[2026] JMCA Civ 1

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE P WILLIAMS JA
THE HON MRS JUSTICE V HARRIS JA
THE HON MRS JUSTICE G FRASER JA

SUPREME COURT CIVIL APPEAL NO COA2021CV00108

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

Mrs Georgia Gibson Henlin KC and Ms Keisha Spence instructed by Henlin Gibson Henlin for the appellant

Miss Ashley Mair instructed by Mayhew Law for the respondents

20 January and 13 February 2026

Civil Procedure – Application to strike out – Abuse of process – Two claims filed involving similar parties and causes of action – Comparing causes of action – Whether the subsequent claim is an abuse of process – Whether certain paragraphs of the subsequent claim should be struck out

P WILLIAMS, V HARRIS AND G FRASER JJA

[1] This is the judgment of the court.

[2] Before us is the rehearing of an appeal against the decision of Batts J ('the learned judge') made in the Supreme Court on 23 November 2021, whereby he struck out several paragraphs of the statement of case filed by the appellant, West Indies Petroleum Limited ('WI Petroleum'). To appreciate the circumstances that led to this rehearing, it is necessary to provide a brief overview of the procedural and factual history.

Background

[3] This matter arose from two claims filed in the court below between the parties to this appeal. The first claim (claim no SU2021CD00268) was initially filed on 11 June 2021 by Island Lubes Distributors Limited and its parent company, WI Petroleum, against John Levy, Donna Levy, Sprint Fuels & Lubricants Limited, Courtney Wilkinson and Eco Marine Energy Petroleum Company Limited (it was subsequently amended to add Eco Petroleum Limited as a defendant) ('the first claim'). The claimants seek injunctive relief and damages against the defendants, jointly and/or severally, for an account, breach of contract, breach of confidence, breach of fiduciary duty, conflict of interest, detinue and/or conversion of a motor vehicle, misappropriation and interference with contractual relations.

[4] The second claim (claim no SU2021CD00281) was filed a few days later on 23 June 2021 by WI Petroleum as the sole claimant against Scanbox Limited, Winston Henry, Courtney Wilkinson and John Levy ('the second claim'). The causes of action pleaded are breach of contract, breach of confidence, breach of fiduciary duty, conflict of interest, misuse of confidential information, breach of privacy, malicious falsehood, and defamation.

[5] The respondents, Messrs Courtney Wilkinson and John Levy, took issue with the overlap between the parties and the causes of action in the amended claims. Accordingly, on 5 October 2021, they filed a notice of application for court orders to strike out the second claim against the respondents in its entirety or, alternatively, paras. 8 and 13-29 of the amended particulars of claim (filed on 1 October 2021), among other things. The basis of the application to strike out was that the second claim amounted to an abuse of the court's process, as it substantially duplicated the first claim.

[6] The learned judge delivered his written reasons on 23 November 2021, following the hearing of the application to strike out on 29 October 2021. The order being appealed is as follows:

1. "(1) Paragraphs 27, 29, 30, 31, 32, 33, 34, 35, 36, 37 and 39 (1) and the words '*and Constitutional Damage*' [sic] in paragraph 39(9), of the Amended Particulars of Claim in SU2021 CD00281 [the second claim] are struck out. …" (Italics as in original)

[7] Although WI Petroleum accepted the learned judge's decision in part, it filed a notice of appeal on 7 December 2021, challenging the striking out of paras. 27, 29, 30, 31, 37, and 39(1), as well as the words "and Constitutional Damages" in para. 39(9) of the amended particulars of claim.

[8] The appeal was initially considered on paper (by a panel comprising P Williams, Edwards JJA and G Fraser JA (Ag), as she then was) and was dismissed on 20 January 2023. Shortly thereafter, WI Petroleum filed a notice of application to set aside the judgment and to have the appeal reheard on the ground that the decision was based on a misapprehension of the material facts, among other issues. On that application, it was determined that, due to an error made by the court and the respondents' concession that certain paragraphs had been wrongly struck out, among other reasons, the orders should be set aside and the appeal reheard in open court (see **West Indies Petroleum Limited v Courtney Wilkinson and John Levy and others** [2024] JMCA App 33). These proceedings, therefore, constitute the rehearing of the appeal.

Submissions

[9] On behalf of WI Petroleum, King's Counsel Mrs Henlin Gibson advanced the position that the disputed paragraphs were not a duplication of the pleadings in the first claim. She argued that similar causes of action arose at different times and were based on different facts. It was submitted that the relevant breaches in the first claim occurred sometime on or before 16 February 2021 and on 6 April 2021, when Eco Marine Energy Petroleum Company Limited and Eco Petroleum Limited were incorporated, respectively. The second claim, on the other hand, is grounded in unauthorised access to and the extraction of confidential information from WI Petroleum's servers, facilitated by the

actions of Scanbox Limited and Mr Henry. She posited that the learned judge failed to appreciate that difference, and in arriving at his decision, he incorrectly examined the particulars of the breach rather than the causes of action, contrary to the legal principles stated in **Moorjani and others v Durban Estates Limited and another** [2019] EWHC 1229 (TCC) ('**Moorjani v Durban**'). It was further contended that the learned judge misapplied the case of **Johnson v Gore Wood & Co (a firm)** [2002] 2 AC 1 since there was no reproduction of the same facts or subject matter to give rise to the respondents' claim of harassment. Ultimately, King's Counsel contended, the learned judge erred in finding that the disputed paragraphs amounted to an abuse of process and should be struck out.

[10] Counsel for the respondents, Ms Ashley Mair, submitted that, save for paras. 27, 29(a), 29(i), 37, 39(1), and the words "and Constitutional Damages" in para. 39(9), the remaining disputed paragraphs (which are 29(b)-(h), (j)-(k), 30 and 31) were properly struck out. She argued that those paragraphs contained substantial duplication of the causes of action pleaded in the first claim and could properly have formed part of that claim as supporting facts. Ms Mair further argued that the alleged breach of fiduciary duty arising from the misuse of information accessed from the servers related to the first claim. She also highlighted that the disputed paragraphs referred to documents already pleaded in the first claim, such as the letter dated 3 February 2021. Relying on **Moorjani v Durban**, counsel argued that it was immaterial that new particulars are being advanced in the second claim since they amount to further allegations in support of the causes of action already raised in the first claim. Accordingly, she submitted, the learned judge was correct in law and fact when he concluded that there is a striking similarity between the two claims and struck out the disputed paragraphs.

Discussion and analysis

[11] The learned judge was empowered by rule 26.3(1)(b) of the Civil Procedure Rules, 2002, to strike out a statement of case or part of a statement of case if it appeared to be an abuse of the process of the court or would likely obstruct the just disposal of

proceedings. Nevertheless, that summary power is widely regarded as a draconian measure that should be used sparingly and with circumspection to avoid unjustly depriving a litigant of the opportunity to have his or her case tried on its merits (see **Sally Ann Fulton v Chas E Ramson Limited** [2022] JMCA Civ 21, **Gordon Stewart v John Issa** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 16/2009, judgment delivered 25 September 2009, and **Ricco Gartmann v Peter Hargitay** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 116/2005, judgment delivered 15 March 2007). Therefore, it is to be reserved for "plain and obvious cases" (see page 29 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 and page 695 of **Drummond-Jackson v British Medical Association and Others** [1970] 1 WLR 688).

[12] In considering the application to strike out, the learned judge compared the amended particulars of claim in the second claim with the second further amended particulars of claim (filed on 6 October 2021) in the first claim. He observed that while there were some differences between the two claims, such as the fact that the 1st and 2nd defendants in the second claim (Scanbox Limited and Mr Henry) were not parties to the first claim, the similarities were "otherwise striking". He noted, for instance, that para. 29 of the second claim repeated particulars of the breach of fiduciary duty already pleaded in the first claim.

[13] The determination of an application to strike out has traditionally been regarded as an exercise of judicial discretion. However, the authority of **Aldi Stores Ltd v WSP Group PLC and others** [2007] EWCA Civ 1260 ('**Aldi Stores**') and, more recently, **Bengal Development Company Limited v Wendy A Lee et al** [2025] JMCA Civ 9 have established that it cannot properly be characterised as such. It is now recognised that the question of whether a statement of case, or any part thereof, should be struck out entails an assessment of numerous factors, for which there can be only one correct answer. It follows, therefore, that the appellate court will only interfere where satisfied

that the learned judge "has taken into account immaterial factors, omitted to take account of material factors, erred in principle or come to a conclusion that was impermissible or not open to him" (Thomas LJ at para. 16 of **Aldi Stores**).

[14] It is common ground that WI Petroleum is a claimant, and the respondents are defendants in both claims. At first blush, it would appear that four of the causes of action identified in the first claim are being pursued in the second claim, namely, breach of contract, breach of confidence, breach of fiduciary duty, and conflict of interest. The disputed paragraphs, however, relate to the breach of fiduciary duty, which is the focus of this appeal. Accordingly, the sole issue arising from the two grounds of appeal advanced by WI Petroleum is whether the learned judge erred in finding that paras. 29(b)-(h), (j), (k), 30 and 31 of the amended particulars of claim constitute an abuse of the process of the court.

[15] The jurisprudence governing applications to strike out is helpfully summarised in the judgment for the procedural appeal at paras. [30] to [39] (**West Indies Petroleum Limited v Courtney Wilkinson and John Levy** [2023] JMCA Civ 2), which discussed authorities such as **Henderson v Henderson** [1843-1860] All ER Rep 378 and **Johnson v Gore Wood & Co (a firm)**. We endorse and adopt that comprehensive discussion of the law, even though the orders were subsequently set aside. Those legal principles remain applicable although the first claim has not yet been heard (see **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).

[16] For present purposes, it is instructive to set out Pepperall J's exposition in **Moorjani v Durban** (which was considered by the learned judge), on the proper approach to be adopted by the court when determining whether a subsequent claim is an abuse of process:

1.

2.

3. "17. …

4. 17.1 The starting point is to consider whether the second claim is brought upon the same cause of action as the first.

5. 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.

6. 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.

7. 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:

8. a) The onus is upon the applicant to establish abuse.

9. 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.

10. 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.

11. 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.

12. e) The court will rarely find abuse unless the second action involves 'unjust harassment' of the defendant." (Emphasis supplied) (Italics as in the original)

[17] We are also mindful of the recent decision of the Privy Council in **Credit Suisse Life (Bermuda) Ltd v Bidzina Ivanishvili and Others No 2** [2025] UKPC 53, in which the Board articulated the correct method for comparing causes of action:

1. "230. … the exercise of deciding whether a new cause of action arises out of the same facts or substantially the same facts is generally to be determined by examination of the pleadings alone. In analysing the pleadings, it is the material facts necessary to formulate the cause of action (or, where relevant, a defence) that matter. Background facts and matters of evidence – which are pleaded all too often although this is contrary to good practice – have no part to play in the analysis."

[18] Although a breach of fiduciary duty is pleaded in both claims, that fact alone is not determinative of the issue before us. This court must examine the factual foundation upon which each cause of action rests. There is, without a doubt, some similarity in the material relied upon; however, the facts diverge in respect of the nature and subject matter of the breach.

[19] In the first claim, the breach of fiduciary duty is in relation to the respondents' duties as directors and the corresponding breaches of those duties. The key facts are that the respondents engaged in several acts detrimental to WI Petroleum, including establishing a company to compete in the same line of business and breaching several clauses of a share transfer agreement dated 14 October 2019, among other acts.

[20] By contrast, the second claim involves non-disclosure agreements between Scanbox Limited and WI Petroleum (dated 21 January 2019 and 1 February 2020). It is averred that the respondents were also bound by those agreements, given their duties as directors, particularly with respect to the provisions relating to confidential information. The critical facts pleaded are that, between 29 August 2020 and 30 November 2020, the respondents caused Scanbox Limited (a company hired by WI Petroleum for information technology services) and Mr Henry (the managing director of Scanbox Limited) to modify their access to WI Petroleum's email server. This was allegedly done to facilitate the unauthorised access to, manipulation of and modification of WI Petroleum's email server and/or exchange platform. The pleadings further disclose that the respondents extracted, misused and circulated WI Petroleum's confidential commercial information obtained through that access.

[21] Upon closer scrutiny of the disputed paragraphs, however, we have arrived at a more nuanced conclusion. Paras. 29(b)-(h), (j) and (k), under the heading "Breach of Fiduciary Duty and/or Conflict of Interest", plead the breach both generally and by reference to specific instances in which the respondents misused and disclosed the aforementioned confidential information and engaged in other acts to further their own interests, to the alleged detriment of WI Petroleum.

[22] We find that paras. 29(f) and (g) substantially mirror the pleadings in the first claim about the preparation and dispatch of a letter dated 3 February 2021 without authorisation and at a time when the respondents were aware of a notice requiring their removal from WI Petroleum's board of directors. Para. 30 merely provides further particulars about the loss and damage stemming from that letter. Para. 31 concerns a

letter dated 15 May 2021 issued by the respondents after they ceased to be directors, a matter already pleaded in the first claim.

[23] Those pleadings (at paras. 29(f), (g) and paras. 30 and 31 in the second claim) do not relate to the alleged unauthorised access to WI Petroleum's server or the misuse of any confidential information obtained from it, nor do they otherwise involve Scanbox Limited and Mr Henry. Furthermore, both letters (3 February and 15 May 2021) are dated after the termination of the contract between Scanbox Limited and WI Petroleum on 22 October 2020. We also observe that those letters assume greater significance in relation to the causes of action of malicious falsehood and defamation (paras. 32–36 of the amended particulars of claim), which have since been transferred to the first claim. It is apparent that the risk of inconsistent findings of fact on the same evidence by different courts (a valid concern expressed by the learned judge at para. [11] of his written judgment) would persist if those paragraphs were to stand. It should be noted that para. 29(j) is a repetition of 29(d).

[24] In light of the foregoing, it is our judgment that paras. 29(f), (g), and (j), together with paras. 30 and 31, were properly struck out on the basis of being duplications of the first claim. Correspondingly, we are of the view that the learned judge erred in principle and omitted to consider relevant factors when he struck out paras. 29(b)-(e), (h) and (k). When combined with the respondents' concession, the learned judge's decision cannot stand in respect of paras. 27, 29(a)-(e), (h), (i) and (k), 37, 39(1), and the words "and Constitutional Damages" in para. 39(9) of the amended particulars of claim. It follows, therefore, that the appeal succeeds in part.

[25] Notwithstanding the outcome of this matter, we consider it necessary to direct the parties to the following *per curiam* observation in the headnote of **Aldi Stores**:

> 1. "Where in complex commercial multi-party litigation a party wishes to pursue other proceedings whilst reserving a right in existing proceedings, the proper course is for the issue to be

> raised with the court seised of the existing proceedings. The court will be able to express its view as to the proper use of its resources and on the efficient and economical conduct of the litigation. It is in the interests of the parties, of the public and of the efficient use of court resources that that is done."

[26] Bearing that in mind, along with the issues raised regarding the fairness, expense and risk of harassment arising from the proceedings in the second claim, which the learned judge also highlighted, we would urge that consideration be given to both claims being heard together before the same judge. This approach would certainly address those concerns.

[27] Having considered the parties' submissions on costs, we are of the view that this is an appropriate case to apply the general rule that costs follow the event. Accordingly, WI Petroleum is awarded 70% of its costs on the appeal, which are to be taxed, if not agreed. With respect to the application to rehear the appeal, the costs of which were reserved pending the determination of this appeal, we award full costs to WI Petroleum to be agreed or taxed.

[28] Having considered all the circumstances of this matter, including the acceptance by the appellant of the learned judge's decision in part, the concessions made by the respondents in this court during the rehearing of the appeal, the outcome of the appeal, and given that there was no appeal against the costs order made by the learned judge, we find no basis to interfere with the order for costs that was made in the court below.

[29] In light of the preceding discussion, the order of the court appears below.

ORDER

1. The appeal is allowed in part.

2. The order of the learned judge made on 23 November 2021 to strike out paras. 29(f), (g), and (j), 30 and 31 of the amended particulars of claim in SU2021CD00281 is affirmed.

3. The order of the learned judge made on 23 November 2021 to strike out paras. 27, 29 (a)-(e), (h), (i) and (k) 37, 39(1), and the words "and Constitutional Damages" in para. 39(9) of the amended particulars of claim in SU2021CD00281 is set aside.

4. Costs of the application for the rehearing of the appeal and 70% costs of the appeal to the appellant to be taxed if not agreed.

5. The order of Straw JA made on 26 November 2025 staying the final costs certificate dated 29 July 2025 and the order for seizure and sale dated on or about 16 September 2025 pending the determination of this appeal, which is no longer extant, is discharged.