EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2018/0016

BETWEEN:

[1] OUTLOOK ASSET MANAGEMENT LP
[2] STANHOPE OVERSEAS LIMITED
[3] CONCORD INTERNATIONAL INVESTMENT GROUP LP

Appellants

and

CAPSTONE CORPORATE LIMITED

Respondent

[1] CAPSTONE ADVISORY SERVICES SAE
[2] MR. SHERIF RAAFAT

Defendants

Before:

The Hon. Mr. Mario Michel — Justice of Appeal
The Hon. Mde. Gertel Thom — Justice of Appeal
The Hon. Mr. Rolston Nelson, SC — Justice of Appeal [Ag.]

Appearances:

Mr. Adam Solomon, QC with him, Mr. Nicholas Brookes for the Appellants
Mr. Peter Ferrer with him, Ms. Sarah Thompson for the Respondent

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2018: October 31;
2019: February 11.

Civil appeal – Interlocutory appeal – Striking out – Whether trial judge erred in striking out the appellant's claim pursuant to rule 20.1 of the Civil Procedure Rules 2000 – Draft judgment – Amendment – Power of judge to amend judgment – Amending the statement of claim – Passing off – Inverse passing off – Goodwill

The appellants, Outlook Asset Management, Stanhope Overseas Limited and Concord International Investments Group LP are legal entities and subsidiaries of the Concord Group. By a claim form filed 21st July 2017, the appellants sought to restrain the

respondent, Capstone Corporate Limited ("Capstone"), a BVI limited liability company, and two others from relying upon the present or past performance of any fund operated and/or managed by any member of the Concord Group or to any projects managed by such funds, save for Castle Property Company Limited ("Castle"), from making or continuing to make any representations, orally, in writing, electronically or otherwise which refer to any past or present fund operated and/or managed by any member of the Concord Group or to any past or present projects managed by such funds, save for Castle.

Capstone applied for a stay on the basis of forum non conveniens and to strike out the claim in the proceedings pursuant to rule 26.3(1)(b) of the Civil Procedure Rules 2000 (CPR). Capstone argued that, Outlook Asset Management, Stanhope Overseas Limited and Concord International Investment Group LP had no reasonable prospect of success with their claim.

Following a hearing of the strike out application on 22nd February 2018 and the circulation of a draft judgment on 22nd March 2018, the learned judge on 28th March 2018 ordered that the action (including the appellants' claim form and statement of claim) be struck out. The appellants appealed with leave of the Court, against the order of Adderley J dated 28th March 2018.

The issues for the Court's determination on the appeal are: (i) whether the learned judge erred in striking out the claim; (ii) whether the learned judge erred in the interpretation and application of the law as it pertains to the tort of passing-off; (iii) whether the claim should have been struck out when it was capable of an amendment and cure of any perceived defect; and (iv) whether the learned judge erred in dismissing the appellants' evidence in the strike out application hearing.

Held: dismissing the appeal; striking out the statement of claim and affirming the order of Justice Adderley dated 28th March 2018 and awarding costs to Capstone in this appeal to be assessed, if not agreed within 21 days, that:

1. A court adjudicating on a statement of claim has power to strike out the statement of claim and consequentially the action. The statement of claim being considered by the Court can only be substituted if the Court decides to treat the action as subsisting while striking out the statement of claim and to give the claimant permission to file a fresh statement of claim, usually in terms of an approved draft amended statement of claim.

   Rule 26.3(1)(b) of the **Civil Procedure Rules 2000** applied.

2. The judge is not bound by the terms of the draft judgment which has been circulated in confidence. A draft judgment was not an open invitation to embark upon an additional round of litigation, remedying lacunae in their own evidence and raising further arguments. It is clear that after circulation of the draft judgment and before a sealed order giving effect to the judgment, the learned judge retained a power to alter his judgment

   Regina (Mohammed) v Secretary of State for Foreign and Commonwealth Affairs (No. 2) (Guardian News and Media Ltd and Others intervening) [2011] QB 218; **Altus Group (UK) Limited v Baker Tilly Tax and Advisory Services LLP and another** [2015] EWHC 411; **Gosvenor London Ltd v Aygun Aluminium UK Ltd** [2018] EWHC 277 (TCC) applied.

3. Before delivery of the judgment, as in the present case, where an application to amend the statement of claim is made the court has a wide discretion to permit amendment in the interests of justice. The court will often grant an opportunity to save the action by amendment of the pleading. The judge is required to give the party who has a defective pleading an opportunity of putting right the defect, if there is reason to believe that he will be in a position to put the defect right. Such an opportunity was given to the appellants.

   Kim v Park [2011] EWHC 1781 (QBD) applied.

4. The statement of claim fell afoul of the ruling in **Starbucks Ltd and another v British Sky Broadcasting Group Plc and others**. It was not enough for the claimant in a passing off action to merely establish reputation in the jurisdiction where the claim was being brought. A claimant was required to show goodwill (in the form of paying customers) in the relevant jurisdiction in order to succeed in a passing off claim.

   Starbucks (HK) Ltd and Another v British Sky Broadcasting Group Plc and others [2015] 1 WLR 2628 applied.

5. It is now settled law that inverse passing off falls within the tort of passing off. The idea of transnational goodwill is rejected. The document submitted to the learned judge, a draft amended statement of claim after he had circulated his draft judgement, did not remedy the defect in the pleading or save the action. The Court has examined the proposed amendments to the statement of claim, especially paragraphs 14, 37 and 44. The appellants, in order to save the action, were required to show that each of the appellants possessed a reputation arising out of the Track Record, its investment methodology and private equity team and that

such reputation was represented by goodwill in the BVI among actual customers within the BVI. Instead, what was pleaded is the existence of transnational goodwill.

Starbucks (HK) Ltd and Another v British Sky Broadcasting Group Plc and Others [2015] 1 WLR 2628 applied; Rule 62.20 of the **Civil Procedure Rules 2000** considered.

JUDGMENT

Introduction

[1] **NELSON JA [AG.]:** By a notice of application dated 22nd December 2017, Capstone Corporate Limited (the respondent in this appeal, hereafter referred to as "Capstone") applied, without prejudice to an earlier application pursuant to rule 9.7 of the **Civil Procedure Rules 2000 (**"CPR"**)** for a stay on the basis of forum non conveniens, and to strike out the claim in these proceedings pursuant to CPR 26.3(1)(b) and/or the court's inherent jurisdiction. The ground was that the pleaded case disclosed no reasonable prospect of success.

[2] The learned judge, Adderley J, reserved judgment on the stay application pending the result of an appeal by the claimants against the learned judge's refusal of permission to serve out. We are told that appeal was ultimately dismissed. The instant appeal arises solely out of the application to strike out.

The Claim

[3] By a claim form filed on 21st July 2017 the appellants/claimants seek to restrain Capstone and two others from:

(1) In any way relying upon the present or past performance of any fund operated and/or managed by any member of the Concord Group or to any projects managed by such funds, save for Castle Property Company Limited; or

(2) Making or continuing to make any representations, orally, in writing, electronically or otherwise which refer to any past or present fund operated and/or managed by any member of the Concord Group or to any past or present projects managed by such funds, save for Castle Property Company Limited.

[4] On 21st July 2017, the appellants/claimants also sought an interim injunction in similar terms to the final relief claimed and the parties on 3rd August 2017 entered into a consent order in that regard. Prior to the filing of the strike out application, Adderley J on 16th October 2017 had refused permission to serve out, as indicated above.

[5] Following a hearing of the strike out application on 22nd February 2018 and the circulation of a draft judgment on 22nd March 2018, the learned judge on 28th March 2018 ordered that the action (including the claimant's claim form and statement of claim) be struck out.

[6] A notice of appeal dated 1st August 2018 was filed but amended on 25th October 2018 by consent. However, the amended grounds (vii) to (x) are no longer being pursued. The appellants/claimants appealed with leave of the Court, against the order of Adderley J dated 28th March 2018 on the grounds that the learned judge wrongly held as follows:

(i) That the court need not consider the amended statement of claim before striking out the claim;

(ii) That the claim should be struck out although capable of being cured (and in fact cured) by amendment;

(iii) That the appellants' evidence be dismissed notwithstanding the learned judge's self-direction that the court should not consider evidence on a strike out application and there was no application for summary judgment;

(iv) That the court did not have jurisdiction to try the claim for passing- off

(v) That the claim be struck out notwithstanding that it concerned a developing area of law; and/or

(vi) That **Starbucks v BSkyB**[1] ("**Starbucks**") is applicable to the tort of inverse passing-off and/or cases of transnational goodwill.

These perceived holdings are described as errors of law and resolve themselves into procedural and substantive grounds of appeal. The main issue in this appeal is whether the claim was defective in failing to allege that the appellants/claimants enjoyed goodwill in the BVI in respect of the business reputation pleaded and sought to be protected. If the claim was defective, did Adderley J properly dismiss the claim after he circulated his draft judgment without considering a document delivered to his chambers on 26th March 2018 entitled "Amended Statement of Claim". To understand the context of the passing off claim, it is necessary to state the facts concerning the parties and the factual background to the claim.

The Factual Background

[7] The background is gleaned from the statement of claim and the affidavit of Tarek Younes sworn and filed on 2nd February 2018 which refers to affidavits of Tarek Younes, sworn and filed on 21st July 2017 and 25th July 2017, adduced in opposition to the application to strike out.

[1] Starbucks (HK) Ltd and another v British Sky Broadcasting Group Plc and Others [2015] UKSC 31; [2015] 1 WLR 2628.

The Parties

[8] The three claimants are legal entities, Outlook Asset Management LP ("Outlook"), Stanhope Overseas Limited ("Stanhope") and Concord International Investments Group LP ("Concord"). Paragraph 1 of the statement of claim describes them as:

> "subsidiaries of a New York-based emerging market asset management group (the "Concord Group") that specializes in Middle Eastern, particularly Egyptian, private equity markets. Investment projects by the Concord Group and its entities consist of investment transactions in particular ventures".

Each such project/venture will be known as a 'Portfolio Investment'.

[9] Capstone is a BVI limited liability company incorporated in 2013. The second defendant (not a party to this appeal) is Capstone Advisory Services SAE, incorporated in Egypt. These two companies together are referred to as "the Capstone Group".

[10] The third defendant, Mr. Raafat is a director of Capstone and Capstone Advisory Services SAE. He is also a director of Outlook.

The Concord Group

[11] While the statement of claim refers to the Concord Group, the action is really by three companies. The Concord Group, according to the statement of claim is one of the leading managers of Egyptian securities worldwide and one of the longest-standing private equity investors in Egypt. It is a recognised market leader. Since setting up its first private equity fund in 2000, it has established three more private equity funds and raised US$210 million through four private equity funds. The following funds were all incorporated in Guernsey:

(1) The Egyptian Direct Investment Fund Limited managed by Stanhope;

(2) The Coral Growth Investment Limited managed by Stanhope;

(3) The Coral Growth Investment (Parallel) Limited managed by Stanhope;

(4) Crown Investments Limited managed by Outlook.

The Concord Group had US$516 million in assets under management including US$321 million in Egyptian equities as at 31st December 2016.

[12] At paragraph 9 of the statement of claim, it is averred that over the course of the Concord Group's involvement in the Egyptian Private Equity market it has particularly been involved in the following portfolio investments relevant to this claim:

(1) Alborg laboratories ("Alborg"): a chain of phlebotomy and medical services laboratories based in Egypt, an investment made by Stanhope on behalf of EDIF, purchased in 2003, sold to the Abraaj Group of the United Arab Emirates in 2008.

(2) Contact Car Trading Company SAE ("Contact Car"): a financial services company, an investment made by Stanhope on behalf of EDIF, purchased in 2004 and sold to the Sarwa Investments Limited of the U.A.E., in 2008.

(3) Amoun Pharmaceutical Company SAE ("Amoun"): an Egyptian pharmaceutical manufacturing firm, which is an investment made by Stanhope on behalf of CGIL and CGIP, purchased in 2006, with additional investment made by Outlook on behalf of CIL in 2009 and sold to Valeant Pharmaceuticals of Canada in 2015.

(4) Egyptian Company for Foods ("Bisco Misr"): a confectionary (sic) manufacturer, an investment made by Stanhope on behalf of EDIF, purchased in 2005 and sold to Kellogg's U.S.A. in 2015.

[13] Paragraph 9 of the statement of claim ends with the pleading that: "the aforementioned Portfolio Investments and the associated reputation of the specific Claimants responsible for each Portfolio Investment will be hereafter referred to as the 'Track Record'".

[14] Paragraph 10 states that: "the resulting Track Record is a major component of Concord's credibility in the local and international private equity and asset management community, as well as in respect of the general public". Concord developed a private equity investment methodology adapted to the local conditions for private equity investment in Egypt that was used by its investment management subsidiaries including Outlook and Stanhope in establishing the Track Record. The Private Equity Team comprised inter alia of the Group Chairman, Mohammed S. Younes; and later Ms. Bahia Ismail worked for Outlook and Stanhope in connection with Portfolio Investments in the Track Record.

[15] Thus, the asset for which the claim sought protection was the Track Record, the investment methodology and the professional expertise which produced the Track Record.

Mr. Raafat and the Concord Group

[16] Mr. Raafat became involved in the Concord Group in 1992. His primary involvement in the Concord Group was to find investors and to raise funds for the different Concord Group funds, as well as managing a corporate finance subsidiary. At no time during his service with the Concord Group did Mr. Raafat serve as a member of the Private Equity Team mentioned above. However, he was given responsibility for leading a discrete investment management team for Castle Property Company Limited, a dedicated real estate fund.

[17] With regards to Mr. Raafat's involvement in Portfolio Investment within the Track Record, paragraph 26 of the statement of claim states:

(1) Alborg. The investment was generated by Mr. Mohammed Younes. Mr. Raafat was not involved in either generating the investment, negotiating the Portfolio Investment, managing of the investment or exiting from the investments.

(2) Contact Car. The investment was generated by the Commercial International Bank. Mr. Raafat was not involved.

(3) Bisco Misr. The investment was by Concord Group subsidiaries in the 1990s. Mr. Raafat was not involved.

(4) Amoun. The investment was generated by Citigroup Venture Capital in London and Capital International of Los Angeles. Mr. Raafat was similarly not involved.

Accordingly, Mr. Raafat's involvement up to the time of his separation in 2013 was limited to real estate management and corporate finance.

The Misrepresentations
The Capstone Group and the Claim

[18] On 3rd May 2017, Mr. Tarek Younes, a director of Outlook and other Concord Group companies, received an email in error from the Capstone Group attaching a presentation in the form of a Microsoft PowerPoint presentation and an Excel spreadsheet (hereinafter referred to as "the Capstone Presentation").

[19] This Capstone Presentation contains a series of electronic slides in draft, which detail a business history purported to be associated with the Capstone Group and Mr. Raafat. The Excel spreadsheet contains a list of financial information which

reflects figures calculated from the Track Record of the claimants. To give a few examples from paragraph 35:

> "(10) Slide 23's references to 5 full exits matches the number of exits depicted on Shde 12, of which four are: Contact Car, Alborg, Bisco Misr and Amoun.
> (11) Slide 27, also headed "Our Investment Philosophy" includes among other names the brand logos for Amoun, Bisco Misr and Contact Cars.
> (15) Slide 35, also headed "Our Investment Philosophy" refers to the capital increase stake in Al Borg in 2003 and refers to its "performance" over a 5-year holding period."

[20] Paragraph 37 of the statement of claim concludes:

> "The production of the Presentation constitutes an act or acts and/or a threatened act or acts by the Defendants by which they falsely represent the Track Record, and each item within it, as well as the general goodwill of the Claimants, as belonging to being associated and/or connected with and/or the work of Capstone Corporate and/or Capstone Advisory and/or Mr. Raafat."

[21] In **Starbucks**, the Supreme Court held that it was not sufficient for the claimant in a passing off action to merely establish reputation in the jurisdiction where the claim was being brought. A claimant was required to show goodwill (in the form of paying customers) in the relevant jurisdiction in order to succeed in a passing off claim. This was the principle of law on which the learned judge relied, when he indicated that the statement of claim did not satisfy the requirements of a passing-off action.

The Business Reputation in this Case

[22] The claim sought to protect the business reputation of each of the three claimants in respect of the Track Record comprised in the four highly successful Portfolio Investments, and the methodology and expertise employed in these investments. The issue was whether the claimants or any of them had customers in the BVI who benefited from investments in the Track Record or were customers of the appellants/claimants who might benefit from the success of the Track Record.

[23] To remedy the defect which the leaned judge identified and which the appellants/claimants clearly resisted, it was critical to show not simply that subsidiaries in the Concord Group existed in the BVI but that one or more of the claimants had actual customers in the BVI who were aware of the record of the appellants/claimants in relation to the Track Record.

The Grounds of Appeal
Ground 1: Striking out a claim without proper consideration and/or without consideration of the amendment pursuant to CPR 20.1 (1)

[24] On a striking out application pursuant to CPR 26.3(1)(b), a court adjudicating on a statement of claim has power to strike out the statement of claim and consequentially the action. The statement of claim being considered by the court can only be substituted if the court decides to treat the action as subsisting while striking out the statement of claim and to give the claimant permission to file a fresh statement of claim, usually in terms of an approved draft amended statement of claim.

[25] If a claimant could circumvent even a decision striking out a statement of claim by filing an amended statement of claim pursuant to CPR 20.1(1) the striking out of a statement of claim pursuant to CPR 26.3(1)(b) would be entirely otiose. A defendant would be entitled to file a fresh application to strike out the amended statement of claim. The overriding objective in CPR 1.1 to deal with cases justly and expeditiously would be frustrated.

[26] Once the court is seised of an application, documents may only be filed in those proceedings with leave of the court. Where the court is adjudicating on a document, a proposed substitute statement of claim may only be filed in draft for the approval of the court. The appellants could not properly file an amended statement of claim in the proceedings before Adderley J without his leave and without being in draft.

[27] On 22nd March 2018, the learned judge circulated his judgment in draft to the parties by email from his judicial assistant. The email included the following words:

> "This is a draft of the judgment intended to be handed down at 10 a.m. on Monday 26th March 2018. The gist may be disclosed to the parties, but it is otherwise confidential until handed down. Please let my Judicial Assistant have by email …by 10 a.m. on Friday 23rd March 2018 for (sic) any corrections or typos or other obvious errors so that they may be incorporated in the document as handed down."

[28] On 22nd March 2018 at 4:36 p.m. counsel for the appellants requested "…that we be given until 10 am on Monday, 26th March 2018 to be able to obtain his (counsel's) input on the draft decision".

[29] On 23rd March 2018 counsel for the appellants asked for confirmation that "...the extension…will also apply in relation to our comments".

[30] On 26th March 2018 at 10:03 a.m. counsel for the appellants stated in an email: "…it has not yet proven possible to provide feedback and I now need to prepare for attendance in the separate matter just communicated before Justice Adderley this morning".

[31] On 26th March 2018 at 10:19 a.m. the learned judge's judicial assistant wrote:

> "…confirming that once all corrections are received (preferably by today) we will update as to the delivery this week". On 26th March 2018 at 10:23 a.m., counsel expressed his gratitude for the indication by the judicial assistant. On 26th March 2018 at 1:40 p.m. counsel for the appellants wrote: "Please find attached correspondence and attachments for his Lordship's attention. A hard copy of same has been sent to Court this afternoon".

[32] On 27th March 2018 at 11:35 a.m., the judicial assistant wrote:

> "The Court acknowledges receipt of your correspondence. However, please note that the purpose of draft judgments is not to allow parties to reargue points or to adduce new evidence for its case. (See for example Altus Group v Baker Tilly [2015] (Ch)). The judgment was circulated for general corrections of a typographical nature and the Judge has directed that no order was made for further submissions and as such his decision will remain unaltered."

[33] On the following day, 28th March 2018, the learned judge delivered his judgment.

[34] It is worth noting that on 26th February 2018 after the learned judge reserved on 22nd February, the appellants wrote the court a supplemental note. In that note, the appellants contended that "there is no requirement that the pleading expressly refer to the jurisdiction and thus is not a defect of the pleading". The appellants stated their alternative position was "to undertake to amend the pleading in accordance with their right to do so under **CPR** r.20.1".

[35] Between 22nd February 2018 and 26th March 2018, the appellants failed to submit any further evidence in the form of a draft amended statement of claim for the consideration of the learned judge.

[36] Once the stage of the circulation of a draft judgment was reached the law was clear. The Court of Appeal in England summarized the law in **Regina (Mohammed) v Secretary of State for Foreign and Commonwealth Affairs (No. 2) (Guardian News and Media Ltd and others intervening)**:[2]

> "In short, the Judge is not bound by the terms of the draft judgment which has been circulated in confidence. The primary purpose of this practice is to enable any typographical or similar errors in the judgments to be notified to the court. Thee circulation of the draft judgment in this way is not intended to provide an opportunity to any party (and in particular the unsuccessful party) to reopen or re-argue the case, or to repeat submissions made at the hearing, or to deploy fresh ones. However, on

[2] [2011] QB 218 at p. 315.

> rare occasions, and in exceptional circumstances, the court may properly be invited to reconsider part of the terms of its draft: see for example Robinson v Fernsby [2004] WTLR 257 and R (Edwards) v Environment Agency (Note) [2008] 1 WLR 1587. For example, a judgment may contain detrimental observations about an individual or indeed his lawyers, which on the face of it are not necessary to the judgment of the court and appear to be based on a misunderstanding of the evidence, or a concession, or indeed a submission. As we emphasise, an invitation to go beyond the correction of typographical errors and the like is always exceptional, and when such a course is proposed it is a fundamental requirement that the other party or parties should immediately be informed, so as to enable them to make objections to the proposal if there are any."

[37] See also dicta of Fraser J in **Gosvenor London Ltd v Aygun Aluminium UK Ltd**,[3] where Fraser J reminded lawyers that a draft judgment was not an open invitation to embark upon an additional round of litigation, remedying lacunae in their own evidence and raising further arguments.

[38] From the case law cited above, it is clear that after circulation of the draft judgment and before a sealed order giving effect to the judgment the learned judge retained a power to alter his judgment.[4]

[39] Sir Christopher Slade in **Stewart v Engel and Another**[5] emphasized the difference between an application to amend made before delivery of judgment and one made after judgment is handed down. In the latter case, there are stringent limits to the exercise of the judge's discretion. Before delivery of the judgment, as in the present case, where an application to amend the statement of claim is made, the court has a wide discretion to permit amendment in the interests of justice. The court will often grant an opportunity to save the action by amendment of the pleading.[6]

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[3] 177 ConLR 127 at p. 52; [2018] EWHC 277 (TCC).
[4] Altus Group (UK) Limited v Baker Tilly and Advisory Services LLP and another [2015] EWHC 411.
[5] [2000] 3 All ER 518, at p. 525.
[6] Kim v Park [2011] EWHC 1781 (QB).

[40] In the present case, the appellants had the opportunity to apply to amend the statement of claim from 22nd February to 22nd March and after circulation of the draft from 22nd March to 26th March. No application to amend was made and no evidence in the form of a draft amended claim was put before the judge for his approval.

[41] Notwithstanding the procedural gaffes made by the appellants, we are concerned with the learned judge's statement in open court on 28th March 2018 that he never looked at the documents sent to his chambers on 26th March, 2018 in the light of the overriding objective of enabling the court to deal with cases justly as stated in CPR 1.1(1). The learned judge said:

> "I didn't actually look at the documents which you sent it (sic). I don't know what they say. They were sent in, but I reached the conclusions and I sent out the judgment for the purpose of, for editorial changes, not for the opportunity to make new submissions, and so I didn't look at them at all. I don't know what they say…"

[42] The learned judge, however expressed the view that counsel for the appellants had at the hearing volunteered in an affidavit "the type of evidence he would put forward in relation to proving that the passing-off was occurring in this jurisdiction". At paragraph 31 of his judgment, the learned judge stated that he had reviewed "the foreshadowed evidence" and concluded that it would do nothing to bring the pleading within the principles of **Starbucks**.

[43] Since pursuant to CPR 62.20 this Court has the same powers as the court below, this Court is entitled to review what is in effect the proposed amended statement of claim with a view to seeing whether the learned judge should have recalled his order. Before doing so, the Court must explain why it agrees with the learned judge that the statement of claim fell afoul of the ruling in **Starbucks**.

Ground 4: The Court misunderstood and applied the law

[44] The appellants submitted in relation to **Starbucks**:

> "The substantive law of the tort of passing-off however has nothing to do with whether a Court has jurisdiction to try a claim for the tort of passing-off. In holding that a claim brought in the BVI requires breaches or threatened breaches in the BVI…the Court fell into error."

[45] We are unable to accept this proposition because of two passages in the speech of Lord Neuberger in **Starbucks**:

> "None the less, it does appear that the courts in the United Kingdom have consistently held that it is necessary for a claimant to have goodwill, in the sense of a customer base, in this jurisdiction, before it can satisfy the first element identified by Lord Oliver. That this has been the consistent theme in the cases can be well established by reference to a series of House of Lords decisions, and a decision of the Judicial Committee of the Privy Council, over the past century."[7]

[46] The second passage from **Starbucks** is equally emphatic:

> "It seems to have been the consistent view of the House of Lords and Privy Council from 1915 to 1990 that a plaintiff who seeks passing off relief in an English court must show that he has goodwill, in the form of customers, in the jurisdiction of the court While it can be said that, in none of the cases discussed in paras [21]-[25] above was that point the main focus of attention, it none the less seems clear that that is what a succession of respected judges, many of whom had substantial experience in this area, considered to be the law. That conclusion is underlined by the reasoning and conclusion in the judgments in the Anheuser-Busch case, and indeed the first instance judgments discussed in paras [32]-[36] above."[8]

[47] It is to be noted that this Court is bound by decisions of the Privy Council in pari materia. Lord Neuberger reviewed cases from Ireland, Canada, New Zealand, Australia, South Africa, Hong Kong and Singapore which the appellants adduced in favour of the view that a claimant does not have to establish goodwill, in the sense of actual customers within the jurisdiction. Lord Neuberger rejected these cases. Lord

[7] Supra, n.1 at para. 20.
[8] Supra, n.1 at para. 48.

Neuberger adhered to the principle that goodwill in the context of passing off is territorial in nature.

[48] This ground of appeal therefore fails.

Ground 5: The Court should not have struck out a developing area of law

[49] In the light of the consistent line of authorities from the House of Lords and the Privy Council from 1915 to 1990, this submission is incorrect.

Ground 6: Starbucks is distinguishable

[50] The appellants contended that **Starbucks** was readily distinguishable (and indeed irrelevant in the present context) because the appellant's pleaded claim was concerned with inverse passing off and transnational goodwill.

[51] Inverse passing off involves a defendant claiming that goods or services for which the claimant properly deserves the credit are in fact the goods and services of the defendant. However, it is now settled that inverse passing off falls within the tort of passing off as such.

[52] In **Starbucks** Lord Neuberger re-affirmed the principle that:

> "a claimant in a passing off claim must establish that it has actual goodwill in this jurisdiction, and that such goodwill involves the presence of clients or customers in the jurisdiction for the products and services in question."[9]

Thus, the idea of transnational goodwill was rejected.

[9] Supra, n.1 at para 47.

[53] Analogous to this point is the proposition stressed by Professor Wadlow in **The Law of Passing Off**:[10]

> "Corporate groups are no exception to the rules that goodwill as legal property must necessarily be owned by some identifiable person or persons. It is meaningless to speak of legal property which is not owned by anyone, or which is supposed to be distributed among a group of persons who do not own it individually, as joint tenants or as tenants in common."

[54] The sixth ground of appeal is therefore rejected.

Ground 2: Striking Out a Claim which was capable of amendment to cure any perceived defect

[55] The appellants argued that it was a cardinal rule of civil procedure that a claim should be struck out, only if any error cannot be cured by amendment.

[56] Counsel for the respondents correctly emphasised the true ratio of **Kim v Park**[11] that the judge is required to give the party who has a defective pleading an opportunity of putting right the defect, provided that there is reason to believe that he will be in a position to put the defect right.

[57] On the facts narrated in the discussion under ground one, it is clear that such an opportunity was given. When, ultimately, steps were taken to amend, the appellants erroneously considered that they could amend without an application to put a draft amended statement of claim before the judge for his approval.

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[10] Christopher Wadlow, The Law of Passing-off: Unfair Competition by Misrepresentation (5th edn, Sweet & Maxwell, 2016) at para. 3-170.
[11] Supra, n.6 at para. 40.

Ground 3: The Court erred in dismissing the Appellants' evidence in strike out application

[58] The appellants contended that the Court should not consider evidence for the purposes of the striking out. The learned judge was very much alive to this proposition.[12]: However, it would be absurd to suggest that where the appellants placed evidence before the court in opposition to an application to strike out, the judge could not look at that evidence. Indeed, we hold that, notwithstanding his firm view as to the "foreshadowed evidence", even at the late stage when evidence of what was in fact a draft amended statement of claim thrust at him after he had circulated his draft judgment, he might have considered it in the interests of the overriding object of the CPR.

[59] In the exercise of its powers pursuant to CPR 62.20, this Court has examined the proposed amendments to the statement of claim, especially paragraphs 14, 37 and 44.

[60] The appellants in order to save the action were required to show that each of the appellants possessed a reputation arising out of the Track Record, its investment methodology and Private Equity Team and that such reputation was represented by goodwill in the BVI among actual customers within the BVI. Instead, what is pleaded is the existence of transnational goodwill collectively owned by the Concord Group. It is pleaded that: "[t]he Concord Group therefore has actual and potential future clients in the BVI, and goodwill in the BVI, in which each of the Claimants participate". The pleading identifies several BVI registered companies with some relationship to the Concord Group, but nowhere is it pleaded that the claimants, or any of them, had any of the BVI companies as customers in relation to the appellants' private equity investment business in the Middle East and Egypt in

[12] Transcript for 22nd February 2018 at p. 101.

particular. Nor was it suggested in the pleading that the Capstone Presentation reached any of the BVI companies identified or any alleged customers in the BVI.

[61] The view of the Court is that the document submitted to the learned judge after he had circulated his draft judgement did not remedy the defect in the pleading or save the action.

[62] In the result, we dismiss grounds two and three of the grounds of appeal and each of the other grounds relied on.

Conclusion

[63] The orders I make are as follows:

(1) The appeal is dismissed.

(2) The statement of claim and the action are struck out and the order of Adderley J of 28th March 2018 is affirmed; and

(3) The appellants will pay the costs of this appeal to be assessed, if not agreed within 21 days of the date of this judgment.

I concur.
Mario Michel
Justice of Appeal

I concur.
Gertel Thom
Justice of Appeal

By the Court

Chief Registrar