IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

Claim No. 2020/CLE/gen/00363

BETWEEN

JAMES ALEXANDER DARLING

Claimant

AND

THE ATTORNEY GENERAL

Defendant

RULING

Before:	**The Honourable Justice Simone I Fitzcharles**
Appearances:	**Ms Raven Rolle for the Plaintiff**
	Ms Kenria Smith for the Defendant
Hearing date:	**On the Papers**

FITZCHARLES, J.

The Applications

1. At its core, this claim involves an allegation by the Claimant that he owns a design copyright in the work entitled "FUN IN THE BAHAMAS." He further alleges that his copyright in this work was infringed as it was unlawfully adopted and used as the National Flag of the Commonwealth of The Bahamas. For this the Claimant seeks compensation in the amount of $328,500,000.00, an order that the Claimant be named as the original author or designer of the design and for delivery up of all copies of the flag as are in the possession, power or custody of the Defendant, its servants, agents or assigns.

2. The case has been plagued by extensive rounds of strike out applications which met with little to no success. This ruling relates to another such application by the Claimant and an answering application by the Defendant. By the Notice of Application filed 12 March 2024, the Claimant seeks orders pursuant to **Part 26.3** of the **Supreme Court Civil Procedure Rules, 2022** ("**CPR**") and/or the inherent jurisdiction of the Court to strike out the Defendant's Re-Amended Defence filed on 14 December 2023, or alternatively, to enter a judgment on liability against the Defendant with damages to be assessed (the "**Strike Out Application**").

3. The Application is supported by the Affidavit of James Darling also filed on 12 March 2024 (the **"Darling Affidavit"**), which sets out details of the Claimant's allegations concerning the alleged infringement of design copyright by unlawful adoption or incorporation of the same in the National Flag of the Commonwealth of The Bahamas. The grounds for the Plaintiff's Strike Out Application are:

(1) that the Defendant's Re-Amended Defence lacks a statement of truth pursuant to **Rule 3.8** of the **CPR**;

(2) that paragraphs 2, 4, 5, 6 and 8 through 13 of the Defendant's pleading are contrary to **Part 10.5** of the **CPR** as they purport to be a request for further information and/or contain legal argument or opinions on matters of law; and/or

(3) that paragraphs 2, 4, 5, 6, and 8 through 13 of the Re-Amended Defence are contrary to or go beyond the scope of Order of the Court dated 24 November 2023.

4. The Defendant resists the Strike Out Application on the basis that the Re-Amended Defence appropriately contains the pleading of substantive defences raising triable issues. The Defendant filed a Notice of Application on 06 May 2024 seeking relief from sanctions and permission pursuant to **CPR 20.1 (2)** to rely upon all paragraphs of the Re-Amended Defence as far as such relief is necessary, and to file a statement of truth in relation to the Re-Amended Defence in order to correct the inadvertent omission of a statement of truth from the Defendant's pleading (the "**Relief Application**").

5. The Defendant's application is supported by the Affidavit of Christine Y. Brown filed on 06 May 2025 (the "**Brown Affidavit**"). In the Brown Affidavit the deponent accepts on behalf of

the Defendant that the statement of truth was inadvertently omitted from the Re-Amended Defence. Ms Brown also observed that no trial date has as yet been set for this matter. In such circumstances, granting permission to correct the mistake of not filing a statement of truth at this time will not jeopardize the trial or prejudice the Claimant. In addition to rehearsing relevant paragraphs from the Order of Brathwaite J by which the Defendant was given leave to re-amend the Amended Defence, the Brown Affidavit states that there were no restrictions on the re-amendment as alleged by the Claimant, amongst other matters.

Brief Procedural History

6. These proceedings were commenced on 10 March 2020 by Writ of Summons.

7. The Defendant filed an appearance on 19 June 2020. The Claimant filed his Statement of Claim on 21 April 2021 and the Defendant entered a Defence on 5 May 2021, which was amended on 27 October 2021 and re-amended on 14 December 2023.

8. There have been extensive interlocutory skirmishes with each party attempting to summarily terminate the other party's case. These included the following:

(1) the Defendant's application filed on 9 July 2020 to strike out the Plaintiff's Writ of Summons, which was dismissed by *Cooper-Burnside J (Actg)*;

(2) the Claimant's application for summary judgment against the Defendant filed on 27 May 2020 which was refused by *Brathwaite J*;

(3) the Claimant's application filed on 14 December 2021 to strike out the Defence and Amended Defence of the Defendant, which was denied but resulted in an unless order made by *Brathwaite J*;

(4) the Defendant's application filed on 26 July 2022 to strike out the Claimant's claim, which was unsuccessful; and

(5) the Claimant's application filed on 12 March 2024 now before this Court to strike out the Defendant's Defence and Re-Amended Defence.

9. By a Ruling delivered on 24 November 2023, Brathwaite J dismissed the Claimant's strike out application and instead, ordered the Defendant to re-amend its Defence within twenty-one (21) days, failing which the Defence will stand as struck out.

10. The Defendant filed its Re-Amended Defence on 14 December 2023. The present Strike Out Application of the Claimant challenges whether that pleading satisfies both the CPR and the Court's prior Order. The Defendant seeks to guard against that challenge by simultaneously launching its Relief Application.

Issues

11. The Court must decide whether in the circumstances of this case, the Re-Amended Defence or paragraphs 2, 4, 5, 6 and 8 through 13 of the Re-Amended Defence filed on 14 December 2023 ought to be struck out in part or entirely as contrary to **CPR 3.9**, or **CPR 10.5** or as exceeding the permission given to the Defendant by the Court on 24 November 2023 to amend the pleading. Alternatively, the Court must consider: (1) whether to grant the Defendant relief from sanctions in relation to its error in not filing a statement of truth with the Re-Amended Defence, and permission to rely on the Statement of Truth dated 30 April 2024; and (2) if the Re-Amended Defence has exceeded the leeway given by the Order of 24 November 2023, whether to grant permission for the Defendant to rely on his pleading as re-amended.

12. Counsel for both parties put forward arguments via written submissions. A comprehensive summary of the parties' submissions follows.

Arguments of the Claimant

13. The main planks of the Claimant's arguments are set out below.

(1) The Claimant contends that paragraph 12 of the Re-Amended Defence does not establish an arguable case of fraud. In placing reliance on an allegation of fraud a claimant is required to specifically state such allegations which he proposes to advance and prove and must distinctly state facts which disclose a charge of fraud. The Re-Amended Defence does not establish an arguable case of fraud and the facts relied on are open to more than one interpretation. See **Old National Bank T/A Old National Wealth Management and AL Socrates Jobson and 2 ors.** [2024] JMCA CIV 14.

(2) Paragraphs 8 through 13 are no more than legal arguments and/or opinions. In the exercise of its power to strike out statements of case pursuant to **CPR Part 26.3**, the Court must be persuaded that either party is unable to produce adequate evidence regarding its claims; 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. See **Walsh v Misseldine** [2000] ALL ER (D) 261. Pleadings are for facts, not arguments or rhetoric. See **Fielden v Christie Miller** [2015] EWHC 752 (Ch).

(3) The Defendant's statement of case is without merit as there are no reasonable grounds for defending the claim contrary to **Part 10.5** of the **CPR**. Therefore, in part or whole, the Defence is frivolous, vexatious and scandalous. It obstructs the just disposal of the proceedings.

(4) Paragraph 4 and 5 and paragraph 8 through 13 should be struck out as they are no more than bare denials and legal arguments. Legal arguments have no basis in pleadings. Additionally, the Defendant's pleading solicits further information. A

request for further information should be made pursuant to **CPR Part 34** and should not be solicited via pleading, as seen in the Defendant's Re-Amended Defence.

(5) The Ruling of Brathwaite J delivered on 24 November 2023 dismissed both applications. It was stated that the unusual nature of the case was best suited for trial. Alternatively, the Defendant was given 21 days to re-amend the Amended Defence regarding fraud or the Amended Defence would stand as struck out. The Claimant asserts that the Re-Amended Defence does not comply with the Order of Brathwaite J as it fails to particularise the allegations of fraud as it relates to the correspondence and in that regard does not make out the allegations of fraud on the facts set out in the pleading. The Defence should be struck out as it does not disclose a reasonable cause of action.

14. The Claimant contends that the Re-Amended Defence or alternatively the offending paragraphs referred to in the Notice of Application ought to be struck out.

Arguments of the Defendant

15. In summary, the Defendant contends that its re-amendments in relation to paragraphs 2, 4, 5, 6, and 8-13, and in fact the entire Re-Amended Defence contains proper pleadings. As such, the Plaintiff's strike-out application is misconceived both procedurally and substantively. The Defendant chiefly advances the arguments set out immediately below.

(1) The Re-Amended Defence complies with the Order of Brathwaite J dated 24 November 2023 and with the CPR. It is accepted that there was, in error, a failure to provide a statement of truth and that this is required by **CPR 3.9**. However, the Defendant has put the matter right by filing a signed Statement of Truth dated 30 April 2024 in relation to its Re-Amended Defence. The matter has not as yet been scheduled for trial and the Defendant has made a genuine and good faith attempt to cure the defect. As such, no prejudice is suffered by the Claimant. Any alleged deficiency in the statement of truth is merely procedural and is to be remedied via relief from sanctions under **CPR 26.8** and **CPR 26.9**. Accordingly, a strike-out is said to be disproportionate. See **Raphaeleta Lewis v Chambers** [2022] JMSC Civ 131 and **Ray George v Attorney General of the Virgin Islands** (BVIHC CV 2012/0162).

(2) The Defendant sought to clarify its Defence as ordered by the Court, but in the event it exceeded the terms of the same, at this early stage of the pleadings (pre-case management) the Defendant would be entitled to apply to amend its Amended Defence in the terms which now appear in paragraphs 2, 4, 5, 6 and 8 through 13 of the Re-Amended Defence filed on 14 December 2023. The clarification of the Amended Defence was made in the context of the Claimant's failed strike out attempt brought on the basis that the pleading was comprised of bare denials and was therefore difficult to understand. To disallow the amendments would be prejudicial to the Defendant and put the Defendant in a position of not being able

to run its full defence at trial. The amendments are necessary to ensure that the real questions in controversy between the parties are determined. See **Mark Brantley v Dwight C Cozier** [2015] ECSC 195.

(3) The Defendant submits that **CPR Part 26.3** sets a high threshold, and that strike-out in whole or in part is inappropriate because the Re-Amended Defence discloses arguable grounds and raises triable issues. Reliance is placed on the principle that courts should not summarily determine matters involving disputed facts or novel legal issues.

(4) The Defendant asserts that his denial of the allegations pleaded by the Claimant and calls for "strict proof" from the Claimant are proper pleadings, particularly in circumstances where the burden rests on the Claimant to establish copyright subsistence, originality, duration, and infringement. The Defendant asserts that he is not required to plead evidence in the pleading.

(5) The Defendant also submits that in the Re-Amended Defence, there is no pleading of fraud. The Re-Amended Defence sets out averments regarding the authenticity, validity, and legal effect of documents sought to be relied on by the Claimant. In the alternative, prior allegations of fraud were not revisited.

(6) As for the complaint that the Re-Amended Defence contains averments of law, it is often perfectly proper to refer to or cite and explain propositions of law in a pleading so that the other side can understand the claim being made. This may be distinguished from advancing submissions by way of legal argument. It is correct that a pleading should contain averments of fact but this does not mean it cannot contain any reference to the law, otherwise it would be impossible to plead any kind of relief or to advance a claim pursuant to a statute. Particulars of a claim should set out a concise summary of the relevant facts which give rise to the claim, the legal basis for the claim and the remedy sought. See **The King's Bench Division Guide** 2024 at para 5.27 (https://www.judiciary.uk). The Defendant must be able to answer the Claimant's case which is a claim to legislative recognition of copyright status. Necessarily the pleading must include some references to legal propositions for clarity of its case.

(7) The Defendant maintains that the case raises novel, complex, and constitutionally sensitive issues that must be resolved at trial, and that repeated strike-out applications themselves, such as is now relaunched by the Claimant, verge on abuse of process.

16. In adherence to **CPR 3.9**, attaching the Statement of Truth dated 14 December 2023, the Defendant makes application seeking:

(1) an Order pursuant to **CPR 20.1(2)** to amend the Re-Amended Defence to add a statement of truth;

(2) further or alternatively, for an Order under **CPR 26.8**, granting the Defendant relief from sanctions for not filing a statement of truth with the Re-Amended Defence, and/or for permission to rely on the Statement of Truth dated 14 December 2023 pursuant to **CPR 26.9(3)**; and

(3) if necessary, an order pursuant to **CPR 20.1(2)**, to rely on paragraphs 2, 4-6, and 8-13 of the said Re-Amended Defence pursuant to **CPR 20.4**.

Law and Discussion

Strike-Out

17. Although the matter commenced in 2020, no trial date has as yet been set. It is therefore ordained by the **Preliminary** part of the **CPR 2 (1)(b)(i)** on '**Application of Rules**' that the applications before the Court fall to be decided under the Supreme Court Civil Procedure Rules 2022 (as amended).

18. **CPR Part 26.3** speaks to the power of the Court to strike out a statement of case or any part thereof:

(1) where there has been a failure to comply with a rule, practice direction, order or direction given by the Court in the proceedings;

(2) which does not disclose any reasonable ground for bringing or defending a claim;

(3) which is frivolous, vexatious, scandalous, an abuse of the process of the Court, or is likely to obstruct the just disposal of proceedings;

(4) which is prolix or does not comply with the requirements of Part 8 or 10.

19. The Court's power is not confined to striking out an entire pleading. Offending paragraphs can be precluded from the remainder. See **Three Rivers District Council v Governor and Company of the Bank of England (No 3) [2001] UKHL 16**. The guiding principle is that only those portions of a pleading which are unsustainable, abusive, or improperly pleaded should be removed, while arguable issues should ordinarily be left for trial. See **Walsh v Misseldine [2000] All ER (D) 261**.

Statement of Truth

20. The Claimant argues that the Re-Amended Defence should be struck out because no statement of truth was filed along with it. The Defendant admits that through inadvertence, a statement of truth did not accompany the Re-Amended Defence. The Defendant therefore seeks relief from sanctions to rely on the Statement of Truth which was dated on 30 April 2024, subsequent to the filing of the Re-Amended Defence. The Defendant argues that it would not be the just disposition of this application to strike out the Re-Amended Defence for such an error. Further, the Court should find persuasive certain decisions in which other regional courts have refused to strike out a pleading on a similar basis.

21. According **to CPR 3.8(1)** "every statement of case must be verified by a statement of truth." Further, by **CPR 3.9**, the "Court may strike out any statement of case which has not been verified by a statement of truth. Any party may apply for an order to strike out a statement of case" on this basis. It is therefore in the discretion of the Court to decide whether a pleading should be struck out for lack of a verifying statement of truth.

22. I have had the benefit of reviewing several cases from Caribbean jurisdictions on this point as cited in the Eastern Caribbean Supreme Court decision of **Ray George v Attorney General of the Virgin Islands**, Claim No BVIHCV2012/0161, referenced in the Submissions of the Defendant. In that case the claimant applied to strike out the statement of case of the Attorney General of the Virgin Islands on many grounds, one of which was that the statement of truth was not signed or given by persons enumerated in CPR 3.12 of the Civil Procedure Rules 2000 of the British Virgin Islands. Counsel for the defendant in that case argued that if the Court found the certificate of truth to be defective, it would be disproportionate and not in keeping with the overriding objective to strike out the pleading. *Master Charlesworth Tabor (Ag)* stated:

> "[26] In **Gilda Lewis v Board of Trustees, University of Belize et al** [Action No. 518], it was held that the omission of the certificate of truth was not fatal to the claimant's statement of case and that such an error is only as to form rather than substantive and as such it should not stand in the way of achieving the overriding objective of the rules. In **Wright v Attorney General** [Jamaica Supreme Court, CV No 6023/2009] it was held that whilst the certificate of truth was not in compliance with the rule, striking out the defence on that basis would be disproportionate. In **Shakira Dixon v Donald Jackson** [Jamaica Supreme Court, CLD 042/2002] it was held that the absence of the certificate of truth was not fatal to the defence; while in **Wayne Dillon v Trinity Housing Company Limited** [Trinidad and Tobago High Court of Justice, CV2010-05075] it was held that the failure of the defendant to sign the certificate of truth can be treated as a procedural defect which could be rectified by Part 26.8 and not one which would void the defence as a whole.
> ...
> "[40] In some of the cases cited by the learned Counsel for the defendant, the court treated the defective certificate of truth as a procedural error and ordered rectification of the error rather than declaring the defence void. This approach is in line with Lord Collins dictum in **Pacific Electric v Texan Management and Others**, UKPC [2009] 46 at para 1, where he said that, "in the pursuit of justice procedure is a servant not a master." I must say that I am in agreement with that approach."

23. In dealing with this question, I find these authorities to be persuasive. The Court also bears in mind that by the CPR it must seek to give effect to the overriding objective, which in turn prompts dealing with cases justly. While a part of the required just dealing involves ensuring that rules, practice directions and orders are complied with, in these circumstances, I am of the view that a strike out of the Re-Amended Defence on the basis that no statement of truth was filed with the pleading is unwarranted and a draconian result. In arriving at this decision, I consider also that successive judges have refused to strike out this claim and the defence in its various stages of evolution, or to grant the Claimant summary judgment. The Court has consistently held the view that due to the novelty of the claim and the content of the pleaded cases on both sides, which raise triable issues, the matter is best suited for trial. I also accept that the Defendant in error or oversight did not file the statement of truth, but has subsequently done so.

24. The Court is willing to treat the failure to file a statement of truth with the Re-Amended Defence as a procedural defect which can be cured. In the circumstances of this case, to accede to the Claimant's application on this point would be disproportionate to the defect. In accordance with **CPR 26.9** the Court has a general power to rectify matters. The rule of course applies where the consequence of a failure to comply with a rule, practice direction or court order has not been specified by any rule, practice direction or order. **CPR 26.9** pertains to the failure to file a statement of truth because the dire consequence of a strike out for such failure is not mandatory, but rather, may be imposed if the Court so chooses. Pursuant to **CPR 26.9 (2)** an error of procedure or failure to comply with a rule, practice direction or court order does not invalidate any step taken in the proceedings, unless the Court so orders. Further, by **sub-rule (3)** the Court may make an order to put matters right.

25. In the circumstances, I consider this case to be a fit and proper one for the Court to invoke its powers under **CPR 26.9** to make such orders as are necessary to put right the error of the Defendant in failing to file a statement of truth with the Re-Amended Defence.

Surpassing the Order of the Court

26. In his Decision delivered on 24 November 2023, *Brathwaite J* ruled on two strike out applications brought by the Claimant and the Defendant, respectively. The Claimant argued that the Defence should be struck out as it disclosed no triable issue, consisted of bare denials and non-admissions and was confusing. Materially, *Brathwaite J* reasoned:

> "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 goes further and alleges that "*the purported correspondent* (sic) *relied on by the Plaintiff is not authored by the Defendant and or its agents and the same is 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 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.

[*Brathwaite J* then reviewed principles set forth in the decision of *Charles J* (as she then was) in the Supreme Court action of **Gooding v Ellis et al**, 2020/CLE/gen/00272].

"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."
(Emphasis added).

27. In a broadbrush interpretation, the Claimant states that what the Court meant was the Defendant should re-amend the Defence "regarding the allegations of fraud pleaded…failing which the defence would be struck out." The Court did not indicate that the Defendant should amend any pleading as to fraud generally, but rather to state which correspondence was alleged to be fraudulent. Further, as to the remainder of the correspondence, the Defendant was ordered to specify what was being contended by the Defendant. The paragraphs of the Decision set out above contextualize the Order made by the Court on 24 November 2023. The Judge did not express dissatisfaction with any pleading as to fraud generally, but rather, sought clarification as to the correspondence and what was being alleged in relation to that evidence.

28. On a review of the Re-Amended Defence, the Defendant has set out in detail its pleading in relation to each piece of correspondence or alleged correspondence in, amongst others, averments made in paragraphs 6, 7, 12, 13, 17 and 18.

Allegation of Fraud

29. The Claimant led his submissions with a ground for strike out which is not found in his Notice of Application filed on 12 March 2024. He contends in submissions that the Defendant's Re-Amended Defence ought to be struck out because by paragraph 12, the Defendant seeks to plead fraud, and that for such a cause, the general allegation made is insufficient. It is contended that the Defendant must state facts which disclose a charge of fraud. In contrast, the Claimant stated as a part of his grounds for strike out in the Notice of Application filed on 12 March 2024, that the Re-Amended Defence fails to "clarify the Defendant's defence and/or goes beyond the scope of the Order which required the Defendant to state the correspondence alleged to be fraudulent and what is being contended with respect to the remainder of the correspondence."

30. In accordance with **CPR 11.7 (1) (a)** an application must include, briefly, the grounds on which the applicant is seeking the order. The rubric in relation to this rule notes the following:

> "There are strict requirements in relation to what an application must include. The practice of failing to set out the grounds of the application attracted severe criticism in the Eastern Caribbean Court of Appeal in **Beach Properties Barbuda Ltd v Laurus Master Fund Ltd.** The Court of Appeal noted that: '[18] The application for the injunction in the court below followed the unfortunate practice of failing to state the grounds of the application. The presecribed form for making applications expressly requires the grounds to be stated in the form by providing a section beginning "the grounds of the application are – ". The lawyers for the appellants thought it satisfactory to complete the section by inserting "as set forth in the affidavits [filed in support]". This is a completely unacceptable practice. It is an abuse of the process of the court that should attract condign consequences. The Trinidadian Court of Appeal took a similar position in **Transport and Industrial Workers' Union v Ansa Polymer Ltd** Civil Appeal No. P194 of 2016 where the Court noted that: "The requirement that the applicant state why an application is being made or commonly referred to as "the grounds" of the application is not meant to be "window dressing" nor a pedantic requirement. The provision is clearly consistent with the basic principle of fairness... While Part 11 CPR requires that these applications are in the most part to be supported by evidence, filing evidence by affidavit does not dispense with the important requirement of stating why the application is being made. This irregularity in failing to state the reasons for the application must not be condoned. The Court nor opposing parties must be left fishing through the evidence to understand or ascertain the reasons why an application is being made...".

31. In answer, the Defendant correctly observed that "if the Claimant intends to proceed on an application in terms that are different to those set out in his Notice of Application, he must say so and file an appropriate application or amended application which reflects the new or additional grounds. The Court agrees that compliance with **CPR 11.7** would require the Claimant to proceed in that way. However, even if the Claimant had complied with **CPR 11.7** and had properly included this ground of a failure to plead fraud with particularity in his strike out application, on a reading of the now clarified pleading at paragraph 12, the application to strike on this basis would not have succeeded.

32. Paragraph 12 is couched in the following terms:

> "12. As to paragraph 5:
> The Defendant has no independent record of the purported letters dated 3 March 1989, 25 April 2012 and 10 October, 2007 relied on by the plaintiff. The Registrar General's files do not contain copies of the alleged letters of 3 March 1989 and 25 April 2012. The records held by the Officer (*sic*) of the Prime Minister do not contain a copy of the alleged letter of 10 October 2007. The signature on the latter is not, or does not appear to be, that of Hubert Ingraham, former Prime Minister. In the circumstances, the Defendant's position is that these letters were not authored by the Defendant or his servants or agents or (in the case of the letter of 10 October 2007) by the Prime Minister. The letters are not authentic and cannot bind the Defendant. Alternatively, the Plaintiff is required to prove the letters and their authenticity…".

33. The Claimant is correct in its submission that well-established is the principle that allegations of fraud must be pleaded with particularity. Material facts must be set out clearly; generalized assertions, suspicion, or insinuation are insufficient: **Davy v Garrett (1878) 7 Ch D 473**. The Court cannot infer dishonesty from facts which had not been pleaded or from facts which are equally consistent with honesty: **Three Rivers DC v Bank of England (No 3)** [2003] 3 AC 1 at paragraph 161. Having considered paragraph 12 of the Re-Amended Defence, the Court finds the pleading to be more consistent with a challenge to the authenticity of the documents enumerated therein, rather than putting forth a positive case of forgery or fraud. The Court is satisfied that no allegation of fraud has been pleaded. There is no averment that the Claimant concocted or tampered with any document. The pleading amounts to a statement that certain identified documents are not accepted as authentic and puts the onus on the Claimant to prove them. There is, of course, a distinction between, on the one hand, challenges to authenticity, and on the other, forgery allegations. In **Crypto Open Patent Alliance v Craig Steven Wright and Dr Craig Steven Wright and others v BTC Core and others** [2023] EWHC 2642 (Ch), Mr Justice Stephen Mellor explained that "[w]hereas the authenticity of a document may be challenged for a range of reasons…, forgery is a species of fraud. It follows that forgery must be specifically and clearly pleaded…". The court summarized a portion of **Civil Fraud** (1st ed., paragraphs 34-014 to 34-017) and, in part, stated:

> "iii) The concept of "authenticity" is broad and "does not merely refer to whether the document is a "genuine" document, in the sense of one that has been doctored or concocted. Any issue that goes to whether the document is what it purports on its face to be can be seen as an issue of authenticity.
>
> "iv) While necessary, mere service of a notice under r.32.19 (or, in this case, serving the list of Challenged Documents) is not sufficient if a party intends to allege deliberate forgery. A clear and distinct pleading of forgery is required."

34. In my view, choosing the path of challenging authenticity is open to the Defendant, and some reasons for the challenge were enumerated in paragraph 12 of the Re-Amended Defence. But the Defendant will be required, at the appropriate time, to serve a notice on the Claimant requiring the documents to be proved at trial. This is consistent with **CPR 28.18** which provides:

> "28.18 Notice to prove a document

"(1) A party shall be deemed to admit the authenticity of any document disclosed to that party under this Part unless that party serves notice that the documents must be proved at trial.
(2) A Notice to prove a document must be served not less than forty-two days before the trial."

35. By way of the Re-Amended Defence, the Claimant is made aware of the authenticity challenge. This is to be supplemented by a **CPR 28.18** notice to prove a document. It ought to be clear to all parties that a refusal to admit authenticity cannot by implication mutate into an unpleaded allegation of forgery or fraud. The Court accepts paragraph 12 of the Re-Amended Defence as, at its highest, an authenticity challenge and does not strike it out. Insofar as the Defendant intended to plead fraud, it is accepted that no such defence can be maintained on the pleading as it stands. It is also observed that the case of documents "being falsely uttered to a Government and/or judicial official knowing the same to be false" which was once pleaded by the Defendant in paragraph 7 of the Amended Defence before Brathwaite J. does not appear in the Re-Amended Defence now before the Court.

Bare Denials, Legal Arguments and Assorted Objections

36. The Claimant contends that paragraph 4 and 5 contain only bare denials or legal arguments. Further it is argued that paragraph 5 purports to seek further and better particulars. The Court disagrees. Paragraph 4 appears to be a precursor to all that follows in the pleading and a reference is made to the "reasons set out below". **CPR 10.5** contains no prohibition against referring to subsequent paragraphs which contain reasons for a denial in a prior paragraph.

37. Contrary to argument, the Court does not read paragraph 5 as a misplaced application for further and better particulars. It reads as a reservation to amend the Defence in the event the Claimant remedies an alleged deficiency in his pleading.

38. I have assessed the Re-Amended Defence, paragraph by paragraph, in light of the Order of Brathwaite J, the CPR, and the applicable authorities. Substantively, the Re-Amended Defence puts forward, amongst other averments, those immediately set out below.

(1) No enforceable copyright ever subsisted, or alternatively any rights expired decades ago. It relies on the UK Copyright Act 1956, the Industrial Property Act 1965, and the absence of statutory protection for the alleged design during certain relevant periods. Further, the authenticity of identified documents upon which the Claimant seeks to rely is challenged by the Defendant.

(2) The Defendant denies substantial similarity or, sharing of distinct features between the National Flag and the design which the Claimant purports to own. Any copying of the design the Claimant purports to own is also denied. The Defendant asserts that shared colors alone cannot amount to infringement and puts the Claimant to proof as to originality and copying of the design he claims to own.

(3) The Defendant relies on statutory authority, asserting that the National Flag is prescribed by statute (the Flags and Coats of Arms (Regulation) Act) and, insofar

as there was any infringement as alleged (which is denied), denies liability for any act done by the Defendant pursuant to Parliamentary authority.

39. Albeit the Re-Amended Defence is not a perfect pleading and does contain more than an explanation as to the Defendant's case in relation to the correspondence involved in the matter, I am satisfied that substantial portions of the Re-Amended Defence disclose an arguable defence. In particular, the Defendant is entitled to plead and pursue his case or put the Plaintiff to strict proof concerning, amongst other matters:

(1) the existence, subsistence, and duration of the alleged copyright;

(2) the alleged lack of resemblance between the design claimed to be owned by the Claimant and the National Flag;

(3) the statutory framework governing the National Flag; and

(4) the legal consequences of acts done pursuant to Parliamentary authority in the circumstances of this case.

40. Under **CPR 10.5 (3) (a), (b), (c)** and **(d)** and **CPR 10.5 (4)**, a defendant must address every allegation in the particulars of claim by identifying whether it is admitted, denied or neither admitted nor denied but required to be proved. Where the allegation is denied, the defendant must state the reasons for the denial and, if putting forward a different version of events, must state that version. Clearly the core obligation is to plead the factual case with sufficient clarity. The rule says nothing about a mandatory separation between factual responses and legal propositions. There is no rule prohibiting the inclusion of legal propositions either. Rather, the CPR emphasizes substantive sufficiency and clarity.

41. The appropriate approach can be gleaned from the ruling of *Paul Matthews J* in the English case of **Brake and another v Guy and others** [2021] 4 WLR 71, where the court had to determine a preliminary issue in the context of a claim for an injunction and damages to prevent the defendants from accessing, retaining and deploying emails said to be private and confidential to the claimants. An argument advanced by the claimants was that Article 8(2) and 10 of the European Convention on Human Rights should have been pleaded in the defence so as to found the defences that the defendants' conduct constituted lawful disclosure, was protected by freedom of expression or that there was a public interest in the defendants' accessing, retaining and sharing of emails evidencing wrongdoing of the claimants. The court, in discussing the pleading of matters of law stated:

> "85 Either way, of course, the public interest defence is a matter of law, not fact. Yet the defendants do not need to plead matters of law, as the Court of Appeal (Slade, Stocker, Bingham LJJ) made clear in Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc [1990] 1 QB 391, 436b-c:

> "In answer, it has been contended that some of these points are not open to M & R on their pleading, and, furthermore, have not been foreshadowed in the affidavit evidence sworn on their behalf. One of Mr Waller's responses to this contention has been to refer us to the general observations made by Lord Denning MR in In re Vandervell's Trusts (No 2) [1974] Ch 269, 321, as to the modern practice concerning pleadings: 'It is sufficient for the pleader to state the material facts. He need not state the legal result. If, for convenience, he does so, he is not bound by, or limited to, what he stated.' We respectfully agree with this statement as a general proposition."

> "86 What that means is that a party is not obliged to refer in his or her statement of case to an applicable legal rule as such, or the source of its authority, such as a decided case or cases or primary or secondary legislation. And, as I said in an earlier decision between the parties, Brake v Swift [2020] EWHC 1810 (Ch); [2020] 4 WLR 113, para 176, referring to a different decision of the Court of Appeal:

> > "Even if Chedington pleaded a legal result, it is 'not bound by or limited to the legal result...alleged, but may rely on any legal consequences of the pleaded facts which may properly flow from them': per Ralph Gibson LJ (with whom Sir John Megaw agreed) in Denyer v Jones (unreported, 23 September 1991."

> ...

> "92 As to (1), whether the defendants' case is that their conduct is justified under article 8(2)...or article 10..., or under the general public interest defence as adapted to fit those articles, this is a matter of law, which in my judgment is not required to be pleaded. I agree that it would be normal, and courteous to the other side, to make clear how a party's case is put on the law. But that function is largely carried out these days by the skeleton argument. I cannot agree that it is compulsory under the CPR to do so...Under CPR r 16.5(3) it is sufficient for the defendant to "set out in his defence the nature of his case in relation to the issue to which the allegation is relevant." In my judgment the defendants have done that."

42. From these passages in **Brake v Guy**, it is clear that legal reasoning may be included where it is useful, but it is not the principal object of the Defence under the CPR. Naturally, there may be some overlap in factual averments and legal propositions. Of course, where specific legal defences are sought to be advanced, (such as limitation or estoppel) these should be pleaded expressly. Further, if a pleading contains legal reasoning, it should be tied to the issues pleaded.

43. In portions of the Re-Amended Defence there is to be found some legal reasoning, but these are tied to averments as to the facts which the Defendant will rely on. These serve to notify the Claimant as to the case the Defendant will run. Of the paragraphs questioned by the Claimant (4, 5, 6 and 8 through 13), I am of the view that paragraph 24 goes too far in providing commentary and/or repetitious or argumentative pleading. In this regard, the averments necessary to put forth the points are adequately contained in paragraphs 22 and 23. Therefore, paragraph 24 ought to be struck out. Otherwise, the pleading contains admissions, and denials with reasons furnished for the

same and puts forward the Defendant's version of the facts. Further, in relation to any alleged issue concerning alternative versions or interpretations of the facts as pleaded, the parties will have an opportunity to advance their evidence to establish the truth at trial. The Court will not adopt an overly-technical approach which would risk depriving the Defendant from putting forward facts which they believe support their defence. The Court is satisfied that amongst the contents of the Re-Amended Defence, the Defendant meets the essential pleading obligation in that the Defendant defines the issues by: (1) responding to allegations in the Claimant's case, (2) giving factual reasons for denials, and (3) pleading any distinct legal defence on which the Defendant wishes to rely.

44. As far as any material has been included in the Re-Amended Defence which falls outside the scope of the Order of Brathwaite J, the Defendant has applied for leave to amend the Defence to include those new averments. I am mindful of the matters to be considered as set out under **CPR Part 20.1(3)** which include the promptness of the application, any prejudice to either party if leave to amend is granted or refused, the adequacy of compensation for any prejudice and the administration of justice. The case management conference in this matter must yet be convened and no trial date has been set. The Defendant has now put forth its full case in the Re-Amended Defence, the Claimant is thereby notified of the same, and the Claimant has an opportunity to plead in Reply.

45. All factors considered, it is the Defendant who will suffer prejudice if leave to amend is not allowed. As already stated, the Court is not convinced that the Re-Amended Defence discloses no cause of action. In these circumstances, the justice of the case weighs in favour of granting the Defendant leave to amend in the terms of its Re-Amended Defence where it exceeds the order of Brathwaite J given on 24 November 2023.

Disposition

46. Rarely would there ever be agreement that one pleading or another is impeccable. I am certain that legal counsel across the jurisdiction are grateful that the law does not require perfection in that regard. It is clear that pleadings must make clear the general nature of the pleader's case and give enough detail to enable the other side to prepare. Where fairness is not impaired, a degree of flexibility and resistance to overly technical objections seems to be a sound approach. In my view, the Re-Amended Defence, filed on 14 December 2023, can stand as it is. I find it adequately expressed to do its job for the trial of this matter. I am mindful also that successive applications to strike out the Defence have been unsuccessful by reason, amongst others, that the case involves novel questions and that, as was opined by Brathwaite J, the intrinsic justice of the case requires that the matter go to trial. I therefore refuse to strike out the Re-Amended Defence, save for paragraph 24. I also grant the application of the Defendant to rely upon the Statement of Truth dated 30 April 2024 and filed subsequent to the issuance of the Re-Amended Defence and to rely upon the Re-Amended Defence in its current form, leave being granted to amend the same as stated above. Case management is now required to progress this matter.

47. In the circumstances and based upon my conclusions above, the Court orders as follows:

(1) paragraph 24 of the Re-Amended Defence is struck out, but otherwise, the application of the Claimant to strike out the Re-Amended Defence is dismissed;

(2) the following applications of the Defendant are granted:

(i) for relief from sanctions pursuant to **CPR 26.8** and for permission to rely on the subsequently filed Statement of Truth dated 30 April 2024 pursuant to **CPR 26.9(3)**; and

(ii) for leave to amend the Amended Defence in terms of the Re-Amended Defence (save for paragraph 24) pursuant to **CPR 20.4** and to rely on the form of the Re-Amended Defence endorsed with a statement of truth filed on 1 May 2024;

(3) costs shall be in the cause.

Dated 27 April 2026

Simone I Fitzcharles
Justice