In The Supreme Court of Bermuda

COMMERCIAL JURISDICTION
2021 No: 80

BETWEEN:

MEXICO INFRASTRUCTURE FINANCE LLC

Plaintiff

And

WAKEFIELD QUIN LIMITED

First Defendant

JOHANN OOSTHUIZEN

Second Defendant

RULING

Dates of Hearing:	16 February 2023
Date of Judgment:	22 May 2023
Plaintiff:	Mr. Keith Robinson / Mr. Sam Stevens (Carey Olsen Bermuda Limited)
Defendants	Mr. Mark Chudleigh / Ms. Laura Williamson (Kennedys Chudleigh Limited)

Application to Strike Out (RSC 18/19) and Court's Inherent Jurisdiction - Whether a reasonable cause of action was pleaded

RULING of Shade Subair Williams J

Introduction

1. This is the Defendants' strike out application in respect of a Generally Indorsed Writ of Summons dated 12 March 2021 ("the Writ") and a Statement of Claim dated 3 March 2022 ("the SOC"). In a summons dated 4 April 2022, the Defendants seek an Order of this Court striking out the Writ and the SOC on the grounds that it discloses no reasonable cause of action.

2. At the close of the hearing of this application, I reserved my ruling which I now provide with the below reasons. Notably, the delay of this Ruling is attributable to my extensive responsibilities as the Supervising Judge over the Criminal Division of the Supreme Court and was further compounded by an extended period during which I was on medical leave and necessarily out of office. So, I thank the parties for their patience in awaiting the delivery of this Ruling.

Relevant Background and Pleadings:

3. The underlying factual background to this case has been set out in various previous rulings of this Court, the Court of Appeal and the Privy Council; so there is no need for me to repeat the narrative on those facts. However, for the purpose of these proceedings, it is necessary to provide a brief overview of the case as pleaded by the Plaintiff, Mexico Infrastructure Finance LLC ("MIF").

4. The First Defendant, Bermuda law firm Wakefield Quin Limited ("D1") acted on behalf of the company seeking to develop Par-La-Ville Hotel and Residences Ltd ("PLV"). The Second Defendant, Mr. Johann Oosthuizen, ("D2") was, at the material times, a practising barrister and attorney. On the Plaintiff's pleaded case, D2 was an employee of Bermuda law firm, King & Associates from 2005 to 2013. From January 2014, D2 became an employee of D1. On the facts pleaded by the Plaintiff, D2 at all material times was the attorney with primary conduct of the advice given to PLV in relation to the project to build and develop the five-star hotel complex on the site of the Par-La-Ville car park in the City of Hamilton ("the Project").

5. In the SOC it is said that a credit agreement dated 9 July 2014 was entered into between PLV and the Plaintiff ("the Credit Agreement") in respect of the $18,000,000 bridging loan ("the Bridging Loan") that MIF was to extend to PLV. The facts averred on the SOC are that under the Credit Agreement all accrued interest was to be paid at the disbursement of the Bridging Loan. All such accrued interest would therefore be deducted from the proceeds of the Bridging Loan. The Plaintiff also points to a promissory note, also dated 9 July 2014, by which the

maturity date for the Bridging Loan was set for 30 December 2014 and the interest rate on the principal was fixed for 25% per annum.

6. The Plaintiff's pleaded case is that clause 3 of the Credit Agreement required it to transfer the net proceeds of the Bridging Loan to the Bank of New York Mellon ("NY Mellon") as an escrow agent, upon PLV having satisfied all conditions precedent. The contractual terms of the escrow arrangement with NY Mellon were contained in an escrow agreement dated 9 July 2014 ("the Escrow Agreement"). The Plaintiff also points to a security agreement of the same date ("the Security Agreement") by which PLV conferred a lien and a security interest over the monies held in escrow.

7. On 14 July 2014, MIF deposited the net proceeds of the Bridging Loan ($15,449,858) into NY Mellon's escrow account. Under the Escrow Agreement, PLV was entitled to an initial draw down of up to $1,200,000 to cover expenses connected with the Project. Beyond that amount, and upon satisfying other contractual provisions, the balance of the funds in escrow (minus a reserve sum of $500,000) ("the Escrow Funds") were to be disbursed to a senior escrow account ("the Senior Escrow Account") i.e. not to PLV directly. The monies to be transferred into the Senior Escrow Account were to be used to cover PLV's expenses in its search for a permanent lender ("Permanent Lender") and the arrangement of a permanent loan ("Permanent Loan"), in accordance with the Escrow Agreement. These are all the pleaded facts of the Plaintiff.

8. According to the case pleaded by MIF, under the Escrow Agreement it was a condition precedent to the drawdown of the Escrow Funds that (i) an officer of PLV certify that all conditions precedent had been satisfied for the funding of a Permanent Loan ("the PLV Certification") and that (ii) copies of the duly executed contractual and ancillary documents evidencing the Permanent Loan were to be delivered to the Corporation of Hamilton ("the COH"). It was also a condition precedent to the drawdown of the Escrow Funds that PLV and the COH would provide NY Mellon with a joint written notice to (i) confirm that the said certification and delivery conditions had been met and to (ii) authorise the disbursement of the Escrow Funds.

9. The Plaintiff's case is that D2, as a servant or agent of D1, not only assisted and advised PLV in securing the release of the initial draw down of $1,200,000 but also wrote to NY Mellon on behalf of PLV requesting the release of the Escrow Funds. It is stated in the SOC that D2, notwithstanding his knowledge of the contractual conditions precedent, drafted a resolution stating that the directors of PLV were in fact satisfied that those conditions had been met and that the released Escrow Funds were to be held in a trust for PLV ("the PLV Resolution").

10. The Plaintiff says that the settlement of this trust, the Skyline Trust ("the Trust") was facilitated by D2, again acting as a servant or agent of D1, where the Trust was executed. The beneficiaries of the Trust were the directors of PLV, namely Mr. Michael Maclean and his wife Mrs. Yasmin Maclean ("the Macleans") and the future beneficiaries were the children and remoter issue. The Plaintiff also averred that the trustees were friends and/or relatives of the Macleans.

11. It is also alleged on the pleadings that the resolution drafted by D2 stated that the Macleans, as directors on behalf of PLV, would apply the released Escrow Funds to cover the fees and expenses associated with the Permanent Loan. The Plaintiff says that D2 reviewed and amended drafts of a Trade and Profit Share Agreement ("TPSA") which the Macleans were negotiating with a Gibraltar incorporated company, Argyle Limited, the intended Permanent Lender. It is said that D2 also facilitated the execution of the TPSA.

12. In a 20 October 2014 Letter of Acknowledgment and Agreement ("the Letter"), the Macleans are said to have confirmed a written acknowledgement and agreement between themselves and the Trustees on the appointment of the Trust as PLV's agent, representative and nominee for the purposes of entering into the TPSA and receiving payments due to PLV pursuant to the TPSA. The Plaintiff says that the Letter also confirmed the appointment of the Macleans as escrow agents to receive and hold on trust all or part of the Escrow Funds for PLV and to release the Escrow Funds to Argyle pursuant to the terms of the TPSA.

13. The Plaintiff alleges that further to the PLV Resolution, D2 (as a servant or agent of D1) drafted a 'purported' funding approval notice which was sent to NY Mellon on 24 October 2014 alongside a similarly drafted notice by the COH. It is said that in those funding notices, NY Mellon was authorised and directed to disburse the Escrow Funds into a personal bank account held by the Macleans at Clarien Bank Limited ("the Macleans' personal account"). This was followed up by a letter to NY Mellon from D2 requesting the release of the Escrow Funds to the Macleans' personal account. Accordingly, on 28 October 2014 NY Mellon transferred the Escrow Funds to the Macleans' personal account.

14. It is the Plaintiff's case that after the Escrow Funds were deposited into the Macleans' personal account, D2 assisted in facilitating the release of the Escrow Funds to an account at EFG Bank in the name of Argyle UAE Limited ("Argyle UAE"), an affiliate of Argyle. The sum of $11,500,000 is said to have been transferred to Argyle UAE and a further $1,000,000 was released from the Macleans' personal account to Argyle's 'purported' London trading platform, namely Rational Foreign Exchange Limited ("Rational"). Additional payments made from the Macleans' personal account are said to have gone to (i) D1 in the sum of $869,748 on trust for PLV and to (ii) the Cahow Trust in the sum of $340,000 to 'purportedly' repay a loan from the trustees of the Cahow Trust to PLV.

15. On the case pleaded by the Plaintiff, D2 falsely communicated to its Mr. Gonzalez that PLV had engaged a "reputable project finance company" and D2 did so under circumstances where he had no grounds for knowing whether that statement was true or not.

16. In breach of the Credit Agreement, PLV defaulted on the Bridging Loan which remains outstanding and a winding-up order was made against it. The Plaintiff says that the $11,500,000 paid to Argyle UAE and the $1,000,000 paid to Rational were never invested on PLV's behalf and were never recovered.

17. On these pleaded facts, the Plaintiff claims that it suffered loss and damage as the distributions from the Escrow Funds constituted breaches of the Credit Agreement and the Escrow Agreement. The Plaintiff's case is that the Defendants in this case are liable as they wrongfully facilitated those contractual breaches by PLV. The Plaintiff says that the Defendants (i) induced and /or procured the breaches and/or (ii) they dishonestly assisted in those breaches.

The Arguments on the Strike-Out Application:

18. The Defendants submit that the Plaintiff has failed to disclose a reasonable cause of action in respect of its claims of tortious inducing or procuring and in respect of its case of dishonest assistance of a breach of fiduciary duty.

19. Where the Plaintiff alleges tortious inducing or procuring, Mr. Chudleigh argued that any duty owed by the Macleans, as Directors of PLV, could have only been a duty owed to PLV itself not to the Plaintiff, MIF. On that basis, MIF is not entitled to be remedied for any breach of directorship duty for which the Macleans might be liable. Similarly, where it is alleged that there was a breach of trustees' obligations on the part of the Macleans as trustees to the PLV, the Defendants say that no duty was owed to MIF.

20. The Defendants also argue that the Plaintiff failed to plead, as an essential element of the tort of procuring a breach of contract, that D2 actually *intended* to interfere with the performance of the contract. Mr. Chudleigh submitted that the mere exercise of drafting or providing a legal document, which serves to facilitate a breach of contract, does not in and of itself amount to a procuring of a breach of contract. To that extent, Mr. Chudleigh relied on the decision of the House of Lords in *OBG Ltd et al v Allan et al* [2007] UKHL 21 at [39]:

> "*To be liable for inducing breach of contract, you must know that you are inducing a breach of contract. It is not enough that you know that you are procuring an act which, as a matter of law or construction of the contract, is a breach. You must actually realize that it will have this effect. Nor does it matter that you ought reasonably to have done so...*"

21. On their complaints against the Plaintiff's pleading of dishonest assistance, the Defendants effectively argue that the pleaded facts sooner sketch out allegations of inadvertent negligence rather than dishonesty. Barring any sufficient explanation as to why the Defendants, in their provision of professional legal services to a client, would dishonestly assist a client's negligent conduct, the pleaded case, at its highest, could only be taken to formulate a case of inadvertent negligence. So, the Defendants say that the Plaintiff has failed to properly distinguish between a case of negligence and a case of dishonesty.

22. Mr. Chudleigh also pointed out that the Plaintiff positively pleaded that the Defendants advised PLV that it would be irresponsible to enter into any financing structure that did not secure the obligation to repay the Bridging Loan. This averment, Counsel submitted, is inconsistent on its face with the Plaintiff's case of dishonest assistance. The same point of argument is made by Mr. Chudleigh in relation to the Plaintiff's pleading that D2 "*knew or ought to have known*" that the Macleans were committing breaches of fiduciary duty in their roles as directors and trustees of PLV.

23. Opposing the application for an order striking out its claims, the Plaintiff contends that the Defendants' application was prematurely made, particularly because a Defence had not yet been filed and also because the application ignores the Plaintiff's entitlement to cure any defects by way of amendment or to further particularise its pleadings upon request. Mr. Robinson submitted that in this case the Defendants have attempted to misuse the Court's jurisdiction to strike out the claims as an alternative mode of trial, thereby usurping the function of the trial judge.

24. Mr. Robinson also warned that the Defendants were effectively inviting this Court to settle questions on the legal viability of the Plaintiff's claims without first making findings of facts built on evidence tested under cross-examination. Citing my earlier ruling in *David Lee Tucker v Hamilton Properties Limited* [2017] SC (Bda) 110 Civ at [11] and [19], Mr. Robinson argued that unless "*the pleadings are so bad on its face and so obviously bound for failure*" or "*unarguable or almost incontestably bad*" the Court ought not to strike it out.

25. In addressing the Defendants' assertion that the element of intention is missing from the pleaded case on tortious inducing or procuring, Mr. Robinson submitted that the absence of the word 'intended' is not fatal in circumstances where the pleadings, when read as a whole, support an intention on the part of D2. The Plaintiff says this is implicit as the intention is an intention to procure the breach of contract. More so, he argued, a case establishing a wilful blind eye on the part of the Defendant(s) would also, as a matter of law, amount to an intention. On this point, Mr. Robinson referred to *OBG Ltd et al v Allan et al* at [40]-[41] where the House of Lords cited Lord Denning MR's remarks in *Emerald Construction Co Ltd v Lowthian* [1966] 1 WLR 691 pp 700-701:

"*Even if they did not know the actual terms of the contract, but had the means of knowledge - which they deliberately disregarded - that would be enough. Like the man who turns a blind eye. So here, if the officers deliberately sought to get this contract terminated, heedless of its terms, regardless whether it was terminated by breach or not, they would do wrong. For it is unlawful for a third person to procure a breach of contract knowingly, or recklessly, indifferent whether it is a breach or not.*"

26. To this, Lord Hoffman said, at [41]:

"*This statement of the law has since been followed in many cases and, so far as I am aware, has not given rise to any difficulty. It is in accordance with the general principle of law that a conscious decision not to inquire into the existence of a fact is in many cases treated as equivalent to knowledge of that fact: see Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd [2003] 1 AC 469. It is not the same as negligence or even gross negligence: in British Industrial Plastics Ltd v Ferguson [1940] 1 ALL ER 479, for example, Mr Ferguson did not deliberately abstain from inquiry into whether disclosure of the secret process would be a breach of contract. He negligently made the wrong inquiry, but that is an altogether different state of mind.*"

27. Standing on these statements of legal principle, Mr. Robinson submitted that the question as to whether the drafting or provision of a legal document demonstrated inducement or procurement is not a matter for a strike out application; he emphasised that it is instead a question to be determined at trial.

28. Mr. Robinson added, in support of the Plaintiff's case of dishonest assistance, that the SOC complies with the requirements set out by Mussenden J in *Doctoroff v Crown Global Life Insurance Ltd et al* [2021] SC (Bda) 44 Com in so far as it (i) identifies a particular individual who is said to have dishonestly assisted the alleged breach of trust and fiduciary duty; (ii) describes the actions that D2 took to assist the breaches of trust and fiduciary duty; (iii) describes precisely how the assistance resulted in the loss to MIF; and (iv) explains how it is claimed that D2 acted dishonestly. Further, Mr. Robinson submitted that the Plaintiff's primary case is that D2 "knew" the aforementioned facts outlining the breaches of contract. The claim that he "ought to have known" is made in the alternative, evidenced by the parenthesis within which those words are contained. That alternative case supports a claim of wilful blindness. On this basis, Mr. Robinson rejected the Defendants' complaints that the dishonesty allegations were vague or more tantamount to a case of negligence. That all said, Mr. Robinson highlighted that if the wording "ought to have known" does not, on the estimation of this Court, sufficiently plead dishonest assistance, then it is open to the Court to give the Plaintiff the opportunity to amend that wording.

29. In rebuttal, Mr. Chudleigh pointed out that an amendment is incapable of curing the effect of the Defendants' submission that the Macleans, as directors and trustees of PLV, owed no legal duty to MIF. Mr. Robinson, however, argued that when applying the principles of equity, the Plaintiff would not be left without a remedy. He submitted that D2 is indeed liable to the Plaintiff as an accessory to the Macleans' breaches of duty because he dishonestly assisted in such conduct and that D1 is vicariously liable for that dishonest assistance. Seeking to make good that submission, Mr. Robinson cited the Privy Council's decision in *Royal Brunei Airlines v Tan* (P.C) [1995] 2 AC 378 at [386 G]-[387 C]:

"*The starting point for any analysis must be to consider the extreme possibility: that a third party who does not receive trust property ought never to be liable directly to the beneficiaries merely because he assisted the trustee to commit a breach of trust or procured him to do so. This possibility can be dismissed summarily. On this position which the law has long adopted is clear and makes good sense. Stated in the simplest terms, a trust is a relationship which exists when one person holds property on behalf of another. If, for his own purposes, a third party deliberately interferes in that relationship by assisting the trustee in depriving the beneficiary of the property held for him by the trustee, the beneficiary should be able to look for recompense to the third party as well as the trustee. Affording the beneficiary a remedy against the third party serves the dual purpose of making good the beneficiary's loss should the trustee lack financial means and imposing a liability which will discourage others from behaving in a similar fashion.*

The rationale is not far to seek. Beneficiaries are entitled to expect that those who become trustees will fulfil their obligations. They are also entitled to expect, and this is only a short step further, that those who become trustees will be permitted to fulfil their obligations without deliberate intervention from third parties. They are entitled to expect that third parties will refrain from intentionally intruding in the trustee-beneficiary relationship and thereby hindering a beneficiary from receiving his entitlement in accordance with the terms of the trust instrument. There is here a close analogy with breach of contract. A person who knowingly procures a breach of contract, or knowingly interferes with the due performance of a contract, is liable to the innocent party. The underlying rationale is the same."

Decisions and Reasons

30. Under Order 18, rule 19(1) of the Rules of the Supreme Court 1985 ("RSC") the Court may at any stage of the proceedings strike out or sanction the amendment of any pleading on the ground that such a pleading:

    (i) discloses no reasonable cause of action;

(ii) may prejudice, embarrass or delay the fair trial of the action; or

(iii) otherwise amounts to an abuse of the process of the court.

31. In the exercise of this jurisdiction of power, it is open to the Court to order the action to be stayed or dismissed or to direct that judgment be entered.

32. In this case, the only ground advanced before me is ground (i): that no reasonable cause of action has been disclosed. RSC Order 18, rule 19(2) provides that on an application under this particular ground, no evidence shall be admissible. (Notwithstanding, evidence may be admissible where the inherent jurisdiction of the Court is invoked so long as the claim is not merely duplicative of the ground (i) and solely filed in an attempt to circumvent the procedural rule. Otherwise, this would likely be an abuse of process.) Be that as it may, no evidence was filed or relied on in this application.

33. This Court must also keep at the forefront of its considerations all of the relevant aspects of the Overriding Objective stated at RSC Order 1A. In this case, I am bound to pay particular regard to the amount of money involved in this action, the general importance of the case and the complexity of the issues.

34. There was no real dispute before me on the legal principles applicable to an application for the Court to strike out the claim. It has long and widely been accepted that the Court will only strike out a claim in the circumstances where it is plain and obvious that it should do so. This means that such an order will only be made where the pleading, taken at its best or highest, is unarguable and clearly bound to fail. Those instances do not apply to cases where the defect or defects are curable by an amendment.

35. Equally, it is not appropriate for the Court to use such a heavy hand in cases which are fact-sensitive. The Court must envision, at the extreme end of its analysis, the possibility that the established facts at trial would support the pleaded facts; for this is what it means to take the impugned pleadings at its highest. Where the legal basis for the claims are challenged, the Court must not be too quick to settle disputed legal principles which would be better determined against the particular facts of the case, once the evidence has been fully tested and heard.

36. At paragraph 20 in *David Lee Tucker v Hamilton Properties Limited* I pointed to the commentary in the White Book (1999 edition) which provides at 18/19/10:

"A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered (per Lord Pearson in Drummond-Jackson v British Medical Association [1970] 1 WLR 688; [1970] 1 All ER 1096, CA). So long as the statement of claim or the particulars (Davey v Bentinck [1893] 1 QB 185) disclose some cause of action, or raise some question fit to be decided by a Judge or a jury, the mere fact that the case is weak and not likely to succeed is no ground for striking it out (Moore v Lawson (1915) 31 TLR 418, CA; Wenlock v Maloney [1965] 1 WLR 1238; [1965] 2 All E.R. 871, CA): ..."

37. There will be cases where the Court's insight into the contested facts and legal issues enable the judge to form a provisional view or impression on the merits of the case. However, a judge must be careful not to be distracted or misled by any possible view that the case will not likely succeed at trial. To that end, I am reminded of my earlier remarks in *Fidelity National Title Insurance Company v Trott & Duncan Limited* [2019] SC Bda 10 Civ where the Court refused to strike out an action at [69]:

"*It matters not whether I find, as a matter of impression or on an uninformed provisional basis, one argument favourable over the other. The point is that these disputes are all arguable on both sides and ought not to be summarily dismissed on the possible preliminary views of a judge at an interlocutory stage. Ultimately, the Court's final findings will turn on the full facts of this case. For these reasons, I find that such issues are inappropriate for summary dismissal.*"

38. Turning to the present case before me, I am tasked to decide whether the Plaintiff has pleaded reasonable causes of action on its case which is two-fold: (i) that the Defendants induced and/or procured contractual breaches of the Credit Agreement and the Escrow Agreement and/or (ii) that the Defendants dishonestly assisted in the carrying out of those contractual breaches.

39. For starters, these are claims which, on the face of it, are recognised causes of action triggering established legal principles. So, it follows that the Defendants' application is more of an invitation to this Court to find that the Plaintiff is unable to prove these causes of actions because the legal or factual basis upon which they are brought is unarguable. This formulation of the Defendants' application plausibly engages the Court's inherent jurisdiction and/or the other procedural grounds for a strike out under RSC O.18/19, which I do not propose to arbitrarily ignore.

40. On the Defendants' submission that the Macleans, as Directors and Trustees of PLV, owed no duty to MIF, the Plaintiff argued that equity will nevertheless afford it a remedy. That submission appears to be aided by the Privy Council's decision in *Royal Brunei Airlines v Tan* which is suggestive that a third person may be held liable to an innocent contracting party

where that third person deliberately and knowingly procures the breach(es) of contractual duty owed to the innocent party. I find that this is an arguable legal point worthy of being tried and tested.

41. I find that the Defendants' complaint that '*intention*' was not expressly pleaded has some merit, but is curable by amendment. The Plaintiff says that intention is implicit on the SOC. While that may be true, I see no significant prejudice that would be occasioned against either side by a direction for an amendment, especially in light of the early stage of these proceedings. (A Defence has not yet been filed).

42. On the issue of dishonesty, I find that this is fact-sensitive. The question as to whether either or both of the Defendants had any interest in procuring a breach of contract or not is a matter for cross-examination at trial, not summary dismissal. Dishonesty was expressly pleaded and sufficiently particularised to meet the requirements outlined in *Doctoroff v Crown Global Life Insurance Ltd et al.* However, I do find that where the Plaintiff means to assert that D2 wilfully turned a blind eye, it should say so on its pleadings. It is not sufficient, in my judgment, to substitute this wording with the phraseology "*ought to have known*" for to do so opens the door to real confusion between a case of negligence and a case of dishonesty.

43. As for the Plaintiff's pleading that the Defendants advised PLV that it would be irresponsible not to secure its obligation to repay the Bridging Loan, I find that this is also a matter for cross-examination and/or submissions at trial. It is open to the Defence to point out the inconsistency on the facts pleaded on the Plaintiff's case on the issue of dishonesty.

44. For all of these reasons I am bound to find that this is not a case which is suitable for summary dismissal.

Conclusion

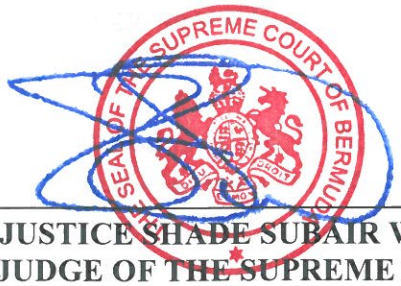
45. The Defendants' strike out summons is dismissed subject to the following conditions and directions of this Court:

    (i) The Plaintiff's case that D2 'intended' to procure the alleged breaches of contract should be expressly pleaded to employ the word 'intended' and

    (ii) The Plaintiff's (alternative) case that D2 wilfully turned a blind eye should be expressly pleaded in those terms.

46. Any party wishing to be heard on the issue of costs shall file a Form 31D within 21 days of this Ruling.

Dated this 22nd day of May 2023



HON. MRS JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT