In the Supreme Court of Bermuda

CIVIL JURISDICTION

2023: No 414

B E T W E E N:

(1) PAUL RODRIGUES
(2) TEREZA RODRIGUES

Plaintiffs

and

(1) WAKEFIELD QUIN LIMITED
(2) JOHN S. BUSH III

Defendants

Before:	**Hon. Alexandra Wheatley, Acting Puisne Judge**
Appearances:	**Laura Williamson of Kennedys, for the First Defendant** **Lilla Zuill of Cox Hallett Wilkinson Limited, for the Second Defendant** **Grant Spurling of Chancery Legal Ltd, for the Plaintiffs**
Date of Hearing:	23 June 2024
Date Draft Circulated:	18 March 2025
Date of Ruling:	20 March 2025

RULING

Strike Out Application; Limitation Period; Res Judicata; Abuse of Process;

Pleading Fraud; Fraudulent Misrepresentation; Barrister's Code of Conduct; Order 18 of the Rules of the Supreme Court 1985; Conversion; Breach of Collateral Warranty; Breach of Implied Undertaking to Court

WHEATLEY, ACTING JUSTICE

INTRODUCTION

1. Both the First Defendant (**WQ**) and the Second Defendant (**D2**) made applications seeking to strike out the Plaintiffs' Generally Indorsed Writ of Summons (the **Writ**) and the Statement of Claim dated 17 January 2024 (**SOC**) (hereinafter collectively referred to as **the Claim**).

2. WQ contends that the Claim is frivolous, vexatious and time barred. WQ also argue that the Claim fails to disclose a reasonable cause of action, which warrants dismissal, as it is an abuse of the court process. D2 also seeks dismissal of the Claim, arguing, *inter alia*, that it is time-barred, the issues raised are *res judicata*, and that the action has improperly been brought against him. The Plaintiffs oppose the Defendants' applications to strike out the Claim, arguing that the Claim is, *inter alia*, legitimate, adequately pleaded, and merits a trial to resolve material factual disputes.

3. The parties collectively relied on the following pleadings in support of their respective positions:

    (a) WQ's and D2's Strike Out Summonses both dated 22 February 2024 (collectively referred to as **the Strike Out Summonses**).
    (b) The Claim.
    (c) The First and Second Affidavits of D2 sworn on 16 February 2024 (**Bush 1 Affidavit**) and 17 April 2024 (**Bush 2 Affidavit**) respectively.
    (d) The First and Second Affidavits filed on behalf of the First Defendant sworn on 19 February 2024 (**Horseman 1 Affidavit**) and 12 April 2024 respectively (**Horseman 2 Affidavit**).
    (e) The First Affidavit of Kenneth Grant Spurling on behalf of the Plaintiffs sworn on 28 March 2024 (**Spurling Affidavit**).

LITIGATION BACKGROUND

4. The Plaintiffs were two of several investors in the development of the Azura Hotel on

Bermuda's South Shore, a property formerly known as Surf Side (the **Azura Project**). In June 2016, the Plaintiffs' investment was paid into the trust account of WQ and, upon closing, the Plaintiffs became Class B shareholders in Clearwater Development Limited (**CDL**).

5. CDL was incorporated in November 2015 as a Bermudian company under the Companies Act 1981. The objects of CDL were to acquire Surf Side and to redevelop it in accordance with a site plan and budget appended to a Shareholder Agreement dated 16 September 2016 (**SHA**). CDL were the project managers of the Azura Project.

6. D2 is a real estate developer specializing in hospitality-related resort and residential projects. He is the President and Managing Director of CDL.

7. In this action, the Plaintiffs are seeking damages from WQ and D2 related to their investment in the Azura Project. The Plaintiffs allege fraudulent misrepresentation, breach of collateral warranty, and conversion. They are asserting that they suffered losses amounting to $213,000 due to the Defendants' actions. In the SOC, under the heading "*Particulars of Damage*", the Plaintiffs set out the loss they allege to have suffered as a result of the aforementioned causes of action. The sum of $213,000 (plus interest) being sought by the Plaintiff in these proceedings represents the difference between the amount they invested in the Azura Project ($650,000) and the amount they recovered when their shares were repurchased by CDL following a valuation conducted by an independent valuer ($437,000). The recovery of the sum of $437,000 by the Plaintiff was resolved through separate court proceedings, as set out more particularly below.

8. There are three actions which have also been brought before the Courts by the Plaintiffs in relation to the Azura Project and against CDL. These actions are hereinafter collectively referred to as "the **Consolidated Actions**". WQ are attorneys of record for CDL in all the Consolidated Actions. The Consolidated Actions are all proceedings brought by the Plaintiffs in relation to their purchase of the CDL shares for $650,000 and are summarized as follows:

    i. Case 2018 No. 38 (the **Petition Action**)

    As referenced in paragraph 7 above, in this action independent valuers were ultimately appointed to value the shares the Plaintiffs acquired in CDL. Deloitte were appointed as the said valuers and the value of the Plaintiffs' shares was accepted by the Court as being $437,000. The Petition was ultimately struck out by Mussenden J (as he was then). Costs were awarded against the Plaintiffs on an indemnity basis due to their unreasonable litigation conduct in rejecting offers for settlement by CDL for the repurchase of the Plaintiffs' shares at a

value greater than the initial purchase price of $650,000.

ii. Case 2017 No. 467 (the **Writ 1 Action**)

This action was resolved by agreement between the parties wherein the action was withdrawn and there was no order as to costs.

iii. Case 2018 No. 66 (the **Writ 2 Action**)

This matter is still pending before the Courts with the substantive application to be listed for the final hearing. Therefore, the issue of costs for the substantive application has yet to be determined.

Notably, in this matter the Plaintiffs attempted to have portions of the Defendant's (CDL's) Defence and Counterclaim struck out where allegations of fraud were pled. That application was unsuccessful as Mussenden J (as he was then) found in favour of CDL on the basis that he accepted a *prima facie* case of fraud had been presented. Costs of that application were awarded to CDL.

9. The Plaintiffs in this action are also seeking "*wasted litigation costs in the Consolidated Actions*".

THE CLAIM

10. The Claim arises out of WQ's representation of CDL in defending the Consolidated Actions brought by the Plaintiffs against CDL in relation to the Plaintiffs' investment in the Azura Project. The Plaintiffs are currently suing CDL, but they now seek also to sue its lawyers (WQ) and a director of the company (D2) in the instant claim.

11. The Writ makes clear that the claims against the Defendants are pleaded on the following bases:

(a) Fraudulent misrepresentation;
(b) Breach of collateral warranty; and
(c) Conversion.

12. The SOC further expands on the above causes of action, albeit Counsel for the respective Defendants submit that the SOC lacks clarity and is so poorly pleaded that it is difficult to interpret exactly what claim is being made against the Defendants. It was therefore

collectively submitted, in the evidence filed in support of the strike out applications on behalf of WQ and D2, that the Claim is littered with a litany of half-baked, spurious allegations that do not add up to anything resembling a reasonable cause of action against either or both of WQ and D2.

13. In contrast, the Plaintiffs assert that the SOC is sufficiently particularized and the evidence upon which they have based their allegations of fraud establishes important matters which must be determined by the Court. Mr Spurling asserted that "*[t]here is abundant evidence…of the Defendants' unscrupulous activity in their concerted effort to mislead the Plaintiffs as investors and shareholders…*". In response to the criticism by the Defendants that the Plaintiffs have no evidential basis to bring the Claim, Mr Spurling argues that the Claim cannot be criticized due to the restriction set out in the Rules of the Supreme Court 1985 (**RSC**) of not being able to include evidence in pleadings.

Foundational legal principles

Misrepresentation

14. It is trite law that a successful claim in misrepresentation requires: (i) a false representation by the defendant; (ii) which induces the plaintiff to act; and (iii) which causes the plaintiff loss. Fraudulent misrepresentation requires the same elements but is based on a representation which the defendant knows to be false or is otherwise made without belief in its truth or recklessly, without regard to whether it is true or not.

15. The SOC includes a claim of fraudulent misrepresentation. For the Claim to stand this must be specifically pleaded by the Plaintiffs in the SOC in accordance with RSC Order 18, Rule 8 and must include the particulars on which the Plaintiffs rely (see RSC Order 18, Rule 12). Therefore, in a claim for fraudulent misrepresentation, the pleadings must specifically plead the particulars of what statement of fact was made, knowingly and without belief in its truth, or recklessly as to its truth, and which defendant (as a party to the contract) made the representation to the plaintiffs, with the intention of inducing them to enter into the contract.

Breach of collateral warranty

16. The Plaintiffs' SOC refers to a Confidential Investment Summary (**CIS**) which is said to have been circulated by an agent of CDL. There then follows a list of several representations purportedly made in the CIS by CDL. Notably, the Defendants raised that neither CDL nor its agent are parties to these proceedings. As such, the CIS contained no representations or warranties that the Plaintiffs can rely on to make out a claim against WQ or D2 in these proceedings. Even if that were not the case, the SHA completely superseded

and replaced the CIS.

17. It is further argued by Ms Williamson that all the representations and collateral warranties asserted by the Plaintiffs were made by CDL, not by WQ. Insofar as the Plaintiffs have any viable cause of action, therefore, it is a cause of action against CDL, not against WQ, and should have been addressed (and in some instances has already been disposed of) in the Consolidated Actions.

18. Ms Zuill for D2, also raised the issue that the SHA contains an entire agreement clause which she says puts to bed any argument that the CIS and any email correspondence operated as collateral warranties. Mr Spurling asserts that the "entire agreement clause" cannot be relied on in circumstances where it would reduce remedies for fraudulent misrepresentations and relied on *Thomas Witter Ltd v TBP Industries Ltd* [1996] 2 All ER 573 in support.

Conversion

19. Conversion is the act of deliberately dealing with a chattel in a manner inconsistent with another's right, thereby depriving the other of the use and possession of it.[1] Money is not ordinarily a chattel capable of being converted (unless it is physically present in specific coins or bank notes).[2]

THE ISSUES

Law on Strike out Applications

20. The legal principles in relation to striking out a claim are well-established and are not disputed between Counsel. The Court has the inherent power to manage its own process, which involves the power to strike out claims which are frivolous, vexatious or an abuse of process. In addition, the Court has the power to strike out claims pursuant to Order 18, Rule 19 of the Rules of the Supreme Court 1985 (**RSC**) if the claim:

    (a) discloses no reasonable cause of action;
    (b) is scandalous, frivolous or vexatious;
    (c) may prejudice, embarrass or delay the fair trial of the action; or
    (d) is otherwise an abuse of process of the Court.

[1] Clerk & Lindsell on Torts, 24th ed. at § 16-07
[2] Clerk & Lindsell on Torts, 24th ed. at § 16-37

21. It is both WQ's and D2's case that the Claim falls into the first, second and fourth of these categories and accordingly should be struck out.

22. Where a claim is so bad on its face that it is obviously bound for failure, the Court should strike it out. Such an approach was addressed and summarized by Subair Williams J in *David Lee Tucker v Hamilton Properties Limited* [2017] SC (Eda) 110 Civ. Mussenden J (as he was then) in his Ruling[3] in the Consolidated Actions set out the law in relation to strike out applications at paragraphs 13 to 18 which will be adopted in this case.

23. Both WQ and D2 assert that the Writ is so poorly drafted as to be almost incomprehensible. It was submitted that on this basis alone, it is vexatious and liable to be struck out. It is argued that although the basis for the Plaintiffs' claim is expanded upon in the SOC, the SOC lacks the clarity one would ordinarily expect from a properly pleaded case. Counsel for the Defendants rely on the Court of Appeal decision in *Intercontinental Natural Resources Ltd v Conyers Dill & Pearman* [1982] Bda LR 1 which states as follows at paragraph 41:

> "*If a statement of claim is so deficient in particulars that a defendant cannot tell what is the case he has to meet then it becomes a vexatious pleading and should not be allowed to stand.*"

Limitation Act

24. It is the Defendants' position that, in a thinly veiled attempt to circumvent the claims being *res judicata* and out of time, the Plaintiffs have sought to avail themselves of a carve out provision in the Limitation Act by now alleging fraud against the attorneys, and the managing director, of CDL (the Defendant Company) in the Consolidated Actions.

25. The Limitation Act 1984 (**Limitation Act**) sets out the timeframes within which actions must be commenced in the Courts. It is accepted that the acts complained of by the Plaintiffs took place in or before September 2016 and as this action was not commenced until December 2023 it falls outside the relevant limitation period which would have expired in September 2022.

26. The period of limitation does not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it. The Plaintiffs say that the usual six-year time bar is not applicable in this matter as fraud is pled against the Defendants and it is argued by Mr Spurling that the discovery

[3] *Paul and Teresa Rodrigues v Clearwater Development Ltd.* [2023] SC (Bda) 55 Civ. 11 July 2023

of the alleged fraud did not occur until 2021 amidst the discovery process in the Consolidated Actions. Therefore, he says the limitation period would not end until 2027 based on calculating the statutory timeframe from the Plaintiffs' discovery of the alleged fraud.

27. Section 33 of the Limitation Act provides as follows:

> "***Fraud; concealment; mistake***
> *33 (1) Subject to subsection (3), where in the case of any action for which a period of limitation is prescribed by this Act, either—*
>
> *(a) the action is based upon the fraud of the defendant; or*
> *(b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or*
> *(c) the action is for relief from the consequences of a mistake,*
>
> *the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.*" [Emphasis added]

28. The case of *White v Conyers Dill & Pearman* [1993] Bda LR 49 confirms section 33 of the Limitation Act is however only applicable where a plaintiff's action is based upon a fraud by the defendant and any fact relevant to the right of action was "*deliberately concealed*" by the defendant.

29. Ms Zuill argued that all the relevant facts appear to have been known to Plaintiffs more than six years prior to commencement of this action and so even if it were accepted that fraud was pled properly, the limitation period still would have ended in September 2022. Therefore, it was submitted that the Plaintiffs were still out of time. Paragraph 4 (c) of the Bush 1 Affidavit addresses this issue:

> "*4c. The claim is statute-barred under the Limitation Act, 1984 and section 33 of this Act does not apply because (i) no case of fraud having any reasonable prospects of success has been made out against me; and/or (ii) even if such a case has been made out (which I vehemently deny) the Plaintiffs were well aware of all material facts relating to the alleged "fraud" or, could, with reasonable diligence have discovered such alleged "fraud".*" [Emphasis added]

30. This argument was also reiterated by Ms Williamson. She also submitted that Section 33 of the Limitation Act does not assist the Plaintiffs, not only because there is no proper basis for alleging fraud against WQ, but the Claim is also hopeless and bound to fail as all the relevant facts appear to have been known to the Plaintiffs more than six years prior to

commencement of this action.

31. Mr Spurling also relies on Section 10 of the Limitation Act that the usual limitation period of six years also does not apply as there is a twenty-year limitation period for matters surrounding a deed, i.e. the SHA.

Requirements for Pleading Fraud

32. There are specific requirements that must be met in order for fraud to be pleaded. Rule 41 of the Barrister's Code of Professional Conduct 1981 (**Barrister's Code of Conduct**) provides that a barrister must have clear instructions in writing to plead fraud and must have before him reasonable credible material which establishes a *prima facie* case of fraud. It was accepted by Mr Spurling for the Plaintiffs that there is a high bar to be met when pleading fraud and he expressly acknowledges the responsibility that he has under Rule 41 of the Barristers' Code of Conduct.

33. The Plaintiffs must also show that there was "*deliberate concealment*"[4]. The Defendants' position is that the Plaintiffs' SOC fails to meet this requirement as it relates to both Defendants.

34. In Mussenden J's (as he was then) decision of *Paul and Teresa Rodrigues v Clearwater Development Ltd.*, he set out the legal principles required to plead fraud in determining the Plaintiffs' strike out application in the Writ 2 Action. Those principles are set out in paragraphs 19 through 23 which will be adopted in this matter. Of note is Mussenden J's citation of the decision of Subair Williams J in *Lines and Blades v Pricewaterhousecoopers and Clarien Bank* [2021] SC (Bda) 42 Civ[5]. In that case, Subair Williams J provides a helpful summary of the legal requirements for pleading fraud as determined by the UK Court of Appeal in *Robert Sofer v Swissindependent Trustees SA* [2020] EWCA Civ 699:

> *"Lord Justice Arnold observed [23-25]:*
>
> *"23. More important for the purposes of this appeal are the principles governing the pleading of dishonesty. There was little dispute as to these before either the Judge or us. They were summarized, in my judgment, accurately, by counsel for the Claimant as follows:*
>
> > *i) Fraud or dishonesty must be specifically alleged and sufficiently particularized and will not be sufficiently particularized if the facts alleged are consistent with innocence: Three Rivers District Council v Governor and Company of the Bank of England (No.3) [2003] 2 AC 1.*

[4] *White v Conyers Dill & Pearman*
[5] At paragraph 21 of *Paul and Teresa Rodrigues v Clearwater Development Ltd.*

ii) Dishonesty can be inferred from primary facts, provided that those primary facts are themselves pleaded. There must be some fact which tilts the balance and justifies an inference of dishonesty, and this fact must be pleaded: Three Rivers at [186] (Lord Millet).

iii) The claimant does not have to plead primary facts which are only consistent with dishonesty. The correct test is whether or not, on the basis of the primary facts pleaded, an interference of dishonesty is more likely than one of innocence or negligence: JSC Bank of Moscow v Kekhman [2015] EWHC 3073 (Comm) at [20]-[23] (Flaux J, as he then was)

iv) Particulars of dishonesty must be read as a whole and in context: Walker v Stones [2001] QB 902 at 944B (Sir Christopher Slade).

24. To these principles there should be added the following general points about particulars: (i) The purpose of giving particulars is to allow the defendant to know the case he has to meet: Three Rivers at [185]-[186]; McPhilemy v Times Newspaper Ltd [1999] 3 ALL ER 775 at 793B (Lord Woolf MR). (ii) When giving particulars, no more than a concise statement of the facts relied upon is required: McPhilemy at 793B. (iii) Unless there is some obvious purpose to be served by fighting over the precise terms of a pleading, contests over their terms are to be discouraged: McPhilemy at 793D." [Emphasis added]

35. Both Ms Williamson and Ms Zuill submitted that the Plaintiffs' attorneys have breached Rule 41 of the Barristers' Code of Professional Conduct. There is no evidence that they had before them credible evidence of fraud before settling the pleadings. The documents that have been exhibited to the Spurling Affidavit do not in any way qualify as "*credible material*" to establish a *prima facie* case of fraud. Furthermore, some of the documents purported to be relied on have been produced in breach of the implied undertaking to the Court.

36. In response, Mr Spurling submitted that he is only relying on the documents which were disclosed in the Consolidated Actions for the purposes of this application to show that he considered there to be a *prima facie* case of fraud when he filed this action. Mr Spurling further asserted that these documents would have to be disclosed in the discovery process of this action in any event. As such, Mr Spurling says that the documents the Plaintiffs rely on to plead fraud are more than sufficient to establish a *prima facie* case of fraud.

37. It was also submitted by Ms Williamson that the Claim fails to plead the crucial elements of fraudulent misrepresentation by WQ (as set out in paragraphs 14 and 15 above) because the Plaintiffs fail to plead: (1) any allegation that they were induced to act by the alleged misrepresentations; or (2) that the Plaintiffs took any action to their detriment as a result of

the misrepresentations. Those failings, the Defendants say, are also fatal to any claim in misrepresentation. Likewise, Ms Zuill for D2 raised these same failings in her submissions.

Res judicata

38. It is both Defendants' positions that the relief being sought in the Claim is *res judicata* for the following reasons:

    i. A claim by the Plaintiffs to be paid a further $213,000 for shares that have already been redeemed for fair value determined in the course of the Petition Action.

    An independent Court-ordered valuation carried out by Deloitte has already determined the fair value of shares redeemed by the Plaintiffs in the Petition Action. Thus, the Plaintiffs have been paid $437,000, as determined in the independent valuation. Those proceedings extinguished the Plaintiffs' right to be paid more for the shares and yet they have brought these proceedings, in abuse of the Court's processes, claiming the balance of their initial investment, i.e. $650,000 - $437,000 (being $213,000).

    ii. "*Wasted litigation costs in the Consolidated Actions*"

    There is no basis for the Plaintiffs to commence separate proceedings against CDL's lawyers in order to claim their costs of the litigation they have engaged in against CDL. Indeed, it is an abuse of process for the Plaintiffs to seek to re-litigate the question of costs and to ask the Court to go behind costs orders that have already been made in relation to two out of the three claims that comprise the Consolidated Actions.

39. As it relates to the outcome of the Petition Action, Mr Spurling argues that the Plaintiffs were not aware of the additional elements that might have supported a different remedy to valuation in the circumstances of the Consolidated Proceedings, i.e. relief other than the 'standard' remedy of repurchase of shares on a valuation. He argues that because of the new evidence (which the Defendants argue was not discovered until 2021) that allegedly establish a *prima facie* case of fraud, the matter falls to be revisited in the context of the instant claim.

40. Mr Spurling relies on Order 62 r. 11(4) regarding the "*wasted litigation costs in the Consolidated Actions*" which simply says costs orders can be made against either party to a case.

Discovery in the Consolidated Actions

41. It was highlighted by the Defendants that the Plaintiffs also attempt to plead a cause of action based on CDL's alleged failure to comply with its discovery obligations in the Consolidated Actions.

42. Furthermore, both Defendants brought to the Court's attention that documents produced by CDL in the Consolidated Actions were produced by the Plaintiffs in breach of the implied undertaking to the Court not to use documents produced in those proceedings for a collateral purpose, including deploying them in separate proceedings. Any action commenced in reliance on documents disclosed in proceedings pursuant to the implied obligation to the Court not to use the documents for a collateral purpose is liable to be struck out. Counsel relied on the Court of Appeal case of *Riddick v Thames Board Mills* [1977] Q.B. 881 CA wherein this principle was confirmed.

43. The Plaintiffs' response is that they are only relying on those disclosed documents for the purpose of this application to prove their attorneys had a *prima facie* case of fraud and that the documents would have had to be disclosed in these proceedings in the discovery phase in any event.

ANALYSIS AND FINDINGS

44. There is no uncertainty that the damages being sought by the Plaintiffs in this action are the difference between what they received when their shares were valued and sold back to CDL in the Petition Action:

> "*Particulars of Damage*
> *(1) funds deposited for investment, less $437,000 received;*
> (2) *wasted litigation costs in the Consolidated Actions to be assessed*"

45. I have little doubt that the fraud allegations against the Defendants are a thinly veiled attempt to overcome the limitation issues that are otherwise fatal to their case. Mr Spurling attempted to justify the pleading of fraud in the Spurling Affidavit, wherein he asserts to have relied on a ledger that he says shows a transfer of the Plaintiffs' $650,000 out of WQ's trust account and into CDL's account immediately upon receipt of those funds. Counsel for WQ highlighted that, despite Mr Spurling making this submission, the email correspondence of 10 April 2024 from Mr Spurling to Ms Williamson shows that he did not have the full ledger:

"*…The screenshot provided was the document supporting the prima facie assessment of fraud (in concert with the other documents provided). …*" [Emphasis added]

46. As such, Mr Spurling did not in fact have the ledger in front of him when he saw fit to plead fraud as the full ledger was not available to him at that time. In fact, that ledger does no more than record the Plaintiffs' investment, as would have been clear to anyone considering the document. The Horseman 2 Affidavit at paragraph 15 addresses this issue:

> *"…Of particular note in [the email correspondence of 10 April 2024 from Mr Spurling] is the fact that Mr Spurling does not appear to have had anything more than the [screenshot] before him when he saw fit to plead fraud against WQ. I find this strange, given the ethical obligations that all Bermuda barristers are subject to when it comes to pleading fraud, Whilst I say that it ought to have been obvious, even from the [screenshot] alone, that there was not enough to plead fraud against WQ, had Mr Spurling considered the full document, as I now have, he would doubtless have realized:*
>
> > *(a) The document is called "CDL P & L Detail Comparison [sic.] 2018 and 2019". The "P & L" here must be a reference to "profit and loss". The document is therefore not purporting to report payments actually made;*
> >
> > *(b) The name "Rodrigues" appears on the following sheets of the Excel workbook: "Balance sheet detail" and "Sheet 4". The "Balance sheet detail" sheet simply records the Plaintiffs' equity in the project. "Sheet 4" is the sheet that has been extracted [as the screenshot].*
> >
> > *(c) The entry relied upon by Mr Spurling appears under the heading "Accounts Payable" in "Sheet 4". I refer to the screen grab showing this at RH-2/39. "Accounts Payable" is a standard accounting term for money that a business owes to others. The other side of the coin in "Accounts Receivable", which is money that others owe to the business. "Sheet 4" appears to record both. What is plain to anyone reading "Sheet 4", however, is that it does not purport to record payments actually made.*
> >
> > *(d) The entry in relation to the Plaintiffs' investment is clear: on 30 June 2016, the Plaintiffs made an investment in the Azura project by paying $650,000 into WQ's trust account. That money was then owed by WQ to CDL on closing. It was therefore recorded as a credit on a list of Accounts Payable (i.e. it was part of CDL's Accounts Receivable). This would be apparent to anyone reading the full document from which the [screenshot] was extracted.*

Plainly, the document cannot possibly form the basis of a pleading of fraud against WQ." [Emphasis added]

47. I agree with Counsel for the Defendants that neither the Plaintiffs, nor their attorneys, have produced any credible evidence as proof that funds were improperly and prematurely released from WQ's trust account, nor any particulars of how those funds were converted for WQ's, or D2's, own use, as claimed, or indeed, their benefit. A screen shot of an incomplete ledger in circumstances where the full context of the document was never considered does not meet the bar which must be met to plead fraud. For the avoidance of doubt, I find that all the documents that have been exhibited to the Spurling Affidavit do not in any way qualify as "*credible material*" to establish a *prima facie* case of fraud.

48. As it relates to the limitation period, I find that all the evidence being relied on by the Plaintiffs was known to them, based on their own pleaded case, in 2016. Consequently, any cause of action arising out of an alleged misrepresentation would have arisen in 2016. The Plaintiffs brought actions against CDL within the statutory time limits by way of the Consolidated Actions. The Court has already disposed of the Consolidated Actions, save for the Writ 2 Action which I understand is ready to be listed for a final hearing. The time in which to bring any further claims has expired and as such cannot proceed. In any event, even if I am wrong on this, I find that the evidence could have reasonably been obtained in 2016, which still leads to the Claim falling outside of the limitation period.

49. Consequently, the Plaintiffs' attorneys have breached Rule 41 of the Barristers' Code of Conduct as I find there is no evidence that they had before them any credible evidence of fraud before settling the pleadings.

50. The claim for conversion against WQ and D2 ignores the obvious fact that any such claim is hopeless (even if it had been properly pleaded) on the basis that the Plaintiffs received shares in exchange for the sums invested, and those shares have since been repurchased at fair value in the Petition Action against CDL. In those circumstances, I agree that the Plaintiffs cannot maintain a claim in conversion in respect of their investment.

51. In addition, it is not clear how the payment of investment money to CDL is said to have caused loss to the Plaintiffs. The Plaintiffs paid $650,000 in return for shares in CDL. They received those shares, and those shares were subsequently repurchased for fair value following a determination by an independent valuer. It is an unfortunate reality of investing in shares that sometimes investors make a loss. This does not mean that they have a claim in conversion based on the (legitimate) use of their investment funds.

52. The Plaintiffs have also failed to plead any misrepresentation by WQ as there are no allegations made in the SOC that the Plaintiffs were induced to act by the alleged

misrepresentations, or that the Plaintiffs took any action to their detriment as a result of the misrepresentations. These missing legal elements of fraudulent misrepresentation are fatal to the Claim.

53. It is apparent that the Plaintiffs have not made out any reasonable cause of action against D2 and that any complaint is in reality most properly brought against CDL, save that it is not a party to these proceedings and any new claims would be statute-barred and/or *res judicata.*

54. It is abundantly evident to me that the Plaintiffs are grasping at straws to the recoup the full amount of their initial investment given the loss they experienced as a consequence of the Petition Action. The Plaintiffs entered into an agreement with CDL for which they received a certain number of shares based on their investment. In *Paul and Teresa Rodrigues v Clearwater Development Ltd.* [2023] SC (Bda) 54 Civ. 5 July 2023, costs were awarded against the Plaintiffs in the Petition proceedings as it was found by Mussenden J (as he was then) that "*they acted unreasonably in rejecting CDL's offers for settlement which were initially more than their original investment value ($650,000)*". The Plaintiffs risked refusing CDL's offers in hopes that the valuers could provide a value far exceeding CDL's offers. Ultimately, the risk did not pay off for the Plaintiffs, who are now attempting to get what would essentially be a pre-emptive fourth bite of the cherry.

55. As is the case against WQ, it is apparent that the Plaintiffs have not made out any reasonable cause of action against D2 and that any complaint is in reality most properly brought against CDL, save that it is not a party to these proceedings and any new claims would be statute-barred and/or *res judicata.*

56. Moreover, the Plaintiffs have improperly relied on documents disclosed in the Consolidated Actions to bring this new action against the implied undertaking by Counsel to the Court that disclosure/evidence produced in those Consolidated Actions is not to be used in other proceedings.

57. As it relates to the Plaintiffs seeking "*wasted litigation costs in the Consolidated Actions*", I agree that such an application cannot be determined in this action. As summarized in paragraph 8 above, there is no basis for the Plaintiffs to commence separate proceedings against CDL's attorneys (WQ) or D2 (as a Director of CDL) to claim their costs of the litigation they have engaged in against CDL by way of the Consolidated Actions. Essentially, the Plaintiffs are seeking to litigate the question of costs in a separate action and to ask the Court to re-litigate and go behind costs orders that have already been made in relation to two out of the three claims that comprise the Consolidated Actions. This cannot be considered as anything other than an abuse of process.

58. Naturally, if the Plaintiffs wanted to challenge either of the costs orders made in the Petition Action and in the Writ 1 Action, appeals ought to have been made. The costs of the Writ 2 Action will be determined when it concludes. There is no jurisdiction for the Court in this action to make any order relating to costs in the Writ 2 Action which has yet to conclude.

59. I am unclear why the Plaintiffs are of the view that separate legal proceedings can address allegations of discovery issues in other legal proceedings. For the sake of completeness, I will state that there is no legal basis for such a position. As was submitted by Counsel for the Defendants, if the Plaintiffs are concerned about CDL's discovery, their proper recourse is a specific discovery application against CDL in the Consolidated Actions; it is not to sue CDL's attorneys in separate proceedings.

CONCLUSION

60. Taking into consideration the findings above, I must balance the prejudice between the parties. In this case, the balance of prejudice clearly weighs in favour of striking out the claim. Denying the Plaintiffs the opportunity to pursue an unmeritorious and abusive claim cannot possibly cause them prejudice, whereas requiring WQ and D2 to defend themselves at trial will clearly cause them prejudice, not to mention the waste of costs and Court resources.

61. Moreover, WQ would be unable effectively to defend itself without making use of CDL's legally privileged material. This would make for an incredibly unfair proceeding, causing a high degree of prejudice to WQ.

62. Therefore, I will grant the Defendants' applications to strike out the Claim against both WQ and D2 on the basis that the Claim is hopeless, frivolous, vexatious, and an abuse of the Court's process.

COSTS

63. Both Defendants made an application for costs in accordance with under RSC Order 62 r. 11 that the Plaintiffs' attorneys do show cause why an order should not be made against them by reason of costs that have been incurred unreasonably or improperly in these proceedings or wasted by failure to conduct the proceedings with reasonable competence and expedition. Mr Spurling addressed these costs applications in the Spurling Affidavit.

64. I agree with the Defendants that there is nothing in the Spurling Affidavit that cures the issues *vis a vis* the pleading of fraud in the SOC. Furthermore, Counsel for the Defendants

highlighted that Mr Spurling, in seeking to address what evidence that he had before him in settling the pleadings, produced documents that the Plaintiffs had only been provided in the earlier litigation under the undertaking to the Court not to use the documents for a collateral purpose.

65. Therefore, I will grant both Defendants' costs against the Plaintiffs on an indemnity basis, to be taxed if not agreed. However, those costs shall be borne equally between the Plaintiffs personally and their attorneys of record, i.e. the firm of Chancery Legal Ltd., having been satisfied that I have the jurisdiction to do so in accordance with the case of *Bermuda Investment Advisory Ltd. v Aurelia Research Ltd.* [2013] SC (Bda) 48 Civ.

DATED this **20th** day of **March 2025**

ALEXANDRA WHEATLEY

ACTING JUSTICE OF THE SUPREME COURT