

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

SAINT VINCENT AND THE GRENADINES

SVGHCVAP2021/0005

BETWEEN:

RBTT BANK CARIBBEAN LIMITED

Appellant

and

FINANCIAL SERVICES AUTHORITY

Respondent

Before:

The Hon. Mde. Gertel Thom

Justice of Appeal

The Hon. Mde. Margaret Price- Findlay

Justice of Appeal

The Hon. Mde. Vicki Ann Ellis

Justice of Appeal

Appearances:

Mr. Stanley John, KC with him Mr. Akin John and Ms. Nakita Charles for the Appellant

Mr. Anthony Astaphan, SC with him Mr. Grahame Bollers and Mr. Sten Sargeant for the Respondent

2023: January 25;

Civil appeal – Appellate interference with exercise of master’s discretion – Strike-out application - Master’s refusal to strike out claim – Whether master erred in finding that FSA’s claim had a scintilla of a cause of action – Rule 26.3 of the Civil Procedure Rules 2000 - Summary judgment - Master’s refusal to grant summary judgment – Whether master erred in finding that affidavit evidence filed in support of summary judgment application failed to provide a complete defence to the claim

British American Insurance Company Limited (“BAICO”), a company registered in Saint Vincent and the Grenadines (“St. Vincent”), carried on long-term insurance business, and was thus obligated to comply with certain requirements of the Insurance Act. Under section

29, BAICO was mandated to establish an insurance fund. Pursuant to section 31(2), the Supervisor of Insurance had the authority to allow the assets within the insurance fund to be held on trust by a bank in St. Vincent. Owing to section 31(2), BAICO sought and obtained permission for RBTT Bank Caribbean Limited ("RBTT") to become the trustee of its insurance fund.

A 2006 letter titled "Trustee Agreement" was addressed to RBTT and is said to have established the trust arrangement between BAICO and RBTT. The letter detailed that as trustee, RBTT was obligated to: (i) report to the registrar of insurers all assets of BAICO (St. Vincent) held in trust; (ii) safe keep the items of assets held; and (iii) monitor and update records on the release and renewal of assets. A sum of assets totalling EC \$107,079,269.50 was then transferred to RBTT to be held on trust which RBTT confirmed receipt of.

In keeping with its obligations, RBTT sent reports to the Supervisor of Insurance which detailed the assets held on trust for BAICO and their value. The last of those reports was dated 16th April 2009, whereby RBTT listed assets totalling EC \$140,547,665.57 as being held on trust for BAICO. In or about 2009, BAICO faced liquidity issues and was put under judicial management by an order of the court. In December 2009, the judicial manager reported to the Supervisor of Insurance that RBTT did not have physical custody of the majority of the assets comprising the insurance fund. On 15th August 2011, the Supervisor of Insurance wrote to RBTT demanding transfer of BAICO's assets or alternatively payment of the sum of EC \$140,547,665.57 within 14 days. However, by letter dated 14th October 2011, it was revealed that RBTT only had physical custody of two bond issues totaling EC \$2,075,076.00.

On 14th May 2012, the Supervisor of Insurance filed the claim against RBTT. On the application of the then claimant, the statement of claim was amended to reflect the change in claimant to the Financial Services Authority ("FSA"). The claim sought, *inter alia*, an order that RBTT account for and deliver to FSA the assets or the monetary value of the assets held in trust in the sum of EC \$135,646,312.07 and alternatively, damages for breach of fiduciary duties and/or breach of trust, and/or breach of statutory duty. On 19th February 2013, FSA filed an application to strike out RBTT's defence and for summary judgment to be entered against RBTT. On 14th May 2014, RBTT filed an amended application seeking an order that the claim form be struck out and alternatively, that summary judgment be entered for RBTT against FSA pursuant to rule 15.2(a) of the Civil Procedure Rules 2000 ("CPR").

At the start of the hearing before the master, FSA withdrew its application to strike out the defence and the matter proceeded on RBTT's application to strike out the claim and alternatively, for summary judgment in its favour. By decision dated 2nd March 2021, the master dismissed RBTT's application to strike out FSA's claim and/or for summary judgment. The master found that by virtue of the 'trust deed' a fiduciary relationship arose between RBTT and the Supervisor of Insurance and that RBTT owed a fiduciary duty to act honestly in reporting to the Supervisor the assets it held on trust. She also noted that

the claim was a private law action and that the Supervisor could bring a private law action against RBTT. Further, in relation to the allegations of breach of fiduciary and/or statutory duties, the master found that 'in the event that the pleaded allegations of breach do not amount to statutory infractions, fiduciary breaches are spelt out in the claim'. In this regard, the allegations of false reporting on the part of RBTT amounted to a breach of a fiduciary duty owed by RBTT as trustee. The learned master also found that there was a proximate relationship for a duty of care to arise in respect of RBTT and that it was a reasonably foreseeable consequence of a false report, that there would be loss/damages incurred.

The master concluded that there was much more than a scintilla of a cause of action in the claim and in the circumstances declined to exercise the power to strike out the claim. In relation to the alternative remedy sought by RBTT in the form of summary judgment, the master found that RBTT had not presented a case which was a complete defence to the claim and which would lead the court to conclude that FSA had no real prospect of succeeding on the claim.

Being dissatisfied with the master's ruling, RBTT appealed. One main issue fell to be determined by the Court, that is, whether the master erred by applying wrong or inconsistent principles of law so that her decision was so blatantly wrong that it must be set aside.

RBTT argued that the master erred in finding that by virtue of the trust deed a fiduciary relationship arose between RBTT and the Supervisor. They further asserted that the master erred by implying that it would be fair for a duty of care to be imposed on them. RBTT submitted that even if it were assumed that they functioned as a statutory trustee under the Insurance Act, FSA failed to plead breaches of the duty. This, they argued, along with the master's erroneous finding to impose a common law duty on them, meant that there was no recognizable claim against them and thus, the claim ought to have been struck out. As to the summary judgment application, they posited that the master erred by ignoring the contents of the affidavits filed in support of the application.

FSA countered that the master was cognisant of the relevant procedural and legal principles to be applied and applied those principles correctly. On the summary judgment application, FSA argued that the master was correct to find that there was no affidavit evidence produced as a complete defence to the claim. They asserted that although RBTT produced affidavits none of them were relied on by RBTT nor was it shown how the facts therein provided a complete defence to the claim.

Held: dismissing the appeal, upholding the decision of the learned master and awarding costs to the respondent in the sum of \$3,500.00 to be paid within 14 days of the date of this order, that:

1. The refusal or grant of a strike-out application, much like a decision on a summary judgment application, involves the exercise of the trial judge's discretion. As such,

appellate interference would only be warranted if it can be said that the trial judge erred in his/her approach by failing to consider relevant matters or by considering irrelevant matters and in so doing, came to a decision which exceeded the general ambit within which reasonable disagreement is possible and was plainly wrong.

Sanphers Trading & Industry Ltd v Moke International Limited AXAHCVAP2020/0014 (delivered 23rd July 2021, unreported) followed; **Didier and others v Royal Caribbean Cruises Ltd, Royal Caribbean Cruises Ltd v Medical Associates Ltd and others** (2016) 89 WIR 277 followed.

2. Rule 26.3 of the CPR empowers the court to strike out a statement of case or part of a statement of case in certain circumstances. This power is a discretionary remedy which is only to be employed in clear and obvious cases where it can be seen on the face of the claim that it is obviously unsustainable, cannot proceed or in some other way is an abuse of process of the court. A claim should, therefore, not be struck out if there is a scintilla of a cause of action. In exercising its discretion, however, the court ought not to conduct a mini-trial at this stage. On the facts, the master would have correctly identified the correct rules and authorities that govern a strike-out application. RBTT, however, failed to provide any authority which would oust the viability of the claim. Instead, RBTT raised a difficult question of law which would involve a careful analysis of the relevant legal and statutory framework, the consideration of which would involve a mini-trial. The master was cognisant of the court's approach at this stage and gave careful consideration to the factors which indicated that FSA's claim was viable. The master therefore did not err in refusing to strike out FSA's claim having found that there was more than a scintilla of a cause of action.

Rule 26.3 of the **Civil Procedure Rules 2000** applied; **McDonald's Corp and another v Steel and another** [1995] 3 All ER 615 applied; **Nelson Spring Condominium Homeowners Association v Beach Front Condominium Holding Company Ltd et al** SKBHCVAP2014/0017 (corrected and re-issued 15th February 2016, unreported) followed; **Cedar Valley Springs Homeowners Association Incorporated and Hyacinth Pestaina et al** ANUHCVAP2016/0009, ANUHCVAP2016/0010 (delivered 18th January 2017, unreported) followed.

3. The test of real prospect of success on a summary judgment application means that the claimant or defendant must have a case or defence that is more than merely arguable. There must be evidence of a realistic as opposed to fanciful prospect of success. On the facts, the master rightly considered the principles applicable to a summary judgment application. Even though the learned master did not expressly acknowledge the contents of the affidavits filed by RBTT in her judgment in relation to the summary judgment aspect of their application, this was not a definitive indication that she had failed to consider them at all. Rather, her conclusion that RBTT had not presented a case that provided a complete defence to the claim would have followed an assessment of the affidavit evidence filed by

RBTT. Furthermore, on consideration of the affidavits by this Court, it was evident that no unanswerable defences were borne out in the affidavits. This, along with the difference in factual assertions identified by the master as was evident in the affidavits, would have provided sufficient basis for the master to exercise her discretion to refuse summary judgment.

Doncaster Pharmaceuticals Group Ltd and Ors v The Bolton Pharmaceutical Company 100 Ltd [2006] EWCA Civ 661 applied; **Swain v Hillman** [2001] 1 All ER 91 applied; **Flat Point Development Limited v Canisby Limited** ANUHCVP2016/0006 (delivered 7th December 2017, unreported) followed; **Jones v Attorney General** [2003] UKPC 48 applied.

4. Whilst it is possible for a party to apply for a striking out order and in the alternative, summary judgment, the two are not to be conflated and are distinct applications with different legal tests and consequences. On a summary judgment application, the court may look beyond the statement of case and consider the evidence. It is a judgment on the merits and operates as an issue estoppel. In an application to strike out, the court is mainly concerned with the adequacy of the statement of case and whether reasonable grounds for bringing or defending the action are disclosed. If a claim is struck out, it does not preclude the party from remedying the faults of their claim and bringing further legal action in relation to the same dispute.

Didier and others v Royal Caribbean Cruises Ltd, Royal Caribbean Cruises Ltd v Medical Associates Ltd and others (2016) 89 WIR 277 followed; **Robert Edwards Jones v Her Majesty's Attorney-General sued on behalf of the New Zealand Police** [2003] UKPC 48 applied.

REASONS FOR DECISION

- [1] **ELLIS JA:** This appeal came on for hearing before this Court on 25th January 2023. At the conclusion of the hearing, the Court delivered an oral judgment in which the following orders were made:

- (1) The appeal is dismissed.
- (2) The decision of the learned master is upheld.
- (3) Costs to be awarded to the respondent in the sum of \$3,500.00 to be paid within 14 days of the date of this order.

The Court promised to provide written reasons for its decision and does so now.

Background

- [2] The appeal stems from a ruling of the learned master on the hearing of cross-applications by the Financial Services Authority (“the respondent” or the “FSA”), the claimant in the court below, to strike out the defence and by RBTT Bank Caribbean Limited (“the appellant” or “RBTT”), the defendant in the court below, to strike out the FSA’s claim and/or for summary judgment to be entered in RBTT’s favour.
- [3] The underlying claim concerns British American Insurance Company Limited (“BAICO”), an external company registered in Saint Vincent and the Grenadines (“St. Vincent” or “the State”). BAICO is licensed to conduct long-term insurance business and is a subsidiary of CL Financial Limited, a Trinidad and Tobago conglomerate. As a company carrying on long-term insurance business, BAICO was obligated to comply with the requirements of the **Insurance Act**.¹ Pursuant to section 29, BAICO was mandated to establish an insurance fund equal to its liability and contingency reserves in respect of policies in the State in that class of business as established by the revenue account of the company, less the amounts held on deposit with the Supervisor of Insurance. Section 31(2) of the **Insurance Act** provided the Supervisor of Insurance with authority to allow the assets within the insurance fund to be held on trust by a bank in the State or a financial institution to the order of or on behalf of the Supervisor. It is by virtue of section 31(2) that it is alleged that BAICO sought and obtained permission for RBTT, a bank, to become the trustee of its insurance fund.
- [4] In 2006, a letter titled “Trustee Agreement” was addressed to RBTT and is said to have established the trust arrangement between BAICO and RBTT. In the letter, it was detailed that as trustee, RBTT was obligated to: (i) report to the registrar of insurers all assets of BAICO (St. Vincent) held in trust; (ii) safe keep the items of assets held; and (iii) monitor and update records on the release and renewal of

¹ Cap. 306 of the Revised Laws of Saint Vincent and the Grenadines 2009.

assets. A sum of assets totalling EC \$107,079,269.50 was then transferred to RBTT to be held on trust which RBTT confirmed receipt of.

[5] In keeping with its obligations, RBTT sent reports in the form of letters to the Supervisor of Insurance which detailed the assets held on trust for BAICO and their value. The last of those reports was sent by letter dated 16th April 2009, whereby RBTT listed assets totalling EC \$140,547,665.57 as being held on trust for BAICO.

[6] In or about 2009, BAICO faced liquidity issues and was put under judicial management by an order of the court. In December 2009, the judicial manager, Mr. Brian Glasgow, reported to the Supervisor of Insurance that RBTT did not have physical custody of the majority of the assets comprising the insurance fund. On 15th August 2011, the Supervisor of Insurance, through his solicitor wrote to RBTT demanding transfer of BAICO's assets or alternatively payment of the sum of EC \$140,547,665.57 within 14 days. However, by letter dated 14th October 2011, it was revealed that RBTT only had physical custody of two bond issues totalling the sum of EC \$2,075,076.00.

[7] On 14th May 2012, Maurice Edwards in his capacity as Supervisor of Insurance filed the claim against RBTT. On the application of the then claimant, the statement of claim was amended to reflect the change in claimant to the FSA.²

The claim sought relief against the appellant in the following terms:

- "1) An order that [RBTT] account for and deliver to [FSA] the assets or the monetary value of the assets held in trust in the sum of ECD135,646,312.07;
- 2) Alternatively, damages for breach of fiduciary duties and/or breach of trust, and or breach of statutory duty;
- 3) Costs;
- 4) Any further or other relief as the Court thinks fit."

² Order #3 of the judgment in the court below.

- [8] FSA alleged that RBTT had a statutory and/or fiduciary duty of care 'to maintain possession and/or control over and to hold the trust assets... and not to dissipate or dispose of them without consent or knowledge'. They say that RBTT breached those obligations and duties when it falsely reported or misrepresented that it was holding and/or had possession and/or control of assets amounting to EC \$140,547,665.57 when in fact the value of the assets was grossly less than reported and it only had two bond issues in its physical custody.
- [9] RBTT in its defence denied that it was a trustee of the insurance fund but rather a custodian of the list of investments/assets and relevant certificates and documents in relation to the insurance fund which it held on behalf of and in the name of BAICO. It further denied that it ever had a statutory or fiduciary duty to hold the assets 'constituting BAICO's statutory fund' nor that it made any representations that it held as trustee assets constituting a value of EC \$140,547,665.57. In reply, FSA averred that RBTT was estopped from denying that it was a trustee for and on behalf of the Supervisor of Insurance and that RBTT had admitted that it was a statutory trustee or deemed a trustee under the provisions of the **Insurance Act** based on its pleaded defence in three claims brought by BAICO policyholders.
- [10] On 19th February 2013, the FSA filed an application to strike out the defence pursuant to rules 26.3(1)(b) and (c) of the **Civil Procedure Rules 2000** ("the CPR"), and for summary judgment to be entered against RBTT pursuant to CPR 15.2. On 14th May 2014, RBTT filed an amended application seeking an order that the claim form be struck out pursuant to CPR 26.3(1)(a), (b) and (c) and/or under the inherent jurisdiction of the court for failure to comply with CPR Part 41.1(2) and CPR 8.1(5) and/or that judgment be entered for RBTT against FSA pursuant to CPR 15.2(a). The applications were listed for hearing before a master on 8th October 2020.

- [11] At the start of the hearing before the master, the respondent withdrew its application to strike out the defence and the matter proceeded on the appellant's application to strike out the claim or alternatively for summary judgment in its favour. In the appellant's notice of application, as amended, 41 paragraphs were set out as grounds for the application, however the matter ultimately proceeded on the question of whether the statement of case disclosed a legally recognisable claim against RBTT.³
- [12] In a written decision dated 2nd March 2021, the master dismissed the appellant's application to strike out the respondent's claim and/ or for summary judgment. In doing so, the learned master made several findings. She found that by virtue of the 'trust deed' a fiduciary relationship arose between RBTT and the Supervisor of Insurance and that RBTT owed a fiduciary duty to act honestly in reporting to the Supervisor the assets it held on trust. She also noted that the claim is a private law action and that the Supervisor can bring a private law action against RBTT. Further, in relation to the allegations of breach of fiduciary and/or statutory duties, the master found that 'in the event that the pleaded allegations of breach do not amount to statutory infractions, fiduciary breaches are spelt out in the claim'. In this regard, the allegations of false reporting on the part of RBTT amounted to a breach of a fiduciary duty owed by RBTT as trustee. The learned master also found that there was a proximate relationship for a duty of care to arise in respect of RBTT and that it was a reasonably foreseeable consequence of a false report that there would be loss/damages incurred.
- [13] The master also found that the penalty for contravention of section 32(2b) of the **Insurance (Amendment) Act 2011**⁴ by the Supervisor of Insurance, in that he was required to give a written directive to remedy the deficiency in the total value of the assets within a specified time, before the imposition of a penalty, was not a

³ SVGHCV2012/0148 Maurice Edwards (Supervisor of Insurance) and RBTT Bank Caribbean Ltd (delivered 2nd March 2021, unreported), paragraph 7.

⁴ Act No. 32 of 2011.

bar to the Supervisor bringing a private law action against RBTT as a statutory trustee. The master concluded that there was 'much more than a scintilla of a cause of action' in the claim and in the circumstances declined to exercise the power to strike out the claim. In relation to the alternative remedy sought by RBTT in the form of summary judgment, the master found that RBTT had not produced any affidavit evidence which was a complete defence to the claim and which would lead the court to conclude that FSA had no real prospect of succeeding on the claim.

The appeal

[14] In its notice of appeal filed on 14th December 2022, the appellant lists 3 grounds of appeal. Ground 1 with sub-grounds (a)-(q) challenge several of the master's findings. The particular findings in contention have been summarised at paragraphs 12 and 13 above. Ground 2 alleges that in making the findings particularized in ground 1 and in coming to her decision, the master erred in that she acted on wrong and/or inconsistent principles of law, contrary to the facts. Ground 3 states that further or alternatively the decision exceeds the generous ambit within which reasonable disagreement is possible and is plainly wrong.

[15] In my view, these grounds of appeal can be encapsulated into one main issue as follows: whether the master erred by applying wrong or inconsistent principles of law so that her decision is so blatantly wrong and must be set aside.

Appellant's submissions

[16] The appellant, in its skeleton arguments filed on 14th July 2021, produced and extrapolated 11 issues which they have identified as those which the Court must determine on the appeal. These include but are not limited to: Whether the "Trustee Agreement" is a trust deed mandated by section 31(1) of the **Insurance Act**; whether ordinarily a statutory trust created under section 31 of **the Insurance Act** has the same indicia as do private law trust obligations; whether the letter

dated 25th May 2006 which forms the said “Trustee Agreement” created a statutory trust or a private law trust; Whether RBTT as a statutory trustee has private law trustee obligations as pleaded; Whether the appellant owed a fiduciary duty to the respondent to act honestly in reporting to the Supervisor of Insurance of the assets held in trust; and whether a duty of care arose at common law. The appellant also identified several issues of fact upon which it says this Court must decide if it has a realistic prospect of succeeding, warranting the matter going to trial.

- [17] With the utmost respect to counsel, it is in the appellant’s reply to the respondent’s submissions filed on 10th January 2022, that the appellant, in my view, zeroed in on the errors that it contends in its notice of appeal that the master made in her decision in relation to the application to strike out or alternatively for summary judgment. I therefore would address these submissions in reply after the respondent’s submissions.

Respondent’s submissions

- [18] FSA submits that the appellant’s appeal has no merit and that the master was correct in dismissing the application to strike out or alternatively for summary judgment. FSA says that the master, in coming to her decision, was cognisant of the relevant procedural and legal principles to be applied and applied those principles correctly. RBTT’s main contention on the strike out or alternatively summary judgment application, was that the statement of case did not disclose a legally recognisable claim against it. FSA submits that given this posture, the learned master correctly addressed her mind to the corresponding Part 26 of the CPR and in setting out the case law. Moreover, the respondent argues that there has been no submission by the appellant that the authorities relied on by the master in her ruling were not correct statements of law or were inconsistent with the law on the test for striking out.

[19] FSA submits that likewise, the master, in considering the issue of summary judgment, addressed her mind to the relevant part of the CPR and outlined the relevant principles from several authorities including **Westpac Banking Corp v MM Kembla New Zealand Ltd**,⁵ **Robert Edwards Jones v Her Majesty's Attorney-General sued on behalf of the New Zealand Police**⁶ and **Didier and others v Royal Caribbean Cruises Ltd, Royal Caribbean Cruises Ltd v Medical Associates Ltd and others**.⁷ Again, FSA submits that RBTT took no issue with the authorities and principles considered by the master.

[20] FSA avers that the appellant's challenge to the master's finding on summary judgment, particularly that there was no affidavit evidence produced that was a complete defence to the claim, is misconceived. FSA says that while affidavits were filed by the appellant in support of its application, none of the affidavits were relied on by RBTT nor was it shown how the facts therein identified to the master '...provide a complete and unanswerable Defence that cannot be cured with disclosure, amendment, witness statement nor cross-examination'. The respondent also contends that the appellant's appeal asks that this Court find that the master erred in law, not by refusing to strike out the application, but by refusing to dismiss the points of law (as defined by them) which are issues for determination at trial. FSA submits that the master was not required to make a determination on the issues of facts and law but for the purposes of the strike-out/summary judgment application, it was sufficient that the issues for determination were identified.

[21] FSA further submitted that there were clearly identifiable issues of fact and law to be resolved which can be gleaned from the appellant's own submissions. The respondent posited that given these issues, there was a recognisable claim for breach of trust created under the trustee agreement and for breach of fiduciary

⁵ [2001] 2 NZLR 298 (CA).

⁶ [2003] UKPC 48.

⁷ (2016) 89 WIR 277.

duties and it would not be appropriate for the master to strike out the claim. It was therefore not open to the appellant in a strike-out application 'to identify issues of facts and law and then proceed [to] seek to resolve these issues with a combined summary judgment application'.

Appellant's reply submissions

- [22] The appellant, in its reply to the respondent's skeleton argument, submits that the strike-out application, and alternatively for summary judgment, was brought on the basis that the claim did not disclose any reasonable ground for bringing the claim and that the claim was bound to fail even if all allegations of fact were true and that it was an abuse of process of the court. Further, the appellant says that by identifying the issues to be determined, it was not asking the master to make a final determination on the issues of the case. Rather, the appellant contends that it was seeking that the master make a determination on threshold issues, not the substantive issues in dispute in the claim.
- [23] The appellant also submits that the master mischaracterised the respondent's pleadings when she found that by virtue of 'the trust deed' mandated by section 31(1) of the **Insurance Act**, a fiduciary relationship arises between RBTT and the Supervisor under the trustee agreement. The appellant says that this is a fundamental error on the part of the master in that, it is contrary to FSA's pleaded case, which was that RBTT was a deemed trustee pursuant to section 31(2) of the **Insurance Act**. Accordingly, section 31(2) created a statutory trust not a fiduciary duty. In addition, the appellant intimates that there was no 'trust deed' in this case which could impose a fiduciary duty since, in order for the trust agreement to be a deed, the parties must have intended for the trustee agreement to be a deed and must have been validly executed and made under seal.
- [24] In relation to the master's finding that a common law duty of care arose between the appellant and the respondent, the appellant contends that the statement of

case alleged that RBTT was a trustee under a statutory trust pursuant to the **Insurance Act** and as such, RBTT was a statutory trustee, therefore its duties do not give rise to a private law cause of action. In support, the appellant cites the cases of **Pacific Associates Inc v Baxter**,⁸ which held that a duty of care would be imposed if three requirements were satisfied: (1) foreseeability of harm; (2) proximity and (3) it being just and reasonable to impose the duty on the defendant. The appellant says that the cases show that whether a duty should be imposed does not end with the tests of foreseeability and proximity. The appellant submits that in the absence of voluntary assumption of responsibility by RBTT, the master erred by implying that it would be fair, just and reasonable for a duty of care to be imposed on RBTT.

[25] The appellant also avers that even if it is to be assumed that the appellant was a statutory trustee under the **Insurance Act** and that this constitutes the foundation for the master's finding that a duty of care should be imposed, the claim would still fail due to the respondent failing to comply with the procedure in accordance with sections 32(2a) to (2d) of the **Insurance (Amendment) Act** for the breaches of duty pleaded. This procedure involves the Supervisor of Insurance, upon the discovery that the assets' value no longer total the sum in the list of assets, issuing a directive for RBTT as trustee to make good the deficiency and if it fails to do so, a penalty kicks in.

[26] Consequently, based on its arguments that as a statutory trustee, it could not owe the Supervisor of Insurance fiduciary nor equitable trustee duties; that the conditions precedent for bringing a claim against a statutory trustee had not been complied with by the Supervisor of Insurance; and that with regard to the common law duty of care it would not be fair, just and reasonable to impose such a duty on the appellant, the appellant says that there is no recognisable claim against RBTT and the claim ought to have been struck out.

⁸ [1989] 2 All ER 159.

[27] In relation to its alternative remedy of summary judgment, the appellant rebuts the respondent's submissions that because the appellant proceeded with its application on the main contention that the statement of case does not disclose a recognisable claim against it, 'the Court would be hard pressed to accept any submission by RBTT that they were genuinely pursuing the summary judgment application'. This, according to the appellant, is a mistaken argument and is contradicted by the simple fact that the master considered the application for summary judgment albeit that she ruled in error. On this point the appellant submits further that the master, in error, ignored the contents of the affidavits filed in support of its application.

The law

[28] CPR 26.3 empowers the court to strike out a statement of case or part of a statement of case in certain circumstances. The court's power to strike out a statement of case, or part thereof, 'is an example of active case management, providing for the summary disposal of issues which do not need full investigation at trial, meaning that no court time is wasted, even in pre-trial processes'.⁹

[29] In the master's judgment, it was noted that after sifting through the issues, RBTT proceeded with its application on the premise that the statement of case did not disclose a legally recognisable claim against it. The relevant rule in this instance is CPR 26.3(1)(b) which specifies that a statement of case or part thereof may be struck out where 'the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending the claim'.

[30] In **McDonald's Corp and another v Steel and another**,¹⁰ Neill LJ in delivering the judgment of the court said:

⁹ Halsbury's Laws of England Volume 12 (2020) para. 522.

¹⁰ [1995] 3 All ER 615 at 623.

“The power to strike out is a draconian remedy which is only to be employed in clear and obvious cases...I anticipate therefore that it will only be in a few cases where it will be possible to say at an interlocutory stage and before full discovery that a particular allegation is incapable of being proved.”

[31] This principle was reiterated by this Court in **Nelson Spring Condominium Homeowners Association v Beach Front Condominium Holding Company Ltd et al**,¹¹ and by Pereira CJ in **Cedar Valley Springs Homeowners Association Incorporated and Hyacinth Pestaina et al**.¹² In the latter case, the learned Chief Justice went further and helpfully summarised the principles arising out of several authorities in relation to an application to strike out. I believe it useful to reproduce those principles here:

“(a) This summary procedure which calls for the exercise of a discretionary power, should only be used in clear and obvious cases as it is a drastic step. The result of such a measure is that it deprives a party of his right to a trial and his ability to strengthen his case through the process of disclosure and other procedures such as requests for information.

(b) This procedure should only be used where it can be seen on the face of the claim that it is obviously unsustainable, cannot proceed or in some other way is an abuse of process of the court. This has been expressed in terms that the claim should not be struck out if there is a ‘scintilla’ of a cause of action.

(c) In treating with an application to strike out made pursuant to CPR 26.3(1)(b), the trier of the application should proceed on the assumption that the facts alleged in the statement of case are true.

(d) The employment of this procedure is appropriate in the following instances: where the claim sets out no facts indicating what the claim is about, or if it is incoherent and makes no sense, or if the facts it states, even if true, do not disclose a legally recognisable claim against the defendant.

(e) Conversely, this procedure would be inappropriate where the argument involves a substantial point of law which does not admit of a plain and obvious answer, or the law is in a state of development, or where the

¹¹ SKBHCVP2014/0017 (corrected and re-issued 15th February 2016, unreported).

¹² ANUHCVP2016/0009, ANUHCVP2016/0010 (delivered 18th January 2017, unreported).

strength of the case may not be clear because it has to be fully investigated.”

[32] The appellant also sought summary judgment pursuant to CPR 15.2. CPR 15.2(1)(a) states that the court may give summary judgment on the claim or on a particular issue if it considers that the claimant has no real prospect of succeeding on the claim or the issue. While it is permissible for a party to apply for a striking out order and for summary judgment in the alternative, Pereira CJ in **Didier and others v Royal Caribbean Cruises Ltd, Royal Caribbean Cruises Ltd v Medical Associates Ltd and others**,¹³ has made it clear that the two are not to be conflated and are two distinct applications with different legal tests and consequences.

[33] On a summary judgment application, the court may look beyond the statement of case and consider the evidence. It is a judgment on the merits which operates as issue estoppel, whereas in applications for striking out, the court is mainly concerned with the adequacy of the statement of case and whether reasonable grounds for bringing or defending the action are disclosed. If a claim is struck out, it does not preclude the party from remedying the faults of their claim and bringing further legal action in relation to the same dispute.¹⁴

[34] The Privy Council in **Robert Edwards Jones v Her Majesty’s Attorney-General sued on behalf of the New Zealand Police**¹⁵ explained the difference by citing the dicta of Elias CJ in **Westpac Banking Corp v MM Kembla New Zealand Ltd**:¹⁶

“Where a claim is untenable on the pleadings as a matter of law, it will not usually be necessary to have recourse to the summary judgment procedure because a defendant can apply to strike out the claim under R

¹³ Supra n. 7.

¹⁴ Ibid. para. 28.

¹⁵ Supra n. 6.

¹⁶ Supra n. 5.

186. Rather R 136(2)¹⁷ permits a defendant who has a clear answer to the plaintiff which cannot be contradicted to put up the evidence which constitutes the answer so that the proceedings can be summarily dismissed. The difference between an application to strike out the claim and summary judgment is that strike-out is usually determined on the pleadings alone whereas summary judgment requires evidence. Summary judgment is a judgment between the parties on the dispute which operates as issue estoppel, whereas if a pleading is struck out as untenable as a matter of law the plaintiff is not precluded from bringing a further properly constituted claim.”

- [35] The test of ‘real prospect of success’ on a summary judgment application means that the claimant or defendant must have a case or defence that is more than merely arguable.¹⁸ There must be a ‘realistic’ as opposed to a ‘fanciful prospect of success’.¹⁹ A claim would be considered fanciful ‘where it is entirely without substance or where it is clear beyond question that the statement of case is contradicted by all documents or other materials on which it is based.’²⁰

The appellate approach

- [36] As can be gleaned from the case law, the power to strike out under CPR 26.3(1) is discretionary. In cases where an appeal challenges a decision involving the judge’s or master’s exercise of his or her discretion, the appellate court will be wary of its approach. In **Sanphers Trading & Industry Ltd v Moke International Limited**,²¹ Michel JA provided the following guidance:

“The decision of a Judge or Master to strike out or not to strike out a party’s statement of case on the ground that it does or does not disclose a viable cause of action, entails the exercise of a judicial discretion which ought not to be overturned by an appellate court unless it is satisfied that in the exercise of his or her discretion, the Judge or Master erred in principle either by failing to take into account or giving too little or too

¹⁷ This rule is analogous to the Eastern Caribbean CPR 15.2(a).

¹⁸ *Doncaster Pharmaceuticals Group Ltd and Ors v The Bolton Pharmaceutical Company 100 Ltd* [2006] EWCA Civ 661.

¹⁹ *Swain v Hillman* [2001] 1 All ER 91.

²⁰ See *Flat Point Development Limited v Canisby Limited* ANUHCVP2016/0006 (delivered 7th December 2017, unreported) per Blenman JA citing *Comodo Holdings Ltd v Renaissance Ventures Limited et al* BVIHCP2014/0032 (delivered 3rd May 2016, unreported).

²¹ AXAHCVP2020/0014 (delivered 23rd July 2021, unreported).

much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations. But, even when the Judge or Master erred in principle in one of these respects, the appellate court must yet be satisfied that, as a result of the error or the degree of the error, the Judge or Master's decision – in the words of Floissac CJ in *Michel Dufour v Helenair Corporation Limited* – ‘...exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong’.”²²

[37] While in **Sanphers** the Court was focused on a strike-out application, the same principles are applicable to an appellate court when considering an appeal from a decision on a summary judgment application. The refusal or grant of a summary judgment application is an exercise of the trial judge's discretion and would not be disturbed unless it can be said that the decision was plainly wrong.

[38] **Didier** is also instructive on the appellate court's approach to interference with the decision of a master on a striking-out application. Pereira CJ stated:

“... It must be borne in mind that this appeal does not involve a final determination of the issues between the parties, but rather, merely a determination of whether or not the learned master properly exercised her discretion in disposing of the Doctors' application to 'strike out and/or dismiss' the claims. The court is only concerned with examining the issues to such an extent that it is able to make this determination.

[18] It is well established that an appellate court should be slow to interfere with the exercise of a judge's discretion unless the judge erred in principle or in his/her approach by taking into account or being influenced by irrelevant factors and considerations, or failing to take account of or giving too little weight to relevant factors, and that as a result of the error or the degree of the error in principle, the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong. This court will therefore examine the learned master's decision to determine whether she made any errors of principle in dealing with the application before her. Only then will this court be in a position to interfere with her decision.”

²² Ibid. para. 20.

Discussion

The striking-out application

[39] In making her determination on the appellant's application to strike out FSA's statement of case, the learned master considered CPR 26.3(1) which she set out at paragraph 8 of her ruling. Further, at paragraphs 37 and 38 of her judgment, the learned master aptly took into consideration FSA's submissions on the relevant principles which govern the court's approach to a striking-out application. I summarise those principles as follows:

- (i) The exercise of the discretion to strike out under CPR 26.3(1) is to be exercised sparingly.
- (ii) Striking out under CPR 26.3(1)(b) and (c) is appropriate where the claim sets out no facts indicating what the claim is about or if it is incoherent or makes no sense, or if the facts it states, even if true, do not disclose a legally recognisable claim against the defendant.
- (iii) A party is only required to set out the general nature of his or her case in the statement of claim.
- (iv) It is entirely pre-mature to strike out a claim before the case management conference.
- (v) The pleaded case is presumed to be true.
- (vi) The court must proceed cautiously when dealing with an application to strike out.
- (vii) The court is not required to conduct a mini-trial. The striking out of a statement of claim or defence is a draconian step which a court should take only if there is not a scintilla of a cause of action. If there are triable issues, the matter ought to proceed to trial.

- [40] It is useful to reiterate that RBTT's main contention on the strike out or alternatively summary judgment application was that FSA's statement of case does not disclose a legally recognisable claim against RBTT. This is tied up in RBTT's contention that by becoming a statutory trustee under section 31(1) of the **Insurance Act**, it assumed a statutory duty and because of the nature of that statutory duty, RBTT would be precluded by the Act from performing obligations that would ordinarily be imposed by common law duties, the breach of which is the basis of FSA's claim. In short, RBTT makes the assertion that a statutory trustee is different from a private law trustee who would not share the same fiduciary duties and therefore could not be capable of being liable for the breaches alleged by FSA.
- [41] In my view, the question of whether a statutory trustee, appointed under section 31 of the **Insurance Act**, may have the obligations of a fiduciary would include an analysis of whether the **Insurance Act** excludes, as a matter of law, all common law rights and remedies, or specifically those concerning fiduciaries, which may arise from the factual matrix of the case where the provisions of section 31 are operative. Indeed, I consider that in the present circumstances, it would first be necessary to determine whether RBTT's role as statutory trustee shields it absolutely from any other breach being made out and enforced in a private law action against it. Such a determination, to my mind, at least in part, involves a question of interpretation which is not an exercise suitably undertaken by the court upon the determination of a strike out application.
- [42] In his oral submissions, counsel for the appellant, Mr. John KC, relied on the case **Swain and another v The Law Society**²³ to support his assertion that, as a matter of law, where there is a public duty imposed on a statutory trustee, common law duties are excluded. In **Swain** the Council of the Law Society was empowered, with the concurrence of the Master of the Rolls, to make rules concerning

²³ [1983] 1 A.C. 598.

professional indemnity insurance for solicitors. The Society indicated, by a circular and in a letter, that it intended to apply any brokerage commission accruing to the Society for the benefit of the profession, rather than pay it out to individual solicitors. A majority of solicitors replied to the letter that they were in favour of the scheme. The Society accordingly made the Solicitors' Indemnity Rules 1975, which provided for a master policy to be taken out with insurers and for certificates to be issued to solicitors, who would pay the premiums. In May 1976 the Law Society entered into a contract which provided, inter alia, for a firm of insurance brokers to be appointed brokers to the Society for various purposes including the indemnity scheme, and that a proportion of the commission earned by them from insurers would be paid to the Society. After 1st September 1976, the scheme was regarded as compulsory and every solicitor to whom the rules applied had to produce a certificate of insurance before receiving an annual practising certificate. The plaintiffs, two practising solicitors, were dissatisfied with how the scheme was being operated and took out an originating summons seeking, inter alia, to make the Law Society accountable for the commission received, on the ground that the Law Society was a trustee of the benefit of the master policy contract for the benefit of all the solicitors. The argument was based on the fact that the contract stated that the policy had been entered into "on behalf of" solicitors and former solicitors which it was contended showed an intention to create a trust of the benefit of the contract.

- [43] On appeal by the Law Society, the House of Lords allowed the appeal and held that the wording in the contract did not create a trust either expressly or impliedly and that on the true construction of the master policy, the Society had not expressly or by implication constituted itself a trustee of the contract for the benefit of premium-paying solicitors, nor had it become a constructive trustee of the commission received. Accordingly, the Law Society was not liable to account to the solicitors for the commission received. This case therefore demonstrates the court's marked reluctance to find a trust of the benefit of a contract.

[44] For the purposes of this matter, the more pertinent finding was set out in the judgment of Diplock LJ who reasoned that the authority conferred on the Society in exercising its functions under section 37 of the Solicitors Act 1974 gave rise not merely to a private duty to premium-paying solicitors but to a public duty and accordingly, there was no remedy in breach of trust or equitable account.

[45] When one has regard to the ratio in **Swain**, it is not at all apparent that this authority assists the appellant. Firstly, **Swain** did not involve a strike-out application. As such, the relevant legal principles would not have been considered or applied in that case. Secondly, the facts of that case reveal that the Law Society had not undertaken any contractual obligations as a trustee whatsoever. The House of Lords' statement that 'the duty imposed on the possessor of a statutory power for public purposes is not accurately described as fiduciary because there is no beneficiary in the equitable sense' was therefore made in the context where no contractual or equitable rights or remedies had arisen on the facts of that case.

[46] In **Swain**, the appeal centred on the way in which the Law Society exercised its powers under section 37 of the Solicitors Act 1974 in relation to the compulsory insurance of solicitors against liability to third parties arising out of the conduct by them of their private practices. Their Lordships recognised at the outset that in the performance of its functions, the Society acts in two distinct capacities: a private capacity and a public capacity. At page 608 of the judgment, Lord Diplock framed the issue before the court in the following terms:

"When acting in its private capacity the Society is subject to private law alone.... the Society acting in its private capacity can do anything that a natural person could lawfully do, with all the consequences that flow in private law from doing it;....It is quite otherwise when the Society is acting in its public capacity. The Act of 1974 imposes upon the Society a number of statutory duties in relation to solicitors whether they are members of the Society or not. It also confers upon the Council of the Society, acting either alone or with the concurrence of the Lord Chief Justice and the

Master of the Rolls or of the latter only, power to make rules and regulations having the effect of subordinate legislation under the Act. Such rules and regulations may themselves confer upon the Society further statutory powers or impose upon it further statutory duties. The purpose for which these statutory functions are vested in the Society and the Council is the protection of the public or, more specifically that section of the public that may be in need of legal advice, assistance or representation. In exercising its statutory functions the duty of the Council is to act in what it believes to be the best interests of that section of the public, even in the event (unlikely though this may be on any long-term view) that those public interests should conflict with the special interest of members of the Society or of members of the solicitor's profession as a whole. The Council in exercising its powers under the Act to make rules and regulations and the Society in discharging functions vested in it by the Act or by such rules or regulations are acting in a public capacity and what they do in that capacity is governed by public law; and although the legal consequences of doing it may result in creating rights enforceable in private law, those rights are not necessarily the same as those that would flow in private law from doing a similar act otherwise than in the exercise of statutory powers."

- [47] In arriving at this conclusion, it is clear that the House of Lords undertook a careful review and analysis of the relevant statutory provisions including section 37 of the Solicitors Act 1974 under which the Society would be said to be acting in its public capacity. At page 618 of the judgment, context is made clear:

"My Lords, the insurance scheme is statutory. It flows from section 37 and the rules made thereunder, of which the form of master policy and the form of insurance certificate are an integral part. In exercising its power under section 37 The Law Society is performing a public duty, a duty which is designed to benefit, not only solicitor-principals and their staff, but also solicitors' clients. The scheme is not only for the protection of the premium paying solicitor against the financial consequences of his own mistakes, the mistakes of his partners and the mistakes of his staff, but also, and far more importantly, to secure that the solicitor is financially able to compensate his client. Indeed, I think it is clear that the principal purpose of section 37 was to confer on The Law Society the power to safeguard the lay public and not professional practitioners, since the latter can look after themselves. This is underlined by the position of section 37, which is one of a group of three sections, the other two of which are plainly enacted in the interests of the lay public. So, there is no doubt at all

in my mind that the power given to The Law Society by section 37 is a power to be exercised not only in the interests of the solicitors' profession but also, and more importantly, in the interests of those members of the public who resort to solicitors for legal advice. So, as I have said, in exercising the power conferred on it, The Law Society was performing a public duty, and not a private duty to premium-paying solicitors."

- [48] Their Lordships were compelled to construe the statutory framework and the insurance scheme before arriving at a determination as to the extent of the duties and obligations imposed on the Law Society by the Solicitors Act 1974 because of the important consequence described at page 618 of the judgment in the following terms:

"This approach, which in my opinion is fundamental, has important consequences, because the nature of a public duty and the remedies of those who seek to challenge the manner in which it is performed differ markedly from the nature of a private duty and the remedies of those who say that the private duty has been breached. If a public duty is breached, there is the remedy of judicial review. There is no remedy in breach of trust or equitable account. The latter remedies are available, and available only, when a private trust has been created: see the decision of your Lordships' House in *The Skinners' Co. v. The Irish Society* (1845) 12 Cl. & F. 425. The duty imposed on the possessor of a statutory power for public purposes is not accurately described as fiduciary because there is no beneficiary in the equitable sense."

- [49] It cannot therefore be said that **Swain** is authority for the principle that statutory and fiduciary duties are mutually exclusive in that they may not co-exist within the same person or body or that a statutory trustee is naturally immune from any private law action. Indeed, there is no express statement set out in the ratio of the judgment to that effect. Instead, the House of Lords recognised that in the performance of its functions, the Society acts in two distinct capacities: a private capacity and a public capacity. When acting in its private capacity the Society is subject to private law alone whereas what they do in a public capacity is governed by public law.

[50] The Court eventually considering the dispute between the parties herein will have to embark on a similar exercise of statutory construction, carefully considering the nature of the scheme prescribed, the nature of the capacity in which RBTT was acting and the remedies of those who seek to challenge the manner in which its obligations were or were not performed.

[51] Counsel for the appellant has also relied on the case of **Re Ahmed & Co (a firm) and others**²⁴ in an attempt to further bolster his submission that fiduciary duties may not be imposed on a statutory trustee. Like **Swain, Ahmed** concerned the interpretation of the duties of the Law Society under the Solicitors Act 1974 and whether those duties are the same as a trustee under a private trust. The facts of that case are important. Under section 35 of the Solicitors Act 1974, the Law Society had the power to intervene in solicitors' practices. Typically, interventions occurred when the council of the society had reason to suspect dishonesty on the part of the solicitor concerned or where there had been a failure by the solicitor to comply with the Solicitors' Account Rules 1998. The powers exercisable on intervention were set out in Part II of Schedule 1 to the Act. By paragraph 5(1) the court might, on the application of the society, order that no payment should be made without the leave of the court by any person of any money held on behalf of the solicitor or his firm. Paragraph 6(1) provided that the Society held such sums of money 'upon trust for the persons beneficially entitled to them'. The Compensation Fund was established under section 36 of the Act, funded by annual contributions paid by practising solicitors out of which grants might be made to the society for the purpose of relieving loss or hardship caused by dishonesty or failure to account. The fund was held and administered by the Society. Paragraph 1 of Schedule 2 provided that the compensation fund was held on trust by the society 'for the purposes' set out in section 36 and in Schedule 2.

²⁴ [2006] EWCH 480 (Ch).

[52] In four test cases, the society applied to the court for directions relating to the exercise of its powers as statutory trustee, and in particular as to whether its duties were the same as those of a trustee under a private trust, or were affected by the statutory nature of the trust and its status in public law. The English Chancery Division ultimately held that the Society's duties in relation to the paragraph 6 trust were grounded in public law. The court determined that it did not follow that when the word 'trust' was used that that brought with it the full range of trust obligations attendant upon a traditional private law trust, particularly so when the trust was imposed by statute and was in the context of the exercise of a public function.

[53] Again, Lawrence Collins J of the English Chancery Division was obliged to construe the relevant statutory framework. The court took pains to consider the background to the need for the powers and the structure of Part II of Schedule 1 of the Act which ultimately made it clear that the paragraph 6 trust was not intended to be, and could not have been intended to be, an ordinary private law trust. The following excerpt from that court's ratio reveals the depth of the analysis:

"114. In my judgment the background to the need for the powers and the structure of Part II of Schedule 1 make it clear that the paragraph 6 trust was not intended to be, and could not have been intended to be, an ordinary private law trust. The Law Society inherits, like a trustee in bankruptcy, a situation not of its own making including records which are often in a chaotic state, in which it does not know initially where all the funds lie, and then, having recovered the funds, does not know who the claimants to the funds are. It has, nonetheless, to determine entitlement to the funds and distribute to those identified as claimants to the funds. It would be difficult if the Law Society were, in that context, to be burdened with overly excessive or onerous duties as a private law trustee under paragraph 6. I accept the Law Society's submission that the trust created under paragraph 6 can be labelled a statutory trust. Similarly, the term "beneficiaries" can be used, in the sense of statutory beneficiaries entitled under paragraph 6 to a share of the funds vested in the Law Society (as opposed to beneficiaries of a private law trust).

115. This approach is also supported by the consideration that the Law Society needs to be able to act efficiently in circumstances where there may be many clients involved (cf. *R v Takeover Panel, ex p Datafin plc* [1987] 1 QB 815, 840), and it is not likely that it could have been envisaged that the Law Society would constantly be applying to the court for directions of the kind sought in this case.

116. Such an interpretation would also avoid the danger that the trust might be void. Were the trust under paragraph 6 a private law trust it would be a fixed trust, and not a discretionary one. A fixed trust with conceptual and/or evidential uncertainty is a void trust, and a fixed trust is only valid if it is possible to draw up a complete list of the beneficiaries at the time of distribution: Lewin on Trusts, para 4-30. I accept that it is by no means certain that failure to identify the clients would make such a private law trust invalid, and certainly a court would do everything it could to find it valid, but it would be an odd interpretation of paragraph 6 to allow it to result in a situation where it is possible that some trusts were valid, because of the good level of accounting records maintained by the solicitor prior to intervention, and others (those, often in fact, where intervention was required the most) were void for evidential uncertainty. The only way in which to ensure that all of the trusts created under paragraph 6 are valid, no matter how bad is the level of evidence as to beneficiaries, is to recognise that the trust created under paragraph 6 is not a trust subject to the usual rules, such as evidential certainty, imposed upon such fixed private trusts.”

[54] It is therefore clear that there is no concrete principle of law made out in **Ahmed** which bars the co-existence of statutory and fiduciary duties where they have both been assumed, nor does the case establish any categorical bars to liability in the case of statutory trustees. Rather, the case demonstrates that it does not follow that, when the word “trust” is used, that brings with it the full range of trust obligations attendant upon a traditional private law trust, particularly so when the trust is imposed by statute and is in the context of the exercise of a public function. The meaning of a word depends on its context. The court considering the substantive dispute between the parties herein must therefore consider all of the circumstances of the case in construing the purported statutory trust.

[55] In my view, RBTT has not provided any authority, statutory or otherwise, which ousts the viability of the claim. In the court below, the appellant’s case that the claim disclosed no maintainable cause of action was premised on the basis of what can be described as a “short point of law”. While the consideration of a question of law at these stages of proceedings is always a difficult one, courts are generally encouraged to determine short points of law or construction as these can be considered before the evidence has been heard. However, it is clear that the

issue raised in the applications below cannot be described as giving rise to a short point of law. It seems to me that this is a difficult question of law which involves a careful analysis of the relevant statutory and legal framework and the consideration of which (at this stage) would involve a mini-trial.

[56] In her ruling, the master was clearly aware of the approach to be taken in determining the strike-out application. At paragraph 45 of her judgment, she stated:

“The court must determine the application to strike out on the claimant’s pleaded case. First, it must be noted that the relief claimed for damages is in the alternative to the relief claimed for an order that the defendant account for and deliver to the claimant the assets or the monetary value of the assets held in trust in the sum of \$135,646,312.07.”

[57] The learned master also gave careful consideration to the factors of this case which indicated that FSA’s claim was viable. This is borne out at paragraphs 51-55 of her judgment where she states:

[51] Clearly, the failure alleged in the claim is not a breach of section 31(2). In fact, as submitted by the defendant, there is no statutory duty under this provision that can be breached by the defendant as a statutory trustee.

[52] A separate issue arises in relation [to] fiduciary duties. A breach of a fiduciary duty does not necessarily in (sic) involve the violation of a statute. The relationship between the parties determines whether such duty exists. According to Black’s Law Dictionary, a fiduciary is ‘[a] person or institution who manages money or property for another and who must exercise a standard care in such management activity imposed by law or contract, e.g. executor of estate; receiver in bankruptcy; trustee. A trustee, for example, possesses a fiduciary responsibility to the beneficiaries of the trust to follow the terms of the trust and the requirements of applicable state law. A breach of fiduciary responsibility would make the trustee liable to the beneficiaries for any damage caused by such breach.

[53] By virtue of the trust deed mandated by section 31(1) of the Act, a fiduciary relationship arises between the RBTT and the Supervisor. Under the trustee agreement, RBTT, was obligated to provide the following services:

(a) Reporting to the Registrar of insurers all assets of British-American Insurance Company (St. Vincent) held in trust.

- (b) The safe-keeping of security items of assets held.
- (c) Monitoring and updating records on the release and renewal of assets.

[54] RBTT owed a fiduciary to act honestly in the reporting to the Supervisor of the assets it held in trust. If all the allegations in the statement of claim are true so that RBTT represented to the Supervisor that it held BAICO's assets totaling EC \$140,547,665.57, and according to the Judicial Manager, it held only assets totaling EC \$2,075,076.00, then this would [be] a false report, amounting to a breach of a fiduciary duty owed by RBTT as trustee to the Supervisor.

[55] Therefore, in light of the trustee agreement, the allegations in subparagraphs (b), (c) and (d) of paragraph 16 of the statement of claim in relation to fiduciary duties will suffice as viable pleadings. By his claim, the Supervisor is contending that the alleged breaches amount to statutory and/or fiduciary breaches so that any of the particulars may amount to both or either one. Therefore, in the event that the pleaded allegations of breach do not amount to statutory infractions, fiduciary breaches are certainly spelled out in the claim."

[58] It is clear that in arriving at her decision the learned master correctly had in mind the relevant principles which inform the determination of a striking out application. She also gave the appropriate consideration to the basis of the appellant's application to strike out, which was whether FSA's statement of case disclosed a legally recognisable claim against RBTT, at least in an arguable sense. The learned master was satisfied, as is this Court, that RBTT has not provided any evidence or law which establishes a categorical bar to the FSA's claim such that the proceedings have no real prospect of success. In the circumstances of this case, FSA can be said to have at least an arguable claim, and as the learned master opined 'there is much more than a scintilla of a cause of action in this claim'.

[59] In his oral submissions, Mr. John KC also relied on **X (Minors) v Bedfordshire County Council**,²⁵ in support of his submission that it would not be just and

²⁵ [1995] UKHL 9.

reasonable in these circumstances to impose any liability on RBTT. He contends that in light of the public interest nature of the relationship and the detailed and elaborate scheme of the **Insurance Act** and the remedy which it provides, it is not just and reasonable but rather undesirable to import into a carefully structured statutory arrangement added obligations in tort.

[60] The relevant principles enunciated in **X (Minors)** were considered by the learned master at paragraphs 58-59 of her judgment as follows:

"[58] Lord Jauncey of Tullichettle in *X (Minors) v Bedfordshire County Council* also gave guidance on the point when he stated:

'Where a statute empowers or ordains the doing of an act which, if done with due care, will cause no harm to a third party but which, if done carelessly will be likely to cause harm, and the circumstances also satisfy the other two requirements in *Caparo Industries Plc v Dickman* [1990] 2 AC 605 namely the relationship between the plaintiff and defendant is sufficiently proximate and that it would be just and reasonable to impose a duty of care, an action will lie at common law. But it will lie simply because careless performance of the act amounts to common law negligence and not because the act is performed under statutory authority.'

[59] Notwithstanding the claimant's apparent refusal to respond with a head-on engagement of the legal principles highlighted by the defendant, the seemingly perfunctory manner in which the claimant addressed the issue in his closing reply, in the circumstances of this case, in my view, will suffice to block a striking out of the claim. I have already adopted the stance that the claimant can bring a private law action against the defendant. The claim reveals at least a breach of fiduciary duty and/or breach of trust. If the defendant is a trustee (as assumed for the purpose of these proceedings) holding BAICO's assets to the order of an on behalf of the claimant, then a proximate relationship for a duty of care to arise is evident. That being so, loss as identified by the claimant in paragraph 17 of the statement of claim, as a reasonably foreseeable consequence of a false report on the assets held by the defendant as trustee. Therefore, it is fair, just and reasonable to impose a duty of care on the defendant." (Emphasis added)

[61] I am unable to identify any error in principle undertaken by the learned master in her assessment of whether the facts of this case reveal that there is a proximate relationship between FSA and RBTT such that if the breach and the reasonably foreseeable loss alleged by FSA can be proven, it would be fair, just and reasonable to impose a duty of care on RBTT in the circumstances. RBTT does not appear to dispute the fact of a proximate relationship between itself and FSA, nor does it dispute the foreseeability of loss based on the facts alleged by FSA. Instead, RBTT's focus is on whether policy considerations would allow for the imposition of fiduciary duties on it.

[62] RBTT relied on **Pacific Associates** to support its argument that the test for establishing a duty of care does not end with the test of foreseeability and proximity as the court should also consider the policy aspect. **Pacific Associates** does not assist RBTT's case in this respect. In that case the plaintiff contractor was the successful tenderer for dredging and reclamation work in Dubai for the employer, the ruler of Dubai. The contractor tendered in the knowledge that the work would be supervised by a consultant engineer retained by the employer, and the contract between the employer and the contractor provided that the contractor would only be paid sums on account of the contract price when they were certified by the engineer. The contractor claimed that inaccurate information provided by the engineer at the tender stage had resulted in the work being more difficult than expected and that in consequence, its tender price had been too low. The contract provided that the contractor was entitled to additional payment if it encountered hard material in the course of dredging which could not have been reasonably foreseen by an experienced contractor, and in the course of the work the contractor made repeated claims for additional payments for hard materials. Those claims were consistently rejected by the engineer on the ground that the hard materials should have been foreseen by the contractor from the data supplied to it. The contractor brought an action against the engineer claiming £45 million, alleging that the engineer had acted negligently or was in breach of its duty to act

fairly and impartially in administering the contract by its continual failure to certify the contractor's claims for additional payments for hard materials and its final rejection of those claims. On the trial of a preliminary issue the judge held that the contractor could not recover damages from the engineer. The contractor appealed to the Court of Appeal which held that where there was no direct contractual relationship between the contractor and the engineer or any assumption by the engineer of direct responsibility to the contractor for economic loss caused to the latter, the engineer owed no duty of care directly to the contractor coterminous with the contractor's rights against the employer.

- [63] The distinction between the present case and that of **Pacific Associates** is immediately apparent. FSA has contended, and the learned master also observed, that there is an extant trust agreement between BAICO and RBTT under which RBTT undertook certain fiduciary duties. In the circumstances of this case the **Insurance Act** provided for the creation of a statutory trust under section 29 and 31 wherein RBTT was deemed to be the trustee. The learned master properly observed at paragraph 47 of her judgement that:

"By virtue of section 31(2) of the [Insurance] Act, the assets held in trust by RBTT are to the order of and on behalf of the Supervisor. This is in the wider interest of the policy holders. The Supervisor has been lawfully appointed by statute to bring an action in place of the policyholders. If there is a breach of the trust, then, in my view, the beneficiary must have a right of action in respect of the breach, that is, against RBTT as a trustee. In the circumstances of this case, the beneficiary, the Supervisor, must come to the court to recover the benefit that he contends was lost because of the alleged breach of the trust. This must be a private law action. If he fails to do so, then the policyholders have the right to bring an action against him in public law." (Emphasis added)

- [64] The circumstances which would have informed the policy considerations which restricted the imposition of a duty of care on the engineer in **Pacific Associates** are not operative here. The court in **Pacific Associates** did not consider that there was an appropriate degree of proximity between the engineer and the contractor beyond the terms of the contract. However, in this case where the trust is held on

behalf of the Supervisor of Insurance, as mandated by the **Insurance Act**, the degree of proximity between the parties is clear. Accordingly, the Court does not agree with RBTT's argument that policy considerations ought to deter the imposition of any fiduciary duties on it in the circumstances and by extension that FSA does not, therefore, have a viable claim made out in its statement of case.

- [65] Moreover, RBTT's contention that given the nature of the relationship between the parties it is not just and reasonable to import into the **Insurance Act** added private law obligations in tort, calls for a kind of assessment and analysis which is best suited to full trial. This is not a clear and obvious case, but I would go further to say that even if the case may turn out at trial not to be really complicated, it would not follow that it should be decided without a complete ventilation of the legal and factual issues at trial than is possible or permissible on an application for strike out or summary judgment.²⁶

The summary judgment application

- [66] In respect of her approach to the summary judgment application brought by RBTT in the alternative, the learned master considered the following principles at paragraph 38 of her judgment:

“vi. Summary judgment ought not to be granted if there are disputed facts, inferences of facts and/or serious questions of law to be tried by the court.

(viii) Summary judgment should be granted only in cases where it is clear that a claim, on its face, obviously cannot be sustained, and cannot be cured or remedied on or before case management with the process of disclosure, exchange of witness statements and cross-examination, or in some way is an abuse of the process of the court.”

- [67] She also appropriately considered the principles applicable to a summary judgment application as distinct from a striking-out application. At paragraph 42 of her judgment, the master stated:

²⁶ Lewison J (as he then was) in *Federal Republic of Nigeria v Santolina Investment Corporation and others* [2007] EWHC 437 (Ch), at [4(vi)] citing the decision in *Doncaster Pharmaceuticals Group Ltd and Ors v The Bolton Pharmaceutical Company 100 Ltd* [2006] EWCA Civ 661.

“[42] Since the defendant’s application is to strike out the claim and/or for summary judgment, it is prudent to highlight the distinction in the principles applicable to the granting of an order in respect of each. In this regard, I am guided by the pronouncements of the Honourable Chief Justice in *Didier*. At paragraph 23 and 24 of the judgment, Her Ladyship stated:

‘In disposing of a claim summarily, the court would essentially consider the legal issues in the case, determine on a balance of probabilities and in light of the affidavit evidence adduced by the parties, whether one party or the other has no real prospect of succeeding on the claim and enter judgment accordingly. This will be a judgment on the merits.

On the other hand, an application for a party’s statement of case to be struck out pursuant to CPR 26.3(1)(b) is decided by the court solely on the parties’ pleaded case before it. No additional evidence is adduced. All facts pleaded in the statement of case are assumed to be true for this purpose.’

[43] Addressing the distinction in the requirements for both procedures, Pereira CJ made it clear that a party applying for summary judgment must file affidavit evidence in support of the application.”

[68] The learned master finally concluded at paragraph 61 of her judgment that she agreed with the respondent that the appellant had failed to produce any affidavit evidence which is a complete defence to the claim. She determined that it could not be concluded that FSA has no real prospect of succeeding on the claim against RBTT.

[69] It is apparent upon review of the documents filed for consideration by the master that RBTT had filed affidavit evidence in support of its application to strike and alternatively for summary judgment. This much has been conceded by the respondent. The appellant filed, in support of their amended notice of application filed 14th May 2014, affidavits of Hermie Miller dated 22nd February 2013 and of Lucille Bascombe-Mondesir dated 11th April 2013, 7th April 2014, 10th November 2015 and 19th November 2019 (“the Affidavits”). It does not appear that the contents of the affidavits filed were expressly considered in the learned master’s

judgment in relation to the summary judgment aspect of the appellant's application.

[70] The affidavit of Hermie Miller appears to mainly aver that CPR 41.1(2) and 8.1(5)(c) required that the claim below be made by fixed date claim form supported by affidavit evidence and that in circumstances where this was not done the court ought to strike out the statement of case for non-compliance with the rules.

[71] As for Lucille Bascombe-Mondesir's affidavit filed 10th November 2015, it simply addressed evidence regarding whether it was appropriate to proceed with the striking out application before issues, which were live in existing judicial review proceedings at the time, were adjudicated upon. Notably, her affidavits filed 11th April 2013 and 7th April 2014 seemed only to reference the striking out applications before the court. In the affidavit filed 11th April 2013, the heading reads 'Affidavit in support of the application to strike out the claim form and in opposition to the application to strike out the defence'. That affidavit also fails to address in any way how the evidence provided satisfies the court that summary judgment could be suitably granted in the circumstance. Furthermore, the affidavit appears to reveal factual assertions which differ from those alleged by the claimant including that none of the assets which were intended to constitute BAICO's statutory fund were ever vested in RBTT's name; that RBTT did not in the course of its dealings with BAICO and/or the Supervisor of Insurance provide these custodial services under the assumption that it was holding the substantive assets, to which the lists and schedules of investments referred, in trust under a statutory fund; nor did RBTT represent to the Supervisor of Insurance or to any other person that it was holding these substantive assets on any such trust at all. This RBTT stated despite one of the obligations of the trust agreement being that RBTT was to safe keep the items of assets held, and the fact of the letter dated 16th April 2009, whereby RBTT listed assets totalling EC \$140,547,665.57 as being held on trust for BAICO. As for the affidavit filed 7th April 2014, it states that it was made supplemental to the affidavit

filed 11th April 2013 and in addition for various directions to be given by the court upon the hearing of the applications to strike.

[72] Lastly, the affidavit of Lucille Bascombe-Mondesir filed 19th November 2019 simply sets out the details surrounding the findings of the court in the judicial review proceedings which were adjudicated upon by Byer J.

[73] In their submissions in this appeal, both parties seem to suggest that the learned master did not take note of the affidavits filed by RBTT as it relates to dealing with the summary judgment application. Paragraph 23 of FSA's submissions filed in support of the appeal states that none of the affidavits were relied on by RBTT and the learned master could not be said to have been in error for not taking into account facts set out in the affidavits when no submissions were made to the learned master identifying these said facts and establishing how they provided a complete and unanswerable defence that cannot be cured with disclosure, amendment, witness statement nor cross-examination. It is also noteworthy, RBTT's submissions and/or reply to FSA's submissions do not appear to clarify to this Court in any way how the evidence from the affidavits would have made out its case on the summary judgment application.

[74] I am not of the view that the learned master's failure to expressly acknowledge the affidavits in her judgment when dealing with the application for summary judgment is an indicator that she also failed to consider them at all. In fact, the master's conclusion was that she agreed with FSA that RBTT 'has not produced any affidavit evidence, which is a complete defence to the claim'. Such a conclusion would have followed an assessment of the affidavit evidence filed by RBTT to discern whether it had provided 'a complete defence to the claim' or adequately made out a case to be granted summary judgment.

[75] Like the learned master, I could find no unanswerable defences borne out in the affidavits filed by RBTT. Moreover, I consider that the difference in factual assertions mentioned in paragraph 64 of this judgment would have been a sufficient basis for the learned master to exercise her discretion to refuse the application for summary judgment. Furthermore, at paragraph 9.25 of its skeleton arguments filed in support of the appeal, RBTT submits:

“The allegations of fact on which the Defendant joins issue with the Claimant in the pleadings and upon which this Court must decide if the Claimant has a realistic prospect of succeeding in order to warrant the matter going on to trial, are the following, namely: -

(1) What were the identities of the assets to be held in the BAICO long term Insurance Fund pursuant to section 29 of the Act and were they placed in trust by the delivery of the lists of investments schedules and certificates and/or was a duty placed on the Defendant to ensure that they were so vested?

(2) Did the Defendant represent to the Claimant that it was trustee of BAICO Insurance Fund pursuant to section 31(2) of the Act?

(3) Has it always been apparent to the Supervisor/FSA that apart from having physical custody of those lists of assets/investments and the relevant certificates and documents which were in fact delivered with them, that no assets in respect of BAICO’s Statutory Fund could be held or are being held by the Defendant?

(4) Did the Supervisor rely on the representations alleged to have been made by the Defendant as pleaded and was it reasonable for him to do so in all the circumstances?

(5) Did the Defendant permit BAICO to either sell or encumber the assets which were said to constitute BAICO’s Statutory Fund?

(6) Whether even if the Defendant is deemed a trustee of the assets to be held in the Contingency Fund (which is denied) it has adequately reported on the status of the fund on a balance of probabilities.

(7) Whether the Contingency Fund has suffered the loss alleged or any loss whatsoever?”

[76] In **Jones v Attorney General**²⁷ Lord Bingham makes it clear that:

“Application[s] for summary judgment will be inappropriate where there are disputed issues of material fact or where material facts need to be ascertained by the Court and cannot confidently be concluded from affidavits. It may also be inappropriate where ultimate determination turns on a judgment only able to be properly arrived at after a full hearing of the

²⁷ [2003] UKPC 48.

evidence. Summary judgment is suitable for cases where abbreviated procedure and affidavit evidence will sufficiently expose the facts and the legal issues. Although a legal point may be as well decided on summary judgment application as at trial if sufficiently clear (*Pemberton v Chappell* [1987] 1 NZLR 1), novel or developing points of law may require the context provided by trial to provide the Court with sufficient perspective.”

Accordingly, this Court does not agree with RBTT that it may be reasonably concluded that the learned master erred in her approach to determining its application for summary judgment.

- [77] For completeness, I consider it prudent to address RBTT’s challenges of whether the trustee agreement is a trust deed mandated by section 31(1) of the **Insurance Act** and whether, assuming that the appellant was a statutory trustee under the **Insurance Act**, FSA’s claim would fail due to its failure to comply with the procedure in accordance with section 32(2a) to (2d) of the **Insurance (Amendment) Act** for the breaches of duty pleaded. It is sufficient to reiterate what has been recognised by the learned master at paragraphs 48-55 of her judgment and that which has been repeatedly made clear by FSA - the claim below is not restricted to a breach of any provision of the **Insurance Act** but is instead grounded in allegations of breaches of fiduciary duties at common law. Furthermore, the impact of both sections would be a matter of statutory interpretation more suited for trial. It is therefore not necessary to embark on a discussion of whether these issues may be resolved in favour of the appellant in order to dispose of the appeal since this Court has already determined that FSA’s claim for breach of fiduciary duties is a viable one.

Conclusion

- [78] In light of the foregoing, this Court is not of the view that the master erred in arriving at the findings of fact challenged by RBTT at ground 1 of its notice of appeal, nor that she acted on wrong and/or inconsistent principles of law in dismissing the appellant’s applications to strike out FSA’s claim or alternatively for

summary judgment. Her findings were informed by a thorough consideration of the principles relevant to both applications. Furthermore, RBTT has failed to bring to this Court's attention any authority by which the approach and principles adopted by the learned master may be impugned.

[79] Bearing in mind the guidance provided in **Sanphers** and **Didier**, this Court has identified no errors in principle committed by the learned master in the exercise of her discretion to refuse the applications below that would warrant appellate interference. RBTT has failed to satisfy this Court that the master took into account or was influenced by irrelevant factors and considerations, or that she failed to take account of or give too little weight to relevant factors, and that as a result of the error or the degree of the error in principle, her decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.

[80] For these reasons, the appeal against the decision of the learned master refusing RBTT's applications to strike out FSA's claim or alternatively for summary judgment was dismissed.

I concur.
Gertel Thom
Justice of Appeal

I concur.
Margaret Price-Findlay
Justice of Appeal

By the Court

Deputy Chief Registrar