill attached to the name; (4) that he, the plaintiff, as a member of the class of those who sell goods, is the owner of goodwill in England which is of substantial value; (5) that he has suffered, or is really likely to suffer, substantial damage to his property in the goodwill by reason of the defendants selling goods which are falsely described by the trade name to which the goodwill is attached".[Emphasis added]

[36] Mr. Astaphan Q.C. also posited that any claim for "passing off" must include the essential element of misrepresentation by the defendant/applicant, as a result of selling goods which are falsely described by the trade name, which has caused or is likely to cause damage to the business or goodwill of the plaintiff in the action, in Anguilla. There is no such pleading in the Statement of Claim.

[37] Mr. Astaphan Q.C. further posited that the pleadings in the Statement of Claim did not disclose any misrepresentation on the part of the defendant/applicant that would create a false impression that the vehicles were made by MOKE International Limited. The post that the claimant/respondent relies upon had "**GO.MOKEAMERICA.COM**" and "**Electric and EMOKIE**" which distinguishes it from the claimant's/respondent's make and discloses the maker of the vehicles as being **MOKEAmerica**.

[38] It was also submitted by Mr. Astaphan Q.C. that damage represented the final requirement for a claim of passing-off. The claimant/respondent has to show damage or the likelihood of damage, by way of alleged facts in its pleadings, resulting from the misrepresentation. The pleadings fail to include any decline in sales of the vehicles or in the business in general, in Anguilla, as a result of the defendant/applicant's activities. No damage to the business or goodwill of MOKE International

Limited in Anguilla, as a result of the defendant's/applicant's actions is pleaded, and indeed it cannot truthfully be pleaded.

[39] It was also the defendant's submission that the claimant's/respondent's action was manifestly weak on its face and should be considered entirely hopeless and it is on this premise that we respectfully submit that the court ought to take into account the probability that there is a greater prejudice to the defendant to have to meet a very weak claim, possibly brought by a claimant/respondent from whom there might be no prospect of recovering its costs, than it is for the defendant/applicant to have to meet a case of substance. **See: Harris v Burdon [2000] CPLR 9 at paragraph 33.** The Claim Form and the Statement of Claim must contain facts that establish the cause of action for which the claim is brought. A failure to establish a cause of action against the Defendant /Applicant may result in the claim being liable to be struck out under CPR 26.3(1)(b).

[40] The claim brought against the Defendant/Applicant meets all of the requirements for striking out as set out in **Tawney Assets Limited v East Pine Management Limited and Ors Civ Appeal HCVAP 20121007, page 13 at paragraph 22 of the judgment:**

- (i) that the Claimant/Respondent is unable to prove the allegations made against Defendant/Applicant;
- (ii) that the statement of case is incurably bad;
- (iii) that the pleadings discloses no reasonable ground for bringing the case; and
- (iv) that the Claimant/Respondent has no real prospect of succeeding at trial.

Claimant's/Respondent's Submissions

[41] Ms. Carter, counsel for the claimant, submitted that:

- i. The defendant's/applicant's admission of removal of the letters confirmed that there was a matter to be tried. This clearly showed an attempt to avoid an infringement action and an attempt to create some dissimilarity. This admission confirms that they recognized there was a triable issue.

- ii. Par. 3.10: There appeared to be a dispute as to the meaning of “use” as it relates to infringement and infringing goods. This is a triable matter.
- iii. Par. 5.3: The defendant/applicant stated that the photograph of the eMoke is not that of a vehicle in the defendant’s/applicant’s fleet. This is an evidential matter to be brought before the court. There is no evidence before the court to confirm that this is not part of the defendant’s/applicant’s fleet. The Facebook post was clearly a post marketing the availability of the photographed vehicle as part of the fleet and was published after being put on notice of the claimant’s claim.
- iv. Par. 6.3: Based on the contents of this paragraph, it is clear that there is a factual matter to resolve, as the claimant’s/respondent’s mark being used by the defendant/applicant in their trade/business is the matter to be litigated.
- v. Par. 6.8: The defendant/applicant asserted that the statement of claim did not contain facts that established a cause of action for passing off. The claimant/respondent submits that the statement of claim is only required to plead material facts. The parties would then file witness statements as the matter proceeded and the evidence would then be tested at trial.
- vi. Par. 8.3: The defendant/applicant asserted that the claimant/respondent had not pleaded any allegation of “use” of the trademark by the applicant. This is quite peculiar in the face of the Statement of Claim at paragraphs 10 and 11 which clearly sets out the particulars of infringement and threats of infringement being alleged by the respondent/claimant.

[42] Ms. Carter posited that if the defendant/applicant took issue with the passing off claim, it must properly file a defence and permit the matter to proceed to trial. The afore-mentioned cases that they submitted before this Honourable Court highlighted the point that this matter had several legal and factual points in dispute which could only be resolved by the trial judge.

[43] Ms. Carter also posited inter alia that the defendant's/applicant's submission in urging the Court to try the case on an issue of fact could only be determined by a trial Judge where witness statements, cross examinations and other documents would be produced.

[44] Ms. Carter further posited that this was a case of mixed fact and law, as it was only in determining the facts that one could conclude whether a contract exists or not. More so, as this was an oral agreement and it appeared that the parties disputed the facts, such a case must be ventilated in a trial to determine the matter. Therefore, this was not a case for summary judgment and/or strike out of the claim.

[45] Ms. Carter additionally 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. Mrs. Carter also submitted that if the claim was 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.

[46] Ms. Carter also submitted that the present Application be dismissed to further the overriding objective of the CPR, that costs be granted to the claimant/respondent and that further directions be given for the matter to proceed to trial.

Issue

[47] The main issue for me to determine is whether or not the claimant/respondent has a reasonable ground for bringing the claim. Also, if there is a reasonable ground for bringing the claim, whether the Court should order security for costs.

Court Analysis

[48] A party confronted with a pleading which does not coherently articulate the case it is required to meet is denied the basic requirement of the procedural fairness that a party should have an opportunity of meeting the case against them (**Banque Commerciale SA (In liq) v Akhil Holdings Ltd** (1990) 92 ALR 53 at 58-59). In such cases, the party is exposed to additional expense and inconvenience in preparing for a trial on the basis of issues which are legally irrelevant, do not assist

in the just determination of the true controversy between the parties and which may significantly lengthen the duration of trials. That injustice ought not to be lightly dismissed. Additionally, an important matter of practice and procedure is raised concerning the proper approach to be applied in applications to strike out deficient pleadings. It is opportune to underline the established principles as to the duty of parties to formulate the real issues in dispute by coherent and relevant pleadings.

[49] A court is not likely to give leave to amend in respect of a pleading that is liable to be struck out, or would have been liable to be struck out had it appeared in the original pleadings: see also **Kaye v Woods** [2014] ACTSC 84 at [50] – [51]. This fact brings into play principles concerning pleadings generally, and particularly those concerning the striking out of pleadings on the basis that they are indefensible. In **McGuirk v University of New South Wales** [2009] NSWSC 1424, Johnson J summarised the relevant principles as follows (at [21] – [35]):

21 The function of pleadings is to state with sufficient clarity the case that must be met by a defendant. In this way, pleadings serve to define the issues for decision and ensure the basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him or her: Banque Commerciale SA En Liquidation v Akhil Holdings Limited (1990) 169 CLR 279 at 286, 296, 302-3. The issues defined in the pleadings provide the basis upon which evidence may be ruled admissible or inadmissible at trial upon the ground of relevance: Dare v Pulham [1982] 148 CLR 658 at 664; Banque Commerciale at 296.

22 In Perpetual Trustees Victoria Limited v Dunlop [2009] VSC 331, Forrest J observed at [24] that the rules of pleading are “the servants of the interests of justice”, with those interests demanding that a party have every opportunity to plead out an arguable case against other parties, but that those other parties have, at an early point in the proceedings, the opportunity to be properly appraised of the case against them.

23 Pleadings provide the structure upon which interlocutory processes, such as discovery, are governed and they constitute the record of the matters which the Court has resolved and become relevant if, in any subsequent proceedings, any party claims issue estoppel or res judicata: Australian

Competition and Consumer Commission v Fox Symes & Associates Pty Limited [2005] FCA 1071 at [100]-[103].

24 Proper pleading is of fundamental importance in assisting Courts to achieve the overriding purpose of facilitating the just, quick and cheap resolution of the real issues in the proceedings: s.56 Civil Procedure Act 2005.

25 Where application is made by a party for leave to amend pleadings, the Court should have regard to considerations of case management, cost and delay: Aon Risk Services Australia Limited v Australian National University [2009] HCA 27 at [111]-[112]; [2009] HCA 27; (2009) 83 ALJR 951. Of course, the present application is made by the Plaintiff at an early stage in the proceedings. A hearing is not imminent. Nevertheless, the orderly progress of litigation requires the Court to apply the letter and spirit of the Civil Procedure Act 2005, in accordance with contemporary principles identified in Aon, in determining an application such as this.

26 The need for clarity, precision and openness in the conduct of litigation and the responsibility of parties and their legal representatives therefore flows most clearly from the statutory duty of a party and the duty in civil proceedings to assist the Court to further the overriding purpose to facilitate the just, quick and cheap resolution of the real issues in dispute: Baulderstone Hornibrook Engineering Pty Limited v Gordian Runoff Limited & Ors [2008] NSWCA 243 at 161. The need for clarity, precision and openness as part of this cooperation has been emphasised in the context of ambush or surprise: White v Overland [2001] FCA 1333 at [4].

27 For a Statement of Claim to comply with the rules of Court, a party should plead, in a summary form, a statement of the material facts upon which the party relies, but not the evidence by which those facts are to be proved: Rule

14.7 UCPR. In doing so, the pleadings should be as brief as the nature of the case admits: Rule 14.8 UCPR.

[50] Therefore, the pleading should inform the defendant of the case it must now meet, but it must clearly set out the facts which the plaintiffs must assert to make good its claim with sufficient particularity to enable any eventual trial to be conducted fairly to all parties. Vague and nebulous allegations on very significant matters may conceal claims which are merely speculative. If this be not the case, the plaintiffs must put their allegations clearly.

[51] It is true that aspects of the paragraphs of the Statement of Claim under consideration are broadly pleaded in some parts. However, the defendant/applicant has not sought particulars of these allegations. In my view, not only is the defendant/applicant apprised of the case it has to meet pursuant to the Trademarks legislation of Anguilla but also the cause of action is made even more pellucid.

[52] I do not find the Statement of Case to be so vague as to deprive the defendant/applicant of knowing the case made against it in this regard and I noted that the defendant/applicant has been informed of the case it must meet and defend.

[53] Considerations relevant in deciding if a pleading is deficient include whether it fails to fulfil the function of pleadings, which are “to state with sufficient clarity the case that must be met” and thus define the issues for decision thereby ensuring procedural fairness (**Banque Commerciale SA (In liq) v Akhil Holdings Ltd** (1990) 92 ALR 53 at 58-59). A pleading will lack sufficient clarity if it is “ambiguous, vague or too general, so as to embarrass the opposite party who does not know what is alleged against him” (**Thiess Pty Ltd v FFE Minerals Australia Pty Ltd** [2007] QSC 209 at [37], applying **Meckiff v Simpson** [1968] VR 62 at 70). Likewise, a pleading will be deficient if the pleader’s case is not “advanced in a comprehensible, concise form appropriate for consideration both by the court, and for the purpose of the preparation of a response” (**QIC Logan Hyperdome Pty Ltd & Anor v Briridge Pty Ltd & Anor** [2011] QSC 43 at [10]).

[54] A pleading must contain all the material facts relied upon and a deficiency in pleading material facts needed to establish a cause of action may not be remedied through the use of particulars, which are

intended to meet a further and quite separate requirement (**Bruce v Odhams Press Ltd** [1936] 1 KB 697 at 712, **Dawnlite Pty Ltd v Riverwalk Realty Pty Ltd** [2010] QSC 249 at [44]). On the other hand, a pleading may be liable to be struck out where it includes irrelevant allegations which, by their nature, will affect the expeditious determination of the proceeding (**Colston v McMullen** [2011] QSC 60).

Passing Off Action

[55] In the case of **Erven Warnink Besloten Vennootschap v J Townend and Sons (Hull) Limited** ('**Advocaat**'): HL 1979 Lord Fraser formulated the action of passing off as it applied to goods: '**It is essential for the Plaintiff in a passing off action to show at least the following facts:**

- (1) That his business consists of, or includes, selling in England a class of goods to which the particular trade name applies;**
- (2) That the class of goods is clearly defined, and that in the minds of the public, or a section of the public, in England, the trade name distinguishes that class from other similar goods;**
- (3) That because of the reputation of the goods, there is a goodwill attached to the name;**
- (4) That he, the Plaintiff, as a member of the class of those who sell the goods, is the owner of goodwill in England which is of substantial value;**
- (5) That he has suffered, or is really likely to suffer, substantial damage to his property in the goodwill by reason of the Defendant selling goods which are falsely described by the trade name to which the goodwill is attached.'**

[56] Lord Diplock also identified the elements necessary to establish passing off: '**(1) a misrepresentation; (2) made by a trader in the course of trade; (3) to prospective customers or ultimate consumers of goods or services supplied by him/her; (4) which is calculated to injure the business or goodwill of another trader (in the sense that it is a reasonably foreseeable consequence); and (5) which causes actual damage to a business or good will of the trader bringing the action or will probably do so.'**

[57] The claimant/respondent maintained that this claim was brought pursuant to **Sections 12 and 36 of the Trademarks Act, R.S.A. c. T30**, and from the defendant's/applicant's own authorities, there is a viable action for passing off to be tried by this Honourable Court.

[58] Counsel for the defendant/applicant has posited that the trademark '**MOKE**' is registered, by the claimant/respondent, in respect of Class 12 [Automobiles, Automotive Parts and the like] of the Nice Agreement concerning the International Classification of Goods and Services for the purposes of the Registration of Marks. Class 12 of the Agreement is limited to the registration of marks on goods/products and does not include services.

[59] It has not escaped the attention of this court that the defendant/applicant submitted that **"in an act of good faith, in immediate response to the claimant's/respondent's lawyer's letter, the defendant/applicant removed the letters 'M' and 'E' from the three vehicles, resulting in the word, now being 'OK'. It was submitted that the average consumer instinctively distinguishes the letters of the Roman alphabet and, in the present case, they will perceive the differences between those letters, especially as the signs at issue are relatively short. This would prevent there being any likelihood or actual confusion resulting from the Marks being similar, in the market. The removal of the letters was known to the claimant prior to the filing of its claim."**

[60] It is at this juncture that I agree with counsel for the claimant/respondent that based on the aforesaid reason inter alia; that learned counsel for the claimant/respondent contended that the point that this matter has several legal and factual points in dispute which can only be resolved by a trial judge.

[61] The crux of the claimant/respondent's case appears to be that of passing off within the aforesaid legislation of Trademarks in Anguilla and to my mind that is a matter to be determined after extensive ventilation of the factors as espoused by Lord Diplock supra.

[62] In the locus classicus case of **Spalding (A G) and Brothers v A W Gamage Ltd**: HL 1915, where Lord Parker opined that:

'This principle is stated by Lord Justice Turner in Burgess v Burgess (LR 14 CD p. 748) and by Lord Halsbury in Reddaway v Banham (LR (1906) AC at page 204), in the proposition that nobody has any right to represent his goods as the goods of somebody else. It is also sometimes stated in the proposition that nobody has the

right to pass off his goods as the goods of somebody else. I prefer the former statement, for whatever doubts may be suggested in the earlier authorities, it has long been settled that actual passing-off of a defendant's goods for the plaintiff's need not be proved as a condition precedent to relief in Equity either by way of an injunction or of an inquiry as to profits or damages (*Edelsten v Edelsten* 1 De G., J and S 185 and *Iron-Ox Remedy Company Ltd v Co-operative Wholesale Society Ltd* 24 RPC 425). Nor need the representation be fraudulently made. It is enough that it has in fact been made, whether fraudulently or otherwise, and that damages may probably ensue, though the complete innocence of the party making it may be a reason for limiting the account of profits to the period subsequent to the date at which he becomes aware of the true facts. The representation is in fact treated as the invasion of a right giving rise at any rate to nominal damages, the inquiry being granted at the plaintiff's risk if he might probably have suffered more than nominal damages' and

'My Lords, the basis of a passing-off action being a false representation by the defendant, it must be proved in each case as a fact that the false representation was made. It may, of course, have been made in express words, but cases of express misrepresentation of this sort are rare. The more common case is, where the representation is implied in the use or imitation of a mark, trade name, or get-up with which the goods of another are associated in the minds of the public, or of a particular class of the public. In such cases the point to be decided is whether, having regard to all the circumstances of the case, the use by the defendant in connection with the goods of the mark, name, or get-up in question impliedly represents such goods to be the goods of the plaintiff, or the goods of the plaintiff of a particular class or quality, or, as it is sometimes put, whether the defendant's use of such mark, name, or get-up is calculated to deceive. It would, however, be impossible to enumerate or classify all the possible ways in which a man may make the false representation relied on.

There appears to be considerable diversity of opinion as to the nature of the right, the invasion of which is the subject of what are known as passing-off actions. The more general opinion appears to be that the right is a right of property. This view

naturally demands an answer to the question – property in what? Some authorities say property in the mark, name, or get-up improperly used by the defendant. Others say, property in the business or goodwill likely to be injured by the misrepresentation. Lord Herschell in *Reddaway v Banham* (LR (1906) AC 139) expressly dissents from the former view; and if the right invaded is a right of property at all, there are, I think, strong reasons for preferring the latter view. In the first place, cases of misrepresentation by the use of a mark, name, or get-up do not exhaust all possible cases of misrepresentation. If A says falsely, ‘These goods I am selling are B’s goods,’ there is no mark, name or get-up infringed unless it be B’s name, and if he falsely says, ‘These are B’s ‘goods of a particular quality,’ where the goods are in fact B’s goods, there is no name that is infringed at all. ‘ and ‘Further, it is extremely difficult to see how a man can be said to have property in descriptive words, such as ‘Camel Hair’ in the case of *Reddaway v. Banham* where every trader is entitled to use the words, provided only he uses them in such a way as not to be calculated to deceive. Even in the case of what are sometimes referred to as Common Law Trade Marks the property, if any, of the so-called owner is in its nature transitory, and only exists so long as the mark is distinctive of his goods in the eyes of the public or a class of the public.’

[63] Therefore, it was held in the aforesaid case that:

“No person has a right to sell, or offer for sale, goods of another trader of an inferior or different class or quality under conditions calculated to represent such goods as goods of that trader of a superior and distinctive class. If this is done, an actionable wrong is committed, irrespective of motive or fraud. A plaintiff who establishes a case of this character is entitled to an injunction, and, if necessary, to an inquiry into damages.”

[64] Another matter of vital importance to be considered is whether there is, or is not, some essential point of difference or resemblance which overcomes or establishes the effect of other points of resemblance: how much of the matter complained of is common to the world, how much to the trade in other similar articles, and how much to the trade in the specific commodity; colour, shape, form,

originality of arrangement – all these have to be considered; but the ultimate decision must be arrived at, having regard to all considerations, as a matter of judgment on a question of fact.

[65] I respectfully agree with the foregoing. It follows that since this is largely still an unadjudicated case in the High Court, the factual questions should be delved into there. I am mindful that I have not specifically alluded to all the arguments and submissions which I heard.

The Striking Out Application

[66] Two main principles are relevant to the analysis of this case. The first is that courts exist for the resolution of disputes. It is preferable, therefore, for cases to be decided on their merits rather than be terminated for technical blunders. It is in accordance with that principle that the overriding objective, which is the bedrock of the CPR 2000, requires that every case that is filed in the Supreme Court must be dealt with justly.

[67] The court in that case was dealing with a striking-out at the early stages of a case. In **Alpha Rocks (Solicitors) v Alade** [2015] 1 WLR 4534; [2015] EWCA Civ 685, in setting out the finding of the court, the headnote states in part:

“Held, (1) that where an application was made under CPR r 3.4(2) to strike out a statement of case in whole or in part at an early stage of proceedings, the court should only exercise the power to strike out in exceptional cases where it was just and proportionate to do so; that the court had power to strike out at an early stage of proceedings where the defendant contended that the claimant had exaggerated his claim, whether fraudulently or otherwise, but only where a claimant was guilty of misconduct in relation to those proceedings which was so serious that it would be an affront to the court to permit him to continue to prosecute the claim, and where the claim should be struck out in order to prevent the further waste of precious resources on proceedings which the claimant had forfeited the right to have determined...”

[68] In that case, Vos LJ, with whom the rest of the court agreed, cautioned against lightly striking out cases at the early stages. He said in part at paragraph 21 of his judgment:

“...striking out is available in [cases where a party to litigation thinks that his opponent has exaggerated his claim, whether fraudulently or otherwise] at an early stage in the proceedings, but only where a claimant is guilty of misconduct in relation to those proceedings which is so serious that it would be an affront to the court to permit him to continue to prosecute the claim, and where the claim should be struck out in order to prevent the further waste of precious resources on proceedings which the claimant has forfeited the right to have determined. The other available remedies for such a default follow the proceedings once they have run their course, but are none the less important. They include costs and interest penalties and proceedings for contempt of court or criminal prosecution.”

That principle does apply to this case.

[69] Fairness contemplates the interests of all the parties to a claim. A judge considering striking out a statement of case must also consider the interests of the administration of justice.

[70] It is in cases such as these, where there is an application to strike out a party’s statement of case that the task of striking a balance between these two major principles becomes most taxing. The aim is to secure a just result and the court should adopt the most appropriate of the alternatives available to it, in order to secure that result (see **Biguzzi v Rank Leisure Tours**).

[71] **Rule 1.1(1)** of the **ECSC Civil Procedure Rules 2000** states that “these Rules are a new procedural code with the overriding objective of enabling the Court to deal with cases justly.” **Rule 1.1(2) (d)** notes further that dealing justly with a case includes “ensuring that it is dealt with expeditiously.”

[72] **Rule 1.2** declares that the Court must seek to give effect to the overriding objective when interpreting these rules or exercising any powers under these rules.

[73] One way in which the Court is able to further its overriding objective is through the exercise of the power given to it under **Rule 26.3 (1)**, which gives the Court the authority to strike out a party’s statement of case or part of a statement of case. **Rule 26.3 (1)** provides that “In addition to any other

powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court that –

- (a) there has been a failure to comply with a rule, practice direction, order or direction given by the court in the proceedings**
- (b) the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim;**
- (c) the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings; or**
- (d) the statement of case or the part to be struck out is prolix or does not comply with the requirements of Part 8 or 10.**

[74] 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 that are frivolous and vexatious, that are likely to obstruct the just disposal of the proceedings.

[75] Also, when considering the effect of the CPR 2000 on the powers of the Court to protect its process from abuse, it is useful to examine the case of **Biguzzi** which also concerned the exercise of the Court's powers under Rule 3.4(2) (c) of the UK's Civil Procedure Rules (the equivalent of Rule 26.3(1)). Lord Woolf MR. pointed out at page 940 that:

“There are alternative powers which the courts have which they can exercise to make it clear that the courts will not tolerate delays other than striking out cases. In a great many situations those other powers will be the appropriate ones to adopt because they produce a more just result.”

[76] In the case of **Branch Developments Limited (t/a Iberostar Rose Hall Beach Hotel v The Bank of Nova Scotia Jamaica Limited** [2014] JMSC Civ 003 McDonald-Bishop J (as she then was) also noted at paragraph 29 that:

“Striking out of a party’s case is the most severe sanction that may be imposed for non-compliance with the orders of the court under the court’s coercive powers. It is draconian and so the power to do so must not be hurriedly exercised as it has the effect of depriving a person access to the courts which could result in a denial of justice. Therefore, the authorities have established that it is reserved for the most serious and repeated breaches or defaults. The ultimate question should, therefore, be whether striking out will produce a just result having regard to all that the achievement of the overriding objective entails.” (Emphasis mine)

[77] It is therefore clear that though the Court does have the discretion to strike out a statement of case for non-compliance with an order of the Court or delay, it is not an unfettered discretion. It must be exercised subject to the Court’s mandate to deal with cases justly.

[78] In considering whether the Court should exercise its discretion to strike out a statement of case, several factors should be taken into consideration to determine whether there is sufficient reason to justify it in doing so. **Strachan v The Gleaner Company** Motion No 12/1999 delivered 6 December 1999 and approved in **Charmaine Bowen v Island Victoria Bank Limited, Union Bank Limited et al** [2014] JMCA App 14, noted the factors which a Court takes into consideration in determining whether or not to exercise its discretion to strike out a statement of case. In **Charmaine Bowen**, Phillips JA specified:

- (a) **“the length of the delay;**
- (b) **the reasons for the delay;**
- (c) **the merit of the case**
- (d) **whether any prejudice may be suffered by the opposing side.”**

[79] The settled legal position in respect of striking out a statement of case is found in **S & T Distributors Limited and S & T Limited v. CIBC Jamaica Limited and Royal & Sun Alliance** SCCA 112/04 delivered 31st July, 2007, a decision of the Court of Appeal in which Harris, J.A. said at page 29:

“The striking out of a claim is a severe measure. The discretionary power to strike must be exercised with extreme caution. A court when considering an application to strike out, is obliged to take into consideration the probable implication of striking out and balance them carefully against the principles as prescribed by the particular cause of action which sought to be struck out. Judicial authorities have shown that the striking out of an action should only be done in plain and obvious cases.”

[80] In **Drummond Jackson v British Medical Association and Others** [1970] 1 WLR 688, Lord Pearson said at page 695 that:

“Over a long period of years it has been firmly established by many authorities that the power to strike out a statement of claim as disclosing no reasonable cause of action is a summary power which should be exercised only in plain and obvious cases.”

[81] The Rules declare that its overriding objective is to empower the court to save time and costs by dealing with matters expeditiously. If there are no reasonable grounds for bringing an action, the court ought to strike it out pursuant to rule 26.3(1) (b).

[82] The allegation of passing off is sufficiently particularized for the purposes of the application. This is not a claim for damages for passing off, the defendant is raising a denial of the claimant’s case which in this context is their defence. The defendant is not required, for the purpose of these proceedings, to particularize how it is not passing off, he simply relies on the defence of that there is no infringement. Both sides have raised triable issues which require a hearing. The application for striking out is dismissed.

[83] 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...”

[84] 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.”

[85] The claim at bar therefore, should not be struck out since it does disclose 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.”

[86] 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.’**

[87] The 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.

[88] In determining whether the claimant's 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.’”

[89] This court cannot though, at this stage of these proceedings, strike out the claimant's claim as not disclosing a cause of action or abuse of process. This 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.’

[90] 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.”

[91] In considering the issue of whether the present claim does not disclose any reasonable ground for bringing or defending the claim, 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.”

[92] 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 claimant's/respondent's action is the passing off or the confusion or the likelihood of confusion by the defendant/applicant having vehicles that are used for hire with the alleged same trademark "**MOKE**". It is not only the infringement of the trademark per se. There would have been no cause of action if there was no alleged infringement of the trademark – See also **Chotterton v. Secretary of State for India in Council** (1893) 2 Q.B. 189. Therefore, I have not been persuaded that there is no cause of action in the case at bar.

[93] It is also to be noted once the defendant has filed an acknowledgement of service and or a defence and defended on the merits, he is taken as having acquiesced and it will then be too late to successfully pursue the defendant's contention that the claim discloses no reasonable ground for bringing the action or claim. In that regard, see: **Johnson v Gore Wood and Co.** [2002] 2 AC 1 and **Coca Cola Co. v Ketteridge** [2003] EWHC 2488 (Ch). In the circumstances, the defendants' application to strike out this claim on the basis that it discloses no reasonable ground for bringing the claim must and does fail.

[94] 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.”

[95] 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.”

[96] Mr. Astaphan Q.C. also submitted that if the court is not minded to strike out the statement of case or parts thereof, as having disclosed no cause of action then the court should make an order for security for costs. The claim is grounded in passing off and confusion or likelihood of confusion, and that the only way to sustain that claim is to find that there was a “use” of the trademark and that it also applies to services under the Trademarks legislation of Anguilla. I am unable to come to this conclusion on the facts and pleadings before me.

[97] An examination of the pleadings, in my view shows that serious issues have been raised and these can only be properly determined at a trial ‘on the hearing of the evidence. The statement of case as pleaded by the claimant/respondent, in my opinion, could not be said to be ‘obviously unsustainable’ and neither is it ‘unarguable’. In fact, if I understand correctly the gravamen of the defendant’s/applicant’s submission, the contention is not that the statement of case discloses no reasonable grounds for bringing a claim, but rather that there is no cause of action as against the named defendant.

[98] Additionally, I have considered, as Bingham and Millett LLJ stated in the case of **Johnson v Gore Wood Co. Limited** 1 All ER 481, 2 WLR 72, UKHL 65, 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 some cause of action and raises some questions fit to be decided by the court and it therefore ought not to be struck out.

[99] Accordingly, the claim, as pleaded, clearly shows that the claimant/respondent is seeking an injunction for passing off and an inquiry or an account of the profit made by the defendant, and an enquiry and account in relation to the profit made by the defendant /applicant in relation to the claim.

[100] This judgment serves to emphasise the key points the court will consider in these types of application: –

- (i) **Is the claim unarguable?** – I have noted the defendant's/applicant's concern at the claimant's/respondent's apparent inability to say exactly what the particulars of the passing off, confusion or likelihood of confusion are, but I do not believe, in light of what is known of the circumstances of the case so far, that the difficulty of the claimant/respondent to be precise makes their claim unarguable or have a poor chance of success.
- (ii) **Should the issues be determined at trial?** – The factors of passing off relate to the evidential burden in the precise circumstances of the facts of a particular case. It will no doubt be a matter of further discussion and argument if this case proceeds to trial when the court can reach findings of fact and from those findings consider the case specific circumstance which party needs to prove what. As I say, in my view, passing off is something that should be properly determined by the trial judge.
- (iii) **Precision in pleadings should be proportionate to the issues** – I have noted the cases quoted by Mr. Astaphan Q.C. as to the need for precision in pleadings and the importance thereof.... I do not demure from the principles of such authoritative case law. However, the sufficiency of the pleadings will be case specific depending on the complexity of the matter at hand.
- (iv) **The need for amendment to be proportionate** – It does to my mind serve the overriding objective in the circumstances of this case bearing in mind the size of the claim to require further amendment.

Discussion & Conclusion

[101] The defendant/applicant also contended that the present claim did not disclose a cause of action 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.

[102] In considering the issue of whether the present claim discloses any reasonable ground for bringing the claim, I am guided by the authorities which demonstrably 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.”

[103] In conclusion, it is therefore not appropriate for present purposes, for this Court to give any consideration to either the defendant’s defence, or his counterclaim if any, or the respective parties’ witness statements, 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.’

[104] I wish to reiterate for emphasis at this juncture that where a statement 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**”.

[105] In the final analysis, it is apparent to this court, that the claimant’s/respondent’s statement of case does disclose reasonable grounds for bringing this claim against the defendant/applicant. 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.

[106] 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.

[107] 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 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 claimant's 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).

[108] I have also borne in mind that while the claim as filed, is only allegation 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 unwise to shut the claimant out at this stage.

[109] 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 be a draconian step to strike out the claim as disclosing no reasonable ground for bringing the claim.

[110] In view of the foregoing, I find that it would be unjust in all the circumstances to strike out the claim on grounds that it discloses no reasonable ground for bringing the claim. Similarly, in this case I find that there are real issues to be tried. Among the issues is whether the defendant/applicant used the said trademark belonging to the claimant/respondent so as to cause confusion on the local market and infringement of the said trademark sign. Those issues should be subject to trial. In light of that,

I am of the view that the claimant/respondent has reasonable grounds for bringing the claim. Therefore, I find that this not an appropriate case for the use of the atomic weapon of striking out.

[111] Having looked at the facts and circumstances of this case and examined the issues and allegations before the court in the claim, and having given careful consideration to the written 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 20th December 1989, where Downer JA, while making reference 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...”

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

[113] The defendant's/applicant's application to strike out the claimant's/respondent's statement of case is not granted and these are the orders that follow:

[114] **Orders**

- (i) The defendant's/applicant's application to strike out the claimant's statement of case is refused and as such, the claimant's statement of case stands.
- (ii) The defendant's/applicant's application for security of costs is granted in the amount of ECD\$30,000.00.
- (iii) Costs to be costs in the cause.
- (iv) No reference to this judgment should be made in front of any judge who may try this case hereafter. This ruling is only on the question whether there was passing off in the circumstances. It is quite possible that the trial judge may think otherwise and the tribunal of fact will reject that there was passing off: dictum of Neill, L.J. in **Keays v Murdoch Magazines** adopted in part.

- (v) The defendant is granted leave to file his defence with respect to the claimant's particulars of claim, if necessary, within 14 days.
- (vi) The claimant shall file a reply to the defence, if necessary, within 14 days of service of the defence.
- (vii) This matter is to be referred to mediation.
- (viii) This matter is set for Case Management Conference in October, 2020.
- (vii) The claimant shall file and serve this order.

Ricardo Sandcroft
Master [Ag]

By the Court

Registrar