

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION

2012/CLE/GEN/FP/00020

BETWEEN

CARIBBEAN MINING GROUP LTD

Plaintiff

AND

JOSEPH O'BRIEN

1st Defendant

AND

CITY SERVICES LIMITED

2nd Defendant

BEFORE The Hon. Mrs. Justice Estelle Gray-Evans

APPEARANCES: Mrs A. Rengin Johnson along with
Mr Osman Johnson for plaintiff

Mr Frederick R.M. Smith, Q.C. along with
Mr Roderick D. Malone for defendants

HEARING DATES: 2012: 3 December
2013: 31 May

RULING

Gray Evans J.

1. This is a two-fold application by summons filed on 20 April 2012 on behalf of the defendants firstly, to strike out portions of the plaintiff's reply on the ground that, contrary to the Rules of the Supreme Court ("RSC") Order 18 rule 10(1), it contains allegations of fact that are inconsistent with the plaintiff's statement of claim; and secondly, that, pursuant to RSC Order 18 rule 19(1), the plaintiff's statement of claim be struck out on the grounds that it is scandalous, frivolous, or vexatious and/or it may prejudice, embarrass or delay the fair trial of the action and/or it is otherwise an abuse of the process of the court. The applications are also made pursuant to the inherent jurisdiction of the court.

2. The plaintiff commenced this action on 16 January 2012 by a specially indorsed writ of summons in which the plaintiff stated its claim as follows:

1. The plaintiff is and was at all material times a company duly incorporated and registered in the Commonwealth of the Bahamas and conducting business in the field of Limestone rock mining and the processing and sale of cement, ready mix concrete and "aggregate fill" products.
2. The 1st defendant is a resident of the Township of Freeport, in the island of Grand Bahama, one of the islands of the Commonwealth of the Bahamas and is the President and a member of the 2nd defendant.
3. The 2nd defendant is and was at all material times a company duly incorporated and registered in the Commonwealth of the Bahamas and conducting business in various fields including civil contracting and the field of Limestone rock mining and the processing and sale of cement, ready mix concrete and "aggregate fill" products.
4. On or about May 2011 the defendants purchased from the plaintiff, "aggregate fill material" and agreed to pay for the product as specified in the invoices numbered 5010, 5011, 5012, 5013, 5014, 5015, 5016 and 5042.
5. The plaintiff supplied the "aggregate fill material" to the defendants and presented invoices numbered 5010, 5011, 5012, 5013, 5014, 5015, 5016 and 5042 for payment of a sum totaling thirty two thousand seven hundred and eighty one dollars (\$32,781.00) for the supply of four thousand six hundred and fifty one (4,651) tons of "aggregate fill material".
6. Contrary to the Agreement between the parties, the defendants failed to pay the outstanding invoices dated 20th May 2011 and numbered 5010, 5011, 5012, 5013, 5014, 5015, 5016 and 5042 to the plaintiff and despite repeated requests for payment the defendants owe an outstanding balance to the plaintiff of thirty two thousand seven hundred and eighty one dollars (\$32,781.00) for the supply of four thousand six hundred and fifty one (4,651) tons of aggregate fill material.
7. On or about November 2011, the plaintiff's Attorney contacted and began to negotiate with the 1st defendant acting on behalf of the 2nd defendant in respect to the repayment of the outstanding invoices and the 1st defendant acting on behalf of the 2nd defendant agreed to pay the sum of twenty four thousand six hundred and six dollars (\$24,606.00), representing part payment of an overall balance owed of thirty-two thousand seven hundred and eighty one dollars (\$32,781.00), as the total price for these products supplied thereof. As a result of this Agreement, the plaintiff's Attorney prepared a letter of final settlement between the parties for execution by both parties. The 1st defendant acting on behalf of the 2nd defendant agreed to attend a meeting in Chambers with Counsel for the plaintiff which took place on the 2nd of

December 2011, in order to sign the final settlement and present a cheque for the agreed amount in the sum of twenty four thousand six hundred and six dollars (\$24,606.00), representing part payment of an overall balance owed a thirty-two thousand seven hundred and eighty one dollars (\$32,781.00), as the total price for these products supplied thereof.

8. The 1st defendant acting on behalf of the 2nd defendant was presented with the final settlement which had been executed by the plaintiff and in the presence of two Attorneys for the plaintiff. After the 1st defendant read the letter of settlement and cross checked the numbered invoices to confirm the amounts corresponded correctly to the contents of this settlement in writing, he then executed on behalf of the defendants this settlement in the presence of two Attorneys representing the plaintiff. The 1st defendant acting on behalf of the 2nd defendant and by way of his execution thereby agreed to remit payment to the plaintiff in the sum of twenty four thousand six hundred and six dollars (\$24,606.00), representing part payment of an overall balance owed of thirty-two thousand seven hundred and eighty one dollars (\$32,781.00), as the total price for these products supplied thereof.
9. Contrary to the verbal and written agreement, the 1st defendant acting on behalf of the 2nd defendant and for reasons best known to him completed a cheque at the meeting in the sum of eight thousand one hundred and seventy-five dollars (\$8,175.00) and stated that he we [sic] would not pay any more.
10. The 1st defendant by his position as President and member of the 2nd defendant, has defaulted on the said Agreement, and has not provided the plaintiff with any payment for services rendered, products supplied or indeed any indication as to when this payment will be remitted, in full and lawful accordance with the terms of the Agreement.
11. Despite repeated requests, made by the plaintiff to the 1st and 2nd defendants and despite the existence of the signed agreement referred to above, and executed by the 1st defendant on behalf of the 2nd defendant, the 1st defendant acting on behalf of the 2nd defendant had not complied with the Agreement aforesaid and has refused to remit the sum of \$26,606.00 [sic] representing part payment of the overall sum of \$32,781.00 which was the agreed price for services rendered and products supplied.
12. The acts of the 1st defendant acting on behalf of the 2nd defendant, her [sic] servants or agents in carrying out such actions constitutes a breach of contract and has resulted in loss and damages being incurred by the plaintiff.

The 1st and 2nd Defendants are in breach of the Contract between the Parties

PARTICULARS OF BREACH OF CONTRACT

1. Failure to abide by the terms and conditions of the initial purchase agreement for aggregate fill products;
2. Failure to deliver a payment of the sum agreed to the plaintiff in accordance with the written and executed Agreement for final settlement between the parties of the outstanding debt for services rendered and products supplied.

By reason of the matters aforesaid the plaintiff has suffered damages and been put to Loss and Expense.

PARTICULARS OF LOSS AND EXPENSE

- 1) Unpaid Invoices for services rendered and products supplied by the plaintiff to 1st and 2nd defendant;
- 2) Failure to comply with the written and executed agreement for final settlement between the parties.

And the plaintiff claims:

1. Payment of the outstanding sum in the amount of \$32,781.00 representing the initial debt under the invoices
2. Damages
3. Costs
4. Interest pursuant to the Civil Procedure (Award of Interest) Act 1992.

13. In their defence, and counterclaim of the 2nd defendant filed 13 February 2012 the defendants, stateas follows:

1. Paragraph 1 of the Statement of Claim is admitted.
2. Paragraph 2 of the Statement of Claim is admitted.
3. Paragraph 3 of the Statement of Claim is admitted.

The Aggregates Agreement and the Rental Agreement

4. Paragraphs 4 and 5 of the Statement of Claim are denied. The defendants aver as follows:
 - a) In or about May, 2009, the 2nd defendant ("CSL") agreed to purchase from the plaintiff and the plaintiff agreed to supply to CSL quarry aggregates for several of CSL's construction projects.
 - b) The 1st defendant ("Mr. O'Brien") was not a party to that agreement ("the Aggregates Agreement") and this Defence is made without prejudice to Mr. O'Brien's right to seek an order striking out the plaintiff's Statement of Claim on the basis that it discloses no reasonable cause of action against Mr. O'Brien and/or that it is an abuse of process of the Court. As stated in paragraph 2 of the Statement of Claim, Mr. O'Brien is merely an officer and a shareholder in CSL and any involvement he may have had in connection with the Aggregates Agreement was in his capacity as an officer of CSL.
 - c) On diverse days from or about 31st May 2009 to on or about 22nd May 2011, the plaintiff pursuant to the Aggregates agreement supplied CSL with thousands of tons of quarry aggregates for which the plaintiff invoiced CSL periodically.
 - d) In or about May 2009 the plaintiff agreed to rent from CSL and CSL agreed to rent to the plaintiff ("the Rental Agreement") certain equipment known as the CAT 980C Loader ("the CAT equipment").
 - e) On diverse days from or about 31st May 2009 to on or about 22nd May 2011, CSL pursuant to the Rental Agreement rented the CAT equipment to the plaintiff for which CSL invoiced the plaintiff periodically.

- f) Whenever the plaintiff presented to CSL the plaintiff's invoices under the Aggregates Agreement, it was an accepted practice between the plaintiff and CSL that CSL would first deduct from such invoices any amounts due under the invoices issued by CSL to the plaintiff under the Rental Agreement and then CSL would make a cheque payment to the plaintiff for the remaining balance (if any). In other words, CSL would pay the plaintiff's invoices under the Aggregates Agreement after deducting any outstanding sums under the invoices issued by CSL to the plaintiff under the Rental Agreement.
 - g) By 22nd May 2011 the only outstanding invoices from the plaintiff to CSL under the Aggregates Agreement were as follows:
 - (i) Invoice No. 5010 adjusted to \$5,152.00
 - (ii) Invoice No. 5011 in the amount of \$5,824.00
 - (iii) Invoice No. 5012 in the amount of \$5,824.00
 - (iv) Invoice No. 5013 in the amount of \$5,656.00
 - (v) Invoice No. 5014 adjusted to \$3,976.00
 - (vi) Invoice No. 5015 in the amount of \$4,816.00
 - (vii) Invoice No. 5016 in the amount of \$728.00.
 - h) The plaintiff has not presented to CSL the plaintiff's Invoice No. 5042 as alleged in the Statement of claim or otherwise.
 - i) Accordingly, the amount due from CSL to the plaintiff under the Aggregates Agreement is \$31,976.00 which is comprised of the amounts under the plaintiff's Invoices Nos. 5010-5016 as aforesaid.
 - j) By 22nd May 2011, the only outstanding invoices from CSL to the plaintiff under the Rental Agreement were as follows:
 - (i) Invoice No. 92410 in the amount of \$4,400.00
 - (ii) Invoice No. 100410 in the amount of \$4,001.00
 - (iii) Invoice No. 41011 in the amount of \$2,200.00
 - (iv) Invoice No. 41711 in the amount of \$2,200.00
 - (v) Invoice No. 42411 in the amount of \$2,200.00
 - (vi) Invoice No. 50111 in the amount of \$2,200.00
 - (vii) Invoice No. 50811 in the amount of \$2,200.00
 - (viii) Invoice No. 51511 in the amount of \$2,200.00
 - (ix) Invoice No. 52211 in the amount of \$2,200.00
 - k) Accordingly, the amount due from the plaintiff to CSL under the Rental Agreement is \$23,801.00.
 - l) CSL is entitled in law and pursuant to the past conduct between CSL and the plaintiff to set off the amount of \$23,801.00 due under the Rental Agreement against the amount of \$31,976.00 due under the Aggregates agreement leaving only a balance of \$8,175.00 to be paid by CSL to the plaintiff.
5. Paragraph 6 of the Statement of Claim is denied. The defendants aver as follows:
- a) Mr. O'Brien was not a party to the Aggregates Agreement. The defendants repeat paragraph 4(b) above.
 - b) The only outstanding invoices under the Aggregates Agreement are Invoices Nos. 5010-5016. The Defendants repeat paragraphs 4(g) and 4(h) above.

- c) The amount due from CSL to the plaintiff under the Aggregates Agreement is \$31,976.00. The defendants repeat paragraph 4(i) above.
- d) The plaintiff is only entitled to \$8,175.00 on account of the invoices due under the Aggregates Agreement. The defendants repeat paragraphs 4(g) to (l) above.

The 2nd December Document

- 6. As regards paragraph 7 of the Statement of Claim, save that in or about November 2011 the plaintiff's attorneys contacted CSL through Mr. O'Brien with respect to the outstanding invoices under the Aggregates Agreement and save that Mr. O'Brien on behalf of CSL agreed to attend the plaintiff's attorneys' chambers on 2nd December 2011, the rest of paragraph 7 is denied and the defendants aver as follows:
 - a) Following contact by the plaintiff's attorneys as aforesaid, CSL on or about 17th November 2011 wrote to the plaintiff's attorneys requesting certain documentation that would assist CSL in verifying the outstanding charges claimed by the plaintiff pursuant to the Aggregates Agreement. The plaintiff's attorneys provided CSL with the requested documentation.
 - b) On or about 1st December 2011, CSL sent to the plaintiff's attorneys a note hand written by Mr. O'Brien. The handwritten note set out the plaintiff's Invoices Nos. 5010-5016 and the amounts due there under as shown in paragraph 4(g) above. The note also indicated that:
 - (i) As regards the plaintiff's alleged Invoice No. 5042, CSL had only been advised by the plaintiff that it was in the sum of \$224.00 however, no invoice had been presented by the plaintiff in respect of that amount.
 - (ii) The amount owed by the plaintiff to CSL under the Rental Agreement was \$23,801.00.
 - (iii) If the sum of \$23,801.00 owed by the plaintiff to CSL under the Rental Agreement was set off against the sum of \$31,976.00 owed by CSL to the plaintiff under the plaintiff's Invoices Nos. 5010-5016 issued under the Aggregates Agreement, the only amount that would be left for payment by CSL would be \$8,175.00.
 - c) On or about 1st December 2011, CSL through Mr. O'Brien advised the plaintiff's attorneys that Mr. O'Brien would attend the plaintiff's attorneys' chambers on 2nd December 2011 in order to present CSL's cheque in the said sum of \$8,175.00.
- 7. As regards paragraph 8 and 9 of the Statement of Claim, save that during the meeting between Mr. O'Brien and the plaintiff's attorneys on 2nd December 2011, Mr. O'Brien presented to the plaintiff's attorneys CSL's cheque in the sum of \$8,175.00, the rest of the allegations in paragraphs 8 and 9 are denied. The defendants aver as follows:
 - a) Mr. O'Brien presented to the plaintiff's attorneys CSL's cheque in the sum of \$8,175.00 in accordance with Mr. O'Brien's representation to the plaintiff's attorneys on or about 1st December 2011. The defendants repeat paragraph 6(c) above.

- b) A document was presented by the plaintiff's attorneys to Mr. O'Brien at the meeting of 2nd December 2011 (the "2nd December Document").
- c) The plaintiff's attorneys requested Mr. O'Brien to append his signature to the 2nd December document.
- d) Mr. O'Brien told the plaintiff's attorneys that he had not carried his reading glasses with him and was therefore unable to read the contents of the 2nd December document. However, given the long standing professional relationship between the plaintiff's attorneys and CSL, Mr. O'Brien proceeded to append his signature to the 2nd December Document under the honest belief that the 2nd December Document was a confirmation that the only amount due from CSL to the plaintiff in respect of the outstanding invoices issued under the Aggregates Agreement as aforesaid was \$8,175.00.
- e) The defendants deny that Mr. O'Brien read the 2nd December Document as alleged in paragraph 8 of the Statement of Claim or at all and repeat paragraph 7(d) above.
- f) Additionally, the defendant will adduce evidence to show that the allegation in paragraph 8 of the Statement of Claim that Mr. O'Brien read the 2nd December Document contradicts the plaintiff's attorneys' letter dated 2nd December 2011 which was sent to CSL immediately after the 2nd December 2011 meeting. In that letter, the plaintiff's attorneys stated that the 2nd December Document was "read to [Mr. O'Brien] thoroughly ensuring that [he] understood the contents...."
- g) When Mr. O'Brien presented CSL's cheque in the sum of \$8,175.00 to the plaintiff's attorneys, they rejected it on the basis that it did not reflect the amount of \$24,606.00 referred to in the 2nd December Document which Mr. O'Brien had just signed.
- h) It was at that point that Mr. O'Brien realized that he had signed a document the import of which was contrary to what he had understood it to be. Mr. O'Brien protested and advised the plaintiff's attorneys that CSL would not pay the plaintiff any sum beyond \$8,175.00.
- i) The plaintiff's attorneys did not provide Mr. O'Brien with a copy of the 2nd December Document however, the plaintiff's attorneys have since the commencement of this action, provided a copy of the same to the defendant's attorneys.
- j) The defendants note that contrary to the plaintiff's attorneys' allegations and those of the plaintiff, the 2nd December Document is NOT a settlement agreement.
- k) The defendants will rely on the express terms of the 2nd December document to show that it was merely AN ACKNOWLEDGEMENT OF PAYMENT by Ms. Daisy Chan who is an officer of the plaintiff and (quite bizarrely) by Mr. O'Brien, of the sum of \$24,606.00 on account of the plaintiff's outstanding Invoices Nos. 5010-5016 and 5042. The contents of the 2nd December Document are reproduced below for easy reference:

"The undersigned hereby acknowledge payment in full for the outstanding sum of Twenty Four Thousands Six Hundred and Six Dollars (\$24,606.00) by way of Banker's cheque/Draft from City Services Ltd. and Mr. Joe O'Brien for 4,651 tons of aggregate fill.

This payment accounts for the outstanding Invoices numbered 5010, 5011, 5012, 5013, 5014, 5015, 5016 and 5042 only (copies enclosed for easy reference).

Caribbean Mining Group Ltd. does not assume responsibility for any outstanding sums that may be owed to City Services Ltd or Mr. Joe O'Brien by any third party.

Yours sincerely,

DAISY CHAN
(emphasis ours)

JOE O'BRIEN

- l) The defendants aver that the 2nd December Document makes no reference whatsoever to any settlement agreement.
- m) The defendants further aver that whereas the plaintiff pleads in paragraph 8 of the Statement of Claim that the 2nd December document was a "final settlement", the plaintiff throughout paragraphs 7, 8 and 11 of the Statement of Claim describes the sum of \$24,606.00 referred to in the 2nd December document as "representing part payment of an overall balance owed of thirty-two thousand seven hundred and eighty one dollars (\$32,781.00) as the total price for these products supplied thereof". The defendants aver that there could not have been a "final settlement" if the alleged settlement amount was (on the plaintiff's own case) only a part payment of the overall alleged debt.
- n) In any event, as the plaintiff relies on the 2nd December Document, the defendants will invite this Honourable Court to infer that by such reliance, the plaintiff in fact acknowledges receipt of the sum of \$24,606.00 on account of its Invoice Nos. 5010-5016 and 5042 and that on the plaintiff's own case, the amount due from CSL to the plaintiff under the said invoices is \$8,175.00 (that is, the amount claimed in the Statement of Claim (\$32,781.00) less the amount allegedly received per the 2nd December Document (\$24,606.00)) which amount is incidentally the same as that which CSL says it owes the plaintiff – albeit on a different basis (see paragraph 4(1) above).

No Liability on part of Mr. O'Brien

- 8. As regards paragraph 10 of the Statement of Claim it is not clear whether by the words "the said Agreement" the plaintiff is referring to the Aggregates Agreement or the alleged settlement agreement.
- 9. In any event, the defendants deny paragraph 10 of the Statement of Claim and aver that:
 - a. To the extent that paragraph 10 of the Statement of Claim refers to the Aggregates Agreement, no liability can be lawfully attributed to Mr. O'Brien under the Aggregates Agreement as he was not a party to the Aggregates Agreement. The defendants repeat paragraph 4(b) above and;
 - b. To the extent that paragraph 10 of the Statement of Claim refers to the alleged settlement agreement, the defendants aver that there was never such a settlement agreement and repeat paragraphs 6 and 7 above. If it is found that the alleged settlement agreement did in fact exist (which is denied), the defendants aver that Mr. O'Brien was not a party to such settlement agreement and therefore no liability arising under the same can be lawfully attributed to him.

10. The defendants deny paragraph 11 of the Statement of Claim and repeat paragraphs 7 and 9 above.

No breach of Aggregates Agreement

11. The defendants deny paragraph 12 of the Statement of Claim including the particulars of breach of contract and the particulars of loss and expense pleaded thereunder. The defendants repeat paragraphs 4 to 9 above.
12. The defendants deny that the plaintiff is entitled to any of the relief sought or otherwise.
13. Save as hereinbefore expressly admitted, the defendants deny each and every allegation of fact in the Statement of Claim as if the same were set forth herein and specifically traversed.

2nd Defendants Counterclaim

14. CSL repeats paragraphs 4(d), 4(e), 4(j) and 4(k) above.
15. Contrary to the Rental Agreement and despite repeated demands, the plaintiff has failed and or refused to pay to CSL the said amount of \$23,801.00 due under the Rental Agreement as aforesaid.
16. Further and or alternatively, the plaintiff has failed and or refused to allow CSL to set off the said amount of \$23,801.00 against the amount of \$31,976.00 due from CSL to the plaintiff as aforesaid.
17. By reason of the foregoing matters, CSL has suffered loss and damage.

Particulars of loss and damage

Loss in the sum of \$23,801.00 as set out in paragraph 4(j) and 4(k) above.

AND THE SECOND DEFENDANT counterclaims:

- a. The sum of \$23,801.00
 - b. Further and or alternatively, a declaration that the 2nd defendant is entitled to set off the said amount of \$23,801.00 against the sum of \$31,976.00 owed by the 2nd defendant to the plaintiff as aforesaid or against such other amount as this Court will find to be lawfully due to the plaintiff.
 - c. Costs and interest.
14. In its reply to defence and defence to 2nd defendant's counterclaim, beginning at paragraph 4 the plaintiff averred as follows:
 1. The plaintiff admits the contents of paragraph 1 of the defence.
 2. The plaintiff admits the contents of paragraph 2 of the defence.
 3. The plaintiff admits the contents of paragraph 3 of the defence.

4. The plaintiff admits the contents of paragraph 4 (a) and (b) [of the defence] and further asserts that in respect to past dealings between the parties, the 1st defendant has at all times assumed personal responsibility for providing payment for quarry aggregates supplied under any agreement entered into between his company, the 2nd defendant, and the plaintiff, Caribbean Mining Group Ltd. the 1st defendant by his own conduct has been privy to every agreement for aggregates between the respective parties and indeed he has therefore no right whatsoever to seek any order striking out the plaintiff's Statement of Claim.
5. Further, the 1st defendant is the President of the 2nd defendant and the company's owner with direct and absolute authority over the business dealings of his company and indeed he has regularly assumed personal responsibility for the repayment of debts owed by the 2nd defendant during the course of its business dealings with the plaintiff.
6. The contents of paragraph 4 (c) are admitted.
7. The contents of paragraph 4(d), (e), (f), (g), (h), (i), (j), (k) and (l) are denied. The plaintiff disputes the existence of any agreement for the rental of any equipment between CSL and the plaintiff at any time and further asserts that it is not responsible for any third-party contractual obligation owed to the 2nd defendant by any other party.
8. Consequently the plaintiff asserts that there was never any accepted practice between the parties, save for the 1st defendant assuming responsibility for any debts owned by the 2nd defendant to the plaintiff in the course of their business dealings. The plaintiff asserts that it presented the 1st defendant personally with all numbered outstanding invoices including No. 5042, which the 1st defendant reviewed in the presence of Attorneys for the plaintiff and which the 1st defendant assumed by his conduct the personal responsibility to pay, by way of his signature affixed to the document of 2nd December. As the plaintiff denies the very existence of any agreement for the rental of equipment between the 2nd defendant and the plaintiff, it is therefore not possible for the 2nd defendant to have any entitlement in law to recover funds which it is not owed by the plaintiff.
9. The contents of paragraph 5(a), (b), (c) and (d) are denied in its entirety and the plaintiff repeats the contents of paragraph 6 of the Statement of Claim. The total amount due under the Aggregates Agreement is \$32,781.00 as specified in the plaintiff's Statement of Claim and the plaintiff is therefore entitled to claim the sum which the 1st defendant by his own conduct in attending the chambers of the plaintiff's Attorneys, verbal statements and by his signature on the 2nd December document assumed personal responsibility to repay under the 2nd December document, the sum of \$24,606.00.
10. The contents of paragraph 6 (b) and (c) are denied. The 1st defendant attended the chambers of the plaintiff's attorneys in the full understanding that he would be assuming personal responsibility for the debt owed by his company, the 2nd defendant, to the plaintiff. The handwritten note referred to in 6(b) indicated a series of invoices which were owed to the 2nd defendant by a third party, which had no contractual relationship with the plaintiff. The plaintiff agreed to offset the sum of \$8,175.00, representing a debt which may or may not have been owed by a third party to the 2nd defendant, from the overall sum of \$32,781.00 owed by the 2nd defendant to the plaintiff, in the interests of reconciliation and was under no legal obligation to assume responsibility for this debt or any other.

11. The invoice numbered, 5042 was provided for the 1st defendant's perusal and he read and reviewed this invoice before signing the 2nd December document. The plaintiff does not owe the 1st or 2nd defendant any outstanding sums and was willing to accept a reduced payment of \$24,606.00 in the interests of resolving this dispute amicably and without taking any formal responsibility for sums which may or may not have been owed by a third party. The 1st defendant was informed that his attendance at the chambers of the plaintiff's Attorneys was in order to facilitate the repayment of a debt owed by his company, the 2nd defendant to the plaintiff in the amount of \$24,606.00 and that he would be assuming personal responsibility for the repayment of this debt.
12. The contents of paragraph 7 (a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m) and (n) are denied in the entirety. The 1st defendant was brought into the chambers of the plaintiff's attorneys and before any cheques were presented it was explained clearly to 1st defendant what the meeting would entail. Numbered invoices were presented to the 1st defendant, clearly indicating the amounts owed by the 2nd defendant to the plaintiff and the 1st defendant took several minutes to personally review the invoices, cross-checking their contents to ensure that they corresponded correctly to the 2nd defendant's records.
13. After having reviewed each invoice carefully, the 1st defendant was presented with a document to sign, which was intended to act as an acknowledgement of his agreement to pay the outstanding sum of \$24,606.00 of an overall balance owed of \$32,781.00 and which Attorneys for the plaintiff had negotiated with the 1st defendant several days before the 2nd December meeting. The 1st defendant made no mention whatsoever of any reading glasses and indeed if his eyesight were impaired it would not have been possible for Attorneys for the plaintiff to identify this problem, given that the 1st defendant personally read each invoice and document that was presented to him.
14. The 1st defendant will therefore be put to strict proof thereof that this series of events as he and his Attorneys present actually took place at all. After reading the 2nd December document very carefully and cross-checking each invoice, the 1st defendant affixed his signature in a personal capacity and with the full understanding that he, Joseph O'Brien, would now be responsible personally for any and all debts owed to the plaintiff as specified in the 2nd December document.
15. The 1st defendant, after signing the 2nd December document and agreeing to assume personal responsibility for the debt owed of \$24,606.00, then attempted to present Attorneys for the plaintiff, with a cheque of \$8,175.00, which was promptly rejected as it was totally contrary to what had been negotiated over, agreed upon and signed for by the 1st defendant just a few moments prior. The 1st defendant refused to provide any justification for his actions and alleged by defamatory remarks that he had been forced or coerced to sign the document.
16. The 2nd December document was intended to operate as a receipt and acknowledgement of payment from the 1st and 2nd defendant to the plaintiff. The numbered invoices are quite obviously owed by the 1st and 2nd defendant to the plaintiff and as such there is nothing bizarre or unusual about both parties signing the document, but for the fact that the 1st defendant refused to provide the payment he had personally assumed responsibility for. The 2nd December document does not need to reference a settlement agreement in order to indicate an acceptance on the 1st defendant's part, by way of his signature, to assume personal responsibility for the debt owed by the 2nd defendant.

17. The defendants are not in any position to invite the Court to infer that the plaintiff has acknowledged payment of the sum of \$24,606.00, quite simply because no payment whatsoever was made and indeed the Attorneys for the defendants admit to such with reference to paragraph 7(g) and (h) of their Defence, rendering any such attempt on their part to draw inference to the court as erroneous.
18. The contents of paragraph 8 and 9 (a) and (b) are denied. The 1st defendant is directly liable for the repayment of the outstanding sum of \$24,606.00 owed by the 2nd defendant to the plaintiff as he assumed personal responsibility to provide these funds by way his statements, conduct and his signature affixed to the 2nd December document.
19. The contents of paragraph 10 are denied.
20. The contents of paragraph 11, 12 and 13 are denied and save as hereinbefore expressly admitted the plaintiff denies each and every allegation of fact in the Defence as if the same were set forth herein and specifically traversed.

2nd Defendants Counterclaim

21. The contents of paragraph 14 are denied. The plaintiff never entered into any agreement for the rental of equipment from the 2nd defendant at any point and the contents and indeed the invoices referred to in paragraph 4(j) are therefore refuted by the plaintiff and the plaintiff further asserts that these invoices were created retrospectively by the defendants in order to provide evidence of their claim.
22. The contents of paragraph 15 are denied and the defendants shall be put to strict proof thereof.
23. The contents of paragraph 16 are denied and the defendant shall be put to strict proof thereof. The plaintiff was not privy to any contract for the rental of equipment from the 2nd defendant and therefore does not owe any outstanding sum to the defendants.
24. The contents of paragraph 17 are denied and the defendants shall be put to strict proof thereof.
25. The plaintiff denies that the defendants are entitled to any of the relief sought.
26. Save as hereinbefore expressly admitted, the plaintiff denies each and every allegation of fact in the Defence as if the same were set forth herein and specifically traversed.

THE REPLY

15. The defendants say that the plaintiff's reply offends the provisions of RSC Order 18 rule 10(1) in that it contains allegations of fact that are inconsistent with the plaintiff's statement of claim. In that regard, the defendants have highlighted [underlined] the alleged inconsistencies in the schedule to the 20 April 2012 summons as follows:

Schedule

- 1) In paragraph 4 of the Reply, the plaintiff alleges that:

The plaintiff denies the contents of paragraph 4(a) and (b) and further that in respect to past dealings between the parties, the 1st defendant has at all times assumed

personal responsibility for providing payment for quarry aggregates supplied under any agreement entered into between his company, the 2nd defendant, and the plaintiff, Caribbean Mining Group Ltd. The 1st defendant by his own conduct has been privy to every agreement for aggregates between the respective parties and indeed he has therefore no right whatsoever to seek any order striking out the plaintiff's Statement of Claim."

The highlighted statement is inconsistent with:

- a) Paragraph 4 of the SOC in which the plaintiff alleges that BOTH the 1st and 2nd defendants "purchased from the plaintiff, aggregate fill material" and BOTH the 1st and 2nd defendants "agreed to pay" for the aggregate fill.
- b) Paragraph 5 of the SOC in which the plaintiff alleges that "the plaintiff supplied aggregate fill material" to BOTH the 1st and 2nd defendants.
- c) Paragraph 6 of the SOC in which the plaintiff alleges that "Contrary to the Agreement" BOTH the 1st and 2nd defendants "failed to pay the outstanding invoices dated 20th May 2011 and numbered 5010, 5011, 5012, 5013, 5014, 5015, 5016 and 5042" and that BOTH the 1st and 2nd defendants "owe an outstanding balance to the plaintiff of\$32,781.00 for the supply of 4,651 tons of aggregate fill material."

2) In paragraph 5 of the Reply, the plaintiff alleges that:

"Further, the 1st defendant is the President of the 2nd defendant and the company's owner with direct and absolute authority over the business dealings of his company and indeed he has regularly assumed personal responsibility for the repayment of debts owed by the 2nd defendant during the course of its business dealings with the plaintiff."

The highlighted statement is inconsistent with Paragraph 6 of the SOC in which the plaintiff alleges that "Contrary to the Agreement between the parties" BOTH the 1st and 2nd defendants "failed to pay the outstanding invoices dated 20th May 2011 and numbered 5010, 5011, 5012, 5013, 5014, 5015, 5016 and 5042" and that BOTH the 1st and 2nd defendants "owe an outstanding balance to the plaintiff of\$32,781.00 for the supply of4,651 tons of aggregate fill material".

3) In paragraph 8 of the Reply, the plaintiff states in part that:

"Consequently the plaintiff asserts that there was never any accepted practice between the parties, save for the 1st defendant assuming responsibility for any debts owed by the 2nd defendant to the plaintiff in the course of their business dealings."

The highlighted statement is inconsistent with Paragraph 6 of the SOC in which the plaintiff alleges that "Contrary to the Agreement between the parties" BOTH the 1st and 2nd defendants "failed to pay the outstanding invoices dated 20th May 2011 and numbered 5010, 5011, 5012, 5013, 5014, 5015, 5016 and 5042" and that BOTH the 1st and 2nd defendants "owe an outstanding balance to the plaintiff of\$32,781.00 for the supply of4,651 tons of aggregate fill material".

4) In paragraph 8 of the Reply, the plaintiff further states that:

"The plaintiff asserts that it presented the 1st defendant personally with all numbered outstanding invoices including No. 5042, which the 1st defendant reviewed in the presence of [the] Attorneys for the plaintiff and which the 1st defendant assumed by his conduct the personal responsibility to pay, by way of his signature affixed to the document of 2nd December."

The highlighted statement is inconsistent with:

- a. Paragraph 7 of the SOC in which the plaintiff alleges that the plaintiff's attorneys "contacted and began to negotiate with the 1st defendant acting on behalf of the 2nd defendant in respect to the repayment of the outstanding invoices and the 1st defendant acting on behalf of the 2nd defendant agreed to pay the sum of ...\$24,606.00...".
- b. Paragraph 7 of the SOC in which the plaintiff further alleges that "The 1st defendant acting on behalf of the 2nd defendant agreed to attend a meeting in chambers with Counsel for the plaintiff ... in order to sign the final settlement and present a cheque for the said agreed amount in the sum of ...\$24,606.00...".
- c. Paragraph 8 of the SOC in which the plaintiff alleges that "The 1st defendant acting on behalf of the 2nd defendant and by way of his execution thereby agreed to remit payment to the plaintiff in the sum of ...\$24,606.00..".
- d. Paragraph 9 of the SOC in which the plaintiff alleges that "Contrary to the verbal and written agreement, the 1st defendant acting on behalf of the 2nd defendant and for reasons best known to him completed a cheque at the meeting in the sum of ...\$8,175.00 and stated that he would pay no more."

5) In paragraph 9 of the Reply, the plaintiff alleges in part that:

"...The total amount due under the Aggregates Agreement is \$32,781.00 ... and the plaintiff is therefore entitled to claim the sum which the 1st defendant by his conduct in attending the Chambers of the plaintiff's Attorneys, verbal statements and by his signature on the 2nd December document assumed personal responsibility to repay under the 2nd December document, the sum of \$24,606.00".

The highlighted statement is inconsistent with:

- a. Paragraph 7 of the SOC in which the plaintiff alleges that the plaintiff's attorneys "contacted and began to negotiate with the 1st defendant acting on behalf of the 2nd defendant in respect to the repayment of the outstanding invoices and the 1st defendant acting on behalf of the 2nd defendant agreed to pay the sum of ...\$24,606.00".
- b. Paragraph 7 of the SOC in which the plaintiff further alleges that "The 1st defendant acting on behalf of the 2nd defendant agreed to attend a meeting in Chambers with Counsel for the plaintiff ...in order to sign the final settlement and present a cheque for the said agreed amount in the sum of ...\$24,606.00...".
- c. Paragraph 8 of the SOC in which the plaintiff alleges that "The 1st defendant acting on behalf of the 2nd defendant and by way of his execution thereby agreed to remit payment to the plaintiff in the sum of ...\$24,606.00".
- d. Paragraph 9 of the SOC in which the plaintiff alleges that "Contrary to the verbal and written agreement, the 1st defendant acting on behalf of the 2nd defendant

and for reasons best known to him completed a cheque at the meeting in the sum of ...\$8,175.00 and stated that he would pay no more."

6) In paragraph 10 of the Reply, the plaintiff alleges in part that:

"The 1st defendant attended the Chambers of the plaintiff's Attorneys in the full understanding that he would be assuming personal responsibility for the debt owed by his company, the 2nd defendant, to the plaintiff..."

The highlighted statement is inconsistent with:

- a. Paragraph 7 of the SOC in which the plaintiff alleges that the plaintiff's Attorneys "contacted and began to negotiate with the 1st defendant acting on behalf of the 2nd defendant in respect to the repayment of the outstanding invoices and the 1st defendant acting on behalf of the 2nd defendant agreed to pay the sum of ...\$24,606.00".
- b. Paragraph 7 of the SOC in which the plaintiff further alleges that "The 1st defendant acting on behalf of the 2nd defendant agreed to attend a meeting in chambers with Counsel for the plaintiff ... in order to sign the final settlement and present a cheque for the said agreed amount in the sum of ...\$24,606.00..".
- c. Paragraph 7 of the SOC in which the plaintiff further alleges that "As a result of this Agreement the plaintiff's Attorney prepared a letter of final settlement between the parties for execution by both parties".
- d. Paragraph 9 of the SOC in which the plaintiff alleges that "Contrary to the verbal and written agreement, the 1st defendant acting on behalf of the 2nd defendant and for reasons best known to him completed a cheque at the meeting in the sum of ...\$8,175.00 and stated that he would pay no more".

7) In paragraph 11 of the Reply, the plaintiff alleges in part that:

"The 1st defendant was informed that his attendance at the Chambers of the plaintiff's Attorneys was in order to facilitate the repayment of a debt owed by his company, the 2nd defendant to the plaintiff, in the amount of \$24,606.00 and that he would be assuming personal responsibility for the repayment of this debt".

The highlighted statement is inconsistent with:

- a. Paragraph 4 of the SOC in which the plaintiff alleges that BOTH the 1st and 2nd defendants "purchased from the plaintiff, aggregate fill material" and BOTH the 1st and 2nd defendant "agreed to pay" for the aggregate fill.
- b. Paragraph 5 of the SOC in which the plaintiff alleges that "the plaintiff supplied aggregate fill material" to BOTH the 1st and 2nd defendants.
- c. Paragraph 6 of the SOC in which the plaintiff alleges that "Contrary to the Agreement" BOTH the 1st and 2nd defendants "failed to pay the outstanding invoices dated 20th May 2011 and numbered 5010, 5011, 5012, 5013, 5014, 5015, 5016 and 5042" and that BOTH the 1st and 2nd defendants "owe an outstanding balance to the plaintiff of ...\$32,781.00 for the supply of ...4,651 tons of aggregate fill material".
- d. Paragraph 7 of the SOC in which the plaintiff alleges that the plaintiff's Attorneys "contacted and began to negotiate with the 1st defendant acting on behalf of the

2nd defendant in respect to the repayment of the outstanding invoices and the 1st defendant acting on behalf of the 2nd defendant agreed to pay the sum of ...\$24,606.00”.

- e. Paragraph 7 of the SOC in which the plaintiff further alleges that “The 1st defendant acting on behalf of the 2nd defendant agreed to attend a meeting in Chambers with Counsel for the plaintiff In order to sign the final settlement and present a cheque for the said agreed amount in the sum of ...\$24,606.00..”.
 - f. Paragraph 7 of the SOC in which the plaintiff further alleges that “As a result of this Agreement, the plaintiff’s Attorney prepared a letter of final settlement between the parties for execution by both parties”.
 - g. Paragraph 9 of the SOC in which the plaintiff alleges that “Contrary to the verbal and written agreement, the 1st defendant acting on behalf of the 2nd defendant and for reasons best known to him completed a cheque at the meeting in the sum of ...\$8,175.00 and stated that he would pay no more”.
- 8) In paragraph 12 of the Reply, the plaintiff alleges that:

“Numbered invoices were presented to the 1st defendant, clearly indicating the amounts owed by the 2nd defendant to the plaintiff and the 1st defendant took several minutes to personally review the invoices, cross checking their contents to ensure that they corresponded correctly to the 2nd defendant’s records.”

The highlighted portion is inconsistent with:

- a. Paragraph 4 of the SOC in which the plaintiff alleges that BOTH the 1st and 2nd defendants “purchased from the plaintiff, aggregate fill material” and BOTH the 1st and 2nd defendants “agreed to pay” for the aggregate fill.
- b. Paragraph 5 of the SOC in which the plaintiff alleges that “the plaintiff supplied aggregate fill material” to BOTH the 1st and 2nd defendants.
- c. Paragraph 6 of the SOC in which the plaintiff alleges that “Contrary to the Agreement” BOTH the 1st and 2nd defendants “failed to pay the outstanding invoices dated 20th May 2011 and numbered 5010, 5011, 5012, 5013, 5014, 5015, 5016 and 5042” and that BOTH the 1st and 2nd defendants “owe an outstanding balance to the plaintiff of ...\$32,781.00 for the supply of ... 4,651 tons of aggregate fill material.”
- d. Paragraph 7 of the SOC in which the plaintiff alleges that the plaintiff’s Attorneys “contacted and began to negotiate with the 1st defendant acting on behalf of the 2nd defendant in respect to the repayment of the outstanding invoices and the 1st defendant acting on behalf of the 2nd defendant agreed to pay the sum of ...\$24,606.00”.
- e. Paragraph 7 of the SOC in which the plaintiff further alleges that “The 1st defendant acting on behalf of the 2nd defendant agreed to attend a meeting in Chambers with Counsel for the plaintiff ... in order to sign the final settlement and present a cheque for the said agreed amount in the sum of ...\$24,606.00..”.
- f. Paragraph 7 of the SOC in which the plaintiff further alleges that “As a result of this Agreement, the plaintiff’s Attorney prepared a letter of final settlement between the parties for execution by both parties”.

- g. Paragraph 9 of the SOC in which the plaintiff alleges that “Contrary to the verbal and written agreement, the 1st defendant acting on behalf of the 2nd defendant and for reasons best known to him completed a cheque at the meeting in the sum of ... \$8,175.00 and stated that he would pay no more”.

9) In paragraph 13 of the Reply, the plaintiff alleges that:

“After having reviewed each invoice carefully, the 1st defendant was presented with a document to sign which was intended to act as an acknowledgment of his agreement to pay the outstanding sum of \$24,606.00 of an overall balance owed of \$32,781.00 and which Attorneys for the plaintiff had negotiated with the 1st defendant several days before the 2nd December meeting.”

The highlighted statement is inconsistent with:

- a. Paragraph 7 of the SOC in which the plaintiff alleges that the plaintiff’s Attorney “contacted and began to negotiate with the 1st defendant acting on behalf of the 2nd defendant in respect to the repayment of the outstanding invoices and the 1st defendant acting on behalf of the 2nd defendant agreed to pay the sum of ..\$24,606.00”.
- b. Paragraph 7 of the SOC in which the plaintiff further alleges that “The 1st defendant acting on behalf of the 2nd defendant agreed to attend a meeting in Chambers with Counsel for the plaintiff ...in order to sign the final settlement and present a cheque for the said agreed amount in the sum of ...\$24,606.00..”.
- c. Paragraph 7 of the SOC in which the plaintiff further alleges that “As a result of this Agreement, the plaintiff’s Attorney prepared a letter of final settlement between the parties for execution by both parties”.

10) In paragraph 14 of the Reply, the plaintiff alleges that:

“After reading the 2nd December document very carefully and cross-checking each invoice, the 1st defendant affixed his signature in a personal capacity and with the full understanding that he, Joseph O’Brien, would now be responsible personally for any and all debts owed to the plaintiff as specified in the 2nd December document.”

The highlighted statement is inconsistent with:

- a. Paragraph 8 of the SOC in which the plaintiff alleges that “The 1st defendant acting on behalf of the 2nd defendant and by way of his execution thereby agreed to remit payment to the plaintiff in the sum of ...\$24,606.00..”.
- b. Paragraph 9 of the SOC in which the plaintiff alleges that “Contrary to the verbal and written agreement, the 1st defendant acting on behalf of the 2nd defendant and for reasons best known to him completed a cheque at the meeting in the sum of \$8,175.00 and stated that he would not pay any more.”
- c. Paragraph 11 of the SOC in which the plaintiff alleges that “...despite the existence of the signed document referred to above, and executed by the 1st defendant on behalf of the 2nd defendant...”
- d. Paragraph 12 of the SOC in which the plaintiff alleges that “The acts of the 1st defendant acting on behalf of the 2nd defendant, ...constitutes a breach of contract.”

11) In paragraph 15 of the Reply, the plaintiff alleges that:

"The 1st defendant, after signing the 2nd December document and agreeing to assume personal responsibility for the debt owed for \$24,606.00, then attempted to present [the] Attorneys for the plaintiff, with a cheque of \$8,175.00, which was promptly rejected as it was totally contrary to what had been negotiated over, agreed upon and signed for by the 1st defendant just a few moments prior ..."

The highlighted statement is inconsistent with:

- a. Paragraph 8 of the SOC in which the plaintiff alleges that "The 1st defendant acting on behalf of the 2nd defendant and by way of his execution thereby agreed to remit payment to the plaintiff in the sum of\$24,606.00..".
- b. Paragraph 9 of the SOC in which the plaintiff alleges that "Contrary to the verbal and written agreement, the 1st defendant acting on behalf of the 2nd defendant and for reasons best known to him completed a cheque at the meeting in the sum of .. \$8,175.00 and stated that he would not pay any more."
- c. Paragraph 11 of the SOC in which the plaintiff alleges that "...despite the existence of the signed document referred to above, and executed by the 1st defendant on behalf of the 2nd defendant ..."
- d. Paragraph 12 of the SOC in which the plaintiff alleges that "The acts of the 1st defendant acting on behalf of the 2nd defendant,constitutes a breach of contract."

12) In paragraph 16 of the Reply, the plaintiff alleges that:

"The 2nd December document was intended to operate as a receipt and acknowledgement of payment from the 1st and 2nd defendant to the plaintiff. The number invoices are quite obviously owed by the 1st and 2nd defendant to the plaintiff and as such there is nothing bizarre or unusual about both parties signing the document, but for the fact that the 1st defendant refused to provide the payment he had personally assumed responsibility for. The 2nd December document does not need to reference a settlement agreement in order to indicate an acceptance on the 1st defendant's part, by way of his signature, to assume personal responsibility for the debt owed by the 2nd defendant."

The highlighted statements are inconsistent with:

- a. Paragraph 7 of the SOC in which the plaintiff alleges that the plaintiff's Attorneys "contracted and began to negotiate with the 1st defendant acting on behalf of the 2nd defendant in respect to the repayment of the outstanding invoices and the 1st defendant acting on behalf of the 2nd defendant agreed to pay the sum of ..\$24,606.00".
- b. Paragraph 7 of the SOC in which the plaintiff further alleges that "The 1st defendant acting on behalf of the 2nd defendant agreed to attend a meeting in Chambers with Counsel for the plaintiff ... in order to sign the final settlement and present a cheque for the said agreed amount in the sum of ...\$24,606.00..".
- c. Paragraph 7 of the SOC in which the plaintiff further alleges that "As a result of this Agreement, the plaintiff's Attorney prepared a letter of final settlement between the parties for execution by both parties".

- d. Paragraph 8 of the SOC in which the plaintiff alleges that “The 1st defendant acting on behalf of the 2nd defendant and by way of his execution thereby agreed to remit payment to the plaintiff in the sum of ...\$24,606.00..”.
- e. Paragraph 9 of the SOC in which the plaintiff alleges that “Contrary to the verbal and written agreement, the 1st defendant acting on behalf of the 2nd defendant and for reasons best known to him completed a cheque at the meeting in the sum of ...\$8,175.00 and stated that he would not pay any more.”
- f. Paragraph 11 of the Statement of Claim in which the plaintiff alleges that “... despite the existence of the signed document referred to above, and executed by the 1st defendant on behalf of the 2nd defendant...”
- g. Paragraph 12 in which the plaintiff alleges that “The acts of the 1st defendant acting on behalf of the 2nd defendantconstitutes a breach of contract.”

13) In paragraph 18 of the Reply, the plaintiff alleges in part that:

“The 1st defendant is directly liable for the repayment of the outstanding sum of \$24,606.00 owed by the 2nd defendant to the plaintiff as he assumed personal responsibility to provide these funds by way of his statements, conduct and his signature affixed to the 2nd December document.”

The highlighted statement is inconsistent with:

- a. Paragraph 7 of the SOC in which the plaintiff alleges that the plaintiff’s attorneys “contacted and began to negotiate with the 1st defendant acting on behalf of the 2nd defendant in respect to the repayment of the outstanding invoices and the 1st defendant acting on behalf of the 2nd defendant in respect to the repayment of the outstanding invoices and the 1st defendant acting on behalf of the 2nd defendant agreed to pay the sum of ..\$24,606.00”.
- b. Paragraph 7 of the SOC in which the plaintiff further alleges that “The 1st defendant acting on behalf of the 2nd defendant agreed to attend a meeting in Chambers with Counsel for the plaintiff ... in order to sign the final settlement and present a cheque for the said agreed amount in the sum of ...\$24,606.00..”.
- c. Paragraph 7 of the SOC in which the plaintiff further alleges that “As a result of this Agreement, the plaintiff’s Attorney prepared a letter of final settlement between the parties for execution by both parties”.
- d. Paragraph 8 of the SOC in which the plaintiff alleges that “The 1st defendant acting on behalf of the 2nd defendant and by way of his execution thereby agreed to remit payment to the plaintiff in the sum of ...\$24,606.00..”.
- e. Paragraph 9 of the SOC in which the plaintiff alleges that “contrary to the verbal and written agreement, the 1st defendant acting on behalf of the 2nd defendant and for reasons best known to him completed a cheque at the meeting in the sum of ...\$8,175.00 and stated that he would not pay any more.
- f. Paragraph 11 of the SOC in which the plaintiff alleges that “...despite the existence of the signed document referred to above, and executed by the 1st defendant on behalf of the 2nd defendant...”

- g. Paragraph 12 of the SOC in which the plaintiff alleges that "The acts of the 1st defendant acting on behalf of the 2nd defendant,constitutes a breach of contract."

16. Although the plaintiff on several occasions in the statement of claim refers to "the defendants", it is common ground that nowhere in the statement of claim are the defendants referred to as "both the 1st and 2nd defendants" as indicated in the above schedule to the said summons.

17. RSC Order 18 rule 10 provides as follows:

- (1) A party shall not in any pleading make an allegation of fact, or raise any new ground or claim inconsistent with a previous pleading of his.
- (2) Paragraph (1) shall not be taken as prejudicing the right of a party to amend, or apply for leave to amend, his previous pleading so as to plead the allegations or claims in the alternative.

18. Counsel on behalf of the defendants submits that the above-mentioned portions of the plaintiff's reply and defence to counterclaim about which the defendants complain as being inconsistent with the plaintiff's statement of claim go over and beyond the matters pleaded in the defendants' defence or otherwise constitute new claims which ought to have been pleaded by way of amendment to the statement of claim. See *Herbert and another v Vaughn and others* [1972] 3 All ER 122. Therefore, counsel submits, those portions should be struck out.

19. As I understood his argument, counsel for the plaintiff, in effect, conceded that there was merit to the defendants' application. In that regard, he argued (see page 40 of the transcript of proceedings), that "all references or the vast majority of references within the statement of claim to the first and second defendants refer clearly to the first defendant acting on behalf of the second defendant"; that there was no attempt on the part of counsel "to plead anything intentionally in the alternative and any discrepancies which have been referred to would have been the result of a general oversight or error as opposed to an intentional pleading or a misstatement of the case." This "oversight" or "error" could, Mr Johnson submitted, be rectified by amendment rather than striking out what he submitted, are "otherwise sound pleadings".

20. Having reviewed and compared the plaintiff's statement of claim and its reply and defence to counterclaim, I agree with counsel for the defendants that the highlighted/underlined portions thereof more particularly set out in the schedule to the summons filed 20 April 2012 as well as paragraph 15 above, should be struck out for the reason that, contrary to RSC Order 18 rule 10(1), they contain allegations of fact that are inconsistent with the plaintiff's statement of claim and I so order.

THE STATEMENT OF CLAIM

21. The defendants also apply to strike out the statement of claim and dismiss the action.

22. In support of that application, the defendants rely on the affidavits of Jacqueline Banona, a Registered Associate in the firm of the defendants' counsel, filed on 16 March 2012 and 20 April 2012 respectively. Although Ms Banona does a comprehensive job of identifying what the defendants say are issues with the plaintiff's case as pleaded, it appears to me that the crux of the defendants' complaint against the statement of claim is as averred by Ms Banona in her 16 March 2012 affidavit, as follows:

1. I have read the statement of claim (SOC) and note that the plaintiff alleges that the defendants breached:

- a. The original agreement referred to in paragraphs 4 to 6 of the SOC and;
 - b. A subsequent agreement settling the plaintiff's claims under the original agreement. The alleged settlement agreement is referred to in paragraphs 7 to 12 of the SOC.
2. The plaintiff claims under both agreements notwithstanding that one is an alleged settlement of claims arising from the other.
 3. Accordingly, I pray that the plaintiff's statement of claim be struck out on the basis that it is scandalous, frivolous, or vexatious and/or it may prejudice, embarrass or delay the fair trial of the action and/or it is otherwise an abuse of the process of the court.

23. The plaintiff opposes the defendants' application and counsel for the plaintiff submitted that it should be dismissed because the defendants had already filed their defence, admitting the debt. In his submission, "it was not possible for Mr Smith for the defendants to concede then file a strike out application." However, as with the case of the reply and defence to counterclaim, it appeared to me that counsel for the plaintiff, during the course of his submissions, acknowledged, if not conceded, that there were problems with the manner in which the plaintiff's case had been pleaded, although he again, expressed the view, they could be rectified by amendment.

24. For example, at page 33 of the transcript, counsel for the plaintiff made the following argument:

"...if there is an offending portion that we definitely should be allowed, my Lady...as I remind the court again, that we were under no positive obligation to submit an application for leave to amend before we dealt with and oppose the strike out application...so we should be allowed by the court, my Lady, with regards to the cause of action which is clearly identifiable on the part of the plaintiffs to pursue this action and we should be allowed leave to amend if necessary."

25. Mr Smith, QC, objected to that latter "application" and urged the court not to entertain the same, pointing out firstly, that there was no summons for leave to amend and secondly, that the court does not give leave to amend at large or in a vacuum.

26. Again, on the issue of amendment, counsel for the plaintiff stated his position as follows:

"Now, Mr Smith has pointed out in argument and objected to the fact that we did not meet his strike out summons with an application to amend. I would point out to this Honourable Court and, indeed, I put Mr Smith to proof on that point. Direct me, please, to the provision of law which stipulates that we are obliged and obligated to make an application for leave to amend in response to a strike out. I believe we are at liberty, my lady, to obviously contest the application that the defendants are filing notwithstanding and not prejudicing our right to apply for leave to amend."

27. In that regard, I pointed out to counsel for the plaintiff, which he appeared to have accepted, that without a proper application for leave to amend to meet the defendants' application to strike out, if I were to accede to the defendants' application, there would be nothing for the plaintiff to amend. Nevertheless, no application for leave to amend was in fact made.

28. In addition to its inherent jurisdiction, the court has the power pursuant to RSC Order 18 rule 19(1), at any stage of the proceedings, to order to be struck out or amended any pleading or the indorsement of any writ in the action or anything in any pleading or in the indorsement on the ground, inter alia, that: (b) it is scandalous, frivolous or vexatious; or (c) it may prejudice, embarrass or delay the fair trial; or (d) it is otherwise an abuse of the process of the court. The court may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

29. Although, it is preferable that such applications be made as soon as possible, there is no bar to the application being made after the defendant has filed a defence, as the rule allows for the application to be made "at any stage of the proceedings".

30. The plaintiff's claim, as I understand it, is as follows: The plaintiff and the second defendant had an agreement for the sale to the second defendant of aggregate fill material for which the second defendant agreed to pay the plaintiff. Between 2009 and 2011, the plaintiff delivered invoices Nos. 5010 through 5016 inclusive and 5042 with respect to 4,651 tons of material delivered to the defendant at a total cost of \$32,781.00. On 2 December 2011 the plaintiff, through its attorneys and/or its president and director, Daisy Chan, agreed with the second defendant through its agent, the first defendant, also a shareholder and officer of the second defendant, to accept \$24,606.00 in settlement of the aforesaid sum of \$32,781.00. That latter agreement was purportedly contained in a letter dated 2 December 2011. Instead of tendering payment in the sum of \$24,606.00, the second defendant through the first defendant tendered a cheque for \$8,175.00, which the plaintiff refused to accept.

31. In its statement of claim, the plaintiff alleges, inter alia, at paragraphs 4 through 6 of the statement of claim, that the defendants purchased 4,651 tons of aggregate fill material from the plaintiff and agreed to pay the plaintiff therefor; that invoices (5010 through 5016 and 5042) totaling \$32,781.00 for the said material were provided to the defendants; that contrary to the (aggregates) agreement, the defendants failed to pay the said sum of \$32,781.00.

32. Then at paragraphs 7 through 12 of the statement of claim, the plaintiff alleges, inter alia, that in November 2011, the plaintiff's attorney contacted and negotiated with the first defendant acting on behalf of the second defendant payment of the sum of \$24,606.00, part payment of \$32,781.00; that a "letter of final settlement between the parties" was prepared by the plaintiff's counsel and signed by the plaintiff and by the first defendant on behalf of the defendants". The first defendant acting on behalf of the second defendant by signing the "letter of final settlement" agreed to remit payment of \$24,606.00 representing part payment of \$32,781.00. However, instead of \$24,606.00, the first defendant acting on behalf of the second defendant tendered a cheque for \$8,175.00. The first defendant has defaulted on the said agreement and has failed to pay the plaintiff. Despite the existence of the (letter of final settlement) agreement executed by the first defendant on behalf of the second defendant, the first defendant acting on behalf of the second defendant had not complied with the (letter of final settlement) agreement and had refused to pay \$24,606.00, part payment of the overall sum of \$32,781.00; that the acts of the first defendant acting on behalf of the second defendant constitute a breach of contract, resulting in loss and damages to the plaintiff. (Underlining supplied for emphasis)

33. The plaintiff then provided particulars of breach of contract on the part of the first and second defendant as follows:

- a. Failure to abide by the terms and conditions of the initial purchase agreement for aggregate fill products; and
- b. failure to deliver a payment of the sum agreed to the plaintiff in accordance with the written and executed agreement for final settlement between the parties.

34. So, the plaintiff is, on the one hand accusing the defendants, that is Joseph O'Brien and City Services Limited, of failing to comply with the aggregates agreement which, on its case, required a payment of \$32,781.00, while accusing them of failing to pay the sum agreed under the agreement for final settlement, \$24,606.00, which it appears was intended to be a compromise of the aggregates agreement, but which sum the plaintiff also pleads as being part payment of the moneys due under aggregates agreement. Additionally, on one hand the plaintiff alleges that the first defendant acted on behalf of the second defendant and on the other hand, the plaintiff alleges wrongdoing on the part of the first defendant in his personal capacity either alone or jointly with the second defendant.

35. The document referred to by the plaintiff in its statement of claim alternatively as "a letter of final settlement", "the final settlement", and "agreement for final settlement", and presumably the evidence on which the plaintiff intends to rely, is, in fact, a letter dated 2 December 2011 written on counsel for the plaintiff's letterhead, addressed to the first defendant and in which "the undersigned" acknowledged "payment in full for the outstanding sum of \$24,606.00 by way of banker's cheque/ draft from the defendants for 4,651 tons of aggregate fill." The letter also indicated that the payment accounted "for the outstanding invoices 5010, 5011, 5012, 5013, 5014, 5015, 5016 and 5042 only." The "undersigned", that is the persons whose signatures appear at the end of the letter, are the said Daisy Chan and the first defendant.

36. Notwithstanding the contents of the aforesaid letter, the plaintiff provided the following particulars of its loss and expense:

- a. unpaid invoices for services rendered and products supplied to the first and second defendants;
- b. failure on the part of the defendants to comply with the said settlement agreement.

37. Further, notwithstanding having pleaded the 2 December 2011 letter, whereby the aforesaid debt was to have been "settled" for \$24,606.00 and for which payment in full had clearly been acknowledged, the plaintiff nevertheless claims payment of \$32,781.00, "representing the initial debt".

38. Although, as a general rule, the court is not to dictate to parties how they should frame their case, that rule is subject to modification and limitation that the parties must not offend against the rules of pleadings which have been laid down by the law; and if a party introduces a pleading which is unnecessary, and it tends to prejudice, embarrass and or delay the trial of the action, it then becomes a pleading which is beyond his right. (per Bowen L.J. in Knowles v Roberts (1888) 38 Ch. D. 263 at 270) and is subject to be struck out. On the other hand, striking out is employed only in plain and obvious cases (Kemsley v Foot [1951] 2 K.B. 34).

39. Counsel for the plaintiff argues that it is clear that the plaintiff is seeking the payment of clearly identified invoices with reference to the provision of supplies and goods which the defendants in their defence have admitted having received.

40. That argument notwithstanding, during the course of his submissions, counsel for the plaintiff acknowledged that there were problems with the manner in which the plaintiff's case was pleaded, intimating on several occasions that the problems could be solved by amendments. However, no application for leave to amend was actually made by or on behalf of the plaintiff, nor was any formulation of such amendments as the plaintiff thought would meet the defendant's application presented to the Court, despite the fact that notice of the defendant's application along with the aforesaid affidavits by Ms. Banona setting out the defendant's complaints about the plaintiff's statement of claim, was provided to counsel for the plaintiff well in advance of the hearing before me.

41. It is accepted that striking out an action at such an early stage in the proceedings is a draconian step. However, on the statement of claim as it is presently pleaded, and for the reasons hereinbefore set out, I am constrained to agree with counsel for the defendants that the plaintiff's case, as presently pleaded, is doomed to fail and is likely to prejudice, embarrass or delay the fair trial of the action. See *Republic of Peru v Peruvian Guano Company* (1887) 36 Ch. D 489 at pages 495-496.

42. In the circumstances, I strike out the statement of claim and dismiss the action against the defendants with costs to be paid by the plaintiff, to be taxed if not agreed.

Delivered this 31st day of May 2013

Estelle Gray Evans
Justice