BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Appeal No. 13 of 2015

BETWEEN:

ERSKINE KELLMAN	**First Appellant**
IRVIN KELLMAN	**Second Appellant**
AND	
GRANVILLE BOVELL	**Respondent**

Before: The Hon. Sandra P. Mason, The Hon. Andrew D. Burgess and The Hon. Kaye C. Goodridge, Justices of Appeal

2016: December 8
2018: May 30

Mrs. Kristin C. A. Turton and Ms. Naomi J. E. Lynton for the Appellants
Mr. Deighton K. Rawlins and Ms. Faye Finisterre for the Respondent

DECISION

GOODRIDGE JA

Introduction

[1] This is an appeal against a decision of **Cornelius J** given on 26 October 2015, dismissing the appellants' application to strike out the respondent's statement of case and awarding costs to the respondent.

Background

[2] The appellants reside at Franklyn Road, Belleplaine, St. Andrew. They are the sons of Marion Kellman, deceased (the deceased).

[3] The respondent alleges that he shared a common law relationship with the deceased for nine years and six months prior to her death on 26 October 2012. During this time, the respondent resided with the deceased at her residence at Franklyn Road, Belleplaine Road, St. Andrew. There they raised pigs and other livestock together.

[4] Shortly after the deceased's death, the appellants directed the respondent to vacate his residence.

[5] Subsequently, the respondent returned to his former residence to feed and care for the pigs, but was met with a warning from the appellants not to trespass on the property.

[6] The respondent reported the incident to officers of the Royal Barbados Police Force. As a consequence, the officers questioned the appellants in relation to the matter and later informed the respondent that the appellants had sold the pigs.

The Claim in the High Court

[7] By way of a fixed date claim form and statement of claim filed on 23 May 2013, the respondent claimed against the appellants ".... the sum of

$30,400.00 ... in respect of the Claimant's livestocks (sic) converted by the Defendants to the Defendants' use and sold by the Defendants without the Claimant's permission, and half share of the value of pig pens which were built by the Claimant on land now in the possession of the Defendants." The particulars of the sum of $30,400.00 were: (i) the sum of $17,400.00 being the value of the respondent's livestock; and (ii) the sum of $13,000.00 being one half share of the value of the pig pens.

[8] The respondent also claimed interest at the rate of 8% per annum and costs.

[9] When the matter came on for the first hearing in the High Court on 23 July 2013, Mrs. Kristin Turton, counsel for the appellants, raised the issue that the proceedings appeared to have been commenced contrary to **Part 8** of **CPR**. Counsel was instructed by the judge to file the appropriate application.

The Application to Strike Out

[10] On 21 February 2014, the appellants filed an application seeking an order that the respondent's fixed date claim form and statement of claim be struck out with costs. The application was premised on two grounds: (i) the respondent incorrectly commenced proceedings for a cause of action grounded in tort by filing a fixed date claim form in Form 2 and not a claim form in Form 1; and (ii) the fixed date claim form and statement of claim failed to disclose reasonable grounds for bringing the claim against the appellants.

[11] The application was supported by an affidavit of the first appellant, who deposed that the property on which he resides at Franklyn Road, Belleplaine, St. Andrew is family land. The first appellant stated that the respondent had vacated the residence nine months prior to the death of the deceased.

[12] The first appellant also deposed that the pig pens to which the respondent laid claim are "mainly of concrete construction" and had been on the land his entire life. Further, he denied that the pigs were owned by the respondent and stated that the pigs were owned by him and the deceased.

[13] The application was also supported by the affidavit of Mrs. Turton, who deposed that the respondent commenced proceedings against the appellants by filing a fixed date claim form in Form 2 and statement of claim. Counsel also deposed that the respondent's case was premised on the cause of action of the tort of conversion, and as such, did not fall within the exceptions to the general rule that claims are to be commenced by a claim form in Form 1 and statement of claim.

[14] Mrs. Turton deposed further that title to animals is vested in the owner of the land, and moreover, that a claim for conversion does not lie in respect of chattels while they are affixed to land. Therefore, Mrs. Turton concluded that the respondent had not established title to the animals in support of his claim of conversion.

The Judge's Decision

[15] The application was heard by **Cornelius J** on 25 March 2014. On 26 October 2015, counsel for the appellants received a copy of the judge's written decision.

[16] At **para [9]**, **[11]** and **[12]** of her decision, the judge stated:

> "[9] ...The claimant's application is for a fixed sum of $30,400.00 representing the loss of livestock and a half share in the pig pens. The claimant however, has not provided any evidence to substantiate his claim; there is absolutely no documentation to show the nature and extent of his contribution.
>
> [11] It is prudent at this point to address the issue of conversion as raised by the defendant in their submissions. Does the claimant have a cause of action? The claimant argued that conversion exist (sic) only if a person had title at the time of the conversion either through actual possession or an immediate right to possess. He stated that he had an interest in the pigs. The defendant argues that for conversion to exist, title in the animals had to vest in the person who owns the land.
>
> [12] **Clarke** (sic) **& Linsell** (sic) **on Torts** stated that "animals and lands are subject to the law of conversion in the ordinary way." There is no requirement for a party to be a land owner and accordingly, and given that there is no evidence or basis to substantiate the defendant's arguments therein I reject the defendant's arguments on this point."

[17] **Cornelius J** disposed of the application by making the following orders:

> "[14] The defendant's application is dismissed.
>
> [15] The claimant shall have his costs to be assessed.

> [16] The matter shall continue as is started by Form 1 and accordingly the claimant has leave to amend and/or re-file his statement of claim."

The Application for Leave to Appeal

[18] On 17 November 2015, the appellants (then intended appellants) filed a notice of application seeking orders that: (i) liberty be granted to them to appeal the order of **Cornelius J**; (ii) the execution of the order made by **Cornelius J** be stayed until the determination of the appeal; and (iii) costs of the application be costs in the appeal.

[19] On 24 March 2016, after hearing the submissions of counsel for the parties, this Court (i) granted the appellants leave to appeal; (ii) stayed the proceedings pending the determination of the appeal; and (iii) awarded costs to the appellants to be agreed. If the costs were not agreed, written submissions were to be filed by 14 April 2016.

[20] The parties failed to agree on costs and on 14 April 2016, Mrs. Turton filed her written submissions on the issue. The respondent addressed this issue in the skeleton arguments filed on 13 June 2016. We shall deal with the costs issue later in this judgment.

The Appeal

[21] On 8 April 2016, the appellants filed their notice of appeal challenging the judge's decision. The grounds of appeal are as follows:

"(a) The learned Judge erred in law in dismissing the application of the Appellant despite finding that the Respondent commenced the Claim in a manner contrary to Part 8 of the Supreme Court (Civil Procedure) Rules, 2008 ("the CPR") to strike the Claim out.

(b) The learned Judge erred in law in finding that the Appellant did not satisfy the legal requirements to strike out in circumstances where:

i. The Respondent instituted proceedings contrary to the requirements of Part 8.

ii. There was undisputed evidence that the pig pens were affixed to the land.

iii. The learned Judge accepted that the Respondents provided no evidence to substantiate the nature and extent of his interest in the pigs or the pig pens.

iv. The learned Judge considered that the matter was quite early in the process.

(c) The learned Judge misdirected herself on the law as it relates to conversion being applicable to land and fixtures.

(d) The learned Judge erred in law in awarding costs to the Respondent upon the dismissal of the Appellant's (sic) application."

The Submissions of Counsel

The Appellants' Submissions

[22] Mrs. Turton filed written submissions and made oral submissions to the Court on behalf of the appellants.

[23] In relation to the first ground of appeal, in the written submissions Mrs. Turton contended that, pursuant to **CPR 26.3 (3) (c)**, the court "may" strike out a statement of case or part thereof where it appears to the court that the statement of case or the part to be struck out does not comply with **Part 8**.

[24] However, counsel contended that, notwithstanding the use of the word "may", the context of **CPR 26.3 (3) (c)** imposes an obligation on the court to strike out the statement of case, as distinct from a mere discretion to do so.

[25] In construing the provisions under **CPR 26.3 (3)**, Mrs. Turton asserted that under **CPR 26.3 (3) (a)** and **(b)**, if the statement of case is an abuse of process or it discloses no reasonable ground for bringing or defending the claim, the court is bound to strike out the statement of case.

[26] Counsel submitted that a similar approach is required under **CPR 26.3 (3)(c)**, adding that non-compliance with **Part 8** could have been subsumed under the court's general power to strike out a statement of case under **CPR 26.3 (1)**, but a distinction was made for two reasons. The first reason is to show the fundamental nature of the error. The second is to distinguish the failure to comply with **Part 8** from other errors of procedure or failures to comply with other provisions of the **CPR** which can be rectified by the court under **CPR 26.4**. Counsel submitted further that **CPR 26.3 (4**) contemplates a claimant

reinstituting proceedings on substantially the same facts, and therefore no prejudice would be caused to the claimant.

[27] However, during the hearing of the appeal, Mrs. Turton did not pursue this line of argument.

[28] Alternatively, Mrs. Turton argued that if this Court finds that a discretion to strike out a statement of case under **CPR 26.3** exists, a court is bound to exercise its discretion to strike out the statement of case or part thereof where the circumstances specified in **CPR 26.3 (3)** are satisfied, unless exceptional circumstances existed. Counsel noted that the respondent never filed an affidavit in response to the application.

[29] Counsel submitted that, in light of the foregoing, once the appellants established that the respondent failed to comply with the requirements of **Part 8**, the judge was bound to exercise her discretion in favour of striking out, unless the respondent established exceptional circumstances. She continued that the judge therefore fell into error when she refused to strike out the statement of case.

[30] As to ground 2, Mrs. Turton contended that the appellants asserted by affidavit evidence that the pig pens were concrete and affixed to the land. This evidence was never challenged by the respondent. She submitted that the judge based her decision to dismiss the appellants' application on an erroneous

statement of law, namely that "animals and lands are subject to the law of conversion in the ordinary way."

[31] However, counsel noted that the actual extract from *Clerk & Lindsell on Torts* stated that "animals and birds are subject to the law of conversion in the ordinary way." Moreover, at page 1132 the authors state unequivocally that "There can be no conversion of land". Counsel submitted that in the circumstances, the appellants did establish that the respondent's statement of case disclosed no reasonable ground for his claim in relation to the pig pens. Accordingly, the judge was obligated to strike out that part of the statement of case and erred when she did not do so.

[32] On ground 3, Mrs. Turton stated that the judge erred in law in finding that the appellants did not satisfy the requirements to strike out. Counsel contended that, contrary to the findings of the judge, the appellants did satisfy the requirements to strike out the respondent's statement of case and the judge's decision should be set aside for the following reasons:

> (1) **CPR** confer a specific power to strike out a statement of case which fails to comply with the requirements of **Part 8**. The respondent clearly commenced his claim in a manner contrary to **Part 8**. Therefore, the appellants satisfied the only requirement which is set out in **CPR 26.3 (3) (c)** to empower a court to strike out;
>
> (2) There was undisputed evidence that the pig pens were affixed to the land and the respondent premised part of his claim on the "conversion" of the pig pens. The judge relied

on an erroneous statement of law that land (including fixtures) is subject to conversion;

(3) The judge did not apply sufficient weight to her finding that the respondent did not provide any evidence to substantiate his claim; and

(4) The judge considered that the matter was "quite early in the process" and this was an irrelevant consideration in determining whether there were reasonable grounds for bringing the claim, especially since the respondent was obligated to include a statement of all facts on which he intended to rely and annex all documents necessary to his case pursuant to **CPR 8.5**.

[33] On the final ground, Mrs. Turton submitted that, in awarding costs to the respondent, the judge failed to balance all the factors fairly. These factors, counsel submitted, were:

(i) the respondent's "egregious" error in failing to comply with **Part 8**;

(ii) the appellants brought that error to the attention of the court and the respondent at the earliest possible time;

(iii) the respondent had sufficient time and opportunity to address the deficiencies between when they were orally raised at the first hearing on 23 July 2013 and when the appellants filed their application on 21 February 2014;

(iv) the respondent never filed an affidavit in response to counter any of the assertions made by the appellants; and

(v) the respondent always disputed the grounds of the application and never applied to the court to amend the statement of case.

The Respondent's Submissions

[34] Mr. Deighton Rawlins and Ms. Faye Finisterre made written and oral submissions to the Court on behalf of the respondent.

[35] On ground 1, counsel acknowledged that the respondent commenced his claim by the incorrect form, thereby failing to comply with the requirements of **Part 8**. However, Mr. Rawlins contended that (i) the mere use of the wrong claim form to initiate proceedings cannot be fatal; (ii) the use of "may" in **CPR 26.3 (3) (c)** merely grants the court the power to strike out the case as opposed to imposing an inescapable duty to do so; and (iii) the overriding objective of **CPR** favours a refusal to strike out in the circumstances.

[36] Relying on the English Court of Appeal decision of **McDonald's Corp and Anr v Steel and Anr [1995] 3 All ER 615**, counsel submitted that the strike out remedy is reserved for the worst kind of pleadings, those which are incapable of being corrected in any way, shape or form.

[37] Mr. Rawlins contended that **CPR** do not contemplate that the strike out remedy is an appropriate response to procedural errors; **CPR** reserved to the court an alternative power of rectification. This was exercised by the judge in the present case as she did in the case of **Best v Cornerstone Development Inc., HC Suit No. 338 of 2012**.

[38] Counsel also contended that to strike out would further retard the ultimate disposal of the case as the respondent would have to recommence proceedings. This would be a drain on the court's limited resources and contravene the proportionality objective in **CPR 1.1**. He argued that the respondent's error could be amended with relative ease, given the early stage of the adjudication of the substantive issues and the fact that the appellants have filed no pleadings in the matter.

[39] As to ground 2, Mr. Rawlins conceded that the judge erroneously stated that "animals and lands are subject to the law of conversion in the ordinary way." However, he argued that it could not have been the judge's intention to misquote the extract from *Clerk & Lindsell on Torts* and that the appellants ought to have brought the error to the judge's attention under **CPR 42.10 (1)**. He submitted further, that despite the error made by the judge, it was likely that the judge would not have struck out the statement of case, but would have allowed for it to be amended accordingly.

[40] On ground 3, counsel submitted that the judge was correct in holding that the appellants had not satisfied the requirements to strike out. Relying on *Atkins Court Forms Volume 13 (3) 276* and **Swain v Hillman [2001] 1 All ER 91**, Mr. Rawlins contended that, given the facts that were presented and the clear intention of the respondent to be compensated for the value of the pig pens, it

could not be said that the judge had before her a claim that had no prospect of success or a fanciful claim.

[41] Mr. Rawlins admitted that the claim phrased as conversion of land was seeking the wrong remedy. However, he submitted that on the facts it was open to the respondent to seek restitution for unjust enrichment or make a claim for mesne profits for the use and occupation of the pens by the appellants and amending the claim form would not involve a substantial departure from the pleadings.

[42] On ground 4, Mr. Rawlins highlighted the general principle under **CPR 64.6** that the court will order the unsuccessful party to pay the costs of the successful party. He submitted that there is a prima facie obligation on the appellants to pay the costs following the dismissal of their application.

[43] Mr. Rawlins refuted the suggestion that the appellants brought the error in respect of the form to the attention of the respondent at the earliest possible time. He noted that no correspondence was received from the appellants to draw the respondent's attention to this defect. He submitted that there were several alternatives available to the appellants prior to making their application to strike out, including filing an acknowledgment of service or defence to the claim so that the respondent could have been alerted to the

procedural error, or applying to the court to have the error rectified under **CPR 42.10 (1)**.

The Appellate Function

[44] In this appeal, the crux of the appellants' argument is that **Cornelius J** erred in exercising her discretion not to strike out the respondent's statement of case. We therefore must determine whether we ought to interfere with the exercise of that discretion.

[45] We have reminded ourselves of the jurisdiction of this Court in matters of this nature, and have borne in mind the various authorities on the appellate function in this regard. We do not consider it necessary to set out these authorities in detail, but will keep foremost in our minds the oft quoted statement of Lord Woolf in the English Court of Appeal decision of **Phonographic Performance Ltd. v AEI Rediffusion Music Ltd. [1999] 1 WLR 1507 (Phonographic Performance)** in respect of the appellate court interfering with the discretion of a judge:

> "Before the court can interfere it must be shown that the judge has either erred in principle in his approach or has left out of account or has taken into account some feature that he should, or should not, have considered, or that his decision was wholly wrong because the court is forced to the conclusion that he has not balanced the various factors in the scale."

This principle has been applied by this Court on numerous occasions, in for example: **Locke v Bellington Limited (Civil Appeals Nos. 31 and 34 of**

2001); Cellate Caribbean Ltd. v Harlequin Property (SVG) Limited (Civil Appeal No. 3 of 2011); Ansa McCal (Barbados) Ltd. v Banks Holdings Limited and SLU Beverages (Civil Appeal No. 21 of 2015); American Life Insurance Company v Ainsley Corbin (Civil Appeal No. 34 of 2014).

[46] Therefore, if we are to interfere with the decision of **Cornelius J**, we must find that: (i) she erred in principle in her approach in dismissing the appellants' application to strike out; or (ii) took into account irrelevant considerations; or (iii) failed to take into account relevant considerations in arriving at her decision; or (iv) her decision was wholly wrong.

The Issues

[47] In our opinion, the following issues arise for our determination in this appeal.

[48] The first issue is whether the judge erred in dismissing the appellants' application to strike out the respondent's statement of case despite finding that it did not comply with the requirements of **Part 8**.

[49] The second issue is whether the judge fell into error when she refused to strike out the statement of case or part thereof on the basis that it disclosed no reasonable ground for bringing the claim.

[50] The third issue is whether the judge exercised her discretion erroneously when she awarded costs to the respondent.

[51] We will now examine those issues.

Discussion

Issue No. 1

Whether the judge erred in dismissing the appellants' application to strike out the respondent's statement of case, despite finding that it did not comply with the requirements of Part 8

[52] We begin our consideration of this issue by examining **CPR 26.3**. This rule outlines the court's powers to strike out a statement of case or part of a statement of case. In particular, **CPR 26.3 (3) (c)** provides:

> "(3) The court may also, in addition to all other powers under these Rules, strike out, at a case management conference or otherwise upon an application on notice, 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 is prolix or does not comply with the requirements of Part 8 or 10."

[53] The appellants contend that the respondent's filing of his claim in Form 2 instead of Form 1 to commence proceedings is a failure which amounts to a breach of the requirements of **Part 8** and should result in a striking out of the statement of case.

[54] **CPR 8.1** provides that a proceeding is started by filing in the Registry the original and one copy for seal of, *inter alia,* a claim form. **CPR 8.1 (4)** and **(5)** provide two types of forms by which a proceeding can be commenced, namely, Form 1 and Form 2. A claim form must be in Form 1, with or without

variation except in the circumstances set out in **sub-rule (5**). According to **sub-rule (5)**, a Form 2 (fixed date claim form) must be used:

> "(a) in proceedings for possession of land;
>
> (b) in claims arising out of hire-purchase or credit sale agreements;
>
> (c) whenever its use is required by a rule or practice direction; and
>
> (d) where by any enactment proceedings are required to be commenced by originating summons or motion."

[55] In this case, although proceedings have been commenced, it is agreed by both sides that the method of commencement was irregular. The respondent's case was grounded in the tort of conversion, and therefore was not one of the circumstances which required that a Form 2 be used under **CPR 8.1 (5)**.

[56] There is no specific consequence prescribed in **Part 8** for a litigant's failure to commence a proceeding in the correct form. However, under **CPR 26.3 (3) (c)**, a sanction may be imposed by the court in the form of striking out the statement of case or part thereof.

[57] It must be stressed that the court's power to strike out under **CPR 26.3** is discretionary by virtue of the use of the word "may": see **section 37** of the **Interpretation Act, Cap. 1** which provides that in any enactment passed or made after 16 June 1966, the expression "shall" shall be construed as imperative and the expression "may" as permissive and empowering.

Therefore, while the court has the power to strike out a statement of case under **CPR 26.3**, it is not imperative that the court so acts.

[58] Consequently, a litigant's failure to comply with the requirement of commencing a proceeding in the correct form, or failure to comply with any other requirement of **Part 8**, triggers a possible exercise of a judge's discretion to strike out a statement of case.

[59] What then are the considerations which should guide a court when faced with an application pursuant to **CPR 26.3 (3) (c)** to strike out a statement of case or part of a statement of case which does not comply with **Part 8**?

[60] Prior to the introduction of **CPR**, the Caribbean Court of Justice (CCJ) dealt with the issue of the striking out discretion in the case of **Barbados Rediffusion Services Limited v Asha Mirchandani, Ram Mirchandani and McDonald Farms Ltd., CCJ Appeal No. CV 1 of 2005 (Barbados Rediffusion)**. At **paras [44]** to **[47]** of the decision, the CCJ set out the factors which a court should take into consideration in the exercise of the strike out discretion. As we have stated in other decisions of this Court, these factors are also applicable to applications made under **CPR**.

[61] A judge dealing with an application to strike out must always be mindful of the fact that to strike out a party's case is an extreme step which is not to be taken lightly. Broadly speaking, a strike out order should be made in two

circumstances: (i) when it is necessary in order to achieve fairness; and (ii) when it is necessary to maintain respect for the authority of the court's order. Fairness means fairness not only to the non-offending party but also to other litigants who are competing for the finite resources of the court.

[63] According to the CCJ, the correct approach required is a balancing exercise, taking into account all the relevant facts and circumstances of the case. In carrying out this exercise, a court must seek to give effect to the overriding objective, that is, to deal with cases justly: **CPR 1.1 (1)**.

[63] In her decision, while the judge made no mention of the guiding principles set out in **Barbados Rediffusion**, she stated at **para [10]**: "The Court had to take into account all the circumstances of the matter in doing justice to the overriding objective". In our opinion, this was a relevant consideration for the court.

[64] The judge notwithstanding the foregoing, stated at **para [8]**:

> "[8] The claimant's application is based on the provisions of Part 26.3 of the **Supreme Court (Civil Procedure) Rules 2008** (CPR) under which the court can strike out a statement of claim for failure to observe the rules. Part 26.4 of the Rules gives the court general power to rectify matters where there has been a procedural error."

[65] It is important to note that, while under **CPR 26.4** a court has a general power to rectify matters where there has been a procedural error, **CPR 26.4 (1)** provides:

> "(1) This rule applies in relation to a matter in respect of which an order has not been sought, or if sought, has not been made under rule 26.3 striking out a statement of case or part of a statement of case."

[66] In light of the above, and the fact that the appellants' application had been made under **CPR 26.3**, the judge could not have resorted to **CPR 26.4** in order to rectify the procedural error made by the respondent by use of the incorrect claim form. This was the conclusion reached by **Richards J** in **Consolidated Finance Co. Limited v Dawe HC Suit No. 2065 of 2012** where she stated at **para [39]**:

> "[39] Rule 26.4 only applies in circumstances where no order was sought or granted under Rule 26.3 for the striking out of a statement of case or part of a statement of case. (See Rule 26.4(1)). In other words, Rule 26.4 is not appropriate where the court has not entertained or granted an application for a striking out sanction under Rule 26.3.."

[67] It is noted that our provision differs somewhat from the corresponding provision of rule 26.9 of the Eastern Caribbean Supreme Court (Civil Procedure) Rules, 2000 and rule 26.8 of the Civil Proceedings Rules, 1998 of the Republic of Trinidad and Tobago.

[68] The above having been said, it must be stressed that the court's power to strike out under **CPR 26.3** is part of the court's general powers of management under **Part 26**. **CPR 26.1 (2) (u)** provides that the court may take any other step, give any other direction or make any other order for the purpose of managing

the case and furthering the overriding objective, which is to deal with cases justly. Thus the court is empowered to make a number of orders before exercising its discretion to strike out under **CPR 26.3 (3)**.

[69] This was the approach taken by the Privy Council in **Real Time Systems Limited v Renraw Investments Limited [2014] UKPC 6** where at **para [17]** Lord Mance expressed the Board's opinion in the following terms:

> "[17] There is no reason why the Court, faced with an application to strike out, should not conclude that the justice of the particular case militates against this nuclear option, and that the appropriate course is to order the claimants to supply further details, or to serve an amended statement of case including such details, within a further specified period. Having regard to rule 26.6, the Court would quite probably feel it appropriate to specify the consequences (which might include striking out) if the details or amendment were not duly forthcoming within that period."

[70] In our opinion, the court's power to strike out is in addition to all other powers under **CPR** and is a power which should be exercised sparingly.

[71] In the English Court of Appeal decision of **Hannigan v Hannigan and others [2000] ER(D) 693**, an application was made by a defendant for an order pursuant to CPR 3.4 (2) (c) of the UK Rules to strike out the statement of case of the claimant because there had been a failure to comply with the rules and practice directions. The defendant complained, *inter alia*, that (i) the claim was issued on the wrong form; (ii) the statement of case was not verified

by a certificate of truth; (iii) the Royal Coat of Arms was not included; (iv) the first defendant was incorrectly named; and (v) there was a failure to serve on the defendants an acknowledgment of service form.

[72] The district judge allowed the application and struck out the claim. The claimant appealed. In delivering the judgment of the court, Brooke LJ stated that the manner in which the judge exercised his discretion was seriously flawed, he had concentrated exclusively on all the technical mistakes which had been made and the sanction he imposed was a quite disproportionate response to the procedural irregularities he was considering.

[73] Brooke LJ went on to say at **para [36]**:

> "..... Moreover the judge was quite correct when he said that the Civil Procedure Rules were drawn to ensure that civil litigation was brought up to a higher degree of efficiency. But one must not lose sight of the fact that the overriding objective of the new procedural code is to enable the court to deal with cases justly, and this means the achievement of justice as between the litigants whose dispute it is the court's duty to resolve. In taking into account the interests of the administration of justice, the factor which appears to me to be of paramount importance in this case is that the defendants and their solicitors knew exactly what was being claimed and why it was being claimed when the quirky petition was served on them. The interest of the administration of justice would have been much better served if the defendants' solicitors had simply pointed out all the mistakes that had been made in these very early days of the new rules and Mrs. Hannigan's solicitor had corrected them all quickly and agreed to indemnify both parties for all the expense unnecessarily caused by his incompetence. CPR 1.3 provides that the parties are required to help the court to further the overriding objective, and the overriding objective is not furthered by and squabbles about

> technicalities such as have disfigured this litigation and eaten into the quite slender resources available to the parties."

[74] Having regard to the fact that the court ought not to defeat the overriding objective of substantive justice by focusing solely on technicalities, and taking into account all the circumstances, **Cornelius J** was correct to decline to exercise her discretion to strike out the respondent's statement of case because of his failure to comply with the requirements of **Part 8**, despite her reference to **CPR 26.4**. To strike out would have been a disproportionate response to that procedural error.

[75] Further, there was no prejudice caused to the appellants by the use of the wrong claim form, and the respondent's case was sufficiently detailed for the appellants to meet it.

[76] We have therefore concluded that **Cornelius J** properly directed the matter to continue as if started by Form 1, so that the correct procedure could be followed.

Issue No. 2

Whether the judge fell into error when she refused to strike out the respondent's statement of case or part thereof on the basis that the statement of case disclosed no reasonable ground for bringing a claim

[77] **CPR 26.3 (3) (b)** provides that the court may also, in addition to all other powers under the Rules, strike out, at case management conference or

otherwise upon an application on notice, a statement of case or part of a statement of case if it appears to the court that the statement of case or part to be struck out discloses no reasonable ground for bringing a claim.

[78] In the case of **Belize Telemedia Limited and Boyce v Magistrate Usher and Attorney General (2008) 75 WIR 138**, the Supreme Court of Belize explained the logic behind the provision to strike out for failure to disclose reasonable grounds. There, Conteh CJ stated at **paras [19]** to **[21]**:

> "[19] The provision of the rules in Part 26.3 (1)(c) which enables the Court to strike out a claim because it discloses no reasonable grounds for bringing or defending the claim is undoubtedly a salutary weapon in the court's armoury, particularly at the case management stage. It is intended to save the time and resources of both the court itself and the parties: why devote the panoply of the court's time and resources on a claim such as to go through case management, pre-trial review and scheduling a trial with all the time and expense that this might entail, only to discover at the end of the line that there was no reasonable ground for bringing or defending a claim that should not have been brought or resisted in the first place? This provision in the rules addresses two situations:- (i) When the content of a statement of case is defective in that even if every factual allegation in it were proved, the party whose statement of case it is cannot succeed; or (ii) Where the statement of case, no matter how complete and apparently correct it may be, will fail as a matter of law. (See The Civil Court Practice (2008), (the Green Book), CPR 3.4[4] at p.76, and The White Book 2005: Civil Procedure at paras 3.4.1 and 3.4.2."
>
> [20] It is important to bear in mind always in considering and exercising the power to strike out, the court should have regard to the overriding objective of the rules and its

> power of case management. It is therefore necessary to focus on the intrinsic justice of the case from both sides: why put the defendant through the travail of full blown trial when at the end, because of some inherent defect in the claim, it is bound to fail, or why should a claimant be cut short without the benefit of trial if he has a viable case?
>
> [21] These are always important factors that perforce must attend any consideration in exercising the discretion to strike out or not strike out a claim - Walsh v Misseldine (2000) CPLR 201 [2000] All ER (D) 261, CA; cited in the Caribbean Civil Court Practice (2008) at Note 23.35; and generally, the White Book 2005, particularly at pp.88 to 92 at para. 3.4.1 and 3.4.2."

[79] Counsel for the appellants argued that the claim in relation to the pig pens discloses no reasonable ground for bringing the claim, because the pig pens are affixed to the land, and as such the tortious remedy of conversion on which the respondent grounds his claim is inapplicable. The respondent did not deny the factual assertion by way of an affidavit in response, and moreover, the respondent in his claim form stated that the pig pens were built on the land in the possession of the appellants. Counsel for the respondent admitted in his submissions that the claim was brought on the wrong cause of action.

[80] In *Clerk & Lindsell on Torts (Twentieth Edition, Sweet & Maxwell 2010)*, the authors state at page 1130 at para [17-34] that "At common law, conversion lies in respect of dealings with any corporeal property (including papers and title-deeds)."

[81] The authors continued to state at page 1132 at para [17-39] that:

> "There can be no conversion of land. But if a portion of realty is severed and taken away, the owner, instead of suing in respect of the injury to the realty, may elect to treat the severed portion as his chattel and sue for its conversion... However there must be severance; while chattels remain fixed to the realty no action in conversion lies, even if (as in the case of tenant's fixtures) they are chattels which the claimant has a right to take away."

[82] In this case, although the claim of conversion is known to law, there were no reasonable grounds for bringing the claim. A claimant must state in the particulars of claim facts that establish a cause of action. Therefore, if the respondent is required to prove the elements of the tort of conversion, based on the facts he relies upon, he would inevitably fail to succeed in his claim. This is because the ground on which the claim was brought would "fail as a matter of law."

[83] On the other hand, if the appellants are required to disprove the existence of the elements of the tort of conversion, this would amount to unfairness to the appellants, who would have to defend their case to the end, when they have been successful in their defence from the beginning. To allow this would result in unnecessary delay and a wastage of the court's limited resources.

[84] According to *A Practical Approach to Civil Procedure, Stuart Sime, Barrister,* "A statement of case ought also to be struck out if the facts set out do not constitute the cause of action or defence alleged, or if the relief would not be ordered by the court."

[85] Having regard to the above, we are of the opinion that the judge acted on a misapprehension of the law and as a result, she fell into error. This was not an error which could have easily been corrected under **CPR 42.10 (1)** as being "any accidental slip or omission" as was argued by the respondent.

[86] We have therefore determined that this part of the respondent's statement of case discloses no reasonable ground for bringing the claim and it ought to have been struck out.

[87] The respondent's further claim is that the pigs were owned by him and were allegedly converted by the appellants. It is to be noted that the respondent provided no evidence to substantiate this claim.

[88] In his affidavit, the first appellant contradicted the respondent's claim as to ownership of the pigs. It is apparent that there is a dispute between the parties as to the ownership of the pigs. As was stated by this Court in **Paradise Beach Limited, Paradise 88 Limited v Edghill and Patel, Civil Appeal No. 10 of 2011**: "It is not appropriate to strike out a claim where the central issues are in dispute: King v Telegraph Group Ltd [2003] EWHC 1312(QB)."

[90] Accordingly, we find that this part of the statement of case discloses a reasonable ground for bringing the claim. We therefore hold that the respondent's case should not be struck out in its entirety. The respondent should be permitted to amend, as was ordered by the judge.

Issue No. 3

Whether the judge erred in awarding costs to the respondent

[91] According to **CPR 64.6 (1)**, in exercising its discretion under **section 85** of the **Supreme Court of Judicature Act, Cap. 117A**, the general rule is that the court will order the unsuccessful party to pay the costs of the successful party. **CPR 64.6 (2)** empowers the court to make no order as to costs or, in an exceptional case, order a successful party to pay all or part of the costs of an unsuccessful party.

[92] In her oral submissions to the Court, Mrs. Turton stated that the appellants were served two days before the hearing. This assertion was not disputed by the respondent. Counsel indicated that the appellants had consulted her the afternoon before the hearing and she was then retained to represent them. Counsel submitted that the only opportunity to raise her concerns about the claim form was at court on the scheduled date.

[93] On the first date of hearing, Mrs. Turton made an oral application to strike out the claim on the basis that it was commenced contrary to the provisions of **Part 8** and was directed by the court to make an application in writing. The respondent therefore had notice of the procedural error being raised by the appellants. The application was filed on 21 February 2014, and heard approximately one month later.

[94] Despite having notice of the appellants' position, counsel for the respondent did not avail himself of the opportunity to correct his procedural error prior to the hearing of the application, and did dispute the grounds of the application. We therefore do not agree with the suggestion that the appellants had several alternatives open to them before making the application to strike out, which they did not explore, and consequently they acted unreasonably.

[95] The conduct of the respondent through his counsel is a relevant consideration when making an award of costs: **CPR 64.6 (5) (a)**. In addition, part of the respondent's statement of case disclosed no reasonable ground for bringing the claim.

[96] In our view, these were factors which the judge ought to have taken into account in determining what order should have been made as to costs. While it is true that the application was dismissed, the court was compelled to grant the respondent "leave to amend and/or re-file his statement of claim". The circumstances in this case justified a departure from the general rule that a successful party must pay the costs of the unsuccessful party.

[97] We have therefore determined that we should set aside that part of the judge's decision on costs.

[98] This was an interlocutory application. We have considered all the circumstances and factors as required by **CPR 64.6 (4)** and **(5)** and have

concluded that the appellants ought to recover the costs of the application which we have assessed at $1,200.00.

The Costs of the Application for Leave

[99] As stated earlier in this judgment, Mrs. Turton filed written submissions on costs with a bill of costs attached in which she claimed the sum of $5,980.00 as professional fees and disbursements of $375.00. Counsel submitted that since the application for leave was procedural in nature, costs are to be determined in accordance with **CPR 65.11**.

[100] Counsel submitted that the overall claim in the principal application is $30,400.00 and that the assessed costs would be $912.00. She argued that confining the appellants to this sum would not be fair and reasonable, having regard to the volume of work done and the time spent to make the application and prepare and attend two hearings. Counsel contended that the circumstances were such that a higher award is justified.

[101] This was an application for leave. **CPR 62.2** only deals with the procedure to be followed when such an application is made. But this was a procedural application and so **CPR 65.11** is the applicable rule. **CPR 65.11 (4)**, **(5)**, **(6)** and **(7)** govern the assessment of costs in procedural applications. Generally speaking, the costs allowed under **CPR 65.11 (7)** may not exceed one tenth of the amount of the prescribed costs appropriate to the principal application.

[102] However, we do not consider that the amount of $912.00 would be a fair and reasonable award for the work done by counsel. Having regard to all the circumstances, we have determined that the appellants should be awarded costs in the amount of $2,500.00.

Disposal

[103] For all the foregoing reasons, the appeal is allowed in part. It is therefore ordered as follows:

1. The decision of **Cornelius J** that the appellants pay the respondent's costs of the application filed on 21 February 2014 is set aside.

2. The respondent shall pay the appellants' costs of the said application in the amount of $1,200.00 on or before 30 June 2018.

3. The respondent shall pay the appellants' costs of the application for leave in the amount of $2,500.00 on or before 31 July 2018.

4. The appellants and the respondent shall each bear their costs of this appeal.

Justice of Appeal

Justice of Appeal **Justice of Appeal**