[2021] JMCC COMM 9

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. SU 2019 CD 00448

BETWEEN	**RUBIS ENERGY JAMAICA LIMITED**	**CLAIMANT/ RESPONDENT**
AND	**ROHAN SIMPSON**	**DEFENDANT/ APPLICANT**

IN CHAMBERS

Ms Marielle D Robb instructed by M.D. Robb & Co for the applicant

Mr Jonathan Morgan instructed by DunnCox for the respondent

28 April 2021, 24 September 2021

Civil procedure- Application to strike out statement of case for Claimant - Rule 26.3 of CPR - Abuse of process considered.

PALMER HAMILTON J

[1] Before me is an application[1] by Mr Rohan Simpson[2] to strike out Rubis Energy Jamaica Limited's[3] ('Rubis') statement of case. Specifically, Mr Simpson is seeking the following orders:

[1] An amended notice of application to strike out Rubis' statement of case was filed on February 8, 2021
[2] Mr Simpson is the applicant in the application to strike out and the defendant in the main claim
[3] Rubis is the respondent in the application to strike out and the claimant in the main claim

(i) That the claim form and particulars of claim filed on October 29, 2019 be struck out;

(ii) Costs to the defendant;

(iii) Such further and other relief as this Honourable Court deems just.

[2] The grounds on which the orders are being sought are set out below:

(1) Pursuant to rule 26.3 (1)(c) of the Civil Procedure Rules 2002 as amended, the claimant's statement of case be stuck out as it discloses no reasonable ground for bringing or defending the claim against the defendant;

(2) Pursuant to rule 26.3 (1) (b) of the Civil Procedure Rules 2002 as amended, the claimant's statement of case is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;

(3) Pursuant to rule 1.1 of the Civil Procedure Rules 2002 as amended, the orders sought are required to give effect to the overriding objective to deal with cases justly.

(4) That the claimant's statement of case, claim form and particulars of claim have named Rohan Simpson as the defendant owing monies to the claimant; when in fact it was the Junction Service Centre Limited ('JSCL') company owned by Keith Wilson and Rohan Simpson, that operated the said Junction Service Station, not Rohan Simpson in his personal capacity.

(5) That the company, JSCL, operated the Junction Service Station and any claims being brought in relation to its operations should refer to the said company as the defendant.

(6) That the claimant has filed a claim against the wrong party.

(7) That the defendant would be prejudiced.

(8) That the overriding objective would not be achieved if the orders sought are not granted.

[3] The application is supported by the affidavit of Mr Simpson sworn to and filed on February 5, 2021.

[4] In opposing the application, an affidavit was sworn to by Ms Chantal Bennett and filed on April 23, 2021, on behalf of Rubis.

Background

[5] It will be helpful, at this juncture, to outline the nature of Rubis' claim against Mr Simpson and Mr Simpson's response to that claim.

The claim

[6] The particulars of claim[4] divulges that Rubis (formerly known as the Antilles Group and formerly known as Cool Petroleum Ltd) is a limited liability company.

[7] At all material times, Rubis engaged in the marketing and retail of petroleum products and was the owner and operator of the Shell branded service stations throughout the jurisdiction.

[8] Mr Simpson was, at all material times, the operator of a Shell-branded service station located at 4 Woodclair Avenue, Dunderhill District, Junction, in the parish of St. Elizabeth called the Junction Service Station and a purchaser and receiver of fuel and lubricant products from Rubis.

[9] On or around March 7, 1994, Rubis entered into a licence agreement with Thomas and Barrington Evans for the operation of the Junction Service Station. The licence agreement provided for the sale and purchase of fuel and lubricants on a credit

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[4] The claim form and particulars of claim were filed on October 29, 2019

basis from Rubis' predecessor, the Shell Company (WI) Limited. The service station was erected on property belonging to Thomas Evans.

[10] The term of the licence agreement was fixed to expire on December 31, 2004 with provision for its automatic renewal for successive periods unless terminated. The licence agreement also permitted either party to terminate the agreement by notice, or terminate it immediately as a result of a breach of its terms.

[11] In or around February 2006, the licence agreement was assigned to Mr Simpson who thereby assumed the dealer's roles and obligations in exchange for the right to operate the service station. Rubis therefore continued in performance of the licence agreement by providing fuel and lubricants to Mr Simpson on a continuous basis between 2006 and 2014.

[12] Under the licence agreement, Mr Simpson agreed to pay a franchise fee of four thousand dollars ($4000) per annum and purchase a minimum of ninety-five thousand (95,000) litres of motor fuel each month, on credit, and to meet Rubis' regulations which include the provision of annual targets for operations.

[13] Mr Simpson was also prohibited under the agreement from selling competitor products or from entering into any commercial arrangements with the competitors of Rubis for the continued operation of the service station.

[14] Clause 9 of the dealer's obligations set out in the licence agreement also provided that Rubis became entitled to the return of all its equipment utilised for the operation of the service station, upon termination of the agreement.

[15] On March 25, 2014, Mr Simpson accrued a debt for products supplied by Rubis in the amount of three million dollars ($3,000,000.00). On June 12, 2014, Rubis also provided products to Mr Simpson, along with an invoice for the settlement of that supply in the amount of three million, four hundred and twenty four thousand six hundred and seventy six dollars ($3,424,676.00).

[16] Between 2014 and 2015, sums were remitted on Mr Simpson's account towards the repayment of those debts in the total amount of two million, four hundred and seventy four thousand, one hundred and ninety dollars ($2,474,190.00). He therefore remained indebted to Rubis for the balance of three million, nine hundred and twelve thousand, two hundred and eighty three dollars and six cents ($3,912,283.06) representing unpaid sums owed on invoices and credit notes issued on March 25, 2014 and June 12, 2014.

[17] By letter dated February 29, 2016, Rubis issued a formal demand that Mr Simpson settle the outstanding debt. Notwithstanding Rubis' demands, Mr Simpson has failed or refused to pay the sums owed to Rubis which remain unsettled.

[18] During the term of the assigned licence agreement, Rubis also provided periodic standards for Mr Simpson to meet in compliance with its obligation to comply with Shell Regulations. These standards included an annual assessment of:

(a) the flow of fuel and lubricant volume;

(b) the implementation of the Mystery Motorist Programme;

(c) service steps taken by the operator and his staff;

(d) the cleanliness of the dispensers and bathrooms;

(e) the degree of stock losses;

(f) promotional efforts taken; and

(g) health and safety precautions implemented

[19] Throughout the term of the licence agreement, Mr Simpson failed to satisfy Rubis' regulations in the aforementioned categories with measurements falling more than 30% below the minimum standards required.

[20] Additionally, in July 2014, Rubis rebranded the service station while Mr Simpson continued in operation of the service station. By virtue of that rebranding, Rubis installed further signage, materials and equipment for the enhancement and functionality of the service station. The materials included a branded canopy, machinery, generators, pumps and tanks all provided by Rubis.

[21] However, Mr Simpson discontinued purchasing fuel from Rubis in 2014, notwithstanding that operations continued at the service station with equipment, material and signage that belonged to Rubis. Mr Simpson began selling competitor products and became unjustly enriched by earning profit on machinery installed at Rubis' expense without remitting any sums to Rubis for his use of the same.

[22] In the circumstances, it was stated that Mr Simpson breached his obligations under the assigned licence agreement.

[23] The particulars of breach of contract were outlined as follows:

(i) Failed to remit payment for product received, thereby accruing a debt in the amount of three million, nine hundred and twelve thousand, two hundred and eighty-three dollars and six cents ($3,912,283.06) that remains unsettled to date;

(ii) Failed to consistently comply with Rubis' regulations for the safe, clean and productive operation of the service station; and

(iii) Utilised competitor products and maintained commercial associations with competing companies for the continued sale of fuel and lubricants to members of the public at the service station.

[24] As aforementioned, it was stated that by virtue of Mr Simpson's improper use of Rubis' property, Mr Simpson also became unjustly enriched.

[25] The particulars of unjust enrichment were outlined as follows:

(i) Ceased performing obligations under the license agreement, while continuing to use, and benefit from Rubis' branding material, equipment and machinery;

(ii) Earned sums through the improper utilisation of Rubis' property, without compensating Rubis for the same; and

(iii) Deprived Rubis from earning sums through the utilisation of its own branding material, equipment and machinery resulting in lost earning potential on the part of Rubis.

[26] As a result of the foregoing, Rubis has sought the following:

(i) The sum of three million nine hundred and twelve thousand, two hundred and eighty-three dollars and six cents (J$3,912,283.06) for debts accumulated on outstanding invoices and credit notes due and owing from Mr Simpson;

(ii) An account of revenue earned at the service station, utilising branding material, equipment and machinery installed by Rubis;

(iii) Damages for loss of use of income earning material, equipment and machinery, owned by Rubis;

(iv) Restitution and/or damages for unjust enrichment;

(v) Interest pursuant to the Law Reform (Miscellaneous Provisions) Act;

(vi) Costs to the claimant; and

(vii) Any further or other relief that this Honourable Court deems fit.

The defence

[27] Mr Simpson filed his defence on January 8, 2020. He stated that the orders being sought are unjustified and unfounded.

[28] Mr Simpson averred that Mr Thomas Evans and Mr Barrington Evans entered into the license agreement with Rubis. He (Mr Simpson) does not know and was or is not privy to the details of the license agreement made between the Evans and Rubis. He was only responsible for the operation of the service station. He and Mr Keith Wilson operated the service station and at no time did he enter into any licence agreement or any other agreement with Rubis.

[29] While he was in charge of operating the service station, he exclusively sold shell fuel and lubricant products and he complied with all Shell regulations; he was even awarded (i) most improved station for the Mystery Motorist program and (ii) graded 100% in the Mystery Motorist program. He did not maintain any commercial associations with competing companies for the sale of fuel or any other lubricant products. Further, there were no complaints or allegations made by Rubis about competitor products being sold during the period he operated the service station.

[30] In June 2014, he contacted Rubis' sales representative, Mr Hutchinson, to inform him that he would no longer be operating the service station. Upon his departure, in June 2014, he ensured that all equipment and signage were intact before he left. Additionally, he introduced Mr Hutchinson to the new person in charge of operating the service station, Mr Miguel Smith of Yardman Petroleum.

[31] Mr Simpson stated that he was told that he owed two million, two hundred and twenty one thousand dollars ($2,221,000.00) in the final statement showed to him by Mr Hutchinson. He paid this outstanding debt, in full, in six payments between June 2014 and April 2016.

[32] Mr Simpson denied receiving the letter dated February 29, 2016. He stated that he had settled all his outstanding debts to Rubis and was no longer in charge of operating the service station in June 2014.

[33] He asserted that he has no knowledge of any rebranding done by Rubis in July 2014 as he and Mr Keith Wilson were no longer operating the service station and had no further dealings with the service station as there was a new operator.

The reply to the defence

[34] In its reply to the defence, filed on January 22, 2020, Rubis repeated that the licence agreement between itself and the Evans was assigned to Mr Simpson and this formed the foundation of the commercial relationship between the parties. It was asserted that without that assignment, Mr Simpson would not have been permitted to take over the operations of the service station.

[35] Rubis stated that it is not open to Mr Simpson to allege that he was not a party to the license agreement that formed the basis for his operation of the service station. It was contended that the products supplied to Mr Simpson, the payments made by him, the performance-assessments conducted by Rubis and the requirement to sell Rubis' products exclusively were all material terms of the licence agreement. It was pointed out that Mr Simpson pleaded that he complied with these obligations but he has also sought to deny that he was bound by the very same license agreement wherein those obligations were found.

[36] It was further stated that Mr Simpson was not permitted to unilaterally assign, transfer or otherwise part with possession of his operations under the licence agreement. It was contended that even if the agreement between the parties were an oral arrangement that allowed Mr Simpson to operate the service station (which is not admitted), he was not permitted under the terms agreed between the parties, to unilaterally assign his obligations to a third party. Mr Simpson therefore remained bound by obligations owed, until the agreement was validly terminated in accordance with its terms or assigned with the agreement of the parties.

[37] Rubis stated that the service station continued in operation with the sale of competitor products; since the agreement between the parties was not brought to an end, Mr Simpson remained obligated to ensure that the service station continued to abide by the term that shell fuel would be exclusively sold at that location. Mr Simpson failed to comply with that obligation, notwithstanding the continued use of Rubis' machinery and branded material.

[38] It was acknowledged that the sum of two million two hundred and twenty one thousand dollars ($2,221,000.00) was paid by Mr Simpson towards the reduction of the debt owed between 2014 and 2016; it was asserted however that Mr Simpson misquoted the sum owed to Rubis which was invoiced in March 25, 2014 and June 12, 2014 in the amounts of three million dollars ($3,000,000.00) and three million, four hundred and twenty four thousand, six hundred and seventy six dollars ($3,424,676.00) respectively. Mr Simpson is therefore incorrect where he alleged, at paragraph 14 of his defence, that the "final statement" showed a balance owed in the amount of two million two hundred and twenty one thousand dollars ($2,221,000.00).

The response to Rubis' reply

[39] A reply to Rubis' reply to defence was filed on behalf of Mr Simpson on February 14, 2020; it essentially repeats the averments made in the defence. They can therefore be summarised as follows:

(i) A licence agreement was never assigned to Mr Simpson; the service station was operated based on the terms of a lease agreement entered into between Mr Simpson and Mr Thomas Evans. At no time was there any written licence agreement and/or any other agreement and/or assignment made between Rubis and Mr Simpson.

(ii) In accordance with the agreement he had with Mr Evans, Mr Simpson fulfilled all his obligations as the operator of the service station. Mr Simpson purchase fuel and lubricant products exclusively from Shell Petroleum.

(iii) The agreement he (Mr Simpson) had with Mr Thomas Evans, who is now deceased expired in June 2014 and Mr Anthony Evans (the son of Mr Thomas Evans and the new owner of the service station) did not renew it. The new operator of the service station is Mr Miguel Smith of Yardman Petroleum. The assignment was done by Mr Anthony Evans. Mr Simpson

was under no further obligation to the service station once the agreement he had with Mr Thomas Evans expired as he no longer had the authority to operate the service station.

(iv) Mr Simpson denied owing any monies to Rubis as he settled all his debts presented to him by Rubis. Further, Rubis is yet to present any proof of their claim that monies are owed to them. Whilst Mr Simpson was in charge of operating the service station, fuel was calculated based on dollars and cents and therefore the flat figure of three million dollars ($3,000,000.00) for March 25, 2019 alleged by Rubis is denied but also questionable as fuel costs are never usually equal to a flat sum figure when calculated. As Mr Simpson stopped being in charge of the operations of the service station in June 2014, it would be illogical for him to incur additional debts in June 2014.

The applicant's evidence

[40] As stated previously, the application to strike out the statement of case is supported by Mr Simpson's affidavit.

[41] Mr Simpson, in his affidavit, stated that a claim form and particulars of claim was served on him on October 29, 2019, naming him as the defendant in the claim. He stated further that Rubis is alleging that he personally owes them monies from operating the service station.

[42] Mr Simpson deposed that he did not operate the service station in a personal capacity, as the said service station was operated by the company, JSCL, which is owned by Mr Keith Wilson and himself jointly as co-owners. A copy of the company's certificate of the incorporation was exhibited.

[43] Mr Simpson further deposed that JSCL entered into a lease agreement on December 10, 2002 with Mr Thomas Evans, who is now deceased, to operate the service station. The said lease agreement ended in June 2014 after the death of

Mr Evans and after the lease agreement had expired. A copy of the lease agreement was exhibited.

[44] He stated that at no time did he operate the service station in a personal capacity as all monetary transactions and bill payments were made in the name of JSCL. Copies of cheques and bank statements in the company's name were exhibited.

[45] It was stated that Mr Evans was at all times the owner of the service station and the lease agreement was solely for JSCL to operate the service station.

[46] Mr Simpson asserted that at no time did he, in any personal capacity, or JSCL enter into any lease agreement or any other agreement with Rubis as all agreements as to the operation of the service station were made between Mr Evans and the owners of JSCL, himself and Mr Keith Wilson.

[47] In the circumstances, he asked that the court grant his application to strike out Rubis' statement of case, thereby giving effect to the overriding objective of dealing with cases justly.

The respondent's evidence

[48] Ms Bennett deposed that she is an Associate employed to Messrs DunnCox, Attorneys-at-law. She stated that the facts and matters deposed by her are either within her personal knowledge, based on the records of the matter or have been supplied to her in the course of her instructions and are true to the best of her knowledge, information and belief.

[49] She stated that by claim form and particulars filed on October 29, 2019, Rubis commenced the matter against Rohan Simpson in his capacity as operator of the service station located at 4 Woodclair Avenue, Dunderhill District, Junction in the parish of St. Elizabeth. The claim seeks to recover sums owed for product supplied by Rubis to Mr Simpson in March and June 2014. The claim also seeks damages for unjust enrichment, insofar as Mr Simpson breached the terms of the dealer

licence agreement and improperly earned income selling competitor products at the said service station while using Rubis' equipment.

[50] Ms Bennett stated that while attempting to arrange mediation details, Mr Simpson's application seeking to strike out the claim on the premise that Rubis filed the claim against the wrong party, was received. She pointed out that the application alleges that the claim should have been filed against JSCL a company owned by Keith Wilson and Mr Simpson and not against Mr Simpson in his personal capacity.

[51] She further pointed out that the affidavit of Mr Simpson, filed in support of the application, claimed to substantiate that ground with assertions that:

(i) The company JSCL entered into a lease agreement on the 10th day of December 2002 with the property owner, Mr Thomas Evans, to operate the service station.

(ii) At no time did JSCL or Mr Simpson personally enter into any lease agreement or any other agreement with Rubis.

[52] Ms Bennett asserted that the matters set out in the affidavit of Rohan Simpson are incongruent. She indicated that the document exhibited to Mr Simpson's affidavit, at J1, purports to be the incorporation document for JSCL. If that document is accurate, the company was created on July 26, 2005 and it did not exist when Mr Simpson entered into the agreement with the property owner (Thomas Evans) to operate the said service station on December 10, 2002.

[53] Further, the lease agreement exhibited to Mr Simpson's affidavit, at J2, reflects the names Thomas Evans, Keith Wilson and Rohan Simpson, all signing in their personal capacity. The lease agreement does not provide that any signatory is signing in a representative capacity on behalf of a company.

[54] Ms Bennett then stated that paragraph 7 of the defence also admitted that the operators of the service station were "Rohan Simpson and Keith Wilson" and that they purchased fuel and lubricant exclusively from Rubis. Paragraph 12 of the

defence also admits that Mr Simpson was operating the service station until his alleged departure in June 2014 and that he personally attempted to hand over responsibility to the new operator at that time.

[55] She deposed that the issue joined on the pleadings in relation to the debt aspect of the claim was confined to whether Mr Simpson settled the debt owed to Rubis by payments made after June 2014.

[56] It was stated that, at all material times, Rubis engaged and interacted with Mr Simpson in his personal capacity in relation to the ongoing operation of the service station. A few examples of that personal engagement is shown by the following documents:

(i) On January 2, 2009, Rubis' predecessor wrote directly to Mr Simpson to notify him of the targets for the operator's management and output for the year 2009.

(ii) On December 20, 2011, Rubis' predecessor wrote directly to Mr Simpson to notify him of the targets for the operator's management and output for the year 2011.

(iii) On August 10, 2012, Rubis' predecessor wrote directly to Mr Simpson to notify him of his breaches of obligations owed under the dealer's licence agreement.

(iv) On February 29, 2016, after Mr Simpson stopped making payments to Rubis to settle his account, Rubis wrote directly to Mr Simpson to request that he settle the debt accrued in the amount of three million nine hundred and twelve thousand, two hundred and eighty three dollars and six cents. (J $3,912,283.06).

[57] The documents were exhibited to the affidavit.

[58] Based on the foregoing, Ms Bennett asked that the court refuse the orders sought by Mr Simpson in his application.

The applicant's submissions

[59] Counsel for the applicant, in her submissions[5] outlined what she regarded as the relevant issues for the court's resolution of the application. She then outlined the law in respect of the court's power to strike out a statement of case. The court's attention was drawn to rules 26.3 (1) (b) and (c) and 1.1 (2) (d) and (e) of the Civil Procedure Rules ('CPR'). Counsel also cited the following cases:

(i) **Sebol Limited and Selective Homes & Properties Limited v Ken Tomlinson et al** (unreported), Supreme Court, Jamaica, Claim No. HCV 2526/2004, judgment delivered 9 October 2007;

(ii) **Beverley Decordova (In her personal capacity and as the Administrator of the estate) and Paula Williams-Phinn v Eunice Bartley and The Registrar of Titles** [2016] JMSC Civ 245; and

(iii) **Charmaine Bowen v Island Victoria Bank Limited et al** [2017] JMCA Civ 23

[60] The submissions, in brief, are as follows:

(i) The claims made by Rubis are not rooted in facts nor are they credible. Mr Simpson was at all material times a director of JSCL, which was co-owned by himself and Mr Keith Wilson and which operated the service station.

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[5] Dated April 20, 2021

(ii) Being a company, JSCL is therefore a separate legal entity from Mr Simpson. The case of **Salomon v Salomon & Co Ltd** [1896] UKHL 1, was cited in support of this point.

(iii) Neither Mr Simpson nor JSCL entered into any agreement, contract, "assignment" or other with Rubis.

(iv) JSCL entered into a lease agreement with the owner of the service station Mr Evans, on December 10, 2002. All agreements and contracts or other for the said service station would have to have been made between the owner, Mr Evans, and Rubis directly.

(v) JSCL was only ever in charge of operating and managing the service station and at no time did it have any form of ownership relating to the said service station. At all material times, JSCL operated the service station based on the terms of the lease agreement with Mr Evans.

(vi) All matters dealing with the ownership, property, infrastructure, products sold, branding material, equipment and machinery and licensing agreements were of the sole decision and the sole discretion of the owner of the service station. Paragraphs 4, 5 and 6 of the particulars of claim were referenced.

(vii) Rubis, in its statement of case, has not proven or provided evidence that it entered into any agreement or contract or other with Mr Simpson or JSCL.

(viii) In July 2014, Mr Simpson was informed that a new person/company had taken over all the operations and was now operating the service station and therefore neither Mr Simpson nor JSCL were involved after their lease agreement had expired and ended in June 2014.

(ix) JSCL was told that a balance of two million two hundred and twenty one dollars ($2,221,000.00) was owed to Rubis prior to the company's lease

expiring in June 2014. JSCL paid off all the monies owed in full between June 2014 and April 2016.

(x) Mr Simpson applied to have Rubis' statement of case struck out, as he sought to prevent further wasting of the court's time and resources and/or an abuse of the processes of the court, as Rubis has no reasonable grounds for bringing forth this claim against Mr Simpson.

(xi) The limitation period was close to being expired when Rubis' claim was filed in the Supreme Court, this raises many serious questions as to the validity and credibility of their claim as JSCL had stopped operating the service station for about five and a half years when the claim was brought. Although the six year limitation period had not yet expired when the claim was brought, the fact that the claim was being brought so close to the limitation period raises many issues as to the facts of the claims being made by Rubis. The substantive claims made by Rubis are inaccurate, false and therefore cannot be proven.

The respondent's submissions

[61] Counsel for the respondent similarly outlined the rule in respect of striking out the whole or a part of a statement of case. In considering rule 26.3 (1)(c) of the CPR, counsel brought the court's attention to the case of **James Brown v Karl Rodney and Maureen Rodney** [2017] JMSC Civ 32.

[62] The submissions, in brief, are as follows:

(i) Rubis' statement of case indicates that it entered into a license agreement in 1994 with Thomas and Barrington Evans for the operation of Junction Service Station. The licence agreement governed and outlined: (1) the terms on which Rubis sold and provided fuel and lubricants on a credit basis to the operator of the service station (2) the regulations that the operator was required to follow (3) the

limitation on the operator selling competitor products or having commercial associations with other petrol brands.

(ii) On Rubis' statement of case, the terms and obligations above were assigned to Mr Simpson in his personal capacity and the parties continued engaging in business pursuant to that assignment until Mr Simpson defaulted on his obligations.

(iii) Mr Simpson accrued debts on March 25, 2014 and June 12, 2014 for product supplied pursuant to the terms of the assigned licence agreement. The primary debt claim was also supplemented by an unjust enrichment claim, on the premise that the operator improperly earned income utilising Rubis' equipment and competitor products, after June 2014.

(iv) The statement of case, therefore, clearly discloses reasonable grounds for bringing the claim against Mr Simpson. This is bolstered by admissions in the defence including, among other things, that the operators of the service station were Mr Simpson and Keith Wilson.

(v) It is clear on Mr Simpson's pleaded case that he personally assumed the roles and responsibilities under the license agreement.

(vi) The issue joined on the pleadings in relation to the debt claim, is therefore whether Mr Simpson settled the amount owed to Rubis There is no issue, raised on the pleadings as to whether Mr Simpson was incorrectly sued.

(vii) The evidence supplied by Mr Simpson does not support his contention that he is not the proper defendant. The documents exchanged between the parties and the numerous admissions in the defence confirmed that Mr Simpson held personal and independent responsibility for the debt owed to Rubis. There is no mention, in the documents, to a corporate entity or to Mr Keith Wilson.

(viii) The lease agreement, on the face of it, confirms that Mr Simpson and his partner agreed to personally operate the service station. The creation of a company, three years later, and making payments to Rubis on corporate cheques does not change the nature of the contractual relationship between the parties.

(ix) Mr Simpson has not adduced any documents or further evidence to convey that Rubis and Mr Simpson agreed to substitute Mr Simpson for the company JSCL in the contractual relationship.

(x) The claim is founded on privity of contract between Rubis and Mr Simpson. Mr Simpson has denied entering into any agreement with the Rubis. Mr Simpson however admitted to owing obligations to Rubis and alleged that he performed those obligations which included: (1) ordering and receiving fuel from Rubis on a credit basis (2) paying for that fuel (3) attempting to follow Rubis' regulations and (4) being assessed by Rubis periodically.

(xi) Since Mr Simpson has denied entering into a written agreement with Rubis, it is a triable issue whether the obligations and Mr Simpson's conduct were governed by an assignment of the Evans' licence agreement or whether the parties operated pursuant to an agreement by conduct.

(xii) The lease agreement between Evans, Simpson and Wilson, does not somehow negate or remove the personal obligations that Mr Simpson admitted to in his defence.

[63] Counsel for Rubis filed supplemental submissions on May 7, 2021. Mr Simpson's counsel then responded, in writing, to these submissions. The written response was filed on May 19, 2021. Counsel can rest assured that, though not outlined herein, they have been considered.

Analysis

[64] Part 26 of the **Civil Procedure Rules** ('**CPR**') deals with, among other things, the court's power to strike out a party's statement of case. Rule 26.3 (1) provides as follows:

> ***"Sanctions-striking out statement of case***
>
> *26.3 (1) In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court-*
>
> *(a) that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings;*
>
> *(b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;*
>
> *(c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim; or*
>
> *(d) that the statement of case or the part to be struck out is prolix or does not comply with the requirements of Parts 8 or 10."*

[65] In the 4th edition of the text 'Commonwealth Caribbean Civil Procedure' by Gilbert and Vanessa Kodilinye, the learned authors note, on page, 196:

> *"The traditional approach to striking out, as propounded by Lord Templeman in Williams & Humbert Ltd v W & H Trade Marks (Jersey) Ltd, [[1986] AC 368, HL] is that striking out is appropriate only in plain and obvious cases, and those cases which require prolonged and serious argument are unsuitable for striking out. This approach has been confirmed in a post-CPR House of Lords case, Three Rivers District Council v Bank of England (No 3) [[2001] 2 All ER 513, HL]."*

[66] It is important to acknowledge that Mr Simpson has relied on rule 26.3 (1) (b) and (c) to ground his application. These sections speak to abuse of process and instances where there are no reasonable grounds for bringing or defending a claim.

[67] In discussing abuse of process, Gilbert and Vanessa Kodilinye stated, on pages 201 and 202, that:

> *"The power in Rule 26.3...to strike out a statement of case which is an abuse of the court's process is one which 'any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people'[6]. Examples of striking out for abuse of process include:*
>
> *(a) starting a claim with no intention of pursuing it;*
>
> *(b) issuing a claim after the expiry of the relevant limitation period;*
>
> *(c) issuing a claim where the description of the claimant does not disclose any entitlement to sue;*
>
> *(d) issuing a claim that is res judicata;*
>
> *(e) issuing a claim that is vexatious, scurrilous or obviously ill-founded;*
>
> *(f) subjecting a defendant to two or more incidental actions simultaneously;*
>
> *(g) seeking redress against a public authority by bringing an ordinary claim instead of a claim for judicial review; and*
>
> *(h) destruction of evidence before proceedings are commenced, with intent to pervert the course of justice, or destruction of evidence after issue of proceedings, if a fair trial can no longer be achieved.*
>
> *Further it was pointed out by Cross J in a Trinidadian case, Sookdeo v Barclays Bank of Trinidad and Tobago Ltd, [(1976) High Court, Trinidad and Tobago, No 2323 of 1976] that the court also has an inherent power to stay or dismiss actions which are obviously frivolous or vexatious or an abuse of process, but this was a jurisdiction which 'should be exercised with great care, and only in*

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[6] See Hunter v Chief Constable of the West Midlands Police [1982] AC 529 per Lord Diplock

cases where the court is absolutely satisfied that no good can come of the action."

[68] The authors then noted, on page 204:

> *"Accordingly, under the CPR regime, in deciding whether or not to strike out a case on the ground that it is an abuse of process, the court has complete discretion which must be exercised in light of the overriding objective. As May LJ stated in Purdy v Cwmbran (sic)[7]:*
>
> > *Under the...CPR, the court takes into account all relevant circumstances and, in deciding what order to make, makes a broad judgment after considering available possibilities. There are no hard and fast theoretical circumstances in which the court will strike out a claim or decline to do so. The decision depends on the justice in all the circumstances of an individual case."*

[69] In considering rule 26.3 (1)(b) (no reasonable grounds for bringing or defending a claim), the authors noted, on page 204:

> *"A statement of case may be struck out on the ground that it fails on its face to disclose a claim or defence that is sustainable in law. A cause of action that is unknown to the law will be struck out, as will a defence which consists of a bare denial or otherwise fails to include the material facts, or which, assuming the facts which are set out to be true, does not reveal any defence in law...Striking out will be refused if the court would be required to conduct a protracted examination of documents. On the other hand, the documents may clearly show that there is no sustainable case."*

[70] In addition to the aforementioned text, thankfully, there are many cases which have considered rule 26.3 (1). Some of the cases are:

(a) **Reynolds-Greene v Bank of Nova Scotia** (unreported), High Court, Antigua and Barbuda, ANUHCV 0443 of 2005, judgment delivered 20 November 2008;

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[7] See Purdy v Cambran [1999] CPLR 843; [1999] All ER (D) 1518, CA; [2000] CP Rep 67

(b) **Elaine Dotting v Carmen Clifford (Executrix of the estate of Dr Royston Clifford) and The Spanish Town Funeral Home Ltd** (unreported), Supreme Court, Jamaica, Claim No. 2006 HCV 0338, judgment delivered 19 March 2007;

(c) **James Brown v Karl Rodney and Maureen Rodney** [2017] JMSC Civ 32;

(d) **Wilton Williams v Ajas Limited** [2020] JMSC Civ 104;

(e) **Ricco Gartmann v Peter Hargitay** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No. 116/2005, judgment delivered 15 March 2007;

(f) **S & T Distributors Limited and S & T Limited v CIBIC Jamaica Limited and Royal & Sun Alliance** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No. 112/04, judgment delivered 31 July 2007;

(g) **Sebol Limited and anor v Ken Tomlinson (As the receiver of Western Cement Company Limited) et al** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No. 115/2007, judgment delivered 12 December 2008; and

(h) **Gordon Stewart v John Issa** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No. 16/2009, judgment delivered 25 September 2009

[71] In **S & T Distributors Limited**, Harris JA, on page 29, said:

> *"The striking out of a claim is a severe measure. The discretionary power to strike out must be exercised with extreme caution. A court when considering an application to strike out, is obliged to take into consideration the probable implications of striking out and balance them carefully against the principles as prescribed by the particular cause of action which is sought to be struck out. Judicial authorities have shown that the striking out of an action should only be done in plain and obvious cases...*

> *In light of the foregoing, it is clear that a claim will only be struck out as disclosing no reasonable cause of action if it is obvious that the claimant has no real prospect of successfully prosecuting the claim. Real prospect of success contemplates the existence of a claim which carried with it realistic prospect of successfully prosecuting the claim as opposed to a "fanciful" prospect."*

[72] The judgment of McDonald-Bishop J (as she then was) in **Elaine Dotting** was delivered a few months before the delivery of the judgment in **S & T Distributors Limited**; interestingly, at paragraph 10 of her judgment, McDonald-Bishop J stated, in part that:

> *"The ultimate question that should be considered in determining whether to strike out the statement of case on the basis that is discloses no reasonable cause for bringing the claim seems to be, essentially, the same as that in granting summary judgment, that is: is the claim against the defendant one that is not fit for trial at all?"*

[73] In **Rico Gartmann**, Cooke JA expressed the view that:

> *"10. The striking out (dismissal) of a claimant's statement of case...is a draconian order. Such an order, while compelling in suitable circumstances, should be informed by caution lest litigants are deprived of access to the "judgment seat". In my view this drastic step of striking out a statement of case should only be considered when such statement of case can be categorized as entirely hopeless."*

[74] The **Sebol** judgment was delivered in 2008, in **Sebol** Panton P cited the **S & T Distributors Limited** case but only in part. No reference was made to Harris JA's statement that a claim will only be struck out as disclosing no reasonable cause of action if it is obvious that the claimant has no real prospect of successfully prosecuting the claim. Panton P said:

> *"27...It can be seen...that before a claim can be struck out it must clearly be obvious that no reasonable cause of action is disclosed."*

[75] In **Gordon Stewart**, the latest of the Court of Appeal cases cited above, Cooke JA said:

> *"13...To determine whether Sykes J was correct it is necessary to carefully examine the pleadings to see whether it gives rise to a cause of action against the respondent. The appellant contended that in respect of this claim there was no criticism that it lacked any validity. Further, as is evidenced by paragraph 5 of the judgment of Sykes J. (supra), he used the wrong test which was "whether Mr Stewart has a real prospect of succeeding [in] his claim against Mr John Issa." This was the test that was relevant to summary proceedings...*
>
> *The appellant also brought to the attention of the court the statement of Harris JA, in S & T Distributors Ltd. & Anor v CIBC Jamaica Ltd & Anor. (SCCA No. 112/2004 delivered 31st July 2007), that-*
>
> > *"Judicial authorities have shown that the striking out of an action should only be done in plain and obvious cases.""*

[76] He continued:

> *"14. It is my view that the approach of the learned trial judge as explained in paragraph 5 of his judgment was incorrect. At this stage, the genesis of the proceedings, the consideration under Rule 26.3 (1) (c) is whether or not the claim as pleaded satisfies the legal requirements for the prosecution of its alleged cause. A trial judge ought not to attempt to divine what will be the outcome of a properly filed claim. Apparently Sykes J. has not been sufficiently discriminating in recognizing the difference in approach in the application of Rules 26. 3 (1) (c) and 15.2."*

[77] Morrison JA (as he then was) indicated that he was in full agreement with the reasoning and conclusions of Cooke JA. Relevantly, he stated:

> *"28. This appeal challenges the correctness of Sykes J's order striking out the appellant's claim, pursuant to rule 26. 3 (1) (b) and (c) of the CPR on the bases that it discloses no reasonable grounds for bringing the claim and that it is an abuse of the process of the court.*
>
> *29. On the first issue (no reasonable grounds for bringing the claim), I am of the view, as Cooke JA has convincingly demonstrated, that Sykes J plainly fell into error at the outset of his consideration of whether the action be struck out under rule 26.3 (1) (c) when described the "real issue" between the parties on the striking out application as "whether Mr. Stewart has a real prospect of succeeding in his claim against Mr John Issa." This, the learned*

judge went on to state, was "another way of saying that there is no reasonable ground for bringing the claim..."

[78] The learned Judge of Appeal then said:

> *"30. By formulating the test in this way, what the judge in effect did, as the appellant submitted, was to conflate the test for summary judgment under rule 15.2 (a)...with the test on an application to strike out under rule 26.3 (1) (c)...*
>
> *31. An application to strike out under this rule raises what Gatley...describes as "a pleading point" in respect of which the authorities are clear that the court is required only to ascertain whether, as Dukharan JA put it in* ***Sebol Limited and others v Ken Tomlinson and others*** *(SCCA 115/2007, judgment delivered 12 December 2008), "the pleadings give rise to a cause of action..." (paragraph 18). The difference between the approach on an application to strike out and on a summary judgment application is neatly captured by Eddy J in* ***B v N and L*** *[2002] EWHC 1692 (QB), in the following passage (at paragraph. 21.22):*
>
>> *"21. I must focus on the claimant's pleaded case in the first instance. That is all I am permitted to do for the purposes of the strike-out application. If I rule against the plea. Then that would be the end of the matter...""*

[79] What is clear from all the authorities is that an order striking out a statement of case is a draconian order and it should only be granted in plain and obvious cases. In order to succeed in his application, Mr Simpson must satisfy the court that this is such a case. I will now look at the 'abuse of process' ground. After that, I will examine the 'no reasonable grounds for bringing the claim' ground.

Abuse of process

[80] It will be recalled that in his amended notice of application Mr Simpson relied, in part, on the following grounds:

(i) That the claimant's statement of case, claim form and particulars of claim have named Rohan Simpson as the defendant owing monies to the claimant; when in fact it was JSCL, a company owned by Keith Wilson

and Rohan Simpson, that operated the service station, not Rohan Simpson in his personal capacity.

(ii) That the company, JSCL, operated the service station and any claims being brought in relation to its operations should refer to the said company as the defendant.

(iii) That the claimant has filed a claim against the wrong party.

[81] In counsel's submissions, on behalf of Mr Simpson, at paragraph 60, it was stated that though the six year limitation period had not yet expired, the fact that the claim is being brought so close to the six year expiration date raises many issues as to the facts of the claims being made by Rubis, which according to counsel, has resulted in the abuse of the processes of the court and the misuse of the court's procedure.

[82] I am unable to agree with counsel's contention. The claim, having been filed prior to the expiration of the limitation period, cannot be impugned on the basis that it was filed shortly before the expiration of the limitation period and the veracity of the allegations made in a claim are, of course, not necessarily tied to the time when the claim was filed. It is the court's task to examine the pleadings, the grounds of the application and the evidence in support, to arrive at a conclusion as to whether the abuse of process contention has been made good. It bears repeating that striking out a claim must not be lightly done. Mr Simpson's application contends that he is not the proper defendant and, for the first time, in the submissions, arguments are made regarding the time of the claim's filing. Having regard to the extracts from the text cited above[8] and the case law[9] concerning abuse of process,

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[8] See also Volume 1 of the Civil Procedure White Book, 2012, pages 74 to 82
[9] See for example Attorney General of Jamaica v Arlene Martin [2017] JMCA Civ 24, paras 35 to 37

it has not been proven, to the court's satisfaction, that Rubis' statement of case constitutes an abuse of process.[10]

No reasonable grounds for bringing the claim

[83] Rubis' claim was set out earlier in this judgment. Having read the defence, I must admit that the grounds relied on by Mr Simpson were unexpected. Observably, no reference was made to JSCL in Mr Simpson's defence. Cheques were annexed to the defence which bear the company's name but there is no mention of the company in the body of the defence. In fact, at paragraph 14 of the defence, Mr Simpson indicates that *he* paid the outstanding debt in full, he then makes reference to the annexed cheques. To put it simply, the primary ground of Mr Simpson's application does not arise on the pleadings.

[84] Having examined the pleadings, the notice of application and the evidence, I am in substantial agreement with paragraphs 6 to 8 of the evidence presented on behalf of Rubis. The matters set out in Mr Simpson's affidavit are incongruent. At paragraph 6 of his affidavit he indicates that the company entered into a lease agreement with Mr Thomas Evans to operate the service station. A copy of the lease agreement is exhibited to the affidavit. A copy of the said lease agreement was annexed to the defence and it makes absolutely no reference to the company. It reads, in part:

> *"**THIS LEASE** is made the 10th day of December 2002 BETWEEN **MR. THOMAS EVANS** a Carpenter of Top Hill District in the parish of Saint Elizabeth (hereinafter called the "LESSOR") (which expression shall where the context so admits include his successors in the title and assigns) of THE ONE PAR and **MR. KEITH WILSON** a Businessman of Kendal Road, Mandeville Post Office in the parish of Manchester and **MR. ROHAN SIMPSON** a Businessman of 4 Woodclaire Avenue, Mandeville Post Office in the parish of Manchester (hereinafter called the 'LESSEES") (which expression*

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[10] See Sherrie Grant v Charles McLauglin and Collin Smith [2019] JMCA Civ 4, per Brooks JA para 42

shall where the context so admits include his successors in title and assigns) of THE OTHER PART."

[85] Further, the lease agreement does not reflect that any signatory was signing in a representative capacity, on behalf of a company. On the face of it, Mr Simpson and Mr Wilson entered into the agreement with Mr Evans in their personal capacity.

[86] In seeking to demonstrate that he is not the proper defendant Mr Simpson also exhibited a copy of JSCL's certificate of incorporation to his affidavit. The document indicates that the company was incorporated on July 20, 2005. Notably, the lease agreement was entered into on December 10, 2002, years prior to the company's incorporation. No explanation has been advanced for this discrepancy. There are no novation allegations in the affidavit, nor has it been said that there was an assignment of the lease agreement to the company.

[87] At paragraphs 7, 8 and 9 of his affidavit, Mr Simpson stated:

> *"7. That at no time did I operate the said "Junction Service Station" in a personal capacity as all monetary transactions, bills, payments and other were made in the name of the company "Junction Service Centre Limited...*
>
> *8. That Mr. Thomas Evan (sic) was all times the owner of the said "Junction Service Station" and the Lease Agreement was solely for the "Junction Service Centre Limited" company to operate the said "Junction Service Station."*
>
> *9. At no time did the "Junction Service Centre Limited" company or I, in any personal capacity, enter into any Lease Agreement or any other agreement with Rubis Energy Jamaica Limited, the Claimants herein, as all agreements as to the operation of the said "Junction Service Station" was made between Mr. Thomas Evans and the owners of the "Junction Service Centre Limited" company, myself and Mr. Keith Wilson."*

[88] Payments made in the name of the company, are not, without more, indicative of the fact that the action was brought against the wrong party and ought to be struck out.

[89] The statements made in the affidavit and the documents exhibited thereto strikingly reveal the need for reconciliation or further explanation and this was simply not provided. After reading the affidavit I was, respectfully, left with more questions than answers. Generally speaking, the documents simply do not support the contentions made in the affidavit.

[90] At paragraph 4 of Rubis' skeleton arguments, filed on April 27, 2021, it is stated that "...the evidence relied on by [Mr Simpson] in support of the Application to Strike out the Statement of Case, is incongruent...inconsistent with the pleadings...and inaccurate when contrasted against contemporaneous documents." I cannot disagree.

[91] Rubis has alleged that there was an agreement in place between the parties by virtue of an assignment of contract. It alleges breach of said contract and has claimed for sums which Mr Simpson allegedly owes. Given the contention, by Mr Simpson, that there was no agreement in place between the parties the court may have to contend with issues surrounding contractual interpretation (assignment, duration and renewal clauses) and/ or the formation of a contract. Mr Simpson also contended that, his arrangement to operate the service station having come to an end in June 2014, he was not responsible for certain debts.

[92] It is my view that some of the issues that arise on the pleadings are, roughly speaking:

(a) *whether there was a valid assignment of the licence agreement and/or whether there was any agreement in existence between the claimant and the defendant (whether by conduct or otherwise)*

(b) *whether the defendant is liable to pay the sums allegedly owed to the claimant for fuel supplied in 2014*

[93] It must also be acknowledged that there is a claim for restitution and/or damages for unjust enrichment.[11]

[94] I am required, on this application, to ascertain whether the pleadings give rise to a cause of action. I am not required to assess whether Rubis has a real prospect of succeeding on its claim.

[95] At first glance, there are serious legal and factual issues which require investigation. In the circumstances, it is my view that the pleadings give rise to a cause of action and this matter is not one for which striking out is appropriate.

[96] In passing, I will highlight a portion of the response to Rubis' supplemental submissions. In the response[12], Ms Robb cited rule 8.9 (3) of the CPR which provides that:

> *"Claimant's duty to set out case*
>
> *The claim form or the particulars of claim must identify or annex a copy of any document which the claimant considers is necessary to his or her case."*

[97] She then submitted that Rubis has not provided any factual evidence (documents etc.) which prove its claim against Mr Simpson.[13]

[98] Rule 8.9 (3) does state that the claim form or particulars of claim *must identify or annex* a copy of any document which the claimant considers is necessary to his or her case. Whilst I am mindful of how the rule is framed, I have observed that in its pleadings Rubis has quoted from a licence agreement; the agreement was not annexed to the particulars. The agreement was also noticeably absent from the affidavit. Furthermore, allegations have been made about sums which are owed,

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[11] See Samsoondar v Capital Insurance Company Ltd [2020] UKPC 33, paras 18-20
[12] Filed May 19, 2021
[13] See paragraph 18 of document entitled 'Defendant's response to claimant's supplemental submissions on defendant's application to strike out claim' filed May 19, 2021

but, again, no documents (for example, credit notes and invoices[14]) were annexed to the defence or exhibited to the affidavit.

[99] These observations are not, in the circumstances of this case, sufficient to rule that there are no reasonable grounds for bringing the claim but it is important to remind parties of the litigation culture which the Civil Procedure Rules embody. In light of Mr Simpson's allegation that he was not privy to the licence agreement, and the seriousness of a striking out application, it was hoped that the court, would by now, have had sight of this agreement.

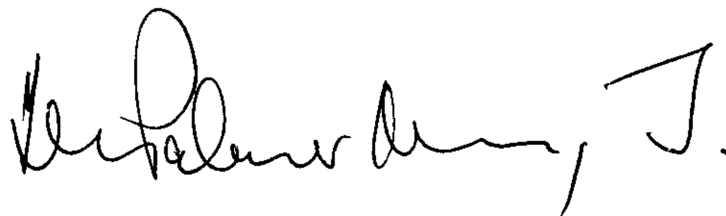
Conclusion

[100] In light of the foregoing it is ordered as follows:

(i) Notice of Application To strike out dated and filed February 5, 2021 is refused, that is Mr Simpson's application to strike out Rubis' statement of case is refused.

(ii) Case Management conference is set for October 19, 2021 at 10 a.m. for 1 hour.

(iii) Costs awarded to Claimant/Respondent to be taxed if not agreed.



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[14] Reference was made to credit notes and invoices in paragraphs10 and 11 of the particulars of claim