

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2014-02732

TRINIDAD AND TOBAGO COPYRIGHT COLLECTION ORGANISATION

Claimant

AND

NATIONAL CARNIVAL COMMISSION

First Defendant

NATIONAL CARNIVAL BANDS ASSOCIATION

Second Defendant

Appearances:

Claimant: Ms. T. Ade-John.

1st Defendant: Mr. D. Punwasee.

2nd Defendant: Mr. C. Kangaloo instructed by Ms. N. Bisram.

Before The Honorable Mr. Justice Devindra Rampersad

Date of Delivery: November 19, 2015.

RULING

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Introduction

1. The claimant asserts that it was assigned the licensing and collection of copyright in relation to works of mas on behalf of the National Carnival Development Foundation (NCDF) by assignment dated January 25th 2011. The claimant went on to state that it is the sole organization in Trinidad and Tobago registered to license copyright in respect of works of mas and alleged that the defendants have infringed its copyright by issuing accreditation to the media in relation to works of mas in return for royalties and/or accreditation fees.
2. The claim seeks an account of those fees as it is believed that the defendants were not entitled to collect them and so must be seen, according to the claimant, to have collected them for and on behalf of the claimant. It was contended that the defendants not only infringed the copyright of the claimant but was in breach of its statutory duty, both defendants being a body corporate established by an Act of Parliament.
3. This ruling deals with an application by the first defendant to strike out the claim form and statement of case pursuant to rule 26.2 of the CPR. This application is supported by the second defendant and arises out of a failure of the claimant to itemize relevant particulars necessary to its claim even when ordered to do so by the court upon the application of the 2nd named defendant. The claimant acknowledged that there were some mistakes made in relation to its pleadings but has requested one last chance to remedy any remaining defects and the issue is whether or not this court ought to grant that last chance in the circumstances before it at present.

Procedural History

4. The matter was commenced July 25th 2014.
5. The second defendant filed its defence on October 3rd 2014 denying each and every allegation in the claimant's particulars of claim and averring that persons entitled to royalties for works of mas were already paid such. That defence further challenged the claimant's entitlement to claim royalties on behalf of members of the NCDF especially for any period before January 25th 2011, the date of the assignment purportedly giving the claimant the right to collect royalties on behalf of the NCDF. The second defendant also pleaded that the claimant's pleadings were vague and un-particularized and should be struck out.

6. On October 13th 2014 the first defendant filed an application to have the claim form and statement of case struck out pursuant to Part 26.2 of the CPR 1998 and that the action be dismissed with costs, or in the alternative, to have certain paragraphs struck out or an extension of the time granted for filing its defence. The grounds of the application were identified as:
 - 6.1. The statement of case is embarrassing and/or an abuse of the process of the court in that the pleas, specifically at paragraphs 5, 6, 7 and 10 are unintelligible and the first defendant is unable to ascertain the precise nature of the case being made out. As such the first defendant is unable to properly answer the pleas at paragraphs 5, 6, 7, and 10;
 - 6.2. The claim form and statement of case disclose no cause of action against the first defendant;
 - 6.3. The hearing and determination of this application is necessary to enable the first defendant to properly reply to the allegations in the statement of case, if necessary.
7. At the first hearing on November 26th 2014, upon raising the issue in relation to the lack of particulars in the statement of case, the second defendant was granted leave to request further particulars of the claimant.
8. On December 19th 2014 the claimant filed an application to have the first defendant's application dated October 13th 2014 dismissed with costs; judgment entered in default of defence; or, judgment entered against the first defendant with damages to be assessed.

The Second Defendant's Application for Particulars

9. On January 26th 2015, the second defendant filed an application for further and better particulars of the statement of case in default of which the statement of case be struck out and/or paragraphs 2, 6 and 10(c) be struck out. The second defendant requested particulars relating to the claimant's entitlement to the licensing of works of mas, the membership of the NCDF, the organization which it is claimed owns the copyrighted material and clarification as to who the 'complainant' was, the word having been used multiple times in the statement of case without clarification as to the identity of the 'complainant'.
10. This formal application for further particulars was made because particulars, as requested pursuant to the order of the court dated November 26th 2014, were not forthcoming from the claimant's attorney. The reason given by the claimant for the failure to provide the requested information was the claimant's inability to divulge information on NCDF's clients pursuant to an agreement between the claimant and NCDF.

11. On January 27th 2015 the claimant filed a notice of change of attorney placing its current attorney on record.
12. On April 2nd 2015, the claimant filed an amended statement of case but did not include the particulars requested by the second defendant.
13. On April 28th 2015, the matter came up for hearing and the second respondent's application for further and better particulars was granted in default of which certain paragraphs of the amended statement of case were to be struck out. The order was granted on the following terms:

1. The Claimant do provide the following further and better particulars of the Amended Statement of Case filed herein on the 2nd April 2015 by the 12th of May 2015 in default of which Paragraph 2 and Paragraph 10(c) be struck out from the Amended Statement of Case:-

A. UNDER PARAGRAPH 2

At paragraph 2 of the Amended Statement of Case, the Claimant has pleaded as follows:

"The Claimant is the sole organisation in Trinidad and Tobago to license copyright in respect of Works of Mas"

Particulars requested

- i. Please particularize the basis for your entitlement for the licensing of works of mas as alleged;*
- ii. Such Particulars should include any reference to any documentation relevant to the licensing of such works of mas;*

At paragraph 2, the Amended Statement of Case, the Claimant has pleaded as follows:

"By assignment dated the 25th day of January, 2011 the members of the National Carnival Development Foundation, a non for profit body incorporated under the Companies Act, assigned the licencing and collection of its copyright in respect of Works of Mas to the Claimant and the Claimant is therefore entitled to License the said Works of Mas and issue legal proceedings to enforce the collection of same."

Particulars requested

- i. Please identify the members of the National Carnival Development Foundation ("NCDF");*

- ii. *When did such persons identified above join the NCDF?*
- iii. *Please provide particulars of the agreements and/or documents evidencing such membership.*
- iv. *Please identify by way of documents the agreements/assignments between the members and the NCDF identifies at No. i above which enables the NCDF to collect copyright royalties on their behalf.*
- v. *Please provide copies of same.*
- vi. *Please give the dates of those agreements and/or assignments.*
- vii. *Please identify which of those members you have identified at No. i above are entitled to copyright royalties and the basis upon which those members are claiming such entitlement to the said copyright royalties.*
- viii. *In respect of the above request under Paragraph 2 of the Claimant's pleadings, please identify and provide the following:*
 - a. *details of where and when these original works of mas owned by the NCDF have appeared in magazines and/or DVD's or any other medium thereby entitling those members to copyright royalties in respect of the National Carnival Band Association's ("NCBA") Carnival Parade and/or Events;*
- ix. *In relation to Paragraph 2 of the Claimant's pleadings please provide particulars of the producer of those original works of mas, proof of ownership and please identify and produce documents related to the works of mas by those producers.*

B. UNDER PARAGRAPH 10 (c) (Page 5 of the Claimant's Amended Statement of Case)

At paragraph 10 (c) of the Amended Statement of Case, the Claimant has pleaded as follows:

"Band leaders acting as the NCDF have assigned their copyright under the works of mas to the Claimant"

Particulars requested

- i. *Please identify which bandleaders acting as the NCDF are producers of the original works of mas.*
- ii. *Please identify which producers have assigned their copyright rights to the NCDF.*
- iii. *Please identify how and in what circumstances those producers have assigned their copyright to the NCDF; if by documentation please give dates and provide copies of such documentation....."*

14. On May 14th 2015 the claimant purported to provide further particulars pursuant to the court's order dated April 28th 2015 together with an application for relief from sanctions pursuant to Part 26.7 of the CPR. The application was granted together with an extension to file same by May 14th 2015. The particulars provided outlined:
 - 14.1. That the claimant was incorporated in 2000 (incorporation documents included) and works of mas is one of its areas of copyright with no other collective management organization (COTT, AWESOME, TTRRO) administering same;
 - 14.2. The collection agreement between the claimant and NCDF specifically authorizes and empowers the claimant to collect royalties on behalf of NCDF's members for the period 2007-2010;
 - 14.3. Details of the membership of the NCDF which totaled 71 bands together with the registration forms indicating the dates of membership;
 - 14.4. That the members listed were all entitled to copyright royalties, protected under section 6 of the Copyright Act Chap. 82:80 and entitled to be paid royalties as their works meet the definition of 'Works of Mas' under the Copyright Act. The claimant however, failed to identify the actual works which were protected and for which royalties were being sought;
 - 14.5. That NCDF was in the process of gathering examples of the media requested from various archives and same would be produced separately in due course prior to the next hearing of the matter.
15. On June 24th 2015 the first defendant filed an amended defence in which it again, inter alia, denied the allegations of the claimant; noted that certain particulars as requested had not been provided and so the claim should be struck out; put the claimant to strict proof regarding its entitlement to claim royalties for all of the members of the NCDF and requested information about the standing of members of the NCDF for which they sought royalties.
16. The matter next came up for hearing on October 29th 2015 by which time the claimant had failed to provide the further particulars as indicated and had also failed to file an application for relief from sanctions. The court entered into discussions with the parties about the possibility of agreeing to further time for the claimant to remedy the defects in its claim and the first respondent indicated that it was still pursuing its application to have the claim form and statement of case struck out. The second defendant joined in putting forward arguments in support of the first defendant's application and it was noted that some of the

particulars requested from the claimant were still outstanding in contravention of the court's order without there being an application for an extension of time or relief from sanctions. The claimant indicated that, given the importance of the claim and the fact that the matter was started with different counsel the court should, in light of the overriding objective, the claimant should be given one more chance to remedy its claim.

17. The matter was adjourned to November 19th 2015 for the court to deliver its decision on the first defendant's application to strike out. The claimant thereafter to file an application for relief from sanctions on November 18th 2015, the day before the date of hearing fixed by the court to deliver its decision, and attempted to provide the court with some of the requested information. However, this application failed to meet the requirements outlined in rule 26.7 of the CPR and so the court was not minded to consider it except to make certain observations as outlined below.
18. In any event, it was obvious from that affidavit that the claimant was still not in a position to provide any material facts in relation to the alleged breaches committed by the defendants and was still in the process of collating evidence in relation to its case.

Failure to comply with the order of the court

19. The court's order dated April 28th 2015 required the claimant to provide the court with certain particulars and carried a specific sanction if that order was not complied with by May 12th 2015. There was an application for the extension of time to May 14th 2015 but as at that date certain particulars remained outstanding. In particular:
 - 19.1. In relation to pleadings at paragraph 2 of the amended statement of case the following particulars were requested and not supplied:
 - 19.1.1. Which of NCDF's members are entitled to copyright royalties and the basis upon which those members are claiming such entitlement to the said copyright royalties (see vii under the requests made in relation to paragraph 2);
 - 19.1.2. Details of where and when the original works of mas owned by the NCDF have appeared in magazines and/or DVD's or any other medium thereby entitling those members to copyright royalties in respect of the National Carnival Band Association's ("NCBA") Carnival Parade and/or Events (see viii [a]);

19.1.3. Particulars of the producer of those original works of mas, proof of ownership and documents related to the works of mas by those producers (see ix).

20. Rule 26.6 (2) of the CPR provides:

“Where a party has failed to comply with any of these Rules, a direction or any court order, any sanction for non-compliance imposed by the rule or the court order has effect unless the party in default applies for and obtains relief from the sanction, and rule 26.8 shall not apply.”

21. An order made by a court of unlimited jurisdiction, such as the High Court has to be obeyed by the person against whom it is made unless and until it had been set aside by the court or on an appeal.¹ The starting point is that directions and orders must be fully complied with² and a party may still be in breach where there is only nominal or purported compliance.³ Unlike the system which exists under the English Rules, the CPR of Trinidad and Tobago does not give the court a discretion to overlook a failure to comply with the court’s rules pursuant to rule 26.6 (2) unless the offending party files for relief from sanctions in accordance with rule 26.7. A possible explanation for this shift was given by Jamadar JA in the case of **Trincan Oil Limited v Martin** Civil Appeal No. 65 of 2009 where at paragraphs 18-20 he said:

“18. The changes that appear in Rule 26.7 arose out of the recognition that in Trinidad and Tobago the prevailing civil litigation culture under the RSC, 1975 was one that led to an abuse of the general discretion granted to judges to grant relief from sanctions. The changes introduced in Rule 26.7 were intended to bring about a fundamental shift in the way civil litigation is conducted in Trinidad and Tobago. The belief is that once new normative standards are set and upheld, then over time parties and attorneys will become aware of them and will adapt their behaviour accordingly, thus effecting the desired change in culture.

19. Simply put, in the context of compliance with rules, orders and directions, the ‘laissez-faire’ approach of the past where non-compliance was normative and was fatal to the good administration of justice can no longer be tolerated.

20. Finally, reliance on the overriding objective as an overarching substantive rule is misplaced. The overriding objective is properly an aid to the interpretation and application of the rules, but it is not intended to override the plain meaning of specific provisions.”

¹ See **Isaacs v Robertson** [1985] AC 97.

² See *Blackstone’s Civil Practice* 2011 at para 46.3.

³ See **Top Layers Interior Ltd v Azure Maritime Holdings SA** [2007] EWHC 2844.

22. In this matter, the court cannot countenance such a blatant disregard for the processes of the court especially in light of the importance of the information requested in putting forward the claimant's case. The fact that the claimant took absolutely no steps whatsoever since it filed the purported particulars on 14 May 2015 – a period of more than 6 months before the Court delivered its ruling on the point – to preserve its position under the sanctioned order shows that the claimant was not serious about following this court's order and failed to attach to the order the due regard and importance which should have been afforded to it.
23. Paragraphs 2 and 10(c) of the claimant's amended statement of case must therefore be taken to have been struck out as of May 15th 2015.

The application to strike out the entire claim

24. The first defendant has submitted that the court should exercise its discretion pursuant to rule 26.2 of the CPR to strike out the claimant's claim form and statement of case because (i) it is embarrassing and/or an abuse of process of the court and (ii) they disclose no cause of action against the first defendant.
25. It was submitted that the claimant was required to set out a short statement of all the facts on which he relied to establish his case against the defendant. This requirement is outlined in rule 8.6 of the CPR and has been given judicial interpretation in the case of ***Real Time Systems Limited v Renraw Investments Limited*** Civil App. No. 238 of 2011 whereby Jamadar JA explained that the rule established an objective standard - "*It is not what a claimant wants (subjectively) to set out that is required; but rather what a claimant is required (objectively) to set out in order to establish his claim.*"⁴ It is submitted that what is objectively required is every fact which would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the Court.⁵
26. It was noted that the claim seeks (i) an account of profits as a result of (ii) an infringement of copyright and (iii) a breach of statutory duty.
27. In relation to an account of profits, it was submitted that the relationship between the parties had to have been one of a fiduciary nature such that would give rise to an obligation on the part of the defendant to account to the claimant. As such, the claimant was required to prove such facts to establish the existence of such a relationship.

⁴ See para 8 of that judgment.

⁵ ***Coburn v Colledge*** [1897] 1 Q.B. 702 per Lord Esher at pg 706.

28. In relation to the claim for copyright infringement, it was submitted that copyright would subsist in a work classed as works of mas where:
 - 28.1. The work is an original production;
 - 28.2. The work is intended to be performed (but need not be performed); and
 - 28.3. The work is one in which the artistic work in the form of an adornment or image is the primary element of the production.⁶
29. Further, it was submitted that the facts that must necessarily be pled to establish copyright infringement include:
 - 29.1. The title of the claimant to sue (whether as owner or licensee);
 - 29.2. The subsistence of copyright in the work (which must be identified with precision);
 - 29.3. The infringement by the defendant; and
 - 29.4. The relief claimed.⁷
30. The first defendant accepted that the claimant has identified its right to sue by assignment dated January 25th 2011 but submitted that the claimant has not pleaded:
 - 30.1. The identity of the members of the NCDF who have assigned their copyright in 'works of mas' to the Claimant and whose said copyright have been allegedly infringed by the first defendant. To my mind, this may be viewed as necessary for the first defendant to identify if any of the alleged members of NCDF actually do have the rights in question. It will also be relevant to identify those alleged members who may already have direct copyright arrangements with other parties, including any of the defendants notwithstanding the claimant's plea of being the sole copyright collection agency in relation to its members.
 - 30.2. In the case of each member of the NCDF whose copyright in 'works of mas' has been allegedly infringed, a description of the work which the claimant alleges is protected as a 'work of mas' under the Act, sufficient to identify each of the said works. This, to my mind, would ensure that the parties can properly determine the 'works of mas' in question and their attendant rights.

⁶ See sections 3, 5, 6, 31 & 32 of the Copyright Act.

⁷ See Bullen & Leake & Jacob's Precedents and Pleadings, 16th Ed., Volume 2 at paras 67-08 to 67-12.

- 30.3. Such facts in relation to each of the works allegedly protected as ‘works of mas’ of each member of the NCDF sufficient to establish that the said works are indeed protected as ‘works of mas’ under the Act;
- 30.4. The date, manner and extent of the alleged breach by the first defendant of each of the works allegedly protected as ‘works of mas’ under the Act. Obviously, this is going to be a most important part of the case – particularizing the actual breaches – and therefore the defendants are entitled to know where and when and to what extent these breaches took place.
31. In relation to the alleged breach of a statutory duty it was submitted that the claimant has failed to plead any provision of the National Carnival Commission of Trinidad and Tobago Act Chap. 42:01 (the NCC Act) as imposing the duty alleged on the first defendant as there is no such provision in the Act. Further, even if there was a duty, a breach of any of the duties would not give the claimant a right to bring a private action unless it can be shown, as a matter of construction, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty – see *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633. It was submitted that the NCC Act was passed with the purpose of establishing a body corporate and was not intended for the benefit of any specific group or for the public at large.
32. Obviously, this claim for breach of statutory duty is hinged on the claimant establishing the alleged breaches by the defendants even though this court had serious doubts as to whether any statutory duty as alleged by the claimant exists that all.
33. Overall therefore, it was submitted that the claimant’s statement of case fails to make out a cause of action. Alternatively, it was submitted that if it does make out a cause of action it is ambiguous, embarrassing and/or an abuse of the process of the court as neither the court nor the first defendant knows what works of mas are the subject of the action at bar or when the first defendant infringed the copyright in those works. This makes it impossible for the first defendant to plead a defence as it can neither admit nor deny the alleged infringements, whether copyright subsists in the works or the damage pleaded. Further it was submitted that the court is placed in a position whereby it cannot order the taking of an account because there is no identified subject (‘works of mas’) in relation to which an account can be taken.

Response of the claimant

34. In response, the claimant submitted that the bar set for a claim to be considered an abuse of process was a high one and it could not be said that the claim was either frivolous, vexatious or in bad faith. According to the claimant the claim is a straightforward one that has grounding both in law and in fact.
35. The claimant also submitted that the relief of an account was appropriate because section 31(1) of the Copyright Act empowers the claimant to seek such a remedy where in cases such as this the defendant is believed to have collected de facto copyright royalties.
36. Further, it is submitted that the claimant has met the criteria identified for pleadings especially when the further particulars provided May 14th 2015 are taken into account. The claimant further submitted that the amended statement of case satisfies the criteria for a short statement of all the facts and even if it was defective the first defendant acted prematurely in seeking to have the claim struck out when further details or clarifications could have been provided under Part 35 of the CPR in order to achieve the overriding objective as noted in the case of *Real Time Systems Ltd.*
37. In relation to the cause of action for a breach of statutory duty the claimant submitted that it has sufficiently particularized same. Further, it is contended that the first defendant's role was not limited to general facilitation as far as Carnival is concerned but its role involves "co-ordination of accreditation, concessionaries, sponsorships, copyrights, donations" as outlined in the Minutes of a meeting of the Cabinet Subcommittee in 1997. Also, the NCC Act, it is submitted, shows a parliamentary intention to protect and work with associations seeking to enhance or manufacture saleable Carnival products.
38. The claimant observed that the first defendant did not take any action in respect of the claim for 67 days after entering its appearance indicating an intention to defend the claim on August 7th 2014 and may have only filed this application to buy time. It is submitted therefore that if the court is not minded to strike out the claim form and statement of case, judgment should be entered against the first defendant in the absence of a defence.

The law in relation to striking out

39. Rule 26.2 stipulates that a court may strike out a statement of case or part of a statement of case in specific instances. One such instance is as alleged in this

matter where the statement of case discloses no grounds for bringing or defending a claim (see rule 26.2(c)). Traditionally, this ground has been restricted to cases which are bad in law or which fail to plead a complete claim.⁸ Therefore, a statement of case ought to be struck out if the facts set out do not constitute the cause of action or if the relief sought would not be ordered by the court.⁹ A statement of case may be hopeless not only where it is lacking a necessary factual ingredient but also where it advances an unsustainable point of law.¹⁰

40. It is well settled however that the court's power to strike out should be used sparingly. It is to be used sparingly because the exercise of the jurisdiction deprives a party of its right to a trial and of its ability to strengthen its case through the process of disclosure and other court procedures such as requests for further information.¹¹ In the case of ***Belize Telemedia Limited v Magistrate Usher*** (2008) 75 WIR 138 Abdulai Conteh CJ warned:

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

41. Further, A. Zuckerman suggests that:

*"It would be wrong to strike out a statement of case that presents an arguable claim or defense or where the claim raises complex issues of fact or law. Accordingly, a statement of case should not be struck out if it raises an issue in an area of law that is in a state of uncertainty or development."*¹²

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

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

⁸ See *Blackstone's Civil Practice* 2011 at para 33.7; ***Lennox Linton et al v Anthony W. Astaphan et al*** Claim No. DOMACV 2008/0436.

⁹ *Ibid* at para 33.8; ***Moonan Sooknanan v Development Innovations Ltd*** CV 2005-00549.

¹⁰ See *Civil Practice*, A. Zuckerman at para 8.24.

¹¹ See ***Hector v Joseph*** (Dominica Civil Appeal No. 6 of 2003); *Blackstone's Civil Practice* 2011 at para 33.6.

¹² See *Civil Practice*, A. Zuckerman at para 8.25.

43. Though the court must be cautious in the exercise of this jurisdiction there are identifiable instances where the court may exercise its discretion to strike out and the most straightforward case for striking out is a claim that on its face fails to establish a recognizable cause of action.¹³ In ***Baldwin Spencer v The Attorney General of Antigua and Barbuda et al*** Civil Appeal No. 20 A 1997, Sir Dennis Byron opined:

"...the operative issue for determination must be whether there is 'even a scintilla of a cause of action'. If the pleadings disclose any viable issue for trial then the court should order the trial to proceed but if there is no cause of action the court should be equally resolute in making that declaration and dismissing the appeal."

The court may also exercise its discretion to strike out where it is satisfied that the statement of case is incurably bad.¹⁴

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

"8. Part 8, Rule 8.6 requires a claimant to set out "a short statement of all the facts on which he relies" to establish his claim. This rule establishes an objective standard. It is not what a claimant wants (subjectively) to set out that is required; but rather it is what a claimant is required (objectively) to set out in order to establish his claim. However, even this formulation of a claimant's responsibility may be somewhat understated. Clearly fairness and justice require, that if a defendant is to be able to discharge the duty on him to also set out all of the facts on which he relies to dispute a claim made against him, then a claimant must set out fully (without being prolix) the facts which underpin his case so as to have the legitimate and relevant issues that he reasonably knows will arise on his claim raised and responded to. Such an approach is consistent with the purpose and mandate for the use of pre-action protocols under the CPR, 1998.

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

10. Moreover, the duty on both claimant and defendant to set out fully all facts which ought to be stated in the statement of case and defence respectively, is also so as to allow a judge to properly manage a matter in the context of the CPR, 1998, with its court driven mandate and the extensive case management powers and responsibilities bestowed on judicial officers. Thus, a court is responsible for "identifying the issues at an early stage," and

¹³ Ibid at para 8.24.

¹⁴ See ***Lennox Linton et al v Anthony W. Astaphan et al*** Claim No. DOMACV 2008/0436.

“deciding promptly which issues need full investigation and trial ...”, and “ensuring that no party gains an unfair advantage by reason of his failure to give full disclosure of all relevant facts ...”. The first two of these duties are given priority by placement in the order of responsibilities set out at Rule 25.1, CPR, 1998. Discharging this duty is only possible if both a claimant and a defendant set out fully all relevant facts in support of and in denial of a claim and of the issues that they reasonably know will likely arise.

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

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

45. Jamadar JA also concluded that where a statement of case inadequately sets out all of the facts which ought to have been stated the court ought to first consider whether an appropriate order for ‘further and better particulars’ of what was set out in the statement of case could facilitate the disclosure of what was required. This process is to allow the claimant to continue pursuing its claim, and also allow the respondent a fair opportunity to know the case it has to answer and be able to state all the facts necessary to admit, explain and/or dispute the claims made against it.¹⁵

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

“The court has an express discretion under rule 26.2 whether to strike out (it “may strike out”). It must therefore consider any alternatives, and rule 26.1(1)(w) enables it to “give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective”, which is to deal with cases justly. As the editors of The Caribbean Civil Court Practice (2011) state at Note 23.6, correctly in the Board’s view, the court may under this sub-rule make orders of its own initiative. There is no reason why the court, faced with an application to strike out, should not conclude that the justice of the particular case militates against this nuclear option, and that the appropriate course is to order the claimant to supply further details, or to serve an amended statement of case including such details, within a further specified period. Having regard to rule 26.6, the court would quite probably also feel it appropriate to specify the consequences (which might include striking out)

¹⁵ See para 7 of that judgment.

if the details or amendment were not duly forthcoming within that period.”

¹⁶

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

Discussion

48. The court must first consider whether the statement of case, as amended, meets the criteria of rule 8.6 of the CPR and whether it contains sufficient facts to found a cause(s) of action.
49. All limbs of the claimant’s case rest on its ability to establish copyright infringement. The ingredients that are necessarily required to be pleaded in a statement of case to establish this cause of action are identified at para 67-08 of *Bullen & Leake & Jacobs Precedents and Pleadings* 16th Ed. Vol II where the authors outline that the particulars of claim must contain:
 - 49.1. The title of the claimant to sue;
 - 49.2. The subsistence of copyright in the work, which must be identified with precision;
 - 49.3. The infringement by the defendant; and
 - 49.4. The relief claimed.Further, relevant documents such as the copyright work should be attached to the claim.
50. As noted in the case of *Real Time*, the text, *Bullen & Leake & Jacobs Precedents and Pleadings*, operate as a guide and is not conclusive of what is required to be pleaded. However, the court accepts the learning in the text as copyright is a property right which can only subsist in specific works as identified by the Copyright Act. To successfully claim that one’s copyright has been infringed it must first be established that (1) copyright subsists in the works in question and (ii) the copyrighted works **were used** without the consent of the owner of that copyright. These particulars are also required to be able to claim the remedies established

¹⁶ In the Jamaican consolidated cases of *Haughton and Haughton executors of the estate of Alexander Haughton v Yvonne Haughton* G476/2001 and HCV 1445/2003, the strike out procedure was described as “the nuclear weapon in the court’s arsenal and should not be the first and primary response of the court...”

by the Copyright Act as the court can only take an account if the extent of the infringement could be ascertained.

51. It is for this reason that the court was minded to grant the order dated April 28th 2015 for further and better particulars. There was, and continues to be, no indication in the particulars of claim of any specific copyrighted work infringed or in respect of which royalties were allegedly collected. The claimant was given an opportunity to produce this information and, as at the last mentioned date of hearing, was unable to do so whether by providing the entirety of the works of mas exploited or examples of such that may be able to move the case forward.
52. Even on the application for relief from sanctions made just one day before this ruling, the claimant was still not in a position to answer the particulars or even to particularize its claim. Further, the affidavit in support of that application did not address the conditions expressed in rule 26.7 of the CPR which has been so comprehensively settled by the Court of Appeal relating to what the court has to consider. In particular, the opening hurdle of promptitude was not even addressed.
53. The deficiency is further exacerbated by the fact that paragraphs 2 and 10(c) have been struck out. Those paragraphs outline the claimant's title to sue, one of the required facts as identified above.
54. When a court makes an order it has to ensure that its orders are properly carried out and complied with. That is the basis of the administration of justice and the rule of law. For the court to then move away from that arena to a relief from sanctions application, steps would have had to have been made promptly, and that was not done. As it stands, the sanction has taken effect and therefore those paragraphs stand struck out as per the court's order.
55. Further, the failure of the claimant to particularize the extent of the breach by identifying the breaches puts the court and the defendants at a disadvantage if even the claimant is successful in its claim and the court is minded to order an account be taken. As previously noted in the case of ***Copyright Music Organisation of Trinidad and Tobago v Columbus Communications Trinidad Limited*** CV2009-04722, the failure of a claimant who pursues copyright infringement to particularize the breaches complained of handicaps the court's process of taking account.
56. All these factors must however be weighed against the fact that this claim is a novel one in Trinidad and Tobago. As agreed by the defendants, it raises complex issues surrounding copyright infringement and may very well be the first of its kind as there are no other known cases to pursue copyright in works of mas. Further,

the importance of Carnival to the economy and those involved in the production of Carnival cannot be simply overlooked.

57. The court has taken these factors into consideration, and though hesitant to do so, there is no other option available to this court at present based on the established principles but that the amended statement of case and claim form must be struck out. The court has already given the claimant the opportunity to directly address important matters which must form an integral part of the statement of facts as identified above. This opportunity to rectify the defects in its amended statement of case, even though made at the instance of the second named defendant, addressed crucial elements of the claim necessary as against both defendants and the claimant has failed to take advantage of this opportunity in direct contravention to the court's order. As it stands, the amended statement of case has not sufficiently made out the cause of action alleged, that is, copyright infringement.
58. The claimant had a responsibility to properly set out the necessary facts to support its case and has failed to do so. The purpose of the CPR is to enable the identification of the issues to be done at an early stage. By its failure to provide these particulars the claimant has exhibited to this court that, even up to now, they are unaware of the true nature and extent of the case which they have brought before the court and are now seeking to identify the elements to construct its case while the court processes are taking place. At present, this is more than merely attempting to strengthen the case in distinction to the case of ***Real Time Systems Ltd***. Quite frankly the court is not sure that the claimant knows the extent of the breaches at this stage and it would be unfair to the defendants now to have to try to meet a case which seems to be, as yet, undefined and unidentified. At the very least, the defendants must know what the alleged breaches are, when the breaches took place and where and it is obvious that the claimant is still in the process of securing that information.
59. The court cannot allow this case to proceed. This cannot be fair to the defendants. The claimant was given a fair opportunity to present the relevant information and was unable to do so and did nothing about seeking relief against the sanction imposed until the eleventh hour, and even then in an incomplete and inappropriate manner.

Order

60. The court orders that the claim be struck out because of the incurable defects of the claimant's statement of case stemming, in part, from a failure to comply with

the order of the court and also for the reasons set out above. The result is that no cause of action can be sustained based on the pleadings.

61. The claimant shall pay the costs of the action and the costs of the application for particulars made by the second defendant and the application to strike out made by the first defendant.
62. The court will allow the parties to discuss the issue of costs amongst themselves to attempt to reach a settlement on that and if there has been no agreement the defendants shall file and serve their respective statements of costs by December 18th 2015 and the claimant shall file and serve objections, if any, by January 17th 2016.
63. The quantification of costs, if required, is fixed for the January 26th 2016.
64. With respect to the claimant's notice of application filed December 19th 2014, that application is dismissed with no order as to costs.

Postscript

65. The court has not dismissed the claim on its merits but on the incurable defects of the claimant's statement of case stemming, in part, from a failure to comply with the order of the court. The result is that no cause of action can be sustained based on the pleadings. Any attempt to file a second action in relation to same ought not, therefore, to raise any issue of abuse of process or *res judicata*.

/s/ D. Rampersad J.

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