

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**Claim No. CV2019-03986**

**BETWEEN**

**RIVULET INVESTMENT GROUP LIMITED**

**Claimant**

**AND**

**ARABCO COMPANY LIMITED**

**First Defendant**

**HUSAYN AL-FAYED**

**Second Defendant**

**THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO**

**Third Defendant**

**Before the Honourable Mr. Justice Robin N Mohammed**

**Date of Delivery: Tuesday 21 July 2020**

**Appearances:**

Mr. Farai Hove Masaisai instructed by Mrs. Jennifer Farah-Tull for the Claimant

Ms. Josefina Baptiste-Mohammed instructed by Mr. Sean Julien for the Third Defendant

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**DECISION ON THREE APPLICATIONS FILED BEFORE THIS COURT– TWO BY  
THE CLAIMANT AND ONE BY THE THIRD DEFENDANT**

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## **I. Introduction**

[1] There are three Applications before this Court for determination. The Claimant filed two Applications on 3 October 2019 and 26 November 2019. The Third Defendant filed one Application on 10 December 2019.

[2] The Claimant's First Application of 3 October 2019 seeks an interim injunction to compel the Third Defendant to immediately return to the Claimant, one New Holland Evo 215C Excavator, which was seized by police officers as agents and/or servants of the State, attached to the Cumuto Police Station on the 17<sup>th</sup> day of July 2019. The Claimant's Second Application filed on 26 November 2019 seeks permission to enter judgment against the Third Defendant in default of filing a Defence.

[3] The Third Defendant's Application filed on 10 December 2019 seeks an order to have the Claim Form and Statement of Case struck out with the alternative relief for an extension of time to file a Defence to the Claim.

[4] These Applications follow the Claim Form filed on 3 October 2019 and Statement of Case filed on 8 October 2019 wherein the Claimant seeks the following relief:

- 1) An interim injunction compelling the Third Defendant by himself, his servant and/or agents or otherwise to immediately return to the Claimant, one New Holland Evo 215C Excavator which was seized by police officers attached to the Cumuto Police Station on the 17<sup>th</sup> day of July 2019.
- 2) Damages for conversion/detinue.
- 3) Damages for breach of contract against the First and Second Defendants.
- 4) Aggravated and Exemplary Damages against the First and Second Defendants.
- 5) Special Damages.
- 6) Damages for loss of use.
- 7) Costs.
- 8) All necessary and consequential Orders, Directions and Inquiries that this Honourable Court may order.
- 9) Any other relief that the Honourable Court may deem just and expedient.

## **II. Factual Background**

[5] It is not fitting at this stage of the proceedings to conduct a mini trial of the respective evidence on affidavit by the parties. However, for the purposes of the Applications before the Court, I will recite some brief facts by way of background.

[6] The Second Defendant is the owner and Managing Director of the First Defendant. On 31 May 2019, the Claimant entered into a lease agreement with the First Defendant for the lease of one New Holland Evo 215C Excavator (hereinafter “Excavator 1”) and one CAT Excavator (hereinafter “Excavator 2”). The Second Defendant on behalf of the First Defendant signed the lease for a period of six months whereby the excavators were to be used in a specific location only.

[7] Both excavators were collected on 31 May 2019 by a representative of the First Defendant at a recreation ground at Indian Trail, Couva where it was carrying out works. The Claimant was provided with a copy of a Certificate of Environmental Clearance by the Second Defendant, which gave the First Defendant clearance to carry out excavation works at Lot No. 7, Block 3, Wallerfield, Arima.

[8] Pursuant to the agreement, rental payments for Excavator 1 was for \$4,500.00 per day and Excavator 2 was for \$3,000.00 per day. Rental payments for both excavators were due fortnightly to be paid on the 15<sup>th</sup> and 30<sup>th</sup> days of each month. The First Defendant attempted to make a payment with an Intercommercial Bank Cheque for \$130,000.00 dated 18 July 2019. However, this cheque has been deemed fraudulent as that bank is no longer in existence and any cheques made under that bank’s name are no longer accepted.

[9] As a consequence of the First Defendant’s failure to make any valid payments pursuant to the Agreement, the Claimant sent a representative to collect both excavators from the First Defendant on 19 July 2019. However, the representative was informed that Excavator 1 had been seized and detained from Lot No. 7, Block 3, Wallerfield by police officers attached to Cumuto Police Station on 17 July 2019.

[10] The Second Defendant indicated to Ms. Jenelle D'Hereaux, Chief Operating Officer of the Claimant Company, that he was making the necessary arrangements to have Excavator 1 delivered back into their possession. After several weeks, Excavator 1 was not delivered back into possession. Accordingly, Ms. D'Hereaux visited the Cumuto Police Station whereby she presented all facts to Corporal Gordon, the investigating officer, including copies proving that the Claimant is the lawful owner of Excavator 1.

[11] On 13 August 2019, Ms. D'Hereaux, along with attorney-at-law, Ms Pierre, visited the Cumuto Police Station and gave a written statement to Corporal Gordon and provided him with a copy of the original lease agreement between the Claimant and the First Defendant. Corporal Gordon indicated that due to the ongoing investigation, Excavator 1 could not be released to the Claimant.

[12] Prior to the station visit, the Claimant caused a letter to be sent to the Ministry of National Security requesting the release of Excavator 1. A response was received on 22 August 2019 indicating that Excavator 1 could not be released due to the current ongoing investigation.

[13] The Claimant, thereafter, through its attorney-at-law, issued a Pre-Action Protocol Letter dated 16 September 2019 to the Ministry of National Security and the Third Defendant demanding Excavator 1 be released into its possession. On 26 September 2019, the Claimant received a response from the legal unit of the Trinidad and Tobago Police Service requesting a further 28 days to respond. However, there was no response forthcoming.

#### **Application for Interim Injunction filed on 3 October 2019**

[14] By Notice of Application filed 3 October 2019, the Claimant applied for the following interim orders:

1. An Interim Injunction compelling the Third Defendant by himself, his servant and/or agents or otherwise to immediately return to the Claimant one New Holland Evo 215C Excavator which was seized by police officers as agents

and/or servants of the State attached to the Cumuto Police Station on the 17th day of July 2019;

2. That the First, Second and Third Defendants do pay the cost of this Application;
3. All necessary and consequential Orders, Directions and Inquiries that this Honourable Court may order; and
4. Any other relief that the Honourable Court may deem just and expedient.

[15] The Claimant repeated the facts pleaded in its Statement of Case in its Application for Interim Injunction. Accordingly, the Court will not repeat same hereunder. Nonetheless, it is the Claimant's contention that Excavator 1 has been unlawfully detained since July 2019, there is no justification for its continued detention and there has been more than a reasonable time within which the investigation can be completed. Furthermore, the Claimant, as the lawful owner of Excavator 1, has suffered a grave financial loss because of the unlawful detention.

[16] In addition, the Claimant gave an undertaking to have Excavator 1 available for any police investigations, which requires the physicality of the Excavator 1, so long as reasonable notice is given. The Claimant also gave an undertaking to compensate the Third Defendant for any loss it may wrongfully suffer as a result of the Court granting the interim reliefs sought.

#### **Application for Default Judgment filed 26 November 2019**

[17] By Notice of Application filed 26 November 2019, the Claimant applied for the following orders pursuant to **Part 10.2(3), Part 11.5 and Part 12.2 of the Civil Proceedings Rules 1998** ("the CPR"):

1. That permission be granted to enter Judgment against the Third Defendant in default of filing a Defence;
2. A date to be fixed for the Claimant's Assessment of Damages before a Master;
3. That the costs of this Application be paid for by the Third Defendant.

[18] The Claimant stated that the Claimant's Claim Form and Statement of Case were filed on 3 October 2019 and were served on the Third Defendant on 9 October 2019. The Third Defendant, being the State, was entitled to 42 days to enter its Defence, which became due on 21 November 2019. The Claimant's contention is that (as of the date of the application) there has been a lapse of 49 days since the Claim has been served on the Third Defendant and no Defence or Application for Extension of Time has been filed. Furthermore, no attorney-at-law representing the State has requested an extension for filing of same as between attorneys.

[19] It was contended that **Part 12.2(2) of the CPR** states that permission must be obtained for default judgment on any claim against the State and that the Claimant has a reasonable prospect of success in this matter. The Claimant has requested permission to enter Judgment or in the alternative that the matter proceed as an undefended Claim.

**Application to Strike Out Claim Form and Statement of Case and/or Extension of Time to file a Defence filed 10 December 2019**

[20] By Notice of Application filed 10 December 2019, the Third Defendant applied for the following orders pursuant to **Part 26 of the CPR**:

1. The Claimant's Claim Form and Statement of Case filed on 3 October 2019 be struck out in so far as it relates to claims for conversion/detinue of an Excavator pursuant to **Parts 26.1(k) and 26.2(1)(b) of the CPR** as it constitutes an abuse of process of this Honourable Court; or alternatively;
2. The Claimant's Claim Form and Statement of Case filed on 3 October 2019 be struck out in so far as it relates to claims for conversion/detinue against the Third Defendant pursuant to **Parts 26.1(k) and 26.2(1)(c) of the CPR** as the Statement of Case discloses no grounds for bringing or continuing the Claim;
3. Time be extended to the Third Defendant to file its Defence pursuant to **Part 10.3 and Part 26.1(1)(d) of the CPR**; and
4. The costs of this matter be paid by the Claimant to the Third Defendant, to be assessed in default of agreement.

[21] It was contended that the Claimant's Claim subsisted at a time when the said investigations were pending and as such Excavator 1 was being detained as the subject of the said investigation. However, in preparation of the Third Defendant's affidavit in opposition to the Application for Interim Injunction as well its Defence, the Third Defendant realised that the Claim as filed can no longer subsist against the Attorney General for the detention of Excavator 1. Charges have since been brought against certain named persons who were in possession of Excavator 1 at the time when they were allegedly partaking of activities, which offended **Section 26 of the State Lands Act**. Accordingly, the matter is currently listed for hearing before the Second Magistrates' Court, Arima.

[22] It is the Third Defendant's contention that Excavator 1 is no longer in the possession of the Commissioner of Police pending investigation but is in the custody of the Court as it now forms part of the evidence in the prosecution of the three persons charged pursuant to **section 26 of the State Lands Act**. Consequently, it is for the Claimant to contend before the sitting Magistrate at the Second Magistrates' Court as to its ownership of Excavator 1 and to obtain an order of that Court to secure its release.

[23] In the interests of the administration of justice and the overriding objective, the Third Defendant stated that this matter will be best served by dealing with this Application to strike out before the Third Defendant incurs further costs in filing a Defence which relates to causes of action which are no longer available to the Claimant and is an abuse of process. Additionally, the Third Defendant wishes to have this Application to strike out dealt with prior to the filing of any further documents in this matter since the Claim will be substantially altered should the Honourable Court grant this Application.

[24] Alternatively, the Third Defendant contended that the Claimant indicated that there was a lease/rental agreement between the Claimant and the First and Second Defendants. In that regard, the Claimant could not be said to have been in immediate possession of Excavator 1 as it was on rental to the First and Second Defendants. The Claimant's right to possession of Excavator 1 was suspended pending the duration of the rental

agreement between the Claimant and the First and Second Defendants. Accordingly, the Claimant has no right to sue the Third Defendant for conversion or detinue.

[25] Furthermore, the Defendant sought an extension of time in the circumstances for the filing of its Defence to the Claim should the Court not grant the Application to strike out the Claim Form and Statement of Case.

### **III. Issues**

[26] During the hearing of the Application for Interim Injunction on 18 December 2019, the Court heard oral submissions by both parties. At this hearing, the parties also referred the Court to the Applications filed on 29 November 2019 and 10 December 2019. The Court, thereafter, enquired from both parties, the practical way forward in dealing with the two later Applications – Application for default judgment and Application to strike out.

[27] The Court does not find it necessary to recount the details of said discussion. Counsel for the Claimant, Mr. Masaisai, however, has requested that the Court consider the Application for Interim Injunction first then the Application for Default Judgment and Application to Strike Out as one.

[28] The Court wishes to highlight that judgment has not been yet been entered against the Third Defendant. Accordingly, the Court must consider all Applications before the Court. Having considered the nature of all Applications before the Court, if the Application for Interim Injunction is granted and the Court subsequently considers the Application to Strike Out and the Third Defendant is successful, it then refutes the purpose of the interim injunction. Consequently, the best way forward in this decision is to decide on the Application to Strike Out, which, if successful, would resolve the other two applications filed by the Claimant.

[29] In that regard, the Court finds it prudent to deal with the Third Defendant's Application first wherein the Third Defendant requests that the Claim be struck out as abuse of



process and/or disclosing no reasonable grounds for bringing or continuing the Claim. The Claimant's Applications for interim injunction and default judgment are contingent on the success of the Third Defendant's Application.

[30] Consequently, the issues that fall for determination before this Court are as follows:

1. *Should the Claimant's Claim be struck out pursuant to Part 26.2(1)(b) of the CPR as an abuse of the process of the Court?*
2. *Should the Claimant's Claim be struck out pursuant to Part 26.2(1)(c) of the CPR as it discloses no grounds for bringing the Claim?*
3. *If the answer to any or both of the above issues is in the negative, should the Court grant the Third Defendant an extension of time to file its Defence to the Claim?*
4. *If the answer to issue 3 is in the negative, should the Court then grant the Claimant permission for default judgment to be entered against the Third Defendant?*
5. *If permission for default judgment is not granted, should the Court grant the interim injunction compelling the Third Defendant to immediately return to the Claimant one New Holland Evo 215C Excavator which was seized by police officers attached to the Cumuto Police Station on the 17th day of July 2019?*

#### IV. Law and Analysis

**Issue 1: Should the Claimant's Claim be struck out pursuant to Part 26.2(1)(b) of the CPR as an abuse of the process of the Court?**

[31] **Part 26.2(1)(b) of the CPR** states as follows:

*"26.2(1) The Court may strike out a statement of case or part of a statement of case if it appears to the Court –*

*(b) that the Statement of Case or the part to be struck out is an abuse of process of the Court."*

[32] The term “*abuse of the court’s process*” is neither defined in **the CPR 1998** nor the English Counterpart nor any in practice direction. Lord Bingham in **Attorney General v Barker**<sup>1</sup> albeit in a different context, explained “abuse of the court’s process” as “*using that process for a purpose or in a way significantly different from its ordinary and proper use*”. I am of the view that this is a fitting explanation for the concept of “abuse of the process of the court”.

[33] The categories of abuse of process are many and are not closed or exhaustive. The Court has the power to strike out a prima facie valid claim where there is abuse of process. However, there has to be an abuse and striking out has to be supportive of the overriding objective<sup>2</sup>. Jamadar J (as he then was) in the case of **Danny Balkissoon v Roopnarine Persaud & Another**<sup>3</sup> stated as follows:

*“While the categories of abuse of the process of the court are many and depend on the particular circumstances of any case, it is established that they include: (i) litigating issues which have been investigated and decided in a prior case; (ii) inordinate and inexcusable delay, and (iii) oppressive litigation conducted with no real intention to bring it to a conclusion.”*

[34] From **The White Book 2013, Civil Procedure Volume 1, Part 3: The Court’s Case Management Powers, under the heading, Power to Strike out a Statement of Case** and **Blackstone’s Civil Practice 2016, Part H: Interim Applications, under the heading Abuse of Process**, the following categories of abuse of the process of the court have been recognised in case law: (i) vexatious proceedings; (ii) attempts to re-litigate decided issues; (iii) collateral attacks upon earlier decisions; (iv) pointless and wasteful litigation; (v) improper collateral purpose; and (vi) delay.

[35] Counsel for the Third Defendant, Ms. Baptiste-Mohammed, submitted that the Claimant’s Claim subsisted at a time when the investigations were pending and as such,

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<sup>1</sup> [2000] 1 FLR 759

<sup>2</sup> Jamadar J (as he then was) in Danny Balkissoon v Roopnarine Persaud and another CV2006-00639

<sup>3</sup> CV2006-00639

Excavator 1 was being detained as the subject of the said investigations. However, in the preparation of the affidavit in response to the Application for Interim Injunction and its Defence, the Third Defendant realized that the Claim as filed can no longer subsist against the Attorney General for the detention of Excavator 1. This is so because charges have been brought against certain named persons who were said to be possession of Excavator 1 at the time when they were allegedly partaking in activities, which offended **section 26 of the State Lands Act, Chap 57:01**, (hereinafter “**the State Lands Act**”).

[36] According to Ms. Baptiste-Mohammed, Excavator 1 is now no longer in the possession of the Commissioner of Police pending investigation but is in the custody of the Court as it forms part of the evidence in the prosecution of the three persons charged pursuant to **section 26 of the State Lands Act**. It was contended that it is now for the Claimant to contend before the sitting Magistrate as to its ownership of Excavator 1 and to obtain an order of that Court to secure its release.

[37] Mr. Masaisai, on the other hand, contended that there is no proof before the Court that the charges were in fact laid against the three named persons nor is there proof that the matter involving the three named persons is before the sitting Magistrate in the Second Magistrates’ Court, Arima.

[38] Mr. Sean Julien, in the affidavit in support of the Application filed on 10 December 2019, stated that he was advised by Ms. Baptiste-Mohammed that the Claimant’s Claim subsisted at a time when the said investigation were pending and as such the Excavator was being detained as the subject of the said investigations. However, on 15 November 2019, he met with Mr. Shawn Gordon who informed him that he was the Police Complainant in the matter involving three persons who were later charged at the end of October 2019 on the advice of the Director of Public Prosecutions for offences pursuant to the **State Lands Act, Chap 57:01**.

[39] Mr. Julien further deposed that Mr. Gordon advised him that he would return to present him with further information and documents relative to the Defence of the Claim,

however up to the filing of the Application to strike out, Mr. Gordon had not done so. Mr. Julien further stated that he called Mr. Gordon on 9 December 2019 about the further documentation and he was informed that Mr. Gordon had in his possession, the copies of the charges that were laid against the three persons arrested and charged for the offences pursuant to the **State Lands Act, Chap 57:01**. Mr. Gordon informed him that he would deliver them forthwith but he had not done so at the time of filing the application.

[40] Pursuant to **Part 31.3(1) of the CPR**, hearsay evidence is generally not allowed in affidavit evidence. However, the exception to that rule is provided at **Part 31.3(2) of the CPR**. That exception is that hearsay evidence that constitutes statements of information and belief will be permitted, provided that the source and grounds for such belief are stated (i) where any of the Rules so allows; and (ii) where it is for use in any procedural or interlocutory application; or (iii) in an application for summary judgment. In that regard, the evidence given by Mr. Julien on affidavit in support of this procedural or interlocutory application is permissible in this circumstance whereby Mr. Julien provided the source and grounds for his statements of information and belief.

[41] In the affidavit of Mr. Shawn Gordon filed on 19 November 2019, he stated that he and a team from Cumuto Police Station met with the Director of Public Prosecutions. They received instructions to lay charges under the **State Lands Act, Chap 57:01** and this was done. Accordingly, the matter is listed before the Second Magistrates' Court, Arima. Mr. Gordon further deposed that in or around October 2019, the three arrested men were charged under the **State Lands Act**, which provides for forfeiture of whatever machinery was being used; Excavator 1 is one of the exhibits in the Court matter and currently remains in the Court's custody. "Court" being the Magistrates' Court and not this Court.

[42] However, in the reply affidavit of Ms. Jenelle D'Hereaux filed on 29 November 2019 to the affidavit of Mr. Shawn Gordon, there was no admission of the alleged charges. The Third Defendant was asked to strictly prove.

[43] Nevertheless, during the hearing on 18 December 2019, Mr. Masaisai submitted as follows, inter alia, the continued detention of Excavator 1 is not necessary; the Magistrate can rely on photographs; there is no need for the Magistrate to physically examine Excavator 1; the physical item is not required to prove the offence had been committed; it is not a fruit of the crime; and Excavator 1 was detained in July and the charge came at the end of October. In this regard, it appears that Mr. Masaisai has accepted that charges have in fact been laid against the three persons and that Excavator 1 is now in the possession of the Magistrates' Court.

[44] It is trite law that a Court can only make a determination on issues of fact based on the evidence as tendered. In an application made before the Court, evidence in support of an application is adduced in the form of an affidavit: **Part 11.8 of the CPR**. An affidavit is defined as “written, sworn statement of evidence”<sup>4</sup>. An affidavit may contain only such facts as the deponent is able to prove from his own knowledge: **Part 31.3(1) of the CPR**. When affidavits are used as evidence in legal proceedings, they are a form of “evidence in writing”.

[45] Justice Pemberton (as she then was) in **Jorsling E Guide and Another v Richard Guide and Another**<sup>5</sup> stated as follows:

*“An affidavit is defined as: “A voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths”. An affidavit is therefore a statement of fact and evidence. It is the question of weight and probative value that is in issue in this case. It can be argued that because an affidavit is really sworn testimony, the evidence contained therein must be taken to be sufficient proof of the facts asserted. It is not disputed that an affidavit is prima facie evidence of the facts it seeks to support.”*

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<sup>4</sup> Glossary to the White Book, Volume 1, 2014

<sup>5</sup> CV2006-00214

[46] Mr. Julien's affidavit evidence in support of this Application was filed on 10 December 2019 along with the Application to strike out. Mr. Julien's evidence is regarded as sworn evidence before this Court wherein he deposed that charges were laid against the three persons involved and the matter was now before the sitting Magistrate in the Second Magistrates' Court, Arima.

[47] There was no affidavit in response to Mr. Julien's affidavit filed by the Claimant. The Claimant had an opportunity to reply to Mr. Julien's affidavit, however, this was not done. Furthermore, at the hearing on 18 December 2019, there was no request made by the Claimant's attorney-at-law to test this item of evidence by cross-examination pursuant to **Part 31.1(3) of the CPR**.

[48] In that regard, the Court must take that evidence on affidavit as proven. Further, as a consequence of Mr. Masaisai's submissions at the hearing on 18 December 2019 concerning Excavator 1 being in the possession of the Magistrates' Court and there being no need for Excavator 1 to be in custody of the Magistrates' Court, the Court is of the opinion that Mr. Masaisai has accepted that the charges have been laid and Excavator 1 is in the possession of the Magistrates' Court.

[49] Additionally, the Court is of the opinion that there is no justifiable reason to disbelieve the sworn affidavit evidence of Mr. Sean Julien, instructing attorney-at-law for the Third Defendant. Consequently, the Court is of the view that Excavator 1 is no longer in the possession of the police officers as agents and/or servants of the State and is now in the possession of the Magistrates' Court. In this regard, this Court cannot order the Magistrates' Court to return Excavator 1 to the Claimant, as such a remedy does not fall within the purview of this Court.

[50] Having regard to the different categories of abuse of process of the Court and the analyses above, the Court is of the opinion that the Statement of Case, as pleaded against the Third Defendant, does amount to an abuse of process of the Court. Accordingly, the

Claim and Statement of Case as filed against the Third Defendant ought to be struck out.

[51] Notwithstanding my finding under this issue, which effectively brings the Claim to an end, for the purposes of completeness, I shall canvass the other issues raised to be satisfied that the Court has arrived at the correct decision.

**Issue 2: Should the Claimant’s Claim be struck out pursuant to Part 26.2(1)(c) of the CPR as it discloses no grounds for bringing the Claim?**

[52] **Part 26.2(1)(c) of the CPR** states as follows:

*“26.2(1) The Court may strike out a statement of case or part of a statement of case if it appears to the Court –*

*(c) that the statement of case or the part to be struck out discloses no grounds for bringing or defending a claim.”*

[53] According to **Zuckerman on Civil Procedure Principles of Practice**, Third Edition at page 373, para 9.36:

*“The full pre-trial and trial process is appropriate and useful for resolving serious or difficult controversies, but not where a party advances a groundless claim or defence or abuses the court process. There is no justification for investing court and litigant resources in following the pre-trial and trial process where the outcome is a foregone conclusion...In such cases the court has therefore the power to strike out the offending claim or defence and thereby avoid unnecessary expense and delay.”*

[54] The **White Book on Civil Procedure 2013** considers what constitutes a Statement of Case which discloses no reasonable grounds for bringing or defending the claim. At page 73, the authors of **The White Book** state that Statements of Case which are suitable for striking out (on the basis that they disclose no reasonable grounds for bringing or

defending the claim) include those which raise an unwinnable case where continuance of the proceedings is without any possible benefit to the respondent and would waste resources on both sides.

[55] In **Brian Ali v The Attorney General**<sup>6</sup>, Kokaram J (as he then was) explained as follows:

*“12. The principles in striking out a statement of case are clear. A court will only seek to strike out a claim pursuant to **Rule 26.2(1)(c) of the CPR 1998** as amended on the basis that it discloses no ground for bringing the claim. The language and wording of our **Rule 26.2(1)** is very generous in that so long as the Statement of Case discloses a ground for bringing the claim, it ought not to be struck out. See **UTT v Ken Julien and ors CV2013-00212**.*

*13. It is a draconian measure and is to be sparingly exercised always weighing in the balance the right of the Claimant to have his matter heard and the right of the Defendant not to be burdened by frivolous and unmeritorious litigation. The Court in the exercise of its discretion to strike out a claim must always ensure to give effect to the overriding objective. See: **Real Time Systems Ltd v Renraw Investment Ltd Civ. App. 238 of 2011**.*

*14. It is for the Defendant to demonstrate that there is no ground for bringing the claim. The Defendant can demonstrate for instance that the claim is vague, vexatious or ill-founded. **Porter LJ in Partco Group Limited v Wagg [2002] EWCA Civ. 594** surmised that appropriate cases that can be struck out for failing to disclose a reasonable ground for bring a claim include:*

*“(a) where the statement of case raised an unwinnable case where continuing the proceedings is without any possible benefit to the Respondent and would waste resources on both sides **Harris v Bolt Burden [2000] CPLR 9**;*

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<sup>6</sup> CV2014-02843



*(b) Where the statement of case does not raise a valid claim or defence as a matter of law.”*

[56] According to Potter LJ in **Partco Group Ltd v Wragg**<sup>7</sup>, cases where striking out under **CPR, r. 3.4(2)(a)** [*our equivalent in Part 26.2(1)(c) of the CPR*], is appropriate include:

- (a) where the statement of case raises an unwinnable case where continuing the proceedings is without any possible benefit to the respondent and would waste resources on both sides: **Harris v Bolt Burdon [2000] CPLR 9**; and
- (b) where the statement of case does not raise a valid claim or defence as a matter of law: **Price Meals Ltd v Barclays Bank plc [2000] 2 All ER (Comm) 346**.

[57] Ms. Baptiste-Mohammed submitted that there is no such grounding in a claim for detinue and conversion since the Claimant lacks the requisite locus to initiate the Claim. Since the seizure and detention of Excavator 1, charges have been laid against certain named persons together with the forfeiture of Excavator 1. Therefore, Excavator 1 is now evidence in the case against the persons charged and arrested.

[58] It was further submitted that the Claimant’s ownership documents are not sufficient to substantiate a Claim as proposed for the Claimant nor for the return of Excavator 1. Ms. Baptiste-Mohammed contended that ownership is not ‘*the be all and end all*’ for the finding of locus; what is relevant is that at the time of the interference, there is a right to immediate possession.

[59] In support of her proposition that the Claimant is without locus to bring the Claim, Ms. Baptiste-Mohammed relied on the authority of **Brent Marlon Primus and other v The Attorney General and others**<sup>8</sup>. In that case, Madam Justice M. Mohammed considered the right of a person in possession to the right to a cause of action in conversion and/or detinue at paragraphs 83 to 91 of the judgment.

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<sup>7</sup> [2002] EWCA Civ 594

<sup>8</sup> CV2012-01650

[60] Mr. Masaisai, on the other hand, disagreed with the submission that the Claimant is without locus to initiate the claim. He maintained that the Claimant as the lawful owner of Excavator 1 has the right to a cause of action in both conversion and detinue since the Claimant did in fact have immediate possession at the time of seizure. Mr. Masaisai referred to the case cited by Ms. Baptiste-Mohammed, **Brent Marlon Primus and other v The Attorney General and others (supra)** where Madam Justice Mohammed cited the English Court of Appeal case of **MCC Proceeds Inc. v Lehman Bros International**<sup>9</sup>. Mr. Masaisai paid particular attention to the following words of Lord Justice Hobhouse:

*“Where a plaintiff is the legal owner of the relevant chattel he will normally be entitled to sue in conversion even if he was not at the relevant time in possession of the chattel.”*

[61] The issue, which arises, is whether the Claimant can rightfully bring a claim for detinue and conversion against the Third Defendant.

[62] The common law tort of detinue has been abolished in the United Kingdom by the **Torts (Interference with Goods) Act, 1977**. The tort of detinue is now said to be incorporated in the tort of conversion. However, in our jurisdiction, the common law tort of detinue is still applicable.

### **Detinue**

[63] In the Court of Appeal case of **Carlton Rattansingh v The Attorney General of Trinidad and Tobago and Kanahar Doopan**<sup>10</sup>, which was later approved by the Privy Council<sup>11</sup>, Warner JA stated as follows:

*“A claim in detinue lies at the suit of a person who has an immediate right to the possession of the goods against a person who is in possession of the goods*

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<sup>9</sup> [1998] 4 All ER 675

<sup>10</sup> Civil Appeal No 105 of 2000

<sup>11</sup> [2004] UKPC 15

*and who, on proper demand, fails or refuses to deliver them up without lawful excuse. (See dictum of Donaldson J in Alicia Hosiery v Brown Shipley and Co. Ltd and another<sup>12</sup>).*”

[64] The Privy Council in Sajan Singh v Sardara Ali<sup>13</sup> adopted the elements of detinue as outlined in *Bullen & Leake Precedents of Pleadings (3<sup>rd</sup> Edn)*, p 312. The Board expressed that in order to succeed in a claim for detinue, it was essential for the Claimant to show that he had the right to immediate possession of the good claimed at the time of commencing the action, arising out of an absolute or special property in it.

[65] Detinue is more in the nature of an action in rem because the Plaintiff seeks the return of the item or payment of its value assessed at the date of judgment, together with damages for its detention: Gerard Mootoo v The Attorney General of Trinidad and Tobago<sup>14</sup>.

### **Conversion**

[66] Warner JA in Carlton Rattansingh v The Attorney General of Trinidad and Tobago and Kanahar Doopan (*supra*) stated as follows:

*“To constitute conversion, there must be a positive wrongful dealing with the goods in a manner inconsistent with the owner’s rights and an intention in so doing to deny the owner’s rights or to assert a right inconsistent with them. The gist of the action is inconsistency. There need not be any intention to challenge the true owner’s rights. A demand and refusal is sufficient evidence of conversion.”*

[67] Conversion is a purely personal action for pecuniary damages resulting in judgment for a single sum, generally measured by the value of the chattel at the date of judgment

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<sup>12</sup> [1969] 2 All ER 504

<sup>13</sup> [1960] 1 All ER 269 at 272

<sup>14</sup> H.C.A CV 431 of 1997

together with any consequential damage flowing from the conversion, which is not too remote: **Gerard Mootoo v The Attorney General of Trinidad and Tobago** (supra).

[68] According to **Clerk & Lindsell on Torts, 22<sup>nd</sup> Edition at para 17-43**, a claimant must have possession or immediate right to possession to be entitled to sue. The learned authors stated as follows:

*“A person has title to sue for conversion if and only if he had, at the time of the conversion either actual possession or the immediate right to possess the property concerned. It is not necessary to prove ownership, and indeed even an owner may not sue unless he either possesses or has the immediate right to possess”.*

[69] The learned authors in **Clerk & Lindsell on Torts**, in considering title to sue by virtue of immediate right to possession, stated that there are many ways in which a claimant may fail to show the necessary right. For example, if goods are let or pledged, the hirer or pledgee, as the case may be, has until the contract is determined the exclusive right to possess. It follows that the owner, having no right of possession, cannot sue<sup>15</sup>.

[70] In the case of **Gordon v Harper**<sup>16</sup>, the Court considered that where goods leased as furniture with a house have been wrongfully taken in execution by the sheriff, the landlord cannot maintain trover against the sheriff pending the lease. To maintain such an action, he must have the right of possession as well as the right of property at the time. Lord Kenyon CJ stated as follows:

*“The true question is whether, when a person has leased goods in a house to another for a certain time, whereby he parts with the right of possession during the term to the tenant and has only a reversionary interest, he can notwithstanding recover the value of the whole property pending the existence*

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<sup>15</sup> Clerk & Lindsell on Torts, 22<sup>nd</sup> edition at para 17-60

<sup>16</sup> (1796) 7 Term Rep 9; 2 Esp 465; 101 ER 828

*of the term in an action of trover. The very statement of the proposition affords an answer to it. If, instead of household goods, the goods here taken had been machines used in manufacture, which had been leased to a tenant, no doubt could have been made but that the sheriff might have seized them under an execution against the tenant, and the creditor would have been entitled to the beneficial use of the property during the term: the difference of the goods then cannot vary the law.”*

[71] **Halsbury’s Laws of England, 5<sup>th</sup> edition, Volume 97 at paragraph 624**, states as follows:

*“Where a person with legal title to a chattel (‘A’) leases his chattel for a term to another (‘B’), the question arises of who has the title to sue a third party (‘C’) who wrongfully interferes with the chattel.... While there is authority suggesting that a chattel lease confers a proprietary right in the lessee, more recent case law has taken the view that when A leases his chattel to B for a term, B only acquires a contractual right, which would not in itself entitle him to sue in conversion. Although a lessee of a chattel may have a mere contractual right, it will be likely that he has taken possession of the chattel in pursuance of the contract. By taking possession of the chattel he will acquire, through his own independent act, a legal title to the chattel enabling him to sue anyone in conversion except for those with a pre-existing title... If a chattel lease is a mere contractual relationship between the lessor (‘A’) and lessee (‘B’), then the lease should not affect the lessor’s ability to sue a third party (‘C’), who wrongfully interferes with the chattel during the lease. Although A may be out of possession at the time of the interference, a person with legal title need not retain possession of the chattel in order to sue in the chattel torts. However, because A is likely to be in receipt of rent from B for the lease of the chattel for the term, C’s interference with the chattel may not actually cause A substantial loss. In this situation, A will only be able to recover for any damage to his ‘reversionary interest’ which is usually the value of the chattel minus the rent that A is in receipt of.”*

[72] Both Counsel placed reliance on the case of **Brent Marlon Primus and Ors v PC Anton Maxime and The Attorney General of Trinidad and Tobago**<sup>17</sup>. This case involved six Claimants who brought separate actions against the Defendants. The actions were not consolidated but were heard together because they arose out of the same incident which took place on 6 May 2008 at the Matura River along the Toco Main Road in Matura. The Claimant who is relevant to the matter at bar is James Lawrence. James Lawrence's claim against the Defendant was damages for the wrongful seizure and detention of his two vehicles, an excavator and a frontier and damages for trespass to the said goods.

[73] Having considered the case law and the evidence of James Lawrence, Justice M. Mohammed found that James Lawrence had no immediate right to possession of the Excavator and the Frontier since the person with the subsisting right at the time the vehicles were seized was Albert Charles since he had hired the Excavator to do a job and part of the job was hiring the services of Alban Baptiste who was also using the Frontier. In that regard, James Lawrence's claim for damages of wrongful seizure and detention of the Excavator failed.

[74] As stated above, it is settled law that in order to sue in detinue and/or conversion, a claimant must show that he had either possession or an immediate right to possession of the chattel at the time of the act of interference in question. Accordingly, it appears that as a result of the subsisting lease between the Claimant and the First Defendant, the Claimant cannot be the proper party to the action since at the time of the act of interference, it did not have possession or an immediate right to possession of Excavator 1.

[75] However, Mr. Masaisai submitted that clause 12 of the lease agreement gives the Claimant the right to immediate possession on default of payment of the rental instalment by the Lessee within five days of the date. Counsel, however, did not refer the Court to any authorities in support of this proposition.

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<sup>17</sup> CV2012-01650

[76] Ms. Baptiste-Mohammed, however, responded that the Claimant's right to immediate possession was suspended since there was a five-day grace period to secure the rental payment. She contended that at the time of seizure and detention, Arabco Company was still within the grace period to pay its rental instalment. She further contended that notwithstanding same, the Claimant's right to immediate possession was suspended because of the lease agreement existing between the Claimant and Arabco Company Limited.

[77] Clause 12 of the lease agreement dated 31 May 2019 between the Claimant and the First Defendant reads as follows:

*“LESSEE'S DEFAULT: Time is of the essence under this agreement and any of the following events shall constitute defaults on the part of Lessees hereunder:*

*(a) failure of Lessee to pay instalment of rental within five (5) days in which same became due;*

*(b) any breach or failure of Lessee to observe or perform any of its obligations under this lease;*

*(c) insolvency or bankruptcy of Lessee or assignment for the benefit of creditors;*

*(d) any other act of Lessee which will allow Lessor to deem itself insecure and the prospect of payment.*

*Upon the occurrence of any default Lessor may exercise this option without notice to or demand on the Lessee and thereupon all equipment and rights of Lessee therein shall be surrendered unto Lessor; upon default, Lessor may take possession of the equipment where found with or without process of law in court, may enter upon the leased premises without liability for suit, action or other proceedings by Lessee and remove same, hold, sell, lease or otherwise dispose of the equipment or keeping of any of them as Lessor so chooses without effecting the obligation of Lessee as providing by this*

*agreement; collect all unpaid lease payments due without prejudice to Lessor's right to regain possession of the equipment.”*

[78] Accordingly, upon examination of Clause 12 of the lease agreement, the Claimant has a right to retake possession of the Excavators upon the default of the First Defendant to pay the rental instalments within 5 days from the due date.

[79] In the case of **Jelks v Hayward (Hackney Furnishing Company, Claimants)**<sup>18</sup>, furniture was let for hire under a hire-purchase agreement, which contained a clause giving the owners the right without previous notice to determine the hiring and retake possession of the furniture, if it should at any time be seized or taken in execution. The furniture was taken in execution by the high bailiff of a county court. No claim was made to the furniture, therefore, it was appraised and sold under the execution and the proceeds paid into court. The furniture was delivered to the purchaser. On the day after the sale, the owners heard for the first time of the seizure and sale of the furniture, and gave notice of their claim to the proceeds. An interpleader summons was issued at the instance of the high bailiff, and in the course of the interpleader proceedings the execution creditor admitted the title of the claimants, who gave a notice claiming damages against the high bailiff in respect of the alleged conversion of the furniture by selling. The Court held that as under the hiring agreement, the Claimants had a right to retake possession immediately upon its being taken in execution, the sale by the high bailiff amounted to an act of conversion for which he was responsible in damages to them.

[80] Kennedy LJ in **Jelks v Hayward (Hackney Furnishing Company, Claimants)** (*supra*) opined as follows:

*“In the present case it is indisputable that the high bailiff has sold the goods of the claimants; he sold them because he had seized them under an execution, the seizure being lawful. Whatever interest the apparent possessor, the*

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<sup>18</sup> [1905] 2 K.B. 460



*execution debtor, had in the goods seized, he had by the terms of the hire-purchase agreement between him and the respondents; it was an interest terminable ipso facto on the occurrence of such a seizure as actually took place; in other words, the respondents became entitled to the possession of the goods without notice or demand immediately upon that act of seizure by the bailiff. In order to maintain an action of conversion for the subsequent sale by the bailiff, there must be a right in the plaintiff to immediate possession of, as well as a property in, the goods. In the present case there is no question that the goods sold were the property of the respondents: had they also a right to their possession at the time of the sale? In my opinion they had, because the act of the bailiff in seizing entitled them to take possession of the goods immediately upon the seizure. The respondents had not only the property in the goods, but also the right to possession at the time of the sale.”*

[81] From the evidence of the Claimant, the First Defendant was in default of the rental payments after taking possession of the Excavators on 31 May 2019. Though the First Defendant attempted to pay \$130,000.00 with a cheque dated 18 July 2019, that cheque was dishonoured. The Claimant, thereafter, sought to retake possession of the Excavators. The Court is of the opinion that the Claimant did not need to wait for the expiration of the five-day period from the 15 July 2019 since it appears that rental payments were outstanding since June 15 2019. Consequently, the Claimant is entitled to retake possession of the Excavator as a result of the First Defendant’s default on payment.

[82] In that regard, from the authority above, the Court agrees with Counsel for the Claimant that Clause 12 of the lease agreement gives the Claimant the right to immediate possession. At the time of the acts of interference with Excavator 1 on 17 July 2019, the First Defendant had defaulted on rental payments since June 15 2019. As a result, the Claimant became entitled to possession of Excavator 1 without notice or demand upon the default of payments. Therefore, the Claimant can maintain an action in detinue and/or conversion against the Third Defendants since the Claimant had not only the

property in Excavator 1, but also the right to immediate possession at the time of the acts of the Third Defendant.

[83] However, as decided above, the Court is of the view that Excavator 1 is now in the possession of the Magistrates' Court – charges have been laid against the three named persons and the matter is now before the sitting Magistrate in the Second Magistrates' Court, Arima – and this Court does not have the jurisdiction to order the Magistrates' Court to return Excavator 1 to the Claimant.

### **Alternative Remedy**

[84] Ms. Baptiste-Mohammed submitted that the Claimant has an alternative remedy available to it under **section 27 of the State Lands Act**. Counsel contended that **section 27** provides an adequate remedy for the Claimant to proceed before the Magistrate to make his case for the return of Excavator 1. The Claimant will have to satisfy the Magistrate as to ownership but also to his knowledge of the use of Excavator 1 at that time.

[85] **Section 27 of the State Lands Act** provides for punishment for unlawful removal and reads as follows:

*“Unless the person—*

*(a) from whom any material has been seized and detained; or*

*(b) whose vehicle, animal, or boat having, drawing, carrying, or removing any material has been seized and detained, or the owner thereof; or*

*(c) who has been arrested as a person suspect of having been engaged or concerned in the digging, winning, or removing of material from State Lands without the prescribed licence,*

*proves to the satisfaction of a Magistrate –*

*(d) that the material so seized and detained was not dug, won, or removed from State Lands without a licence in the prescribed form; or*

*(e) that any material for the having, carrying, or removing of which such vehicle, animal or boat has been seized and detained was not dug, won, or removed from State Lands without a licence in the prescribed form; or*

*(f) that he was not in truth and in fact engaged or concerned in the digging or removing of material from State Lands, or that he had a licence in the prescribed form,*

*the proof of all which shall be on the person charged, such Magistrate shall declare-*

*(g) all such material, vehicles, animals, or boats forfeited to the State, and shall order the same to be sold by the Commissioner, and the proceeds arising from such sale shall be paid into public funds for the use of the State; and*

*(h) that the person so arrested on suspicion as having been concerned in the digging, winning, or removing of material is guilty of an offence against this Act,*

*and the person shall be punished accordingly as provided by section 25.”*

[86] Stollmeyer J (as he then was) in **Keith George (Trading as George Auto Rentals) v Max James**<sup>19</sup> considered **Section 27 of the State Lands Act** and its interpretation with which this Court is in agreement. **Section 27 of the State Lands Act** provides, *inter alia*, for forfeiture by a Magistrate of a vehicle used in the unlawful digging and removal of material from State Lands. The burden of satisfying the Magistrate that forfeiture should not be imposed lies on the person charged with such an offence, or the owner of the vehicle in question.

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<sup>19</sup> H.C.A. No T240 of 1994

[87] Mendonça J.A. in **PC Rajcoomar No. 11907 v Satesh Mahase and ors**<sup>20</sup> opined as follows:

*“section 27 seems to provide however for persons other than those charged to have an opportunity to establish one of the grounds in section 27(d), (e) and (f) which would avoid the forfeiture of the vehicles. One such person may be the owner of the vehicle. He may not be any way involved in the digging, winning or removal of the material from the lands by the vehicles belonging to him having, drawing or carrying such material may be seized. It seems that he may prove to the satisfaction of the Magistrate the grounds referred to at (d), (e) or (f) and so avoid the forfeiture of the vehicles.”*

[88] In that regard, the Court agrees with Counsel for the Third Defendant that there is an adequate remedy under **section 27 of the State Lands Act**. A Claimant can proceed before the sitting Magistrate and prove to the satisfaction of the sitting Magistrate that he is the owner of Excavator 1 and that he was not in truth and in fact engaged in the removal of materials from State Lands (**section 27(f) of the State Lands**).

[89] As a consequence of charges having been laid and Excavator 1 presently forming part of the evidence in a matter before the sitting Magistrate in the Second Magistrates' Court, Arima, the Claimant is now aware of the provisions of **section 27 of the State Lands Act**. The Claimant has been made aware of the opportunity to be heard by the sitting Magistrate as to why Excavator 1 ought not to be forfeited and returned to it.

[90] In this regard, the Court is of the opinion that the Statement of Case as pleaded against the Third Defendant discloses no ground for bringing the claim and ought to be struck out.

[91] In light of the Court's finding that the Claimant's Claim and Statement of Case against the Third Defendant ought to be struck out, the Application for Default Judgment against

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<sup>20</sup> Magisterial Appeal No. 149 of 2006

the Third Defendant and the Application for Interim Injunction both filed by the Claimant have been rendered otiose and ought to be dismissed.

## **V. Disposition**

[92] In light of the findings and analyses above, the Order of the Court is as follows:

### **ORDER:**

- 1. The Claimant's Claim and Statement of Case filed against the Third Defendant be and are hereby struck out pursuant to Part 26.2(1)(b) and Part 26.2(1)(c) of the CPR on the bases that the Statement of Case amounts to an abuse of process and discloses no grounds for bringing the Claim against the Third Defendant.**
- 2. The Claimant shall pay to the Third Defendant costs of the Notice of Application to strike out filed on 10 December 2019, to be assessed in accordance with Part 67.11 of the CPR, in default of agreement.**
- 3. In the event that there is no agreement on the issue of costs, then the Third Defendant to file and serve a Statement of Costs for assessment on or before 28 August 2020.**
- 4. Thereafter, the Claimant to file and serve Objections to the items on the Statement of Costs, if necessary, on or before 18 September 2020.**
- 5. The Claimant's Notice of Application filed on 3 October 2019 for interim injunctive relief be and is hereby dismissed.**
- 6. The Claimant's Notice of Application filed on 26 November 2019 for permission to be granted for default judgment against the Third Defendant be and is hereby dismissed.**

- 7. Costs on these two latter applications to be subsumed in the costs of pursuing the NOA to strike out the Claim as against the Third Defendant on the basis that there has been much overlap.**
- 8. Decision on quantification of costs to be given without a hearing on a date to be announced.**
- 9. Leave is granted to appeal the order for costs.**

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**Robin N Mohammed**  
**Judge**