

COMMONWEALTH OF THE BAHAMAS

2020

IN THE SUPREME COURT

CLE/gen/00363

Common Law Equity Division

B E T W E E N

JAMES ALEXANDER DARLING

Plaintiff

AND

THE ATTORNEY GENERAL

Defendant

Before The Hon. Mr. Justice Neil Brathwaite

Appearances: Richette Percentie, Lashanda Bain for the Plaintiff

Kenriah Smith for the Defendant

Date of Hearing: 21st October 2022

DECISION

1. By Generally Endorsed Writ of Summons filed 10th March 2020, the Plaintiff initiated an action against the Defendant, claiming that his rights as owner of a design copyright called "Fun In The Bahamas" had been infringed. The Plaintiff claims that the Defendant has used his design as the Bahamian National Flag.
2. By Summons filed 9th July 2020, the Defendant applied pursuant to Order 18 Rule 19(1)(a) of the Rules of the Supreme Court to strike out the Plaintiff's writ on the basis that the claim was statute-barred, and was therefore frivolous, vexatious, and/or an abuse of the process of the court. That application was heard and determined by then Justice Tara Cooper-Burnside (Actg.), who dismissed the application.
3. Following that application, the Plaintiff sought summary judgment against the Defendant. That application was heard by this court and dismissed on 16th February 2022. The Plaintiff had also filed a summons of 14th December 2021, seeking to strike out the Defence and Amended

Defence. The Defendant filed a summons on 26th July 2022, again seeking to strike out the claim. These two summonses are the subjects of this decision. The Defendant's summons is in the following terms:

1. LET ALL PARTIES concerned attend before a Justice of the Supreme Court of the Commonwealth of The Bahamas, at the Supreme Court Building, Bank Lank, Nassau, The Bahamas on the 26 day of July A.D., 2022 at 2:30 o'clock in the after-noon on the hearing of an application by the Defendant for an Order pursuant to strike this action pursuant to Order 18 Rule 19 of the Rules of the Supreme Court 1978 and under the inherent jurisdiction of this Honourable Court, and pursuant to section 5 (2) the Crown Proceedings Act Ch 68. That the costs of this application and those incurred in this action be paid by the Defendant to the Plaintiff to be taxed if not agreed.
4. The Statement of Claim in this matter reads as follows:
 1. The Plaintiff is a citizen of the Commonwealth of The Bahamas and was at all material times the owner of the design copyright called "FUN IN THE BAHAMAS"
 2. That by virtue of a letter dated 2nd January, 1964 ("the said letter") the Plaintiff and or its agent wrote to the Defendant and or its agents or otherwise attaching the supporting documents and requesting the protection of the Plaintiff's design ("the said design").
 3. On or about 3rd February, 1964 the Defendant and or its agents subsequently responded by letter confirming receipt of the said letter and granting permission to the Plaintiff and or its agent to copyright the said design.
 4. Sometime on or about 1973, the Defendant, by themselves or their respective servants or agents or otherwise, without the license or permission of the Plaintiff, used as the Bahamian National flag, a design that shares similarity to the Plaintiff's said design. The Bahamian National flag is painted the exact colors as the said design and has the same shape and/or layout of the said design.
 5. That at all material times the Defendant was aware of and acknowledged the Plaintiff's copyright claim to the said design.
 - (a) On 3rd March, 1989, the Defendant, by themselves or their respective servants or agents or otherwise provided the Plaintiff with written confirmation that "a search was conducted brought by JAMES ALEXANDER DARLING and has found him to be the first inventor and designer of FUN IN THE BAHAMAS the design for the flag of the Commonwealth of The Bahamas."
 - (b) On or about 31 October, 2007 the Defendant, by themselves or their respective servants or agents or otherwise confirmed in writing that:

"... When I came to know of your intellectual properties I was astound of the existence to your copyright claim dated July 25th, 1988 in addition to a claim previously submitted on your behalf dated January 2nd, 1964, after verifying these with Registry for the purpose of authenticating the documents which you sent, in observing there are grounds to determine base where it can be seen that the design of the Bahamas flag and the design that is recorded shares some similarities to an extent that one is clearly an indication of an infringement to

the other...It is unfortunate that at the time given for a search of a design to be used as the National flag that proper due diligence was not thoroughly conducted in determining true ownership to a design previously existing in our own Registry.

(c) Further the Defendant, by themselves or their respective servants or agents or otherwise on or about 25th April, 2012 reiterated in writing that "...a search was conducted on an invention application brought by JAMES ALEXANDER DARLING for an invention in respect of FUN IN THE BAHAMAS and has found him to be the first inventor and designer of FUN IN THE BAHAMAS, the design for the flag of the Commonwealth of The Bahamas".

(d) Finally, in a letter dated 19th April, 2016 the Defendant, by themselves or their respective servants or agents or otherwise confirmed "...that the Registrar General's Department is the custodian of a 2 page letter dated January 2nd, 1964 by Carolyn Ann Esther Darling-Storr on behalf of her younger brother, James Alexander Darling. Mrs. Darling Storr attested to a Game Board Design which she states was designed and completed by Mr. Darling on January 1st, 1964. The Letter is also accompanied by the details of the game."

6. That despite the obvious awareness and acknowledgement of the Plaintiff's copyright to the said design the Defendant, by themselves or their respective servants or agents or otherwise without the licence and permission of the Plaintiff fraudulently, negligently and intentionally used and permitted to use the Plaintiff's said design.

7. Further, the Defendant, by themselves or their respective servants or agents or otherwise has sold or offered for sale and have thereby infringed the Plaintiff's copyright in the said design.

8. The Plaintiff made numerous attempts to renew the copyright to the said design but was refused by the Defendants and or its agents with no reason given.

9. By virtue of a letter dated 5th November, 2019 the Attorneys for the Plaintiff wrote to the Defendant demanding payment in the sum of Forty-two million dollars (\$42,000,000.00) for loss due to the illegal and unauthorized use of the Plaintiff's copyright of the said design.

10. The Defendant has failed and/or refused to pay any sum at all and continues its illegal and unauthorized use of the Plaintiff's copyright of the said design.

11. The Defendant intends, unless restrained by this Honourable Court, to continue the acts of infringement aforesaid.

12. In the premises, the Plaintiff's copyright of the said design has been infringed resulting in loss and damages.

AND THE PLAINTIFF CLAIMS:

1. The sum of \$328,500,000.00
2. An Injunction to restrain the Defendants by themselves or their respective servants or agents or otherwise from using without the licence or permission of the Plaintiff the said design or any production of the said design and from authorizing any of the acts aforesaid;

3. An order that the Plaintiff be named as the original author/designer of the said design;
4. An Order for delivery up, of all copies of the said flag as are in the possession, power or custody of the Defendant and or their servants, agents or assigns;
5. An inquiry as to damages or at the Plaintiff's option an account of profits and an order for payment of all sums found due upon the making of such inquiry or taking of such account;
6. Damages;-
7. Interests as aforesaid;
8. Such further and other Relief as the Court deems just.
9. Costs.

Defendant's Submissions-Claim Strike Out

5. As an alternative to the main contention that there was no infringement of any copyright held by the Plaintiff, the Defendant submits pursuant to section 5 of the Crown Proceedings Act Ch. 68 that no proceedings can be brought against the Crown for any infringement. They rely on the decision of Justice Winder (as he then was) in **MG Apartments Ltd. v AG et al 00845 of 2022** to support the contention that an action brought against the Crown which is prohibited by the Crown Proceeding Act will be struck, and also the decision of **Blackburn v AG [1971] 2 All ER 1380** in support of the suggestion that a statement of claim impugning the prerogative powers of the Crown will be struck out.
6. With respect to the submission of the Plaintiff that this application is an abuse of process, the Defendant submits that there is no abuse of the process of the Court, as the issue of the Crown Proceedings Act has not been previously raised.
7. The Defendant further submits that the relevant provisions of the Crown Proceedings Act are not unconstitutional, as the savings clause would apply.

Plaintiff's Submissions-Claim Strike Out

8. In opposing the application, the Plaintiff submits that the summons lacks particulars, as it does not specify which sub-rule of Order 18 Rule 19 is being invoked. They note that the Defendant has placed no evidence before the court in relation to this application, and further submit that the application is an abuse of process, as the issue should have been raised during the previous application which was heard by Cooper-Burnside J (Actg.) The Plaintiff relies on the well-known case of **Johnson v Gore Wood [2001] 1 All ER 481**, and also the more recent decision of **Cable v Liverpool Victoria [2021] 2 All ER 121**, in which the English Court of Appeal said as follows:

'First the court has to determine whether the claimant's conduct was an abuse of process. Secondly, if it was, the court has to exercise its discretion as to whether or not to strike out the claim. It is at that second stage that the usual balancing exercise, and in particular considerations of proportionality, becomes relevant.'

9. With respect to section 5(2) of the Crown Proceedings Act, the Plaintiff relies on Article 27 of The Constitution of the Commonwealth of the Bahamas, which reads as follows:

"27. (1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied, that is to say —

(a) the taking of possession or acquisition is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilisation of any property in such manner as to promote the public benefit or the economic well-being of the community; and

(b) the necessity therefore is such as to afford reasonable justification for the causing of any hardship that may result to any person having an interest in or right over the property; and

(c) provision is made by a law applicable to that taking of possession or acquisition —

(i) for the making of prompt and adequate compensation in the circumstances; and

(ii) securing to any person having an interest in or right over the property a right of access to the Supreme Court, whether direct or on appeal from any other authority, for the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled, and for the purpose of obtaining prompt payment of that compensation; and

(d) any party to proceedings in the Supreme Court relating to such a claim is given by law the same rights of appeal as are accorded generally to parties to civil proceedings in that Court sitting as a court of original jurisdiction. Protection from deprivation of property.

(2) Nothing in this Article shall be construed as affecting the making or operation of any law so far as it provides for the taking of possession or acquisition of property —

(a) in satisfaction of any tax, rate or due;

(b) by way of penalty for breach of the law, whether under civil process or after conviction of a criminal offence under the law of The Bahamas;

(c) as an incident of a lease, tenancy, mortgage, charge, bill of sale, pledge or contract; (d) upon the attempted removal of the property in question out of or into The Bahamas in contravention of any law;

(e) by way of the taking of a sample for the purposes of any law;

(f) where the property consists of an animal upon its being found trespassing or straying;

(g) in the execution of judgments or orders of courts;

- (h) by reason of its being in a dilapidated or dangerous state or injurious to the health of human beings, animals or plants;
- (i) in consequence of any law making provision for the validation of titles to land or (without prejudice to the generality of the foregoing words) the confirmation of such titles, or for the extinguishment of adverse claims, or with respect to prescription or limitation of actions;
- (j) for so long only as may be necessary for the purposes of any examination, investigation, trial or inquiry or, in the case of land, the carrying out thereon —
 - (i) of work of reclamation, drainage, soil conservation or the conservation of other natural resources; or
 - (ii) of agricultural development or improvement that the owner or occupier of the land has been required, and has, without reasonable and lawful excuse, refused or failed to carry out; or
- (k) to the extent that the law in question makes provision for the vesting or taking of possession or acquisition or administration of —
 - (i) enemy property;
 - (ii) property of a deceased person, a person of unsound mind or a person who has not attained the age of twenty-one years, for the purpose of its administration for the benefit of the persons entitled to the beneficial interest therein;
 - (iii) property of a person adjudged insolvent or a defunct company that has been struck off the Register of Companies, or a body corporate in liquidation, for the purpose of its administration for the benefit of the creditors of that insolvent person or body corporate and, subject thereto, for the benefit of other persons entitled to the beneficial interest in the property; or
 - (iv) property subject to a trust, for the purpose of vesting the property in persons appointed as trustees under the instrument creating the trust or by a court or, by order of a court, for the purpose of giving effect to the trust.

(3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that the law in question makes provision for the orderly marketing or production or growth or extraction of any agricultural or fish product or mineral or water or any article or thing prepared for market or manufactured therefor or for the reasonable restriction of the use of any property in the interest of safeguarding the interests of others or the protection of tenants, licensees or others having rights in or over such property.

(4) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that the law in question makes provision for the compulsory taking possession in the public interest of any property, or the compulsory acquisition in the public interest of any interest in or right over property, where that property, interest or right is held by a body corporate established directly by law for public purposes in which no monies have been invested other than monies provided by Parliament or by any Legislature established for the former Colony of the Bahama Islands.”

10. The Plaintiff notes that The Constitution is the supreme law of the land, and submits that, at the very least, Article 28 of The Constitution mandates that the court conduct a full inquiry to determine whether the rights of the plaintiff have been infringed, which would mean that a

summary dismissal of this matter would be unjust and inappropriate. The Plaintiff therefore submits that the application brought by the Defendant should be dismissed, with costs to the Plaintiff.

Discussion-Claim Strike Out

11. Abuse of the process of the Court was considered in **Hunter v Chief Constable (1982) AC 529** at 536, where Lord Diplock said the following:

“[abuse of process] concerns the inherent 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. The circumstances in which abuse of process can arise are very varied . . . It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power.”

12. In **Thomas v Attorney-General (No 2) (1988) 39 WIR 372**, the Privy Council said:

“...It is in the public interest that there should be finality to litigation and that no person should be subjected to action at the instance of the same individual more than once in relation to the same issue. The principle applies not only where the remedy sought and the grounds therefore are the same in the second action as in the first but also where, the subject matter of the two actions being the same, it is sought to raise in the second action matters of fact or law directly related to the subject matter which could have been but were not raised in the first action. The classic statement on the subject is contained in the following passage from the judgment of Sir James Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100 at page 115:

‘... where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) 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.’

13. Applying those principles to the facts of this case, it is without doubt that the Defendants could and should have raised the issue of section 5(2) of the Crown Proceedings Act in the earlier application determined by Cooper-Burnside J. Nothing has been mentioned to explain why this was not done. Indeed, as the Plaintiff points out, the Defendant has provided no evidence whatsoever in support of the application, and have chosen to merely say that the issue was not considered in the earlier application. This submission misses the point that the issue should have been raised. The application is therefore, in my view, clearly an abuse of process. However, that is not the end of the matter.

14. In **Cable v Liverpool Victoria Insurance Co. [2021] 2 All ER 121** at paragraph 45 the court said the following:

“45. A claim must be clearly shown to be an abuse before it can be struck out: see *Stuart v Goldberg Linde* [2008] EWCA Civ 2, [2008] 1 WLR 823. The striking out of a claim is a draconian remedy and one that should be seen as a last resort. In *Summers*, Lord Hope said:

“48. It is in the public interest that there should be a power to strike out a statement of case for abuse of process, both under the inherent jurisdiction of the court and under the CPR, but the Court accepts the submission that in deciding whether or not to exercise the power the court must examine the circumstances of the case scrupulously in order to ensure that to strike out the claim is a proportionate means of achieving the aim of controlling the process of the court and deciding cases justly.”

At paragraph 73 the court says the following:

“73. Having established that there was an abuse of process, the second step for the court is the usual balancing exercise, in order to identify the proportionate sanction. Striking out the claim is an option, but as we have seen, it is not the only, or even the primary solution.”

15. In the circumstances of this case, the Defendant suggests that the law prohibits the bringing of a claim against the State pursuant to the Crown Proceedings Act. To strike out the summons on the ground of abuse of process would have the effect of failing to adjudicate on a question of law which, if the Defendant is correct, would operate as a bar to the bringing of the action. In my view, this could not be a just result. I therefore decline to dismiss this application, despite the fact that it should have been raised during the earlier application.

16. The Plaintiff contends that the alleged infringement of copyright, without a right to seek redress, would amount to a breach of the constitutional prohibition against deprivation of property without compensation. The Defendant responds that the savings clause at Article 30 of The Constitution of the Commonwealth of the Bahamas would apply, so that the application of the Crown Proceedings Act would not be unconstitutional.

17. I note that, having examined the Statement of Claim, no mention is made of the Constitution. While the courts of the Commonwealth of the Bahamas have long recognized that constitutional applications can be raised by informal means, including by letter, as far as I am aware those have all involved the liberty of the subject, when a more liberal approach is necessary and required. That is not the case here. Further, I harbor some doubt that it can be right to raise this issue in this way in these proceedings, when one considers the usual rules that parties are bound by their pleadings. However, in considering this matter, for reasons which will become readily apparent, it is in my view not necessary to resolve this question, or the question of whether the savings clause would apply.
18. The Defendant relies on section 5 (2) of the Crown Proceedings Act Chapter 68. The entire section reads as follows:
- “5. (1) Where after the commencement of this Act any servant or agent of the Crown infringes a patent, or infringes a registered trade mark, or infringes any copyright and the infringement is committed with the authority of the Crown, then subject to the provisions of this Act, civil proceedings in respect of the infringement shall lie against the Crown.
- (2) Save as expressly provided by this section no proceedings shall lie against the Crown by virtue of this Act in respect of the infringement of a patent, in respect of the infringement of a registered trade mark, or in respect of the infringement of any such copyright as is mentioned in subsection (1) of this section.”
19. The Defendant relies on subsection 2, but make no reference to subsection 1. Subsection 2 includes the words “save as expressly provided by this section.” The section includes subsection 1, which clearly indicates that where the infringement is committed with the authority of the Crown, an action will lie against the Crown. In my view, subsection 2 might apply where there is a suggestion of vicarious liability for the acts of a servant of the Crown done without the authority of the Crown, but it does not act as a blanket prohibition of an action against the Crown.
20. This issue is referenced in Halsbury’s laws of England Volume 23 of 2016 at 832, where the following is stated:

“832. Rights of action in general.

An infringement of copyright is actionable by the copyright owner; and in a claim for infringement of copyright all such relief by way of damages, injunction, accounts or otherwise is available to the claimant as is available in respect of the infringement of any other property right.

Civil proceedings lie against the Crown for an infringement of copyright committed by a servant or agent of the Crown with the authority of the Crown; but otherwise no

proceedings lie against the Crown by virtue of the Crown Proceedings Act 1947 in respect of an infringement of copyright.”

21. No evidence has been provided to imply that any actions were done without the authority of the Crown, and indeed any such evidence would be appropriate in a trial, but not in a summary application of this nature. I therefore decline to find that there is any such blanket prohibition as is contended for by the defence, and dismiss the application.

Plaintiff's Submissions-Defence Strike Out

22. The Amended Defence filed in this matter on 27th October 2021 reads as follows:

“1. Reference in this pleading to numbered paragraphs are, unless otherwise stated, references to paragraphs in the Statement of Claim filed herein on 21 April, 2021.

2. Without prejudice to the Defendant’s right to take any preliminary point in objection or seek to stay all or part of the Plaintiff’s action, the Defendant pleads the following herein by way of defence. The Defendant further pleads Order 18 Rule 19(1) (a), (b) and (d) of the Rules of The Supreme Court.

3. Paragraph 1 is not admitted and the Plaintiff is put to strict proof of each and every claim therein.

4. Paragraph 2 is not admitted and the Plaintiff is put to strict proof of each and every claim therein.

PARTICULARS

i. On the 2nd January, 1964 a letter was written by the Plaintiff’s sister stating that her youngest brother, who was ten at the time, had invented a new game board that he called Fun in the Bahamas.

ii. On the 6th January, 1964 a further letter was written by the Plaintiff’s sister registering the said game as Name of Game Design (FUN IN THE BAHAMAS) with the details of the game attached thereto.

5. Paragraph 3 is not admitted and the Plaintiff is put to strict proof of each and every claim and allegation therein.

PARTICULARS

i. On the 3rd February, 1964 the Registrar’s General Office wrote to the Plaintiff giving permissions to take steps for the preservation of the game: Fun In The Bahamas Game Design.

6. Paragraph 4 is denied and the Plaintiff is put to strict proof of each and every claim and allegation therein.

7. Paragraph 5 is denied and the Plaintiff is put to strict proof of each and every claim and allegation therein.

PARTICULARS

i. On the 25th July, 1988 Form 11A Notice of Claims for Design Copyright was lodged with the Registrar General's Department Industrial Property Office, in Deposit list of Design 105 "Fun in The Bahamas" an Educational and Entertainment Game."

ii. It is the Defendant's position that the purported corresponden[ce] relied on by the Plaintiff is not authored by the Defendant and or its agents and the same being falsely uttered to a Government and/or judicial official knowing the same to be false.

8. Paragraph 6 is denied. It is denied that the Defendant fraudulently, negligently or intentionally used any design of the Plaintiff or otherwise.

9. Paragraph 7 is denied.

10. Paragraph 8 is not admitted and the Plaintiff is put to strict proof of each and every claim and allegation therein.

11. Paragraph 9 is not admitted and the Plaintiff is put to strict proof of each and every claim and allegation therein.

12. Paragraph 10 is denied.

13. Paragraph 11 is denied.

14. Paragraph 12 is denied.

15. Further, the Defendant denies that the Plaintiff is entitled to damages, and further denies that the Plaintiff is entitled to sum payment herein in the amount of \$328,500,000.00, interests, other relief, or costs, or otherwise.

16. Save and hereinbefore specifically admitted the Defendant denies each and every allegation in the Statement of Claim as though the same were set out herein and traversed seriatim."

23. The Plaintiff relies on Order 18 Rules 13(3) and (4), which states that:

"(3) Subject to paragraph (4), every allegation of fact made in a statement of claim or counterclaim which the party on whom it is served does not intend to admit must be specifically traversed by him in his defence or defence to counterclaim, as the case may be; and a general denial of such allegations, or a general statement or non-admission of them is not a sufficient traverse of them.

(4) Any allegation that a party has suffered damage and any allegation as to the amount of damages is deemed to be traversed unless specifically admitted.”

24. The Plaintiff submits that the Defence and Amended Defence consists of bare denials and non-admissions, and is in some instances confusing at best, and should therefore be struck out. They rely on the decision of **Performing Right Society Ltd v Barbary Beach Development Ltd. T/a Viva Wyndham Fortuna Beach Hotel 2014/CLE/gen/00219**, a decision of Hanna-Adderley J in which a defence was struck out on the basis that it consisted of non-admissions and bare denials, and did not disclose a reasonable defence; and **Colina Insurance Limited and Willard [2014] 1 Bahamas Law Reports No. 56.**, a decision of the Court of Appeal in which a refusal to strike out a defence was reversed. The Plaintiff therefore submits that the defence discloses no triable issue, and should be struck out, with the result that judgment in default should be entered for the Plaintiff.

Defendant’s Submissions-Defence Strike Out

25. The Defendant submits that the Summons seeking to set aside the defence ought itself to be set aside, as it does not comply with Order 20 Rule 4, which provides that an application to disallow an amendment should be made within 14 days of service of the amended pleading. They further submit that pleadings were not closed, permitting the defence to be amended without leave of the court.
26. The Defendant further submits that the defence is not a bare defence, as it is denied that the Plaintiff holds a patent for the Bahamian flag, or that the Crown infringed any copyright. They rely on Order 18/8/1A of the 1976 English Rules, which provides that a Defendant need only deny a claim and then dispute its validity. The Defendant disputes the validity of the claim, and suggests that the correspondence relied upon by the Plaintiff is false.

Discussion-Defence Strike Out

27. While the summons filed by the Plaintiff references Order 18 Rule 2 (2), Order 18 Rule 19 (a) and (b), and Order 20 Rule 4 of the Rules of the Supreme Court, the submissions have focused on Order 18 Rule 19 (a) and (b).
28. Order 20 Rule 4 states as follows:
- “4. (1) Within 14 days after the service on a party of a writ amended under rule 1 (1) or of a pleading amended under rule 3(1), that party may apply to the Court to disallow the amendment.”
29. The evidence in this case is that the amended defence was served on the Plaintiff on 9th November 2021, while the summons was not filed until 14th December 2021, more than one month after service of the amended defence. The summons is therefore out of time with respect to this provision. I therefore decline to disallow the amendment. I further do not accept that the

defence is out of time, as time for serving a defence had been extended by virtue of the operation of Order 14 Rule 2, and would have been fourteen days after delivery of the decision on an Order 14 application of the Plaintiff, which was filed on 28th May 2021. That decision was delivered on 16th February 2022.

30. Order 18 Rule 19 reads as follows:

“The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that –

- (a) it discloses no reasonable cause of action or defence, as the case may be; or
- (b) it is scandalous, frivolous or vexatious; or
- (c) it may prejudice, embarrass or delay the fair trial of the action; or
- (d) it is otherwise an abuse of the process of the court.”

31. Order 18 Rule 13 reads as follows:

(1) “Any allegation of fact made by a party in his pleading is deemed to be admitted by the opposite party unless it is traversed by that party in his pleading or a joinder of issue under rule 14 operates as a denial of it.

(2) A traverse may be made either by a denial or by a statement of non-admission and either expressly or by necessary implication.

(3) Every allegation of fact made in a statement of claim or counterclaim which the party on whom it is served does not intend to admit must be specifically traversed by him in his defence or defence to counterclaim, as the case may be; and a general denial of such allegations, or a general statement of non-admission of them, is not a sufficient traverse of them.”

32. The Plaintiff submits that the defence as pleaded consists of a bare defence, while the Defendant submits that they are entitled to plead the defence in the manner in which they did. The issue of the modern approach to pleadings has been addressed extensively by the learned Charles Snr. J. in **Ralph Gooding v Elizabeth Ellis & National Workers Co-operative Credit Union 2020/CLE/gen/00272**. From the headnote of that decision are extracted the following statements:

“1. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader: *Bahamas Ferries Limited v Charlene Rahming SCCivApp & CAIS No. 122 of 2018 and Montague*

Investments Limited v (1) Westminster College Ltd and (2) Mission Baptist Church [2015/CLE/gen/00845] relied upon.

2. O. 18, r. 13(3) appears to be geared towards minimising the mischief created by vague and evasive pleadings. The modern approach to pleadings requires a more structured approach to a proper pleading in order to avoid vague and evasive pleadings.

3. It is well-established that a defendant simply cannot deny an allegation and ask the plaintiff to prove it. Those bad days are long over. Where there is a denial, it must be accompanied by the defendant's reasons for the denial. If the defendant wishes to put forward a different version of events from that given by the plaintiff, he must state his own version: Mendonca JA in *M.1.5 Investigations Limited v The Centurion Protective Agency Limited* [Civil Appeal No. 244 of 2008] [Trinidad & Tobago] and *Elwardo Lynch v Ralph Gonsalves* (St. Vincent & The Grenadines Civil Appeal No. 18 of 2005) (Judgment delivered on 18 September 2006) applied.

4. The Defence must set out all the facts on which the defendant relies to dispute the claim. Such statement must be as short as practicable. A defendant is under a positive duty to admit or deny pleaded allegations where he is able to do so and could only put the plaintiff to proof of a fact where he was unable to admit or deny it. In the case of a corporate defendant, which can only act through human agents and has no mind of its own, its actual knowledge must clearly be understood as that of its individual officers, employees or other agents whose knowledge is for the purposes of applying rule 16.5 to be attributed to it, in accordance with the relevant rules of attribution....": *SPI North Limited v Swiss Post International (UK) Ltd and another* [2019] 1 WLR 2865."

33. In examining the Amended Defence filed by the defendant on 27th October 2021 it is readily apparent that the Defendant does not accept that the Plaintiff was granted permission to copyright a game design, or that that copyright was infringed by using the design for the flag of the Commonwealth of the Bahamas, nor that the Defendants acknowledged the Plaintiff's copyright claim. This is the crux of the claim. The Defendant go further and allege that "*the purported correspondent (sic) relied on by the Plaintiff is not authored by the Defendant and or its agents and the same being falsely uttered to a Government and/or judicial official knowing the same to be false*".
34. The Plaintiff in the Statement of Claim refers to a number of pieces of correspondence, namely a letter of 3rd February 1964 confirming receipt of a letter written on behalf of the Plaintiff and granting permission to the Plaintiff to copyright the design; correspondence on 3rd March 1989 stating that "*a search was conducted brought by James Alexander Darling and has found him to be the first inventor and designer of FUN IN THE BAHAMAS the design for the flag of the Commonwealth of the Bahamas*"; and letter purportedly written by a former Prime Minister dated 31st October 2007; a letter dated 25th April 2012 in similar terms to the letter of 3 March 1989, and a letter of 19th April 2016 stating that the Registrar General's Department is the

custodian of a 2 page letter dated January 2nd 1964 by Carolyn Ann Esther Darling-Storr on behalf of her younger brother, James Alexander Darling.

35. In the Defence, the Defendant seems to simply be requiring the Plaintiff to prove that the sister of the Plaintiff sent in any letters in January 1964 seeking to register the designs of the subject game, and that the Plaintiff is in fact the owner of a copyright to the game FUN IN THE BAHAMAS, as well as to prove that the flag of the Commonwealth of the Bahamas does as a matter of fact infringe the copyright of the Plaintiff, if such copyright is found to exist. These are matters which must be determined at trial following the usual process of discovery, witness statements, and cross-examination. I therefore do not accept that the defence consists solely of bare denials, with no way of understanding the defence of the Defendant. However, I do accept that some clarity could be brought to this matter by specifying which correspondence is alleged to be fraudulent, which would have the effect of clarifying whether the various pieces of correspondence from the Plaintiff to the servants of the Defendant were in fact received but the effect of that correspondence is disputed, or whether the Defence says the correspondence was not received.
36. The proper approach for the court in an application to strike out was also considered in **Gooding v Ellis**, where at paragraph 6 the court said as follows:

[6] In *B.E. Holdings Limited v Piao Lianji* [2014/CLE/gen/01472], this Court set out the powers of the court to strike out at paras [7] to [10] as follows:

“[7] As a general rule, the court has the power to strike out a party’s case either on the application of a party or on its own initiative. Striking out is often described as a draconian step, as it usually means that either the whole or part of that party’s case is at an end. Therefore, it should be taken only in exceptional cases. The reason for proceeding cautiously has frequently been explained as that the exercise of this discretion deprives a party of his right to a trial and his ability to fortify his case through the process of disclosure and other procedures such as requests for further and better particulars.

[8] In *Walsh v Misseldine* [2000] CPLR 201, CA, Brooke LJ held that, when deciding whether or not to strike out, the court should concentrate on the intrinsic justice of the case in the light of the overriding objective, take into account all the relevant circumstances and make ‘a broad judgment after considering the available possibilities.’ 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 claim is incurably bad; or that it discloses no reasonable ground for bringing or defending the claim; or that it has no real prospect of succeeding at trial.

[9] It is also part of the court’s active case management role to ascertain the issues at an early stage. However, a statement of claim is not suitable for striking out if it raises a serious live issue of fact which can only be determined by hearing oral evidence: *Ian Peters v Robert George Spencer*, ANUHCVP2009/016 - Antigua

& Barbuda Court of Appeal - per Pereira CJ [Ag.] - Judgment delivered on 22 December 2009.

[10] The court, when exercising the power to strike out, will have regard to the overriding objective of RSC O. 31A r. 20 and to its general powers of management. It has the power to strike out only part of the statement of claim or direct that a party shall have permission to amend. Such an approach is expressly contemplated in the RSC: see Order 18 Rule 19.” [Emphasis added]

37. Applying that reasoning to the facts of this case, I do not see this case as falling within that category of exceptional cases which would justify the exercise of the draconian power to strike out. This case in my view contains a number of curious features which would best be resolved at trial, and about which it would perhaps be wise to say no more at present, no evidence having been led. Considering the intrinsic justice of the case, I decline to strike out the defence, and order instead that the Defendant within 21 days of the date of this judgment, file a re-amended defence clarifying the defence, particularly which of the correspondence is alleged to be fraudulent, and what exactly is being contended with respect to the remainder. Failing this, the defence will stand as struck out.
38. As I have dismissed the summons of the Defendant, and have required that the Defence be amended, I award the costs of the summons of the Defendant to the Plaintiff, as well as the costs of the summons of the Plaintiff.

Dated this 24th day of November, A.D. 2023



Neil Brathwaite
Justice