In The Supreme Court of Bermuda

COMMERCIAL JURISDICTION
2018 No: 74

BETWEEN:

FIDELITY NATIONAL TITLE INSURANCE COMPANY

Plaintiff

And

TROTT & DUNCAN LIMITED

Defendant

RULING

Dates of Hearing: Monday 07 January 2019
Date of Judgment: Tuesday 05 February 2019

Plaintiff: Mr. Keith Robinson and Mr. Kyle Masters (Carey Olsen Bermuda)
Defendant: Mr. Mark Diel and Ms. Katie Tornari (Marshall Diel & Myers Limited)

Application to Strike Out (RSC 18/9) and Court's Inherent Jurisdiction / Date of Accrual of Cause of Action for Professional Negligence Claim / Whether Claim is for Actual Loss or Contingent Loss

RULING of Shade Subair Williams J

Introduction

1. The Plaintiff commenced these proceedings by a Specially Indorsed Writ of Summons filed on 13 March 2018 followed by an Amended Statement of Claim filed on 28 August 2018.

The underlying claims allege breaches of a retainer agreement for client legal services and professional negligence asserting that the Defendant failed to exercise the care and skill to be expected of reasonably competent attorneys in the performance of their duties pursuant to the retainer.

2. By summons dated 8 October 2018, the Defendant seeks to have the Plaintiff's Specially Indorsed Writ of Summons and Amended Statement of Claim ("the Amended Claim") struck out under RSC O.18/19 and/or under the Court's inherent jurisdiction on the basis that no reasonable cause of action against the Defendant has been disclosed. The Defendant further relies on grounds asserting that the claims are scandalous, frivolous and/or vexatious and an abuse of the process of the Court.

3. The Plaintiff's summons action for these proceedings to be stayed pending the determination by the Privy Council of the appeal of the Court of Appeal's decision in *Mexico Infrastructure Finance LLC v The Corporation of Hamilton Civ. Appeal No. 19 of 2016* ("The Court of Appeal proceedings") was not argued. In any event, it would seem that the stay application has now been rendered futile by the Privy Council judgment which was delivered post-hearing on 21 January 2019 in *Mexico Infrastructure Finance LLC v Corporation of Hamilton [2019] UKPC2* ("the Privy Council proceedings") in favour of the Corporation of Hamilton.

4. Having heard Counsel for both parties on the Defendant's strike out application, I reserved my ruling which I now provide together with reasons herein.

Factual Background:

5. The dispute between the parties to these proceedings is an offspring from the hard-fought litigation between Mexico Infrastructure Finance LLC ("MIF") and the Corporation of Hamilton ("the COH"). The facts giving rise to this battlefield have been summarized in various written judgments of the Courts which have been later rehearsed by media outlets in Bermuda and beyond.

6. It all started with ambitions for Par-La-Ville Hotel and Residences Ltd ("PLV") to build and develop a five-star hotel complex on the site of the Par-La-Ville car park in the City of Hamilton ("the Car Park") which was to open on 31 August 2016. It was envisaged that the new hotel would attract and accommodate the needs of opulent business travelers. The COH aspired to collect rental profits from the leasing of the Car Park and revenue stemming from the use of a new underground car park. The COH's general outlook on the project was that

the new hotel would increase the vibrancy of Hamilton City and result in enhanced revenues for other city services.

7. For these reasons, on 11 April 2012 the COH entered into a development agreement and an agreement for the lease with PLV. The COH was further motivated to secure a loan agreement wherein MIF would lend an $18,000,000 sum to PLV to meet the anticipated cost of borrowing monies in the estimated sum of $350,000,000 for the building and development of the luxurious hotel complex. The security for the $18,000,000 loan was to take the form of a guarantee ("the Guarantee") and mortgage over the COH's freehold interest in the Car Park ("the Mortgage").

Summary of Legal Advice given to the COH

8. The COH instructed Mr. Charles Flint QC to provide a legal opinion on its powers to provide the security for the loan. Mr. Flint QC, by a written opinion dated 10 May 2013 (narrowly pre-dating the 2013 Amendment), advised that the COH were not so empowered and that section 23(1) of the Municipalities Act 1923 ("the 1923 Act") did not confer any general powers on the COH to provide financial assistance to a commercial developer.

9. Following the written advice of Mr. Flint QC, the COH instructed Bermuda law firm, Terra Law Limited ("Terra Law"), to provide a second legal opinion on its powers to execute the Guarantee. Having been disclosed with Mr. Flint QC's opinion, Terra Law, in a draft written opinion, advised that the COH had the power to mortgage its property pursuant to section 20(1)(b) of the 1923 Act if Ministerial approval were obtained. It further opined that the COH derived all of its powers from the statute which was vague and unclear.

10. Of note, Terra Law qualified its opinion by acknowledging that the possibility of challenge on the basis that the 1923 Act does not confer an express power to mortgage its land to support the borrowing of a third party. In the final part of the qualification, Terra Law states; "*We submit, however that the Lender can be protected against such risk through the issuance of the Mortgagee Title Insurance by Stewart Title Insurance Company (required under clause 6.1(xii) of the Credit Agreement).*"

11. At paragraph 15 of the judgment in the Court of Appeal proceedings it states; "*As the learned judge noted, Mr. Flint could understandably be considered a more authoritative source of legal advice than Terra Law, and his opinion addressed the point in greater depth than that of the Bermuda law firm, which the judge commented, had addressed the point somewhat cursorily…*"

Ministerial Refusal under s.23(1)(f) of the Municipalities Act 1923 and the Passing of the Municipalities Amendment Act 2013

12. By letter dated 10 July 2013, the Minister informed the Mayor that the Attorney-General's Chambers had considered the 1923 Act and concluded that it did not permit the Corporation to use its assets for the benefit of third party financing. On this basis, the Minister declined the approval required under section 23(1)(f).

13. In an attempt to bestow the COH with the legal authority it needed to honour its apparent liability under the Guarantee, the Legislature amended the 1923 Act in October 2013 by passing the Municipalities Amendment Act 2013 ("the 2013 Amendment"). (It was always common ground between the parties that the 2013 Amendment was intended to cure the concerns that the COH's statutory powers fell short of permitting it to lawfully provide the Guarantee.)

14. Section 14 of the 2013 Amendment required the approval of Cabinet and the Legislature to validate certain agreements and dispositions. A draft copy of the Guarantee was subsequently submitted and approved by the House of Assembly on 13 June 2014 and by the Senate on 25 June 2014.

MIF's Insurance Coverage by the Plaintiff upon Legal Advice of Trott & Duncan Ltd

15. At paragraph 5 of the Amended Claim, the Plaintiff avers that MIF first approached a competitor title insurance company, Stewart Title Guaranty Company ("Stewart") for insurance coverage over the mortgage and other related costs. However, Stewart sought to insert an exclusion clause in its proposed contract in the following terms:

    "*Any claim or loss by reason of any lack of legal or constitutional authority by the Corporation of Hamilton to act as mortgagor and /or guarantor of the Insured Mortgage over the Land[.]*"

16. At paragraph 6 of the Amended Claim the Plaintiff explained that MIF was unsatisfied with the suggested exclusion clause and subsequently sought out the Plaintiff in hopes for obtaining coverage without a similar restriction. The Plaintiff, upon obtaining legal advice from the attorneys of Trott & Duncan Ltd ("Trott & Duncan"), issued a title policy to MIF on 18 August 2014 without any exclusion clause similar or identical to that proposed by Stewart ("the Title Policy").

The Execution and Default of the $18M Loan and the COH's Security for the Loan

17. MIF entered the loan agreement with PLV for the $18,000,000 sum and on 9 July 2014 the COH provided the Guarantee and the Mortgage.

18. PLV, having failed to repay the loan on its due date of 30 December 2014, defaulted on the loan which led MIF to employ efforts to seek full repayment of the entire outstanding balance of $18,000,000 plus interest from the COH under the Guarantee.

19. To date, the loan remains unpaid.

Court Proceedings between MIF and the COH:

20. The 2013 Amendment was subsequently passed and the first set of Court proceedings began in the Supreme Court in an action brought by MIF against the COH for enforcement of the Guarantee. The COH, acting on the advice of its new attorney, Mr. David Kessaram of Cox Hallett Wilkinson ("CHW"), concluded that it could not properly defend the claim and consented to MIF's application for summary judgment against it. Accordingly, the Consent Order was entered by the learned Mr. Justice Stephen Hellman on 27 May 2015 ("the Consent Order"). This Court has not been made privy to or even aware of any written legal opinion proffered by CHW, save to say it would be difficult to infer from the making of the Consent Order that their advice was in tandem with that of Mr. Flint QC whose position was that the Corporation had no power to grant the Guarantee in the first instance. At paragraph 14 of the Court of Appeal judgment, the learned Bell JA stated:

"*Mr. Kessaram had not been provided with a copy of Mr. Flint's opinion, nor had he been advised that there had ever been an issue as to ultra vires, and indeed, to the contrary, had been told that the 2013 Amendment had been passed expressly to enable the Corporation to enter into the Guarantee. In March 2016, by which time Mr. Gosling had been elected Mayor, the issue of the vires of the Guarantee was raised in another context. This led to a copy of Mr. Flint's opinion being forwarded to Mr. Kessaram, who advised that a further opinion should be obtained from Mr. Flint. That was done, and as a result of Mr. Flint's further advice, the present proceedings were issued*."

21. The COH subsequently secured new Counsel from Marshall Diel & Myers ("MDM") who filed an Originating Summons dated 23 June 2016 in pursuit of its efforts to set aside the Consent Order on the ground that the Guarantee was null, void and of no effect since the COH had no power to provide it. Lead Counsel for the COH was Mr. Michael J. Beloff QC and Lord Pannick QC appeared as leading Counsel for MIF.

22. Hellman J, having heard full arguments, found in favour of the case of the COH that the Guarantee was indeed *ultra vires* and uncured by the 2013 Amendment Act. In his judgment, Hellman J further rejected MIF's case that the application to set aside the Consent Order amounted to an abuse of process, although the learned judge did express sympathy with MIF for the position it found itself in.

23. MIF appealed to the Bermuda Court of Appeal on the *ultra vires* issue and the abuse of process argument. However, Hellman J's decision was fully upheld. MIF further appealed to the Privy Council. Lady Arden in delivering the decision of the Privy Council surmised the principal issue before the Judicial Committee at the opening of the judgment as follows:

"The principal issue on this appeal is whether the grant by the Corporation of Hamilton ("the Corporation") of a guarantee ("the guarantee") to support a borrowing by a private developer was ultra vires and unenforceable as it was not for a "municipal purpose" within section 23(1)(f) of the Municipalities Act 1923 of Bermuda ("the 1923 Act")."

24. The Privy Council, by majority decision, upheld the decisions of the lower Courts in finding that the Guarantee was *ultra vires* because it was not for a municipal purpose.

25. At paragraphs 26-28 of Lady Arden's judgment she provides an analysis of the impact of the 2013 Amendment which conferred on the COH a power to issue a guarantee, so long as such a guarantee complied with the 1923 Act:

26. The amendment to section 37 made by the 2013 Act now makes clear that the Corporation has an implied power to issue guarantees within the limits imposed by section 37 (1) of the 1923 Act, as amended. However, as explained, those guarantees cannot be an activity in themselves and must therefore be issued for an authorised purpose found elsewhere in the 1923 Act.
27. The appellant's case is that the purpose is found in section 23(1)(f) as part of the power to levy rates. It is common ground that if the purpose of the guarantee is within that paragraph, it is an authorised act of the Corporation since, if it had to levy a rate to meet its liability and could do so under that provision, the guarantee must necessarily be authorised. It is also common ground that, if the guarantee falls within section 23(1)(f), the necessary ministerial approval has been given.
28. Consideration of these issues must commence with a detailed examination of the wording of section 23(1)(f)…

26. The *ratio* for Board's majority decision is set out at paragraph 41 and onwards. At paragraph 55 Lady Arden provided a succinct explanation of the route taken in finding that the Guarantee was *ultra vires*:

55. The Board's interpretation takes due account of the words "of an extraordinary nature" in section 23(1)(f). In the opinion of the Board, those words simply mean that the purpose is one which is outside the normal run of the Corporation's purposes and activities. In order for a purpose to qualify as a purpose of an extraordinary nature, a purpose must first overcome the hurdle of being a "municipal purpose".

27. The application of the meaning of "municipal purpose" is outlined at paragraphs 58 – 59:

58. On the evidence before the Board, it is clear that the purpose of the Corporation in giving the guarantee was to help the developer obtain funding for the development. As to this, it is no part of the Corporation's functions to act as banker to a developer.

59. The primary purpose of the guarantee was to enable the developer to obtain credit. It may be that, although the funds were not in fact applied for the purposes of obtaining funding for the development, the credit raised by the guarantee was limited to funding for developing the hotel complex. However, for the reasons given, that would not in the opinion of the Board change the legal position. The hotel complex did not provide any service or facility for inhabitants, except possibly for the conferencing facilities, but it has not been suggested that the conferencing facilities alone (doubtless a relatively small part of the total complex) could make the purpose municipal, as the Board has interpreted that term. As explained above, the guarantee was not capable of being brought within the Corporation's powers by reference to a wider motivation and desire on the Corporation's part generally to promote Hamilton's economic development.

28. The dissenting judgment was provided by Lord Sumption with whom Lord Lloyd-Jones agreed. In the dissenting judgment Lord Sumption found that the Corporation did in fact have the power to guarantee the bridging loan, having applied a broader interpretation of the statutory terminology "municipal purposes of an extraordinary nature".

29. In separate Supreme Court proceedings issued by MIF against the COH, MIF now seek to enforce the Mortgage against the COH on the basis that the Guarantee and the Mortgage are legally separable and distinct ("the Mortgage Action"). The COH's position is that the two forms of security are inextricably linked. These proceedings were rendered dormant for an excess of 6 months by reason of the then pending outcome of the Privy Council proceedings.

Summary of the Plaintiff's Pleaded Case in these Proceedings

30. The Amended Claim alleges both breach of contract and negligence as follows:

26 In breach of contract and/or negligently the Defendant failed to exercise the care and skill to be expected of reasonably competent attorneys in performing their duties pursuant to the said retainer:-

(i) By failing to advise the Plaintiff that there was a real possibility that a court, if called upon to adjudicate the issue, would find that the guarantee was ultra vires; and/or

(ii) By failing to disclose to the Plaintiff the potential conflict of interest relative to (the) *Defendant's prior ongoing representation of the Corporation.*

31. The Plaintiff claims for *any loss that MIF might sustain in the event that the mortgage is not enforceable in accordance with its terms*.

32. The Plaintiff's claim for damages arises if MIF is unsuccessful in recovering its damages for the unenforceability of not only the Guarantee but also the Mortgage over the Car Park. Such damages would include, on the Plaintiff's case, an $18,000,000 sum in addition to *costs, legal fees and expenses incurred in defense of any matter to which the Plaintiff is liable to indemnify MIF (pursuant to the terms of the Policy)* which to date is said to be a sum in excess of $933,632.80. The Plaintiff's claim for legal fees extends to its liability for MIF's future legal fees covered by the terms of the Title Policy.

Summary of Opposing Arguments on Strike-Out Application

33. The Defendant seeks to strike out the Plaintiff's Amended Claim in its entirety as the alleged negligence which is pleaded as both a breach of duty in tort and contract hinges on the criticism that Trott & Duncan omitted to qualify its written legal opinion to warn the Plaintiff that the enforceability of the Guarantee and the Mortgage might be challenged. Mr. Diel, gallantly melted the Plaintiff's case down to the following baseline: "*If Trott & Duncan had put at the end of their opinion; 'but of course we could be wrong' this action wouldn't be happening*."

34. Counsel further sought to discard any implication that the Defendant was unaware of the risk of an enforceability challenge and referred the Court to evidence of email exchanges on 10 and 12 June 2013 between the COH's former legal representative, Terra Law, on the one side and Counsel of Conyers Dill & Pearman ("CDP") for MIF on the other. In the 12 June 2013 email to Ms. Francesa Fox, Terra Law disclosed their draft opinion which contained the following qualification:

QUALIFICATION

We have opined on our interpretation of the Act in paragraph 2 above. Nonetheless remains the possibility of challenge on the basis that as the Act does not give the Corporation the express power to mortgage its land to support the borrowing of a third party, the

Corporation does not have the power to enter into this particular mortgage. This would, we think, require a very narrow interpretation of Section 20(1)(b) of the Act and given that transactions of a similar nature have been entered into by the Corporation previously in the course of its long history, we consider any such challenge to be unlikely. The risk remains nonetheless. We submit, however that the Lender can be protected against such risk through the issuance of the Mortgagee Title Insurance by Stewart Title Insurance Company (required under clause 6.1(xii) of the Credit Agreement).

35. In the 12 June 2013 email reply from Ms. Fox she wrote:

I understand that a conference call is scheduled at 11 EST/12 AST to discuss the outstanding issues. In advance of that meeting I attach a mark up of your firm's opinion. You will appreciate that the provision of an enforceable mortgage is fundamental to my client's decision to lend. In addition, during the conference call on Monday, Robert Osterwalder was very clear that the requirement to provide a redacted version of the London QC's opinion in respect of the Corporation's power to enter into the mortgage would only be dropped if Terra were able to provide a robust opinion confirming the same. The qualifications that have been included are not therefore acceptable.

36. The implication, as underscored by Mr. Diel, was that MIF's attorneys were well aware of the risk of challenge to the enforceability of the Mortgage and they were even cognizant of the fact that a London QC had opined in writing that the Mortgage was in fact unenforceable.

37. In the second affidavit of Mr. Delroy Duncan he stated at paragraph 6 (b):

"*6 Whilst Marshall Diel & Myers Limited (MDM), attorneys for the Defendant, will address this matter in legal argument at the hearing, I set out briefly how Mr Rivera's assertion is not correct:*
(a)…
(b) The Plaintiff cannot allege negligence against the Defendant in light of the decision of the Honourable Mr Justice Hellman dated 18 November 2016 wherein he stated that "Competent legal advisors considering the question in depth could reasonably have concluded that the Corporation had power to give the Guarantee…" and in circumstances where the Plaintiff was fully aware that there was uncertainty of the Corporation's powers to enter into the mortgage as accepted by Mr. Rivera at paragraph 16 of his Affidavit."

38. However, in Mr. Rivera's affidavit evidence (Mr. Rodolfo Rivera is the Chief International Counsel and Vice President of the Plaintiff company), he openly confronted this argument through his clear acceptance that the Plaintiff was in fact aware of the uncertainty in enforcing the Mortgage and the Guarantee. Mr. Rivera asserted that this was the very basis

for which Trott & Duncan was retained. In Mr. Rivera's first affidavit at paragraphs 16a-16b he deposed:

"*a. MIF informed Fidelity of the uncertainty as to the Corporation's capacity to enter into the Guarantee and Mortgage which was the subject of the Policy Exclusion. Furthermore, Fidelity communicated that uncertainty to T&D and asked for T&D's opinion as to whether the Stewart Title Exception could be omitted from the Title Policy that Fidelity would issue to MIF. Paragraph 10 of the ASOC states, relevantly, that: "…the Defendant was fully and completely aware of the Policy Exclusion in the Stewart title insurance commitment". It is also instructive to consider the context in which T&D's opinion was sought. The first page of the opinion provides that:*

"[Fidelity] has asked us to provide this opinion in relation to certain questions that have been raised regarding…the capacity of the [Corporation] to enter into…[the Guarantee and Mortgage]"

b. It follows that Mr. Duncan's "assumption" is false. Not only did MIF disclose the uncertainty to Fidelity, so that there is no valid basis to claim that MIF has no coverage under the Title Policy due to any non-disclosure, but Fidelity specifically disclosed to T&D that there was an issue as to whether the Corporation had the legal capacity to grant the Guarantee and the Mortgage. Indeed, that was the very reason that Fidelity sought the opinion from T&D."

39. In turning to the Defendant's other grounds for complaint, Mr. Diel contended that the Plaintiff's claim for loss was contingent as it had not suffered any actual loss which it could properly claim. Counsel pointed to the damages claimed in the Amended Claim at sub paragraph (a):

    (a) Damages in respect of amounts paid to MIF as a result of the mortgage over the Property being unenforceable, in a sum to be particularized prior to trial

40. The Defendant argued that the Plaintiff's claim is speculative since it is contingent on MIF's inability to mitigate its loss for the default on the $18,000,000 loan through its claim to enforce the Mortgage. However, if MIF turn out to be successful in their claim to enforce the Mortgage, the Plaintiff would be disabled from claiming for any loss in these proceedings. According to Mr. Diel, the point is this: the Plaintiff's damages may arise in the future, but equally they may not and had the Defendant not entered an appearance in these proceedings, the Plaintiff would not have been in a position to obtain summary judgment for damages as no loss has been suffered. As a pre-emptive strike against the Plaintiff's anticipated argument

that an inquiry into damages would necessarily arise, Mr. Diel forcefully contended that such an inquiry could only properly apply when damage or loss had in fact occurred.

41. Mr. Robinson, in rebuttal, argued that its claim for loss in respect of legal fees already incurred by MIF would not be undone by the pending Mortgage action. The relevant prayer for damages claimed is:

    Damages in respect of amounts expended as costs, legal fees and/or expenses incurred as a result of the Plaintiff's reliance on the Defendant's advice.

42. The damages already incurred total a sum exceeding $933,632.80. These legal fees arise out of the proceedings where MIF unsuccessfully asserted the enforceability of the Guarantee in the Supreme Court, Court of Appeal and Privy Council. Mr. Diel argued that the Plaintiff in these proceedings, through its pleadings and evidence, have drawn a material distinction between the Guarantee action and the Mortgage action. Thus, the Plaintiff should be precluded in these proceedings from recovering any loss which arises out of litigation in pursuit of the Guarantee as its insurance coverage for MIF was only in relation to the Mortgage.

43. Turning to MIF's pending legal proceedings to enforce the Mortgage, the Defendant argued that the Policy would not cover these costs which are restricted for actions defended by MIF, as opposed to any legal proceeding commenced or prosecuted by MIF.

44. In the Defendant's written submissions, various terms of the Policy between the Plaintiff's insurer and the insured MIF were recited. Mr. Diel directed the Court's attention to the clause governing the choice of law:

    (b) *Choice of Law: The Policyholder acknowledges that the Company has underwritten the risks covered by this policy in reliance upon the laws of the jurisdiction where the Land is located. A court or tribunal shall apply the laws of the jurisdiction where the Land is located to determine the validity of claims against the interest indemnified by this policy. No court or tribunal shall apply its conflicts of law principles to determine the applicable law*.

45. The relevance of this provision turns on the interpretation of the term "defence" in the context of the Policy which restricts coverage to the defending of an action. It is suggested that as a matter of New York law, the term "defence" would be broadly construed. However, under Bermuda law, Mr. Diel submits that the term "defence" would be given its literally plain and unambiguous meaning so to exclude coverage for the prosecution of the Mortgage Action. The Defendant says that it is clear on the clause that the applicable law is, in fact,

Bermuda law where *the Land is located* and that even if the choice of forum had been outside of Bermuda, this would not change the choice of law.

46. The Plaintiff, on the other hand, through the second affidavit of Mr. Rivera, stated at paragraphs 14-17:

14. Fidelity is a California company and MIF a Delaware limited liability company. Conditions 16 and 17 of the Title Policy (page 14 of RR-1) deal with arbitration and choice of law and forum. Condition 16 is an arbitration clause relating to "any disputes" while Condition 17(a) provides that any proceedings or litigation (except arbitration) by MIF against Fidelity must be brought in a court of the State of New York.

15. Condition 17(b) is headed Choice of Law and reads: (see paragraph 44 above)

16. I should also note that General Exclusion 9 to the Title Policy (page 11 of RR-1) excludes:

> *"Any claim (a) against the Title or the Lien of the Covered Mortgage brought outside the country where the Land is located; or (b) relating to the interpretation or enforcement of this policy brought in a jurisdiction other than as specified in Section 17 of the Conditions*(")

17. It is Fidelity's position, therefore, that while the validity of the Guarantee and Mortgage and other questions relating to the title to the Land (as defined in the Fidelity Policy) are clearly matters of Bermuda law, the question of whether MIF has as the date hereof a valid claim under the Title Policy is not a matter of Bermuda law at all and certainly not a matter this Court ought to determine on a strike out application. Rather, as between Fidelity and MIF, it is a matter that must be determined either by arbitration or before a court of the State of New York, applying New York law.

47. In supposing MIF's success in its claim under the Mortgage action, Mr. Diel submitted that Trott & Duncan would surely be vindicated and proven correct in their legal advice as to the enforceability of the Mortgage. However, Mr. Diel conceded that the opinion provided was in relation to both the Mortgage and the Guarantee but qualified his concession in highlighting that the purpose of the opinion was for the Plaintiff to ascertain whether it would provide coverage in respect of the Mortgage only.

48. The Defendant further submits that the Plaintiff's pleading of failure to disclose a potential conflict of interest relative to the Defendant's prior ongoing representation of the COH is isolated and meaningless in the context of its pleaded case. Mr. Diel argued that the

Plaintiff's pleaded case did not disclose or give any insight into the particulars of the alleged conflict of interest or the loss or damage resulting therefrom.

49. At the core of his oral arguments, Mr. Robinson urged the Court to be mindful that the burden of proof for the strike out application rested on the Defendant to establish that there is no realistic possibility of a cause of action. Mr. Robinson cautioned that a claim for negligence calls for a fact-specific inquiry which would require the Court to thoroughly assess the evidence of the precise correspondence and interaction between the client and the attorney against what was specifically requested.

Guiding Legal Principles

The Law on Strike-Out Applications

General Approach and the Court's Case Management Powers

50. In *David Lee Tucker v Hamilton Properties Limited [2017] SC (Bda) 110 Civ* I outlined the general approach and relevant legal principles applicable to strike out applications. As a starting point, at paragraph 11 I stated:

"*The principles of law applicable to the strike-out of a claim were no source of contention between the parties. This area of the law has been well recited in previous decisions of this Court. In general synopsis, strike out applications ought not to be misused as an alternative mode of trial. It is not a witness credibility or fact finding venture and for good reason. The evidence before the Court at this stage is not oral and has not yet been tested through cross-examination. A strike out application, in reality, is a component of good case management. Where the pleadings are so bad on its face and so obviously bound for failure, the Court should strike it out*."

51. Mr. Robinson at paragraph 28 of his written submissions directed the Court's attention to the following passage in *Wenlock v Moloney [1965] 1WLR 1244 D-E per Diplock LJ*:

"*But this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that is to usurp the position of the trial judge and to produce a trial of the case in chambers on affidavits only, without discovery and without oral evidence tested by cross examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power*."

52. At paragraphs 14-16 in *David Lee Tucker v Hamilton Properties Limited* I considered the Court's case management powers in the context of a strike out application:

14. *The Court's determination of a strike-out application is a component of active case management. Essentially, the Court is required to identify the issues to be tried at an early stage of the proceedings and to summarily dispose of the others. This is aimed to spare unnecessary expense and to ensure that matters are dealt with expeditiously and fairly.*

15. *As a starting point, the Court must have regard to the Overriding Objective stated at RSC Order 1A:*

1A/1 The Overriding Objective
(1) These Rules shall have the overriding objective of enabling the court to deal with cases justly.
(2) Dealing with a case justly includes, so far as is practicable-
(a) ensuring that the parties are on equal footing;
(b) saving expense;
(c) dealing with the case in ways which are proportionate-

(i) to the amount of money involved;
(ii) to the importance of the case;
(iii) to the complexity of the issues; and
(iv)to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly; and
(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases

1A/2 Application by the Court of the Overriding Objective
2 The court must seek to give effect to the overriding objective when it-
(a) exercises any power given to it by the Rules; or
(b) interprets any rule.

1A/3 Duties of the Parties
3 The parties are required to help the court further the overriding objective.

1A/4 Court's Duty to Manage Cases
4 (1) the court must further the overriding objective by actively managing cases.
(2) Active case management includes-
a) encouraging the parties to co-operate with each other in the conduct of the proceedings;
b) identifying the issues at an early stage;

c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;
d) deciding the order in which issues are to be resolved;
e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure;
f) helping the parties to settle the whole or part of the case;
g) fixing timetables or otherwise controlling the progress of the case;
h) considering whether the likely benefits of taking a particular step justify the cost of taking it;
i) dealing with as many aspects of the case as it can on the same occasion;
j) dealing with the case without the parties needing to attend at court;
k) making use of technology; and
l) giving directions to ensure that the trial of a case proceeds quickly and efficiently

16. *In Jim Bailey v Wm E Meyer & Co Ltd [2017] Bda LR 5 at paras 14-15 the learned Hon. Chief Justice, Ian Kawaley, examined the impact of the new CPR regime and the Overriding Objective on strike out applications:*

"…In Biguzzi v Rank Leisure plc [1999] 4 ALL ER 934 (CA), Lord Woolf explained that the CPR introduced an entirely new procedural code. It is true that he stated that pre-CPR authorities would not generally be relevant. But that was in the context of contending that the new regime imposed greater case management powers on the court to prevent delay than under the old Rules. Trial judges, post-CPR, were expected to use these case management powers judicially, only striking out as a last resort. It is also important to remember that this reasoning was articulated in a statutory context in which an entirely new procedural code was in force. And the particular strike-out discretionary power which was under consideration in that case was an entirely new one, a power exercisable on grounds of mere non-compliance with the Rules. As Lord Woolf observed (at 939-940):
"Under the CPR the keeping of time limits laid down by the CPR, or by the court itself, is in fact more important than it was. Perhaps the clearest reflection of that is to be found in the overriding objectives contained in Part 1 of the CPR. It is also to be found in the power that the court now has to strike out a statement of case under Part 3.4. That provides that:
'(2) The court may strike out a statement of case if it appears to the court- (a) that a statement of case discloses no reasonable grounds for bringing or defending the claim; (b) that the statement of case is an abuse of the court's process…' [and, most importantly] (c) that there has been a failure to comply with a rule, practice direction or court order.'

Under Part 3.4(c) a judge has an unqualified discretion to strike out a case such as this where there has been a failure to comply with a rule. The fact that a judge has that power does not mean that in applying the overriding objectives the initial approach will be to strike out the statement of case. The advantage of the CPR over previous rules is that the court's powers are much broader than they were. In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out."

53. At paragraph 13 in *David Lee Tucker v Hamilton Properties Limited* I cited Auld LJ's remarks in *Electra Private Equity Partners (a limited partnership) v KPMG Peat Marwick [1999] EWCA Civ 1247 p.613* which were previously relied on by the Bermuda Court of Appeal in *Broadsino Finance Co Ltd v Brilliance China Automative Holdings Ltd [2005] Bda LR 12:*

"*It is trite law that the power to strike-out a claim under RSC Order 18 Rule 19, or in the inherent jurisdiction of the court, should only be exercised in plain and obvious cases. That is particularly so where there are issues as to material, primary facts and the inferences to be drawn from them, and where there has been no discovery or oral evidence. In such cases…to succeed in an application to strike-out, a defendant must show that there is no realistic possibility of the plaintiff establishing a cause of action consistently with his pleading and the possible facts of the matter when they are known. Certainly, a judge, on a strike-out application where the central issue is one of determination of a legal outcome by reference to as yet undetermined facts, should not attempt to try the case on the affidavits…There may be more scope for an early summary judicial dismissal of a claim where the evidence relied upon by the Plaintiff can properly be characterised as shadowy, or where the story told in the pleadings is a myth and has no substantial foundation…*
However, the court should proceed with great caution in exercising its power of strike-out on such a factual basis when all the facts are not known to it, when they and the legal principle(s) turning on them are complex and the law, as here, is in a state of development. It should only strike out a claim in a clear and obvious case. Thus, in McDonald's Corp v Steel [1995] 3 ALL ER 615 at 623, Neill LJ…said that the power to strike out was a Draconian remedy which should be employed only in clear and obvious cases where it was possible to say at the interlocutory stage and before full discovery that a particular allegation was incapable of proof.

'Reasonable Cause of Action'

54. The rule against the admission of evidence in support of the ground that no reasonable cause of action is disclosed is contained at RSC Order 18/19(2).

55. At paragraphs 18- 20 in *David Lee Tucker v Hamilton Properties Limited* I referred to the following authorities in support of the rule at RSC Order 18/19(2):

18. This rule was recognized in Broadsino Finance Co Ltd v Brilliance China Automative Holdings Ltd [2005] Bda LR 12: "Where the application to strike-out (is) on the basis that the Statement of Claim discloses no reasonable cause of action (Order 18 Rule 19(a)), it is permissible only to look at the pleading."

19. In E (a minor) v Dorset CC [1994] 4 All ER 640 at 649, [1995] 2 AC 633 at 693-694, Sir Thomas Bingham MR stated:

'It is clear that a statement of claim should not be struck out under RSC Ord 18, r 19 as disclosing no reasonable cause of action save in clear and obvious cases, where the legal basis of the claim is unarguable or almost incontestably bad…I share the unease many judges have expressed at deciding questions of legal principle without knowing the full facts. But applications of this kind are fought on ground of a plaintiff's choosing, since he may generally be assumed to plead his best case, and there should be no risk of injustice to plaintiffs if orders to strike out are indeed made only in plain and obvious cases. This must mean that where the legal viability of a cause of action is unclear (perhaps because the law is in a state of transition) or in any way sensitive to the facts, an order to strike out should not be made. But if, after argument, the court can be properly persuaded that no matter what (within the reasonable bounds of the pleading) the actual facts the claim is bound to fail for want of a cause of action, I can see no reason why the parties should be required to prolong the proceedings before that decision is reached.

20. The White Book (1999 edition) 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): …"

'***Scandalous, Frivolous or Vexatious***'

56. At paragraphs 21- 22 in *David Lee Tucker v Hamilton Properties Limited* I considered the meaning of these terms and made the following observations:

Scandalous

21. *A complaint that a pleading is 'scandalous' necessarily imports an allegation that the pleading is grossly disgraceful, false and malicious or defamatory. Scandalous claims are irrelevant to the proceedings and are invariably liable to be struck out on the basis that they are improper.*

Frivolous and Vexatious

22. *Justice Meerabux in The Performing Rights Society v Bermuda Cablevision Limited 1992 No. 573 at page 31 considered the meaning of 'frivolous' and 'vexatious':*

"…It is pertinent to mention that the words "frivolous or vexatious" mean cases which are obviously frivolous or vexatious or obviously unsustainable. Per Lindley L.J. in Attorney-General of Duchy of Lancaster v L. & N. W. Railway [1892] 3 Ch. 274 at 277. Also when "one is considering whether an action is frivolous and vexatious one can, and must, look at the pleadings and nothing else… One must look at the pleadings as they stand." Buckhill L.J. in Day v William Hill (Park Lane) Ld. [1949] 1 K.B. 632 at page 642."

However, Day pre-dates the 1985 Supreme Court Rules and the new CPR regime which introduced the Overriding Objective. RSC O.18/19(2) only excludes the admissibility of evidence on the grounds that no reasonable cause of action or defence is disclosed. Evidence may now be filed in support of grounds that the pleadings are 'scandalous, frivolous or vexatious'.

'***Abuse of Process***'

57. The term 'abuse of process' has long been explored and addressed by the Court. Having relied on the persuasive passages stated and approved by learned judges of this Court and those sitting in the English House of Lords, I cited the following at paragraphs 23- 25 in *David Lee Tucker v Hamilton Properties Limited:*

Misuse of procedure

23. *In Michael Jones v Stewart Technology Services Ltd [2017] SC (Bda), Hellman J considered the meaning of 'abuse of process' by reference to Lord Diplock's passage in Hunter v Chief Constable [1982] AC 529 at 536 C:*

"It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among

right-thinking people. The circumstances in which abuse of process can arise are very varied…"

Delay in Prosecution of Claim

24. *Kawaley CJ considered the legal principles relevant to a strike out application on grounds of abuse of process in Jim Bailey v Wm E Meyer & Co Ltd [2017] Bda LR 5 at paras 12-25. The issue underlying the abuse of process in Bailey v Meyer was pinned to delay in the prosecution of the claim. Kawaley CJ summarily rejected the submission that civil want of prosecution was governed by the same law applicable to an accused's constitutional right to be tried within a reasonable time. The Court cited Biguzzi v Rank Leisure plc [1999] 4 All ER 934 (CA) where the High Court reversed a deputy district judge's decision to strike out the claim. The reversal on appeal in that case hinged on the Defendant's contribution to the delay in advancing the proceedings exceeded passive assent. See also Re Burrows [2005] Bda LR 77 (at paragraphs 13-14) and Russell v Stephenson [2000] Bda LR 63.*

Mythical Allegations incapable of proof

25. *The House of Lords in Dow Hager Lawrance v Lord Norreys and Others HL 1890 [Vol XV] 210 held:*

"It cannot be doubted that the Court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the Court. It is a jurisdiction which ought to be very sparingly exercised, and only in very exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved. But the Court of Appeal did not proceed on that ground. They took into consideration all the circumstances of the case. We have, to begin with, a statement of claim which, if it discloses a concealed fraud within the meaning of the statute, does so in the barest fashion, with much that is most material left vague and undefined, when there ought to have been distinctness and precision. Moreover, this is not the first but the third edition of a statement of claim delivered with the object of recovering the Towneley estate; and when we review the history of the litigation there is much to lead to the belief that important allegations now made were an afterthought, the result of criticisms of the earlier form in which the charges of fraud were presented, and that the charges thus raised against persons long dead are wholly incapable of proof. These impressions might have been dissipated by the affidavits filed on behalf of the appellant; but they have not been. On the contrary, I think they have been strengthened. Both in what it says and in what it does not say, Colonel Jaques' affidavit confirms in my mind the impression that the case has not a solid basis capable of proof, but that the story told in the pleadings is a myth, which has grown with the progress of the litigation, and has no substantial foundation. For these reasons, I

concur with the Court of Appeal in thinking that the action is an abuse of process of the Court…"

The Law on Negligence- Actual Loss and Contingent Loss

58. A principal complaint of the Defendant's application to strike out the Amended Claim is grounded on the contention that the Plaintiff's claim for loss is contingent and not actual. Mr. Diel argued that the pleading of a contingent claim arises out of the Plaintiff's claim for "*any loss that MIF might sustain in the event that the mortgage is not enforceable in accordance with its terms*."

59. The learned authors of the eleventh edition of Charlesworth & Percy on Negligence published the following passage at paragraph 1-29 on actual damage:

"*Breach of a duty of care only becomes actionable if accompanied by proof of actual damage (See per Lord Phillips C.J. in Rothwell v Chemical and Insulating Co. Ltd [2006] EWCA Civ 27, January 26, 2006, CA, para [19]: "It has always been the law in England (&) Wales that negligence is not actionable per se, it is only actionable on proof of damage. While such damage need not be substantial it must be more than minimal."). There is no right of action for nominal damages…As Lord Reading C.J. has said: "Negligence alone does not give a cause of action, damage alone does not give a cause of action; the two must co-exist." (J. R. Munday Ltd v London C.C. [1916] 2 K.B.. 331 at 334, a passage approved by Lord Simon in East Suffolk Rivers Catchment Board v Kent [1941] A.C. at 86-87, and to which he added: "A third essential factor is the existence of the particular duty*.") *Accordingly, a bare admission of negligence by a defendant is not necessarily an admission of liability. For instance, a claimant will presumably have to show that each element in his cause of action, including that he has suffered actual damage, is admitted, before being able to enter judgment under Pt 14.3 of the Civil Procedure Rules 1999…*"

60. On the issue of accrual of the cause of action, the learned editors at paragraphs 3-150 – 3-152 stated:

"*The test is however deceptively simple to state, more difficult to apply in practice. Problems can arise in identifying when an immediate economic loss has arisen. The suggestion has been made that "the courts have been driven to draw narrow, some would say unconvincing, distinctions between transactions where it has been held that the loss was measurable when the relevant transaction was entered into and transactions where it has been held that loss occasioned by the unsatisfactory bargain lay in the future" (per Neill L. J. in First National Commercial Bank v Humberts [1995] 2 ALL ER 673, CA)"*

In Nykredit plc v Edward Erdman Ltd [1997] 1 WLR 1627, HL Lord Nicholls emphasized that "the loss must be relevant loss. To constitute actual damage for the purpose of constituting a tort, the loss sustained must be loss falling within the measure of damage attributable to the wrong in question." He pointed out that where as a result of negligent advice property was acquired as security the lender suffers a detriment in the sense that he parts with his money which he would not have done if he was properly advised, but he may no (sic) suffer no actual loss at all, for instance is the borrower does not default. The relevant damage in a negligent valuation case is that attributable to the shortcomings in the valuation and the lender's cause of action accrues when he can show that he is actually worse off as a result.

The question when loss has arisen is frequently an issue in claims against professional persons. For instance, so far as solicitors are concerned, there is no presumption that where negligent advice has been given, damage arose at that time: it is a question of fact in each case whether damage in fact accrued then or later. Where claimants executed what they were advised were valid and binding restrictive covenants with a third party; but the covenants later proved ineffective and valueless, they suffered damage and hence their cause of action accrued, at the time the agreements were entered, not later when they discovered the error…Where the claimant, a member of a rock band, alleged negligence by solicitors in failing to verify that the terms of a recording contract reflected the members' intentions, or to advise him that he could be summarily expelled from the band without compensation, damage accrued when he entered the agreement, even though actual loss arose later when he was actually expelled. (McCarroll v Statham Gill Davis [2003] P.N.L.R. 509, CA (assuming the claimant's allegations were correct, the agreement he signed was commercially less favourable that it would have been had the solicitors' duty been discharged, and that was a sufficient damage to complete his cause of action). Exposure to a contingent loss is not actual damage before the contingency occurs. In the words of Lord Hoffman in Law Society v Sephton & Co: "The existence of a contingent liability may depress the value of other property, as in Forster v Outred & Co. or it may mean that a party to a bilateral transaction has received less than he should have done, or is worse off than if he had not entered into the transaction (according to which is the appropriate measure of damages in the circumstances). But, standing alone… the contingency is not damage."

61. At paragraphs 3-154:

"*In a common class of case, solicitors are alleged to have been negligent in allowing their client's claim to be struck out by the court, for delay or some other reason. The question arises when the damage should be regarded as having accrued. Did it accrue at the moment of strike out, or at some earlier time when by reason of the solicitor's negligence the action was liable to be struck out? The answer given, where a claim for medical negligence was*

struck out for want of prosecution, was that damage accrued for purposes of limitation at the striking, even though by then the value of the claim was much reduced… However, the decision has been criticised. It was suggested to be inconsistent with Nykredit Mortgage Bank v Edward Erdman Group Ltd, above, and the position taken that time for limitation purposes should run from the point when the effect of a solicitor's negligence has been substantially to diminish a claimant's chances of succeeding, even though the action is struck out for delay at a later time…"

Analysis and Findings

62. The first question for determination in this case is whether the attorneys of Trott & Duncan breached their duty in falling below the standard of care and skill reasonably expected of competent attorneys. Is it arguable that they were professionally negligent?

63. Mr. Diel submitted that a legal opinion was simply that: an opinion. He contends that legal opinions often differ and for good reason. He emphasized that even in the previous original judgment of this Court (the Supreme Court proceedings) the learned judge deemed it reasonable that a competent attorney would have advised that the Guarantee was enforceable. Indeed, the learned members of the Judicial Board sitting in the Privy Council proceedings were not unanimously agreed on the issue of whether the Guarantee was enforceable**.**

64. However, Mr. Robinson has urged the Court against a hasty disposal of this issue without a trial. He suggested that on a full examination of *vive voce* evidence the Court would better grasp all of the relevant facts. Mr. Robinson insisted that the development of the Plaintiff's pleaded case at trial would demonstrate that the attorneys of Trott & Duncan were in fact made aware of the Policy Exclusion in the Stewart Title Insurance Commitment and that they knew that their legal opinion would be the determinative factor in the Plaintiff's decision whether to issue the Title Policy to MIF or whether to issue more restrictive coverage.

65. Surely, these fiercely contentious issues are a matter for resolve at trial where the Court would have the needed benefit of all the relevant and detailed facts which would fully come to light after discovery; the mutual exchange of witness statements; the examination and cross-examination of witnesses and the receipt of full submissions on the relevant law and evidence.

66. The next question is whether the Plaintiff has suffered actual loss as opposed to mere contingent loss. Is it arguable that a reasonable cause of action has already accrued? Mr. Diel forcefully argued that the Plaintiff's claim for loss is contingent and a cause of action for the recovery of the $18,000,000 in damages is non-existent for as long as MIF's Mortgage Action remains pending and undetermined.

67. In my judgment it is arguable that the cause of action accrued as early as the point in time when the Plaintiff insurer issued what could reasonably be described as the commercially unfavorable and disadvantageous Title Policy. Additionally, it is open to the Plaintiff to argue that the actual loss is the exposure to the contingent loss and all of the costs related thereto, ie the legal costs incurred by MIF. There is also scope for argument that the accrual of the cause of action for professional negligence arose at the time when PLV defaulted on the loan and liability for coverage ensued. From this side of the dispute, the Plaintiff is not barred from arguing that MIF's desperate and final attempts to mitigate its loss through the Mortgage Action does not undo the existence of a current loss for which the Plaintiff is presently contractually liable. This Court ought not, especially at such an early stage of the proceedings, deafen its ears to Mr. Robinson's submission that the trial judge in this action may be called upon to make a finding on whether the enforceability of the Mortgage is legally separable from the Guarantee in any event.

68. I also accept Mr. Robinson's submission that the issue on the choice of law which governs the contractual relationship between the Plaintiff and MIF is a matter for the trial judge's determination. It would be woefully premature of this Court at this stage to make a finding whether the rules for interpretation of the Title Policy are governed by New York law or Bermuda law. The particular importance of the choice of law issue appears to be determinative of whether the legal fees for MIF's prosecution of the mortgage action is covered under the Title Policy. These answers are not as plain and obvious as Mr. Diel has invited this Court to find. Certainly, it is not a matter for resolve through the exercise of the Court's early case management powers.

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.

70. Notwithstanding, I do accept Mr. Diel's arguments that the portion of the Amended Claim which asserts a conflict of interest on the part of Trott & Duncan discloses no reasonable cause of action, having regard only to the Plaintiff's pleadings. On the Plaintiff's pleaded case, the particulars of the conflict and resulting negligence and/or breach of contract are undisclosed and the consequential loss is un-pleaded.

71. I have carefully reviewed the affidavit evidence of Mr. Rivera on behalf of the Plaintiff and in particular considered paragraph 24 of his second affidavit:

24 I should also note that, as pleaded in paragraph 9 of the Amended Statement of Claim, the Plaintiff's case is that the Defendant was acting subject to an undisclosed conflict of interest. This conflict of interest was of the most serious kind and supports Fidelity's claim that the Defendant breach its duty of care. The Defendant and Mr. Duncan in particular advised the Corporation concerning the Par-La-Ville Project in April and early May 2013. This involvement is now a matter of public record having been dealt with in detail in Affidavit evidence sworn by Mr. Edward Benevides and filed on behalf of the Corporation in the Guarantee Proceedings. In particular I beg leave to refer when produced to paragraphs 22-27 of the Affidavit sworn by Mr. Benevides on 18 May 2016 and the exhibits therein referred to (which include emails passing between Mr. Duncan and the Corporation to which Mr. McKervey was copied).

72. However, having heard the parties in oral arguments, there has been no suggestion by the Plaintiff that un-pleaded consequential loss resulting from the alleged conflict of interest might be cured by an amendment. For these reasons, I find that this portion of the Writ should indeed be struck out.

Conclusion

73. The Defendant's application to strike out the Plaintiff's Writ and Amended Claim is refused save where I have found that the claim for breach of contract and / or breach of duty pleaded at paragraph 26(ii) discloses no reasonable cause of action and is accordingly struck out.

74. Either party may be heard on the issue of costs of this application upon filing a Form 31TC within 7 days of the date of this Ruling. Otherwise, I make no order as to costs.

Dated this 5th day of February 2019

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SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT