EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

HCVAP 2012/007

(On appeal from the Commercial Division)

BETWEEN:

TAWNEY ASSETS LIMITED

Appellant

and

[1] EAST PINE MANAGEMENT LIMITED
[2] GUILDRON TRADING LIMITED
[3] SI CAPITAL PARTNERS LIMITED
[4] RUDY AMIRKHANIAN
[5] ELENA LOKTEVA

Respondents

Before:
The Hon. Mr. Don Mitchell — Justice of Appeal [Ag.]

On written submissions:
Mr. James Ayliffe, QC, Ms. Keisha M. Durham with him, for the Appellant
Mr. Christopher R. Parker, QC, of Maitland Chambers, for the 1st and 3rd Respondents

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2012: August 28;
September 17.

Civil interlocutory appeal – Case management powers of a judge – Striking out substantial part of statement of claim – Claim found to be unsustainable – Test in Baldwin Spencer v Attorney-General – Exercise of judicial discretion by a trial judge – Function of an appellate body –Test in Ian Peters v Robert Spencer – Test in Michel Dufour v Helen Air

Tawney Assets and East Pine entered into a joint venture agreement for the merger of two agricultural machinery businesses formerly carried on by them separately in the Russian Federation. Tawney Assets' business was a Russian company, Agrosnab, through its

wholly owned Cypriot subsidiary, Plancroft. East Pine's business was Mercury, held through a wholly owned Cypriot subsidiary called Oldril.

East Pine is owned or controlled by Strategic Initiatives of which Rudy Amirkhanian and Elena Lokteva are alleged to be senior executives. SI Capital is the corporate persona in the BVI of Strategic Initiatives. Tawney Assets is owned or controlled by Dimitry Korntsvit.

They entered into a further agreement dated 29th September 2010 for the supply by Mercury to Agrosnab of 8 tractors for a price of RR65.5 million (over US$2 million). Some RR40.4 million of that sum has been paid, leaving some RR25 million outstanding.

In November 2010, the parties transferred their shares in Plancroft and Oldril to Guildron in exchange for equal shareholding in the BVI company, Guildron. East Pine was to make a balancing payment of US$4 million to Tawney Assets, of which only $2 million was paid. The result was that Tawney Assets and East Pine indirectly held the two Russian businesses through Guildron's ownership of their respective Cypriot parents. On 24th November 2010, Tawney Assets and East Pine entered into a Shareholders Agreement to regulate the conduct of the affairs of Guildron. Under this agreement, the shareholders had agreed to adopt all decisions of any shareholders' or directors' meeting and to exercise their voting rights at shareholders' and directors' meetings in a manner consistent with their obligations under the Shareholders Agreement.

On 1st December 2010, Mercury lent Agrosnab RR13 million repayable on 21st December, which loan was not repaid. Mercury subsequently lent further sums to Agrosnab totalling more than RR24 million, which were not repaid. In mid-December 2010, Mercury's Russian personnel moved into Agrosnab's Moscow offices and the two businesses were operated together under the name MAST. The combined businesses were managed by a management board created for that purpose.

A dispute arose over the balancing payment and the management of Mercury and its employees who were working in the Agrosnab offices left, never to return or further cooperate with Agrosnab. Following the walk-out by Mercury, Tawney Assets could have convened a meeting as contemplated by the Shareholders Agreement at which East Pine would have been obliged to vote as required by that agreement. However, Tawney Assets never called on East Pine to attend any such meeting.

Tawney Assets then issued a claim based on contract, tort, and section 1841 of the BVI Business Companies Act, 2004. SI Capital applied for an order that the appropriate forum is the courts of the Russian Federation. East Pine next applied for an order that the amended statement of claim be struck out pursuant to rule 26.3(1) of Civil Procedure Rules 2000 ("CPR") as disclosing no cause of action or as being prolix and failing to comply with the requirements of CPR 10.

On the strike out application, the learned trial judge, after analysing the terms of the Shareholders Agreement, and considering the submissions made to him, concluded that the terms pleaded did not arise either as a matter of construction of the Shareholders'

Agreement or by implication. He concluded that the claim for breach of the Shareholders Agreement must be struck out.

The learned trial judge further concluded that the allegations marshalled in support of claims in conspiracy and breach of contract should not stand as allegations in support of a section 1841 claim. He found that the paragraphs would need recasting if they were to be used in relation to that claim.

He therefore ordered that paragraphs 1 to 70 of the statement of claim, together with paragraphs 1 to 3 inclusive of the prayer, be struck out. He ordered Tawney Assets to pay East Pine and SI Capital their costs of their applications and of the action to date.

Tawney Assets appealed on various grounds which included (1) that the judge incorrectly interpreted the Shareholders Agreement; (2) that it was inappropriate for him to rule out the contract claim at such an early stage having regarding to, among other things, the difficulty of the issues and the importance of the claim to Tawney Assets' case; (3) that there was a well-arguable case for an express or implied term as alleged in its statement of claim and for East Pine's conduct in causing or procuring the walkout by Mercury and Mercury's pursuit in Moscow of its litigation to constitute breaches of the Shareholders Agreement; (4) that the judge ought to have left in the factual allegations pleaded in the statement of claim because they were also relevant to and relied on by Tawney Assets in support of the surviving section 1841 claim; (5) that the learned trial judge was wrong to hold that the only appropriate respondent to the surviving section 1841 claim was East Pine; and (6) that the learned trial judge was wrong to order Tawney Assets to pay East Pine and SI Capital their costs of their applications and the action to date.

In its counter-appeal, East Pine and SI Capital urge that the judge was right to make the order he did for the reasons he gave, and for further reasons.

Held: dismissing the appeal brought by Tawney Assets and the counter appeal brought by East Pine and SI Capital; and awarding East Pine and SI Capital costs of this appeal pursuant to CPR 65.13, that:

1. The striking out of a party's statement of case, or most of it, is a drastic step which should only be used in clear and obvious cases, when it can clearly be seen, on the face of it, that the claim is obviously unsustainable, cannot succeed or in some other way is an abuse of the process of the court. The court must therefore be persuaded either that a party is unable to prove the allegations made against the other party; or that the statement of case is incurably bad; or that it discloses no reasonable ground for bringing or defending the case; or that it has no real prospect of succeeding at trial. In the present case, Tawney Assets never pleaded an actual breach nor an anticipatory breach of the Shareholders Agreement by East Pine. Tawney Assets had neither called upon East Pine to perform the obligations it identified in the amended statement of claim, nor had it accepted East Pine's conduct as a repudiating of the contract. Until it did one or the other, it could have no case. Tawney Assets never did call on East Pine to attend a meeting. If East Pine had refused to attend, then Tawney Assets could have

pleaded an actual breach. In contract, there must be a pleaded breach that could give rise to an action in damages. This failure by Tawney Assets led to the statement of case being incurably bad. No amount of oral evidence could have saved the error made in the pleadings. Accordingly, the learned trial judge's finding, that the claims in contract were unsustainable and would not succeed, was correct. With the striking out of the contract claim the tort claims necessarily fell away.

Baldwin Spencer v The Attorney General of Antigua and Barbuda Antigua and Barbuda High Court Civil Appeal No. 20A of 1997 (delivered 8th April 1998, unreported) followed; Ian Peters v Robert George Spencer Antigua and Barbuda High Court Civil Appeal No. 16 of 2009 (delivered 22nd December 2009, unreported) followed.

2. An appeal against a judgment given by a trial judge in the exercise of a judicial discretion will not be allowed unless the appellate court is satisfied (1) that in exercising his or her judicial discretion, the learned judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations or by taking into account or being influenced by irrelevant factors and considerations and (2) that as a result of the error or the degree of the error in principle, the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong. The learned trial judge exercised a judicial discretion after careful consideration of the facts and the applicable principles of law. He has not been shown to have erred in principle. There is no basis upon which the court is justified in substituting its own discretion for the discretion already exercised by the judge. As such, the appeal brought by Tawney Assets must fail.

   Michel Dufour et al v Helenair Corporation Ltd. et al (1996) 52 WIR 188 followed.

3. The striking out of the facts relied upon in support of the section 1841 claim was an eminently sensible case management decision which the learned trial judge was entitled to make. Thus the Court of Appeal would not disturb that decision.

4. While all the parties might be proper parties to a properly pleaded section 1841 claim, there is nothing that has been shown that demonstrates that the learned trial judge was in error in finding that all parties excluding East Pine were not proper parties to the claim as pleaded. This was a case management decision he was entitled to make.

5. The costs order made by the learned trial judge was an order that naturally followed on the orders he had made striking out a large part of the claimant's claim.

JUDGMENT

[1] MITCHELL JA [AG.]: This is an interlocutory appeal by Tawney Assets from an order made by Edward Bannister J in which he struck out paragraphs 1 to 70 of its statement of claim and paragraphs 1 to 3 of its prayer for relief. There is also a counter-notice of appeal filed by East Pine and SI Capital saying the learned trial judge was right to make the order he did for the reasons he gave and giving further reasons. The matter has been passed to me as a single judge of the court to deal with it on paper pursuant to rule 62.10(5) of the Civil Procedure Rules 2000 ("CPR"). I have considered the record of appeal and submissions of Tawney Assets filed on 1st June 2012, and the counter-appeal and submissions of East Pine and SI Capital filed on 18th June 2012.

Background Facts

[2] The case arises out of a typically complex, Russian, multi-layered, offshore structure. The facts may be principally taken from the judgment and summarised as follows. The claim arose out of a joint venture agreement between Tawney Assets and East Pine, both BVI registered companies, for the merger of two agricultural machinery businesses formerly carried on by them separately in the Russian Federation. Tawney Assets' business was Agrosnab, which is a Russian company, through its wholly owned Cypriot subsidiary, Plancroft. East Pine's business was Mercury, held through a wholly owned Cypriot subsidiary called Oldril.

[3] East Pine is allegedly owned or controlled by Strategic Initiatives or alternatively by investors in Strategic Initiatives. Rudy Amirkhanian ("Rudy") and Elena Lokteva ("Elena") are alleged to be senior executives of Strategic Initiatives and to effectively control East Pine. SI Capital is the corporate persona in the BVI of Strategic Initiatives. Tawney Assets is owned or controlled by Dimitry Korntsvit.

[4] The Memorandum of Understanding between the two sides was signed on 22nd October 2010, by which time the parties were already working together on orders for agricultural equipment. They entered into an agreement dated 29th September

2010 for the supply by Mercury to Agrosnab of 8 tractors for a price of RR65.5 million (over US$2 million). Some RR40.4 million of that sum has been paid, leaving some RR25 million outstanding.

[5] In November 2010, the parties transferred their shares in Plancroft and Oldril to Guildron in exchange for equal shareholding in Guildron, which is a BVI company. East Pine was to make a balancing payment of US$4 million to Tawney Assets, of which only $2 million was paid. The result was that Tawney Assets and East Pine indirectly held the two Russian businesses through Guildron's ownership of their respective Cypriot parents. On 24th November 2010, Tawney Assets and East Pine entered into a shareholders agreement to regulate the conduct of the affairs of Guildron (the "Shareholders' Agreement"). The Shareholders' Agreement is governed by English law.

[6] On 1st December 2010, Mercury lent Agrosnab RR13 million repayable on 21st December, which loan was not repaid. Mercury subsequently lent further sums to Agrosnab totalling more than RR24 million, which were not repaid. In mid-December 2010, Mercury's Russian personnel moved into Agrosnab's Moscow offices and the two businesses were operated together under the name MAST. The combined businesses were managed by a management board created for that purpose.

[7] On 4th March 2011, Elena claimed that East Pine was entitled to revise the US$4 million balancing payment down to US$1.25 million based on an alleged agreement that would happen if the valuation of Agrosnab differed substantially from information disclosed to East Pine when the merger was being negotiated. This is alleged to have amounted to a dishonest attempt on the part of Rudy and Elena to secure financial advantage. Two weeks later, under the direction of Rudy or Elena, the management of Mercury and its employees who were working in the Agrosnab offices left, never to return or further cooperate with Agrosnab. As a result, Agrosnab's original controller has been forced to run Agrosnab as a separate business. That month, Mercury began a series of proceedings in the

Moscow Arbitrazh Court for the outstanding balance under the supply contract of September 2010 and for payment of the loans made by Mercury. East Pine sent letters alleging that the Shareholders' Agreement had been rescinded. East Pine claimed that it had been induced to enter into the merger on the basis of inaccurate financial information. Tawney Assets denies this.

[8] The legal framework in the Shareholders' Agreement envisaged that the affairs of each company within the group would be supervised by its immediate parent, so that there was a chain of command leading all the way up to Guildron. In this way Guildron would have ultimate control over the affairs of all of its subsidiaries, direct control in the case of direct subsidiaries and indirect control in the case of indirect subsidiaries. This legal framework was never implemented in practice. Guildron never supervised Oldril, and Oldril never supervised Mercury. Following the walk-out by Mercury, Tawney Assets could have convened a meeting as contemplated by the Shareholders' Agreement at which East Pine would have been obliged to vote as required by clauses 2.1-2.8 of the Shareholders' Agreement. In particular, by clause 2.1(a)[1] the shareholders agreed to adopt all decisions of any shareholders' or directors' meeting and to exercise their voting rights at shareholders' and directors' meetings in a manner consistent with their obligations under the Shareholders' Agreement.[2] If East Pine had refused to attend, then Tawney Assets could have pleaded an actual breach. But, Tawney Assets never did call on East Pine to attend a meeting. So, Tawney Assets was never in a position to plead a breach of clauses 2.1-2.8 and never did plead a breach of clauses 2.1-2.8, as the judge observed.[3]

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[1] Clause 2.1(a).
(a) The Shareholders agree (i) to take all actions necessary or appropriate to cause the adoption of all resolutions and decisions at any General Meeting of Shareholders and any meeting of the Board, as required in each case to implement this Agreement and (ii) to exercise their voting rights at any General Meeting of Shareholders and to instruct Directors which they nominated to exercise their voting rights, subject to their fiduciary duties, in a manner consistent with all of their respective obligations under, and other applicable provisions of, this Agreement.
[2] It must be noted that clause 2.1(a) has been adopted from the judgment as the Shareholders' Agreement was never exhibited.
[3] At para. 19 of the judgment.

Proceedings in the Commercial Court

[9] On 1st September 2011, the present proceedings were commenced and served. By its amended statement of claim Tawney Assets initially pursued five causes of action: (a) in contract against East Pine for breach of the Shareholders' Agreement; (b) in tort against SI Capital, Rudy and Elena for deliberate inducement of breach of the Shareholders' Agreement; (c) in tort against SI Capital, Rudy and Elena for conspiracy with the predominant purpose of injuring the claimant; (d) in tort for conspiracy to injure the claimant by unlawful means; and (e) under section 1841 of the BVI Business Companies Act, 2004[4] on the basis of deadlock. This last claim was that East Pine, SI Capital, Rudy and Elena had caused the affairs of Guildron to be conducted in an oppressive, unfairly discriminatory and/or unfairly prejudicial manner entitling Tawney Assets to relief under section 1841. This claim was not included in the original statement of claim but was made for the first time in the amended statement of claim.

[10] SI Capital applied for an order that all further proceedings against it be stayed on the ground that notwithstanding the fact that SI Capital is a BVI company the appropriate forum is the courts of the Russian Federation. This is the forum application. East Pine next applied for an order that the amended statement of claim be struck out pursuant to CPR 26.3(1) as disclosing no cause of action or as being prolix and failing to comply with the requirements of CPR 10. This is the strike out application. East Pine next issued proceedings against Tawney Assets, Oldril and Guildron seeking relief under section 1841 of the BVI Business Companies Act, 2004. This is the section 1841 cross-action for unfair prejudice.

[11] The learned trial judge dealt first with the strike out application. So far as the claim in contract was concerned, he found[5] that the cause of action was identified at paragraphs 45A and 45B as an allegation that the aforesaid actions of Mercury were procured by East Pine or known to or acquiesced in by East Pine and amounted to a breach of the obligation pleaded at paragraph 31A. He cited

[4] No. 16 of 2004, Laws of the Virgin Islands.
[5] At para. 17 of the judgment.

paragraph 31A which he found pleaded an obligation which arose either on the true construction of the terms of the Shareholders' Agreement or 'implicitly'. After analysing the terms of the Shareholders' Agreement, and considering the submissions made to him, he concluded[6] that the terms pleaded in paragraph 31A did not arise either as a matter of construction of the Shareholders' Agreement or by implication. He concluded that paragraph 31A must be struck out. He then concluded[7] that paragraph 45B, alleging a breach by East Pine of the obligation alleged at paragraph 31A must also be struck out.

[12] The same went for the allegations at paragraph 45C that East Pine's breach was procured by Rudy and Elena, and paragraph 45D, and paragraphs 46 to 53 relating to the conspiracy claims. He found that the Shareholders' Agreement did not impose upon each party a standalone obligation to police the business of each subsidiary and to ensure that its provisions are complied with. If either party was unhappy at the conduct of one of the subsidiaries its remedy under the Shareholders' Agreement was to convene a meeting of Guildron and propose resolutions designed to put matters right. He found that it was not necessary to imply any term in order to give business efficacy to the Shareholders' Agreement, nor was the term obvious. None of the parties had convened the required meeting of Guildron, so that East Pine could not be accused of being in breach of the Shareholders' Agreement. The upshot, he concluded,[8] was that the claims both in contract and in tort must be struck out.

[13] The learned trial judge considered[9] the submission that the facts which underlay the causes of action which he had struck out were germane to the claim under section 1841 and, those paragraphs of the statement of claim should not be struck out. He concluded, however, that whether that was right or not the paragraphs will need recasting if they are to be used in relation to that claim. He did not think it

[6] At para. 23 of the judgment.
[7] At para. 24 of the judgment.
[8] At para. 32 of the judgment.
[9] At para. 33 of the judgment.

right that allegations marshalled in support of claims in conspiracy and breach of contract should stand as allegations in support of a section 1841 claim.

[14] On the second application, SI Capital's forum challenge, the learned trial judge considered the facts pleaded, the submissions made to him and the law produced by the parties. He found it[10] impossible to envisage that SI Capital, which appears to have played no role as an actor in the story, would be compelled to provide relief to the claimant. The claims against Rudy and Elena, now that the claims in contract and tort had gone, fell away. He found no grounds for obliging them personally to recompense Tawney Assets. The forum challenge had therefore disappeared.

[15] He therefore ordered that:

> "[40] Paragraphs 1 to 70 inclusive of the statement of claim, together with paragraphs 1 to 3 inclusive of the prayer must be struck out. References in paragraphs 4(c) and 4(e) of the prayer to the third, fourth and fifth defendants must be deleted.
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> [41] I will hear Counsel on the question of costs and as to directions in this and East Pine's cross action for unfair prejudice."

Acting under paragraph 41, he subsequently ordered Tawney Assets to pay East Pine and SI Capital their costs of their applications and of the action to date.

The Appeal

[16] In its appeal, Tawney Assets seeks an order overturning the orders of the learned trial judge and replacing them with orders that the applications of the defendants are dismissed and for East Pine and SI Capital to pay the costs of the application and of the appeal. The grounds of the appeal are that the judge was wrong to so find because there was a well-arguable case for express or implied terms of the Shareholders' Agreement as alleged in the amended statement of claim. There was a well arguable case that East Pine's conduct in causing or procuring the walkout by Mercury and the pursuit of Mercury's Moscow litigation constituted

[10] At para. 39 of the judgment.

breaches of the terms alleged in the amended statement of claim. He incorrectly interpreted the Shareholders' Agreement. It was inappropriate for him to rule out the contract claim at such an early stage. There was a well-arguable case for an express or implied term as alleged in its statement of claim and for East Pine's conduct in causing or procuring the walkout by Mercury and Mercury's pursuit in Moscow of its litigation to constitute breaches of the Shareholders' Agreement. The judge's conclusion was based on an incorrect interpretation of the Shareholders' Agreement and did not accurately deal with the arguments presented by Tawney Assets. Tawney Assets also urged that it was inappropriate to rule out the contract claim at such an early stage having regard to (among other things) the difficulty of the issues and the importance of the claim to Tawney Assets' case.

[17] Tawney Assets submitted that the learned trial judge had been wrong to hold that the tort claims were not reasonably arguable, as his conclusion was based solely on his view that there was no reasonably arguable case for breach of contract which was wrong for the reasons submitted.

[18] Further, Tawney Assets submitted that the learned trial judge was wrong to have struck out the entirety of paragraphs 1-70 of the amended statement of claim as, even if he had been correct to conclude that the contract and tort claims should be struck out, he ought to have left in the factual allegations because they were also relevant to and relied on by Tawney Assets in support of the surviving section 1841 claim. This striking out was particularly inappropriate in that, among other things, many of the alleged facts were not in dispute between the parties, and the judge accepted that some of the facts were relevant to the section 1841 claim. Not even East Pine had been seeking to strike out all of paragraphs 1-70, and Tawney Assets would be required to re-plead the facts in support of its section 1841 claim, leading to significant additional cost and delay.

[19] Further, Tawney Assets submitted that the learned trial judge was wrong to hold that the only appropriate respondent to the surviving section 1841 claim was East

Pine. Section 1841 gives the court a very wide discretion both as to the relief which it is able to grant and also as to the persons against whom relief may be granted. East Pine was merely a holding company with no assets other than its shares in Guildron and SI Capital, while Rudy and Elena were the prime movers behind East Pine and accordingly responsible for the conduct on the part of East Pine. The court might at trial consider it appropriate to order relief against one or more of them, and they would be in court in any event as defendants to the tort claims and as witnesses for East Pine. The judge was wrong to have found that SI Capital appeared to have played no part as an actor in the story when it was East Pine's own case that SI was the decision-maker behind East Pine. He had shut his eyes to the wide-ranging allegations of deliberate wrongdoing by Rudy and Elena. He had accepted that much of what had been set out in the paragraphs would remain relevant to the section 1841 claim and would be reinstated when Tawney Assets re-pleaded its case on that claim. He ought to have concluded that Rudy and Elena were proper parties.

[20] Further, the learned trial judge was wrong to order Tawney Assets to pay East Pine and SI Capital their costs of their applications and the action to date. Even if Tawney Assets fails on the substantive appeal the costs order was inappropriate and should be replaced by an order limiting the costs to those of the application, and any costs thrown away as a result of the striking out of the contract and tort claims, such costs to be assessed if not agreed. The order was unfair because, among other things, the section 1841 claim was continuing and a substantial part of the costs incurred to date arose from the investigation and analysis of that claim. It was also unfair when the judge did not in fact determine the SI Capital forum application, and the proper order would have been no order as to costs on that application.

[21] In its counter-appeal, East Pine and SI Capital urge that the judge was right to make the order he did for the reasons he gave, and for the following further reasons:

(i) the injunction sought did not reflect the terms of the Shareholders' Agreement and went beyond East Pine's obligations;

(ii) none of the facts pleaded constituted a breach of the implied term pleaded in the statement of claim; and

(iii) the facts as pleaded could not justify a claim against the defendants in tort based on one or more of them procuring East Pine to breach the terms of the Shareholders' Agreement.

The Applicable Legal Principles

[22] The striking out of a party's statement of case, or most of it, is a drastic step which is only to be taken in exceptional cases. The reason for proceeding cautiously has frequently been explained as that the exercise of this jurisdiction deprives a party of his right to a trial and of his ability to strengthen his case through the process of disclosure, and other procedures such as requests for further information. The court must therefore be persuaded either that a party is unable to prove the allegations made against the other party; or that the statement of case is incurably bad; or that it discloses no reasonable ground for bringing or defending the case; or that it has no real prospect of succeeding at trial. The proper approach to be taken in striking out a statement of case as disclosing no facts upon which the court can proceed has been described by Pereira CJ [Ag.], in her judgment in the interlocutory appeal in Ian Peters v Robert George Spencer,[11] where she found that a statement of case is not suitable for striking out if it raises a serious live issue of fact which can only be determined by hearing oral evidence. In that case she set aside the master's order striking out the claimant's claim as containing no allegations of fact which supported the claim.

[11] Antigua and Barbuda High Court Civil Appeal No. 16 of 2009 (delivered 22nd December 2009, unreported) following Citco Global Custody NV v Y2K Finance Inc Territory of the Virgin Islands High Court Civil Appeal No. 22 of 2008 (delivered 19th October 2009, unreported).

[23] Even under our old rules, the striking out of a claim was a jurisdiction which was to be exercised sparingly. In the words of Sir Dennis Byron in Baldwin Spencer v The Attorney-General of Antigua and Barbuda et al,[12]

> This summary procedure should only be used in clear and obvious cases, when it can clearly be seen, on the face of it, that the claim is obviously unsustainable, cannot succeed or in some other way is an abuse of the process of the court.[13]

There is no reason to believe that this is not still good guidance under the new CPR.

[24] CPR 26.3 gives the trial judge a wide discretion to manage a case before him, including striking out parts of the statement of case if he is satisfied it does not disclose any reasonable ground for bringing it.[14] The principles on which an appellate body will overturn a case management order of a judge are not in doubt. In Michel Dufour et al v Helenair Corporation Ltd. et al,[15] Sir Vincent Floissac CJ said the following which has been quoted and followed in this court on numerous occasions:

> We are thus here concerned with an appeal against a judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate Court is satisfied (1) that in exercising his or her judicial discretion, the learned judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations or by taking into account or being influenced by irrelevant factors and considerations and (2) that as a result of the error or the degree of the error in principle, the trial judge's decision

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[12] Antigua and Barbuda High Court Civil Appeal No. 20A of 1997 (delivered 8th April 1998, unreported).

[13] Ibid, p. 5.

[14] Sanctions – striking out statement of case

26.3 (1) In addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court that –

(a) there has been a failure to comply with a rule, practice direction, order or direction given by the court in the proceedings;

(b) the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim;

(c) the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings; or

(d) 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.

[15] (1996) 52 WIR 188.

> exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.[16]

[25] As Michael Gordon JA noted in Attorney-General of Montserrat et al v Geraldine Cabey,[17] the first condition was explained by Viscount Simon LC in Charles Osenton and Company v Johnston,[18] where the Lord Chancellor said:

> "The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there had been a wrongful exercise of discretion, in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified."

[26] The second condition was explained by Asquith LJ in Bellenden (formerly Satterthwaite) v Satterthwaite[19] as follows:

> "We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere."

Applying the Law

[27] As Mr. Parker, QC's submissions make clear, in the argument in the court below the applicants' position was not that Tawney Assets was not in a position to plead a case of breach of contract by East Pine, but only that Tawney Assets had not successfully done so. And, as the learned trial judge noted, the facts alleged were such that Tawney Assets could readily have pleaded an anticipatory, repudiatory breach of contract that Tawney Assets was accepting as putting an end to the contract and claimed damages on that basis. But, Tawney Assets expressly eschewed any such case. Tawney Assets did so because such a case was

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[16] Ibid, p. 189.
[17] Montserrat High Court Civil Appeal No. 8 of 2008 (delivered 12th January 2009, unreported).
[18] [1942] AC 130 at 135.
[19] [1948] 1 All ER 343 at 345.

inconsistent with the principal relief that was being sought, namely an injunction by way of specific performance of the contract. As the learned author of the textbook Chitty on Contracts[20] explains, a term requiring performance of an obligation is only breached at the time that performance of the obligation is required and the obligation is not then performed. If before the time arrives at which a party is bound to perform a contract, he expresses an intention to break it, or acts in such a way as to lead a reasonable person to the conclusion that he does not intend to fulfil his part, this constitutes an 'anticipatory breach' of the contract and entitles the other party to take one of two courses. He may 'accept' the renunciation, treat it as discharging him from further performance and sue for damages forthwith, or he may wait till the time for performance arrives and then sue. On the other hand, where the anticipatory breach takes a continuing form, the fact that the innocent party initially continued to press for performance does not normally preclude him from later electing to terminate the contract provided that the party in breach has persisted in his stance up to the moment of termination.

[28] Tawney Assets' problem was that the time for the performance by East Pine of its clause 2.1 obligations had never arrived as there had never been a meeting of shareholders, nor any meeting of directors at which the matters had been considered. Indeed, Tawney Assets had neither called upon East Pine to perform the obligations it identified in the amended statement of claim, nor had it accepted East Pine's conduct as a repudiating of the contract. Until it did one or the other, it could have no case. Tawney Assets was not willing to plead the case as an anticipatory breach because it wished to contend that the contract was still on foot and could be specifically enforced. In the end, it pleaded neither an anticipatory breach nor breach of a term by failure to perform when required to do so. Because neither an actual breach nor an anticipatory breach accepted by Tawney Assets was pleaded, there was no pleaded breach that could give rise to an action in damages. The leaned trial judge was therefore entitled to find that the claim in

[20] Chitty on Contracts (30th edn. Volume 1, Sweet & Maxell 2008) para. 24-021.

contract could not stand, and the relevant paragraphs of the statement of claim should be struck out.

[29] So far as the tort claims are concerned, most of these were abandoned during the hearing in the court below, save for that for procuring breach of contract and conspiracy to procure a breach of contract. With the striking out of the contract claim, as the learned judge found, the tort claims necessarily fell away. He therefore had good reason for ruling that the relevant paragraphs of the statement of claim raising the claim in tort should be struck out.

[30] So far as the striking out of the facts relied upon in support of the section 1841 claim is concerned, the learned judge agreed with East Pine's submission that Tawney Assets should be required to formulate its factual allegations on the basis that its claim was now to be solely one under section 1841. The significance was that Tawney Assets would have to demonstrate how any allegations of fact concerning Mercury and Agrosnab related to the conduct of Guildron's affairs. The learned judge agreed that factual allegations made for claims of breach of contract and tort, with a section 1841 claim tacked on the end, should be reformulated now that the claim was one solely under section 1841. This was an eminently sensible case management decision, which the learned trial judge was entitled to make, and this ground of appeal should be dismissed.

[31] So far as Tawney Assets' complaint that the learned trial judge was wrong to have excluded Rudy and Elena as parties, and to have found that SI Capital played no part as an actor in the story, is concerned, the judge was here dealing with the question whether the causes of action raised were properly pleaded. No doubt they might be proper parties to a properly pleaded section 1841 claim. What he found was that they were not proper parties to the claim as pleaded, and there is nothing that has been shown that demonstrates that he was in error in so finding. This was a case management decision he was entitled to make, and this ground of appeal should be dismissed.

[32] The learned trial judge proceeded to deal with the respondents' applications on the assumption that the facts alleged in the statement of claim were true. Tawney Assets' submission that the facts alleged in the statement of claim should not have been struck out because they might get better on further investigation is without basis. The learned trial judge struck out the parts of the statement of claim that he did because he found that the claims in contract and tort were obviously unsustainable and would not be able to succeed, as described above. That meets the test in Baldwin Spencer v The Attorney-General of Antigua and Barbuda.[21] The paragraphs of the statement of claim were suitable for striking out because no amount of oral evidence could save the error in pleading found by the learned trial judge and described above. That satisfies the test in Ian Peters v Robert George Spencer.[22]. The learned trial judge exercised a judicial discretion after careful consideration of the facts and the applicable principles of law. He has not been shown to have erred in principle. There is no basis upon which this court is justified in substituting its own discretion for the discretion already exercised by the judge. The appeal fails to pass the test described by Sir Vincent Floissac in Michel Dufour et al v Helenair Corporation Ltd. et al.[23] For these reasons the appeal brought by Tawney Assets must fail.

[33] East Pine and SI Capital submit that Tawney Assets including as an item of complaint in its appeal the order made by the judge that it pay costs should be barred by its failure to obtain leave to appeal this costs order. They make this submission on the basis that the entire appeal was in reality no more than a camouflaged appeal against the order for costs. However, this requires a stretch of the imagination, given the express grounds of appeal and the submissions made in their support. So far as the learned trial judge's order in relation to costs is concerned, it was an order that naturally followed on the orders he had made striking out a large part of the claimant's claim. Tawney Assets did not require

[21] Antigua and Barbuda High Court Civil Appeal No. 20A of 1997 (delivered 8th April 1998, unreported).
[22] Antigua and Barbuda High Court Civil Appeal No. 16 of 2009 (delivered 22nd December 2009, unreported) following Citco Global Custody NV v Y2K Finance Inc Territory of the Virgin Islands High Court Civil Appeal No. 22 of 2008 (delivered 19th October 2009, unreported).
[23] (1996) 52 WIR 188.

leave to appeal the order for costs made in those circumstances, as, if it had succeeded in its appeal, it would have been entitled to have the costs order made in the court below altered.

[34] So far as the counter-appeal of East Pine and SI Capital is concerned, it is difficult to see what its purpose was. The 'further reasons' advanced do no more than repeat and summarise some of the findings of the learned trial judge set out at paragraphs 19 to 32 of his judgment. I find no merit in the counter-appeal, and it must be dismissed. Tawney Assets has had no opportunity to respond to the counter-appeal, and it would not be appropriate for East Pine and SI Capital to be made to bear any cost for its dismissal.

Order

[35] In the circumstances, and for the reasons set out above:

(1) Tawney Assets' notice of appeal against the orders made by the learned trial judge and filed on 11th June 2012 is dismissed.

(2) East Pine and SI Capital's counter-notice of appeal filed on 18th June 2012 is dismissed.

(3) Tawney Assets will pay East Pine and SI Capital their costs of this appeal pursuant to CPR 65.13, i.e., two-thirds of the amount awarded to them in the court below.

Don Mitchell
Justice of Appeal [Ag.]