



disclose a cause of action and that it is an abuse of process of the court. In support of its application, the defendant relied on the affidavit of Naima Barrow Badillo sworn to on 17<sup>th</sup> April 2007.

Mr. Marshalleck of counsel for the defendant contended that the defendant owes obligation, if any, to the claimant company, Edmundo Cayetano and Jorge Barrios jointly, not severally. As such any enforcement of such obligation cannot be sought by the claimant alone. The right to sue, Counsel argues, cannot be exercised by the claimant alone, but must be done jointly with Edmundo Cayetano and Jorge Barrios.

In support of his argument, Mr. Marshalleck relied on *Halsbury's Laws of England* Vol. 9, 4<sup>th</sup> Edition, paragraph 618, for the proposition that where the rights and obligations are joint, not any one of them can exercise it alone. Counsel further made reference to Section 2 of the *Contract Act* (Cap.166) as to the effect of a covenant with two or more persons jointly.

The claimant has filed no reply to the affidavit filed on behalf of the defendant. Mr. Arthurs, however, argued that the defendant's objection is only technical and goes to form rather than to the substance of the claim.

So, that even if there is a defect in the form, the Court can still exercise its discretion disallowing the application to striking out the claim because the substance of the claim remains good with identifiable issues to be determined between the parties. In other words as Counsel added, the defect can be cured.

The position in law is that as set out in the passage in *Halsbury's Laws of England* cited by Counsel for the defendant, where the learned author states:

*“Where by a simple contract, or by a contract under seal entered into before 1926, a promise is made to several persons jointly, they are entitled collectively to performance of it. Proceedings to enforce the performance of such a promise can be taken only in the names of all the joint promisees; one of them cannot sue alone, because the promise was made to all of them jointly, and not to any of them separately.”*

Thus at common law, for example, an action to recover by two joint promisees must be brought by both of them and it would fail if it is brought

by only one of them. See also *Coulls -v- Bagot's Executor and Trustee Co. Ltd.* (1967) 119 C.L.R. 460.

In the present case, the right to recover pursuant to the Agreement does not rest exclusively to anyone of the three persons described as “*The Contractors.*” They are all jointly entitled to that right against the defendant.

It may be argued that, one way of solving the defect in this case is to join the other persons to the contract as claimants. However, the defendant cannot force other parties to sue itself.

Citing *Blackstone*, Mr. Arthurs argued that the principles applicable in summary judgment cases apply in this case. As such, Counsel submitted that the Court should only strike out the case and enter judgment for defendant if the claimant's case is so weak. Counsel further urged that the Court should look at the identifiable issues and assess the degree of success by the claimant before deciding whether to strike out the claim. I pause here to note with concern of Counsel's failure to furnish the Court with copies of

the references to *Blackstone* relied upon despite Counsel's intimation that he would do so.

Be that as it may, I accept the principles as expounded in *Blackstone* as settled principles of law applicable in cases where summary judgments are sought. They are, however, not applicable in a case, such as the present one, where the right to commence an action does not exist alone in the party bringing the action. Thus commencing proceedings without the right to do so, in the first place, is a defect as to substance and not to form, and it strikes at the heart of the claimant's claim. No amendment, in form, can cure such defect. This is the position in the present case.

The right to bring the claim against the defendant is a right jointly belongs to those named as "The Contractors" and can only be exercised by them jointly. The claimant here comes to the Court alone, as though the rights to which it is entitled under the contract can be exercised by itself alone to the exclusion of the others. In law, it cannot do so unless permitted under the terms of the agreement.

The claimant in this case lacks the capacity to bring the present action and so it must be struck out with costs.

***Order:***

1. The Claim No. 107 of 2007 brought by the claimant is struck out.
2. The claimant to pay the defendant's cost occasioned by this application.

**Hon Justice Sir John Muria**

3 July 2007