[2023] JMCA Civ 2

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA
THE HON MRS JUSTICE G FRASER JA (AG)

SUPREME COURT CIVIL APPEAL NO COA2021CV00108

BETWEEN	**WEST INDIES PETROLEUM LIMITED**	**APPELLANT**
AND	**COURTNEY WILKINSON**	**1ST RESPONDENT**
AND	**JOHN LEVY**	**2ND RESPONDENT**

Written submissions filed by Henlin Gibson Henlin for the appellant

Written submissions filed by Mayhew Law for the respondents

20 January 2023

PROCEDURAL APPEAL

(Considered on paper pursuant to rule 2.4(3) of the Court of Appeal Rules 2002)

P WILLIAMS JA

[1] I have read in draft the judgment of my sister G Fraser JA (Ag) and agree with her reasoning and conclusion. I have nothing further to add.

EDWARDS JA

[2] I, too, have read the draft judgment of my sister G Fraser JA (Ag). I agree with her reasoning and conclusion and have nothing to add.

G FRASER JA (AG)

[3] This is an appeal by West Indies Petroleum Limited ('the appellant') challenging the decision of Batts J made on 23 November 2021, wherein he made orders striking out paras. 27, 29 – 37 and 39(1), and the words "and constitutional damage" in para. 39(9) of the appellant's amended particulars of claim, filed on 5 October 2021, in Claim No SU2021CD00281 in the Supreme Court.

Background

[4] The appellant and another, on 11 June 2021, filed a claim in the Supreme Court against John Levy, Donna Levy, Spirit Fuels & Lubricants Limited, Courtney Wilkinson, and Eco Marine Energy Company Limited. The claim was subsequently amended several times, including an amendment to add Eco Petroleum Limited as a 6th defendant. This claim is recorded as Claim No SU2021CD00268 ('the first claim'). In that claim, the appellant sought damages and other relief for breach of contract, breach of confidence, breach of fiduciary duty, conflict of interest, and interference with contractual relations, among other things.

[5] A second claim (Claim No SU2021CD00281), involving only the appellant, was filed on 23 June 2021 against Scanbox Limited, Winston Henry, Courtney Wilkinson, and John Levy ('the second claim'). In that claim, the appellant sought damages and other relief, for breach of confidence, breach of fiduciary duty, conflict of interest, misuse of confidential information, breach of privacy, malicious falsehood, and defamation. The claim had at its nucleus the alleged data breach of the appellant's email servers and/or exchange platforms and letters emanating from the respondents and dispatched to stakeholders of the appellant. These correspondences the appellant contended were defamatory and disclosed confidential information.

[6] On 15 September 2021, the appellant filed a notice of application for court orders, with respect to the first claim, seeking an injunction restraining the respondent's use of confidential information and to provide protection against breach of fiduciary duties,

conflict of interest, and inducing and/or procuring breaches of contract. The application was heard by Laing J who, on 28 September 2021, granted injunctive relief in the appellant's favour, with respect to the first claim.

[7] Thereafter the parties engaged in discussions and the appellant conceded that the injunctive relief sought in the second claim, relative to competing business, was already covered in the first claim. The appellant, then, filed an amended claim form and amended particulars of claim on 1 October 2021 with respect to the second claim. The appellant also withdrew some of the relief sought in its notice of application for court orders, filed on 23 June 2021, regarding the second claim.

[8] The respondents, on 5 October 2021, filed a notice of application for court orders, seeking an order to strike out the appellant's amended claim filed on 1 October 2021. In the alternative, the respondents asked that paras. 8 and 13 – 29 of the particulars of claim, with respect to the second claim, be struck out. That application was heard by Batts J ('the learned judge') who on 23 November 2021 made the orders indicated in para. [3] of this judgment. The orders were made on the basis that the offending paragraphs were a duplication of causes of action and the similarity between the first and the second claims. It is to be noted that the learned judge had specifically stated that the portions of the particulars of claim of second claim he had ordered excised, did not relate to the alleged breaches of non-disclosure agreements. The parties were, however, made to understand that the excised paragraphs could be added to the first claim as amendments, as that claim was still at a stage of proceedings where it could be amended.

[9] On 23 December 2021, the appellant transferred to the first claim the excised paras. 32–36 of the amended particulars of claim of the second claim by way of a second further amended claim form and a third further amended particulars of claim. These paragraphs were related to the claim for malicious falsehood and defamation and the appellant conceded that those paragraphs "may be more conveniently addressed in the first claim, Claim No SU2021CD00268, as suggested by the learned judge…". The appellant, nonetheless, maintains its stance that:

> "…the remaining paragraphs on breach of privacy, breach of confidence and breach of fiduciary duty cannot be successfully moved to the first claim as they are rooted in different facts that stem directly from the acts complained of in this action based on the unauthorized access to the Appellant's email server with the core contract being the Non-Disclosure Agreements."

[10] It is that stance that has given rise to this appeal.

Grounds of appeal

[11] By notice of appeal filed 7 December 2021, the appellant has raised two grounds of appeal as follows:

> "a. The learned judge erred as a matter of fact and/or law in finding that the Appellant's first and second claim (sic) are strikingly similar in that he did not appreciate that while the causes of action are the same, they are grounded in different facts that flow directly from the acts complained of in this action based on the unauthorized access to the Appellant's email server in this case whereas the breach of fiduciary duty in Claim No. SU2021CD000268 (Second Further Amended Particulars of Claim) is based on acts related to these Defendants' actions in relation to this Appellant and its subsidiary, Island Lubes Limited, that are unconnected to the breaches in this Claim.
>
> b. The learned judge erred as a matter of fact and/or law insofar as he struck out the portions of the Appellant's claim on the basis of a substantial duplication of the first claim (Claim No. SU2021CD000268) because the Appellant and its subsidiary sued the Respondents in that claim for breaches of fiduciary duty *inter alios* based on different facts from those existing in the present claim."

The written submissions

<u>The appellant's</u>

[12] It was submitted on behalf of the appellant that the learned judge erred in his understanding and/or interpretation of the evidence before him and the law in rule 26.3(1)(b) of the Civil Procedure Rules 2002 ('CPR'). Specifically, it was argued that (1)

he erred in understanding that different sets of facts can give rise to the same causes of action and (2) he erred in misunderstanding the evidence which demonstrated that the appellant was not litigating claims that had been investigated and decided in another case, so as to establish any substantial duplication and an abuse of process.

[13] It was further submitted that an examination and comparison of the relevant paragraphs of the particulars of claim demonstrate that there is no duplication or any substantial duplication of the claims. It was contended that the appellant's claims cannot be "strikingly similar…just because the name of the causes of action are the same…when they are grounded in different facts and different allegations". In relation to the first claim, the appellant indicates that it is seeking damages and other relief for breach of contract, breach of confidence, breach of fiduciary duty, conflict of interest, and interference with contractual relations among other things. Whereas in the second claim, the subject matter relates to the unauthorized access to the appellant's server, the unauthorized extraction of the appellant's confidential information from its system, the misuse of its confidential information by the respondents and the breach of the non-disclosure agreements dated 21 January 2019 and 1 February 2020.

[14] According to the appellant's submission, the relief sought in the second claim, relative to the unauthorized access and extraction of confidential information by all defendants (including the respondents), cannot be obtained in the first claim since it is based on different facts and since the conduct of the respondents flow directly from and are connected to the conduct of Scanbox Limited and Winston Henry, the 1st and 2nd defendants in the second claim. There is no similar set of facts in the first claim and, therefore, the breach of privacy is appropriately averred in the second claim.

[15] It was also contended by the appellant that, the learned judge misapplied the law in **Moorjani and others v Durban Estates Limited and another** [2019] EWHC 1229 (TCC) ('**Moorjani v Durban Estates Limited**'), in that he failed to appreciate that the test expounded in that case was not satisfied by the facts in the instant case. The learned judge's finding at para. [10] of his judgment, that paras. 27, 28 and 29 of the particulars

of claim of the second claim, and paras. 19, 20, 23, 24, 25 – 27, 30 – 33, 35 – 41 of the second amended particulars of claim of the first claim have the same cause of action, supported by much of the same particulars, is erroneous.

The respondents'

[16] On behalf of the respondent, it was submitted that the learned judge acted within his discretion and had rightfully struck out the portions of the particulars of claim in the second claim. Further that, contrary to the complaints of the appellant, the authorities he considered in coming to his decision were correctly interpreted by him. In particular, the case of **Moorjani v Durban Estates Limited**, wherein the England and Wales High Court laid down helpful guidelines as to when the filing of multiple claims amount to an abuse of process.

[17] It was further submitted that it was clear from the learned judge's judgment that he had correctly analysed the content of the claims and came to a correct decision that the claims were, in relation to the offending portions, duplicitous.

[18] This court was urged to give considerable thought to the learned judge's concern "that there is a significant risk of inconsistent findings of fact on the same evidence by different courts which is a potential embarrassment which should be avoided". It was also pointed out that the learned judge had accepted the submissions of the respondents that it was unfair to put a defendant to the expense of responding to the same allegations more than once and that the inclusion of the offending averments into the second claim was tantamount to "harassment" within the meaning of the authorities. In particular, the rule in **Henderson v Henderson** [1843 – 1860] All ER 378, encourages litigants to put forward all their potential claims and arguments in one set of proceedings rather than unduly taxing the limited resources of the court by making successive applications based on the same factual content and issues in a second or subsequent proceeding.

[19] The respondent derided the appellant's averment that if it is not permitted to pursue the claim for breaches of privacy and communication, it would be left without a

remedy. It was posited that the allegations pertaining to those said breaches can properly form part of the causes of action for breach of fiduciary duty and breach of confidence averred in the first claim.

Analysis

The issue

[20] The central issue in this appeal is the contention of the appellant that the learned judge misunderstood and or misinterpreted the evidence before him as well as rule 26.3(1)(b) of the CPR. This will therefore require a determination as to whether the learned judge was incorrect, in finding that particular portions of the particulars of claim of the second claim constituted an abuse of the process of the court and ordering said portions excised.

Role of the appellate court

[21] Before addressing that issue, however, it is important to register the court's appreciation of its appellate function in a case of this kind. An order arising from a decision of the learned judge in relation to the provisions of rule 26.3 of the CPR is discretionary and based upon an interpretative judgment of relevant facts. This appeal, therefore, seeks to challenge the exercise of the learned judge's discretion.

[22] This court will not disturb a judge's exercise of discretion unless it is satisfied that the judge was "plainly wrong", in that he exercised that discretion by misapplication or non-application of the law or misconstrued the facts. This was the posture taken by Morrison JA (as he then was) in **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1 where he applied the approach recommended by the House of Lords in **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042. At para. [20] Morrison JA enunciated that:

> "[20] This court will therefore only set aside the exercise of a discretion by a judge on an interlocutory application on the ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference -

> that particular facts existed or did not exist - which can be shown to be demonstrably wrong, or where the judge's decision, 'is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it."

[23] The appellate court must therefore accede to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently. Accordingly, this court will only interfere with the learned judge's discretion if it is satisfied that the learned judge misunderstood the law or the evidence before him; misconceived the facts before him which can be shown to be demonstrably wrong; or that he arrived at a decision that no judge having regard to his duty to act judicially could have arrived at. The forgoing principles as stated above will be adopted and adapted in this appeal.

The legal principles

[24] At the core of their functions, courts exist for the resolution of disputes between opposing parties. The preferred position is that cases should be decided on their merit instead of being truncated because of technical blunders as per Lord Bingham of Cornhill in **Johnson v Gore Wood & Co (a firm)** [2002] 2 AC 1 ('**Johnson v Gore Wood**'). Notwithstanding that stance, the Supreme Court has inherent powers to curb abuses of its processes. This power is aimed at ensuring fairness, protecting the integrity of the legal system, safeguarding the principle of finality (that is, litigations must end), and preserving courts' and litigants' resources. Additionally, the court's powers to curb abuse of its processes include the powers set out in the CPR.

[25] The overriding objective of the CPR requires that every case be dealt with justly. This means that the court should endeavour to ensure that each litigant gets an equal and fair opportunity to present its case, while restraining any attempt at an abuse of the court's process by litigants or their counsel. In that regard, judges are constantly challenged to achieve and uphold this delicate balance.

[26] Rule 1.1(1) of the CPR states that the overall objective of the CPR is to enable the court "to deal with cases justly." Rule 1.1(2) further explains that:

> "(2) Dealing with cases justly includes –
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> (a) ensuring, so far as is practicable, that all parties are on an equal footing and are not prejudiced by their financial position;
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> (b) saving expense;
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> (c) dealing with it in ways which take into consideration –
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> (i) the amount of money involved
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> (ii) to the importance of the case;
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> (iii) to the complexity of the issues; and
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> (iv) to the financial position of each party;
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> (d) ensuring that the case is dealt with speedily and fairly; and
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> (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

[27] Litigants should therefore give serious consideration to whether it is necessary and/or economic to bring multiple claims.

[28] Judges of the Supreme Court have the power to strike out a party's statement of case either on the application of a party to the claim or on its own initiative. There is no dispute between the parties that the respondents' application to strike out was within the remit of the learned judge to determine. The power of the court to strike out a statement of case is provided for by rule 26.3(1)(b) of the CPR, which states that:

> "26.3 (1) 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 –

…

(b) that 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…"

[29] Striking out is often described as a draconian step, as it usually means that either the whole or part of that litigant's case is at an end. Since the discretion to strike out is considered a nuclear option the discretion ought not to be utilized except in the clearest of cases. The reason for proceeding cautiously is that, the exercise of this discretion deprives a party of his right to a trial with respect to the portions of his case that are struck out. Therefore, a decision to strike out a party's statement of case should only be done in exceptional circumstances.

[30] The circumstances in which the court may strike out a statement of case on the ground that it amounts to an abuse of the process of the court are varied. There can be no limited or fixed categories of the kinds of circumstances in which the court has a duty to exercise this salutary power since the category of cases in which it may arise is not closed. In the instant case, the learned judge purportedly exercised his discretion to curtail abuse of the process of the court by striking out portions of the particulars of claim of second claim because of duplicity.

[31] It must be noted that duplication of process does not arise only in circumstances where claims have been previously investigated and decided in earlier litigation. The concept of "abuse of the process of the court" in the form of duplicity is wider than the concept of *res judicata* or issue estoppel. The ground of abuse of the process of the court based on duplicity includes, but is not limited to, situations such as bringing an action:

(1) between the same parties and based upon the same matters as have already been adjudicated upon, such as to give rise to an issue estoppel;

(2) which could and should have been raised in earlier concluded proceedings between the same parties as in **Yat Tung Investment Co v Dao Heng Bank Ltd and another** [1975] AC 581, in which a second claim for injuries was struck out following the successful first claim for damage to the car;

(3) which amounts to a collateral attack upon an earlier decision of a court of competent jurisdiction as illustrated in **Hunter v Chief Constable of the West Midlands Police and others** [1982] AC 529; and

(4) which would involve the re-litigation of issues already settled by a compromise, which was the point of dispute in **Clarence Ricketts v Tropigas SA Ltd and others** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 109/1999, judgment delivered 31 July 2000, where this court considered whether a claimant would be allowed to file a claim for the recovery of damages for personal injury suffered in a motor vehicle crash, in circumstances where a judgment in respect of his property loss in that crash, had already been concluded in a previous claim, by way of consent.

[32] I believe the starting point in considering the law on this subject is the view of the English court expressed in **Henderson v Henderson**, which was one of the earliest decisions to shed light on the issue of abuse of process. In that case, JH died intestate and his wife/administratrix, EH, brought three separate claims against BH, the brother of the deceased, in the Colonial Court in Newfoundland. Ultimately, the three claims were joined, heard, and determined by the courts in Newfoundland, and BH was ordered to pay the sum of £26,650.00 to EH and her family. EH then brought subsequent proceedings in England in an attempt to enforce the debt. In those proceedings BH sought to resist the claim, alleging that the decree of the Colonial Court in Newfoundland was

irregular. He further alleged that in fact, it was EH (as administratrix of JH's estate) who owed money to him. However, BH had not sought to advance any of these claims in the legal proceedings before the Colonial Court in Newfoundland. The court refused to allow BH to impugn the proceedings of the Colonial Court by seeking an injunction to restrain enforcement. Sir James Wigram VC, in delivering the judgment of the court, held that any action to challenge that judgment could only be made by way of appeal and enunciated that:

> "… In trying this question I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and adjudication by, a Court of competent jurisdiction, the Court requires the parties to the litigation to bring forward their whole case and will not (except under special circumstance) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

[33] The law in **Henderson v Henderson** remains relevant, however, in recent times, it appears that the courts have moved away from treating matters of abuse of process with the "iron fist" approach applied in that decision, and have adopted a more relaxed stance. This evolved approach was demonstrated by Lord Bingham in the case of **Johnson v Gore Wood** where, at page 31, he opined:

> "The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to an abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on

> a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in the earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgement which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process off the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not."

[34] Thus, the approach recommended by Lord Bingham is that, in deciding whether subsequent proceedings amount to an abuse of process, the court should concentrate on the intrinsic justice of the case in the light of the overriding objective, taking into account all the relevant circumstances and make a broad-based judgment after considering the available possibilities.

[35] The inquiry as to special circumstances was an essential element of the approach. As Lord Bingham stated in **Johnson v Gore Wood**, the result in each approach "may often be the same". It may be that the application of the former approach in some of the previous cases did amount to, what Lord Bingham described as "too mechanical an approach". This court has adopted the reasoning in **Johnson v Gore Wood**. It did so in **S & T Distributors Limited and another v CIBC Jamaica Limited and another** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 112/2004, judgment delivered 31 July 2007 ('**S & T Distributors v CIBC**'), and in **Hon Gordon Stewart OJ and others v Independent Radio Company Limited and another** [2012] JMCA Civ 2 ('**Stewart v Independent Radio**').

[36] In **S & T Distributors v CIBC**, Harris JA considered the rule in **Henderson v Henderson** in the context of Lord Bingham's approach. She said at page 48 of the judgment:

> "…Where a party seeks to pursue a claim already brought in a previous suit which clearly seeks to unjustly expose the defendant to litigation, then, the court must view the later proceedings as abusive. There are however, circumstances in which a second suit may be regarded as something other than an obvious endeavour by a claimant to revive an earlier action. There, [sic] are also situations in which a matter which ought to be raised in an earlier suit was not raised, or, a claim made in an earlier suit, is advanced in later proceedings which the court may not regard as an unfair persecution of a defendant. In such cases, as proposed in **Johnson v Gore Wood & Co**. (supra), the court ought to adopt a broad based approach by engaging itself in a balancing exercise and conducting an 'enquiry into all the circumstances with due weight given to each circumstance and with a judgment being formed at the end of the exercise as what justice requires overall.'"

[37] Another case that demonstrates the modern or nuanced approach where the court considered procedural and factual circumstances when applying its mind to a determination whether there was in fact an abuse of process, is the case of **Danny Balkissoon v Roopnarine Persaud and another** (unreported), High Court of Justice, Trinidad and Tobago, Claim No CV 2006-00639, judgment delivered 6 July 2007. In that case, the claimant filed proceedings against the defendants but subsequent negotiations resulted in a compromise and agreement. The terms of the agreement were set out in a written document but the 1st defendant refused to complete his obligations under the said agreement. The claimant, consequently, filed another action against the defendants, the terms of which were identical to the matter previously filed before the court. The defendants got word of this, despite not being served, and entered an appearance in the matter. Shortly after, the defendants filed an independent claim relating to the said agreement seeking damages and other relief. In delivering the judgment, Jamadar J (as

he then was) outlined the following three general categories of abuse of the process of the court:

> (i) litigating issues which have been investigated and decided in a prior case (see **Johnson v Gore Wood** and **Perkins v Devoran Joinery Company Ltd** [2006] EWHC 582);
>
> (ii) inordinate and inexcusable delay (see **Grovit v Doctor and others** [1997] 1 WLR 640 and **Habib Bank Ltd v Jaffer (Gulzar Haider)** [2000] CPLR 438, CA); and
>
> (iii) oppressive litigation conducted with no real intention to bring it to a conclusion.

[38] Jamadar J also indicated a fourth category, as enunciated by Lord Bingham in **Johnson v Gore Wood**, that is, "where a party commences two or more sets of proceedings in respect of the same subject matter which amounts to harassment of a defendant because of the attendant multiplication of costs time and stress". As it relates to this fourth category, Jamadar J at pages 9 and 10 of the judgment, stated:

> "First, it is clear that the onus of proof is on the party who is alleging the abuse. Second, under the CPR even the power to strike out proceedings as an abuse of the process of the court ought to be considered in light of the overriding objective and the function of the court to deal with cases justly. Thus, even where there may be abuse of process that does not mean that the only correct response is to strike out a claim or statement of case (or part thereof). Third, the jurisdiction and power of the court to strike out proceedings as an abuse of the process of the court is discretionary; and given the status of the constitutional right of access to the courts it would appear that striking out a claim should be last option."

[39] The St Christopher and Nevis Court of Appeal decision in **St Kitts Nevis Anguilla National Bank Limited v Caribbean 6/49 Limited** (unreported), Court of Appeal, Saint Christopher and Nevis, Civil Appeal No 6 of 2002, judgment delivered 31 March

2003, contains factual circumstances that are closely analogous to this appeal. That case involved the filing of a second claim without termination of the first claim resulting in the simultaneous existence of two suits involving the same parties with identical causes of action. The court was called upon to determine whether the second claim ought to be struck out as an abuse of the process of the court. Barrow JA (Ag) (as he then was) cited Part 26.3 of the Organisation of Eastern Caribbean States Civil Procedure Rules (which is similar to rule 26.3 of our CPR) and opined that the action of the claimant was an abuse of the court's process. At para. [35] he had listed a number of instances regarded as "text book examples of abuse of process" which included "…bringing a second action based on the same cause of action as forms the basis for proceedings in existence at the time of filing the second action".

Application of the principles to the case at bar

[40] In the case at bar, the issues do not concern a re-litigation of the same issues between the same parties as both claims are still extant. The appellant's contention is that the learned judge acted in error when he made striking out orders against certain portions of the particulars of claim in the second claim, on the basis that they were strikingly similar to the first claim and therefore duplicitous.

[41] I note that the appellant is not asking the court to set aside the decision of the learned judge in its entirety. Rather, the appeal is confined to the learned judge's decision relative to paras. 27, 29, 30, 31, 37, and 39(1) of the amended particulars of claim in the second claim. I also note that although the learned judge was invited by the respondents to strike out the whole claim, he declined to do so, and instead, after considering the parties' submissions and the law extracted from the many cases cited, he determined that only particular portions of the particulars of claim of the second claim was duplicitous and ought to be excised.

[42] In the instant case the learned judge demonstrated, at para. [8] of his judgment, that he had taken a holistic approach in respect of his perusal and appreciation of the two claims. He specifically stated that:

> "[T]he statements of case relevant for comparison before me are firstly, the second Further Amended Particulars of Claim in SU2021CD 00268 (the first action) and secondly, the Amended Particulars of Claim in SU2021 CD 00281 (the second action)."

[43] The learned judge then went on, at paras. [9] - [11] of his judgment, to make a comparative analysis of the relevant portions of the statements of case. To appreciate the extent of his careful analysis I believe it is worth reproducing those paragraphs. Those paragraphs are as follows:

> "[9] My first observation is that, whereas West Indies Petroleum Limited [the appellant] is a Claimant in both actions, the 1st and 2nd Defendants in the second action are not parties in the first action. The second noteworthy distinction is that the second action concerns an alleged breach, by the 1st and 2nd Defendants, of 'Non-Disclosure Agreements' dated 21st January 2019 and 1st February 2020 (see paragraphs 9, 10, 11, 12, and 13 of the second action). The 3rd and 4th Defendants [respondents] are, in the second action, alleged to have participated in the breach of the said non-disclosure agreements (paragraphs 15, 16, 17, 18, 19, 20, 21, 23, 24, 25 and 26 of second action). Neither the alleged non-disclosure agreements nor, allegations pertaining to their breach, are mentioned in the first action.
>
> [10] However, the similarity between the first and second actions are otherwise striking. So that paragraphs 27, 28 and, 29 of the second action allege breaches of fiduciary duty by the 3rd and 4th Defendants [respondents]. This is the same cause of action, supported by much of the same particulars, such as letters of November 2020 and the formation of Eco Petroleum Ltd, as are found in the first action, see paragraphs 19–20, 23–24, 25–27, 30–33 and 35–41 of the first action. The "'new" causes of action contained in the second action are malicious false hood, defamation and, breach of constitutional rights, see paragraphs 32–36 and, 37 of the second action. However, the facts relied upon to support those particulars are not connected to the 1st and 2nd

> Defendants in the second action. Those facts are all, it seems, also pleaded in the first action, see paragraphs 36 (c), 36 (h), 36 (j), 33, 37, 38 and 40.
>
> [11] It is apparent that these "new" causes of action ought to have been made a part of the first action. In the first place not to do so risk inconsistent findings of fact on the same evidence by different courts. A potential embarrassment which should be avoided. In the second place it is unfair to put a Defendant to the expense of responding, to the same allegations, more than once. Indeed, if necessary, I find that tacking these claims onto the second action is tantamount to 'harassment' within the meaning of the authorities."

[44] The crucial findings of the learned judge in relation to his observations, as set out in paras. [9] and [10] of his judgment are not alleged to be erroneous. Rather, it is his interpretation of and the impact of his observations that is being contested by the appellant.

[45] An application for striking out under Rule 26.3 of the CPR focuses almost exclusively on the statement of case. The material that the learned judge examined and analysed was precisely the statement of case in both suits.

[46] Upon an overview of the particulars of claim and a comparison of the claims in both suits, the learned judge found the paragraphs he ordered struck from the particulars of claim of the second claim to be of striking resemblance to pleadings already existing in the first claim. The pleadings he said were almost identical and where they were not, the pleadings had already featured in the first claim. In that, whilst the 1st and 2nd defendants in the second claim were not parties in the first claim, the breaches allegedly committed by them in the second claim, could operate as supportive evidence for breaches of the causes of action of breach of fiduciary duty and breach of contract as outlined in the first claim.

[47] The appellant complained that the learned judge had misinterpreted the import and impact of the seminal decision of **Moorjani v Durban Estates Ltd** and that as a result he applied an incorrect test in deciding the issue of abuse of process.

[48] In **Moorjani v Durban Estates Limited**, Durban Estates Limited applied to strike out the claim by Mr Moorjani as an abuse of process on the ground that he was barred by the judgment he had obtained against Durban Estates in the County Court proceedings, from bringing any further claim in respect of the cause of action he relied upon in the County Court. It was also argued that to the extent that he was relying on any different causes of action in respect of the period to which his earlier County Court claim related, the new claim amounted to an abuse of process under the doctrine in **Henderson v Henderson**.

[49] The judgment of Pepperall J in **Moorjani v Durban Estates Limited** includes an interesting analysis of the proper approach to be adopted when a court is seeking to determine whether a second or subsequent claim amounts to an abuse of process. At para. 17 he distilled the following principles:

> "17.1 The starting point is to consider whether the second claim is brought upon the same cause of action as the first.
>
> 17.2 The focus is upon comparing the causes of action relied upon in each case and not the particulars of breach or loss and damage. New particulars are not particulars of a new cause of action if they seek to plead further particulars of breach of the same promise or tort or further particulars of loss and damage.
>
> 17.3 Both cause of action estoppel and merger operate to prevent a second action based on the same cause of action. Such bar is absolute and applies even if the claimant was not aware of the grounds for seeking further relief, unless the judgment in the first case can be set aside.
>
> 17.4 Even if the cause of action is different, the second action may nevertheless be struck out as an abuse

> under the rule in Henderson v. Henderson where the claim in the second action should have been raised in the earlier proceedings if it was to be raised at all. In considering such an application:
>
> a) The onus is upon the applicant to establish abuse.
>
> b) The mere fact that the claimant could with reasonable diligence have taken the new point in the first action does not necessarily mean that the second action is abusive.
>
> c) The court is required to undertake a broad, merits-based assessment taking account of the public and private interests involved and all of the facts of the case.
>
> d) The court's focus must be on whether, in all the circumstances, the claimant is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.
>
> e) The court will rarely find abuse unless the second action involves 'unjust harassment' of the defendant."

[50] The forgoing *ratio* encapsulates the principles embraced by the learned judge in his analytical comparison of the two claims filed by the appellant. The test, as I understand it, as to whether a previous claim is a bar to a subsequent one, is not whether the remedies sought to be recovered are different but whether the cause of action is the same and arises from the same set of facts. The learned judge, therefore, had correctly identified that the determination he was being called upon to make was whether the causes of action were the same in both claims and not whether the particulars of breach or loss and damage were the same.

[51] After carefully considering the authorities, and the circumstances of the case, I come to the conclusion that the striking out of the specified paragraphs, by the learned judge, was appropriate. On my own examination and comparison of the particulars of

claim in both claims, it seems to me that the pleadings advanced in the second claim were already encompassed in the first claim under the general breaches such as breach of fiduciary duty, breach of contract and defamation, in so far as the claim for malicious falsehood and breach of privacy are concerned. As far as I could discern the appellant was seeking to argue additional particulars of the same cause of action in the second claim, contrary to their assertions that though the causes of action in both claims were the same they emanated from different facts.

[52] I am also of the view that since no trial date had yet been set in the first claim, it was appropriate for the learned judge to suggest that the excised portions of the particulars of claim of the second claim be added to the first claim, bearing in mind that the second claim arose out of and was primarily concerned with significantly the same actions on the part of the respondents averred in the first claim.

[53] In light of the foregoing, I form the opinion that the claim for breach of privacy and malicious falsehood fall within the broad cause of action already claimed in the first claim. It is my view that the learned judge was correct in striking out the paragraphs of the particulars of claim of the second claim that did not relate to the non-disclosure agreement. I agree with the position of the learned judge that the prospect of two claims proceeding between the same parties in respect of the same subject matters is undesirable. The spectre of having different results from the two claims is abhorrent to the court.

[54] In all the circumstances of this case, it is my view that the appellant cannot succeed on its grounds of appeal. The learned judge has properly distilled the relevant cases and, in particular, the requirements of rule 26.3 of CPR. I find that there was material to support his findings in respect of both the law and the facts.

[55] In the circumstances, I would propose that the appeal be dismissed with costs to respondents to be taxed, if not agreed.

P WILLIAMS JA

ORDER

1. The appeal is dismissed.

2. The orders made by the learned judge in the court below are affirmed.

3. Costs of the appeal to the respondents to be taxed if not agreed.