THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE
(CIVIL DIVISON)

CLAIM NO. ANUHCV2022/0498

BETWEEN:

ASHLEY HANLEY

Claimant

and

[1] LIAT (1974) LTD. (IN ADMINISTRATION)
[2] BRIT SYNDICATES

Defendants

Appearances:

Clement Bird, Counsel for the Claimant
Tiwana Martin holding papers for Loy Weste, Counsel for the 1st Defendant
Kendrickson Kentish, Counsel for the 2nd Defendant

2023: October 12th;
2024: February 9th.

DECISION

[1] **MICHEL, M.:** The 2nd Defendant has applied to strike out the Claimant's claim against it pursuant to rules 9.7 and 26.3.(b) of the Civil Procedure Rules 2000 ("CPR"). The application is strenuously resisted by the Claimant. The 1st Defendant has not participated in the hearing of the application.

Background

[2] The brief background to these proceedings is that the Claimant was formerly employed as a pilot by the 1st Defendant Company. The 1st Defendant maintained an insurance policy with the 2nd Defendant, the stated purpose of which was to cover employees of the 1st Defendant (the insured) as per an attached schedule, for permanent and temporary loss of flying license. Whilst still employed by the 1st Defendant, the Claimant began experiencing a series of health challenges and was later declared medically unfit to fly. His employment with the 1st Defendant subsequently came to an end on certain terms.

[3] The 1st Defendant made a claim to the 2nd Defendant under its insurance policy with the 2nd Defendant to obtain coverage for the Claimant consequent upon

him being declared unfit to fly. The 1st Defendant's initial claim to the 2nd Defendant was rejected by the 2nd Defendant. The Claimant, being unhappy with this development, made further attempts to have his claim advanced to receive benefits under the insurance policy, without success.

The Claimant's Claim

[4] The Claimant subsequently commenced the current proceedings against the Defendants. In his statement of claim, he outlined the health challenges he faced whilst in the employ of the 1st Defendant, the details of which are not material to this decision and pleaded that upon presenting himself to the 2nd Defendant's medical professional, he was declared medically unfit to fly. He alleged that at this point he and the 1st Defendant agreed to a termination of the employment relations, with a claim to be made under the insurance policy with the 2nd Defendant to secure his insurance benefits.

[5] The Claimant pleaded that the 1st Defendant's claim under the insurance policy to the 2nd Defendant in respect of insurance benefits to him was rejected by the 2nd Defendant. He further alleged that with the permission of both Defendants, he subsequently treated directly with the 2nd Defendant in relation to the claim. He alleged that the 2nd Defendant suggested that their position in relation to his claim would change were he to obtain specialist advice on the matter. The Claimant alleged that his subsequent efforts to obtain specialist advice were stymied by the onset of the COVID-19 pandemic and the 2nd Defendant's failure to make the arrangements for the requested test/analysis to assist him.

[6] In his particulars of claim, the Claimant stated:

(1) The insurance policy being continuous and renewable from year to year, was in force at all material times of his employment.
(2) The discovery of his medical condition, which on its own was the determining factor leading to his being categorized as medically unfit to fly, occurred within the applicable insurance period.
(3) The mutual termination of his employment relationship with the 1st Defendant was expressly predicated to being on the condition that his claim would be fully prosecuted.
(4) The 2nd Defendant expressly held out to him the option of further specialized analysis which could assist his claim, and yet has failed to make such service available.

[7] At paragraph 18 of his statement of claim, the Claimant alleged that the 1st Defendant failed to diligently prosecute or failed to prosecute his claim in any material fashion and the 2nd Defendant's failure to honour his claim in willful breach of their duty towards him, express or implied caused him loss.

[8] The Claimant has sought the following reliefs on his claim:

(1) a declaration that he is deemed a beneficiary pursuant to a loss of licence insurance policy that the 1st Defendant maintained with the 2nd Defendant;
(2) a declaration that the Defendants are liable to him in respect of a claim made by him under the loss of license insurance policy for permanent disability;
(3) a declaration that the 1st Defendant failed in its duty of care to him to prosecute his claim under the policy;
(4) damages for failure to honour the claim or breach of the policy or to prosecute the claim and damages for loss of employment.

The 2nd Defendant's Application to Strike

[9] The 1st Defendant filed a defence to the Claimant's claim. The Claimant was granted permission to serve the 2nd Defendant out of the jurisdiction and on the day before the deadline for filing its defence, and thus before the matter has come on for case management, the 2nd Defendant filed the present application to strike out the Claimant's claim against it. The 2nd Defendant has advanced its application to strike on the following grounds:

1. Pursuant to CPR 26.3(1)(b) the Court may strike out a statement of case or part thereof for failing to disclose any reasonable ground for bringing or defending a claim.
2. The Claimant has failed to disclose any or any sufficient facts to ground a claim against the 2nd Defendant.
3. The Claimant has failed to set out the facts, matters and/or circumstances relied upon to show that the 2nd Defendant is liable on the claim herein.
4. There is no privity of contract between the Claimant and the Second Defendant nor is there any duty of care between them.

[10] As is the case on applications made pursuant to CPR 26.3(1)(b), no affidavit accompanied the application.

[11] I note that the 2nd Defendant has advanced no grounds or arguments, whether written or oral, in relation to CPR 9.7, to form the basis for the Court to declare that it has no jurisdiction to try the Claimant's claim. The 2nd Defendant has also not filed an affidavit in support of the application as is required under CPR 9.7(4). Thus, the Court has proceeded to determine this application pursuant to CPR 26.3(1)(b) under which the application has quite properly been made.

The Law on Striking out

[12] The 2nd Defendant on its application is in essence inviting the court to exercise its discretionary power to strike out the Claimant's claim as disclosing no reasonable grounds for bringing the claim against it. It is well settled that the Court should exercise restraint in exercising its power to strike. Striking out a party's statement of case has been described as a draconian step and is considered the nuclear option in the court's expansive toolbox of case management powers. It should only be used in clear and obvious cases. The power to strike out a statement of case at a preliminary stage, before a defence has been filed, is sparingly used as the court will be reluctant to drive out a claimant from the doors of the court without being given an opportunity to deploy its case.

[13] In **Cedar Valley Springs Homeowners Association Incorporated v Hyacinth Pestaina**,[1] Pereira CJ helpfully distilled the strike out principles from the many authorities of the Court of Appeal:

> "(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. [5 [As expressed in the Canadian case of Operation Dismantle Inc v R [1986] LRC (Const) 421 which was cited in Baldwin Spencer v The Attorney-General of Antigua and Barbuda et al ANUHCVAP1997/0020A (delivered 8th April 1998, unreported)]
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> (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,

[1] ANUHCVAP2016/0009 heard together with Cedar Valley Sprints Homeowners Association Incorporated v Hilda Meade et al ANUHCVAP2016/0010 (delivered 18th January 2017, unreported) at para. 6.

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

[14] With the above principles in mind, I will consider the claimants' pleadings only, and in so doing assume that the facts alleged in the statement of claim are true unless they are manifestly incapable of proof, to determine whether the Claimant's pleaded cases discloses a reasonable cause of action against the 2nd Defendant.

Whether there is Privity of Contract between the Claimant and the 2nd Defendant

[15] Learned Counsel for the 2nd Defendant's first argument in support of the 2nd Defendant's application to strike was focused on the issue of privity of contract. Learned counsel for the 2nd Defendant argued that there is no privity of contract between the Claimant and the 2nd Defendant, therefore, he contended, the Claimant has no cause of action against the 2nd Defendant pursuant to the insurance policy.

[16] I must pause to note that although a copy of the insurance policy accompanies the Claimant's statement of claim, it does not appear that the insurance contract or the entirety of the insurance contract accompanied the claim. There are instances where the policy refers to attached schedules and terms and conditions from another document being incorporated, but these documents do not accompany the statement of claim. I will return to this observation later.

[17] Notwithstanding my comment above, as it relates to the insurance contract, I do not believe there is any dispute between the parties that the Claimant is not a party to the insurance policy contract between the 1st Defendant and the 2nd Defendant. There does, however, appear to be differences between the Parties as to whether the Claimant was "actively at work" to have been entitled to receive coverage under the insurance policy. (This is a triable issue and not at all suitable for consideration on this strike out application). Regardless, I do not consider there to be much dispute that the Claimant's status in relation to the contract would be nothing more than a beneficiary of any payout under the policy.

[18] The law as it relates to privity of contract is also not disputed by the parties and I need not discuss it in detail. In essence, the common law position is that only

a person who is a party to a contract may sue on it.[2] Thus, only the parties to a contract can acquire rights under it or have obligations imposed upon them under it, even if the contract was created to give that party a benefit. There are recognized exceptions to the doctrine of privity of contract, none of which appear to be applicable to this case. The doctrine has proved to be particularly harsh to third parties to a contract, leading sometimes to unsatisfactory results. In England and Wales, the common law position of privity of contract has been substantially eroded by the **Contracts (Rights of Third Parties) Act 1999** which gives a person who is not party to a contract the right to enforce a term of that contract in specified circumstances. In Antigua and Barbuda, Parliament has not seen it fit to pass similar sweeping legislation making provision for the enforcement of contractual terms by third parties.

[19] Thus, in the present case, the Claimant not being a party to the contract of insurance between the 1st and 2nd Defendants, the operation of the doctrine of privity of contract would apparently bar the Claimant from suing the 2nd Defendant in contract on the insurance policy since there is no privity of contract between him and the 1st Defendant, the insurance policy contract being only between the 1st and 2nd Defendants.

[20] The Claimant has sought to argue that there is no provision in the insurance policy contract which indicates any intention that beneficiaries under the insurance policy are precluded from taking action on it. I do not consider that there is much merit to this argument because it is the operation of the doctrine of privity of contract which precludes a beneficiary, who is third party, from suing on the contract. In my view, the contract would not have to state that a beneficiary is precluded from taking action on the contract for the doctrine of privity of contract to operate.

Whether the Insurance Act, 2007 confers a right on a third party to enforce a contractual term

[21] As I observed above, unlike in other countries such as the United Kingdom, Parliament has not passed sweeping legislation conferring rights on third parties to a contract to sue on a contract to which they are not a party to. However, learned counsel for the Claimant submitted that provisions of the **Insurance Act, 2007**,[3] operate similarly to that of the **UK Contract (Rights of Third Parties) Act 1999**, and establishes third party rights on an insurance policy contract. In reliance on this submission, he pointed the Court to sections 125, 126 and 129 of the **Insurance Act**. I shall set out the sections in full.

[22] Section 125 provides:

[2] See: Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd [1915] AC 847 at 853.
[3] Act No. 13 of 2007.

"125. Enforcement by beneficiary trustee
A beneficiary may enforce for his own benefit and a trustee appointed pursuant to section 120 may, in accordance with the terms of the contract or declaration, as the case may be, enforce payment of monies payable under a policy even though there is no privity of contract, but the insurer may invoke against the beneficiary or trustee any defence available against the policy-holder or his personal representative."

[23] Section 128 and 129 provides:

"128. Policy of group insurance
If a policy is entered into for the provision of group insurance, the insurer must

(a) set out in the policy the following particulars:

(i) the name or sufficient description of the insured;
(ii) the method of determining the persons whose lives are insured;
(iii) the beneficiaries under the policy;
(iv) the amount, or the method of determining the amount, of the insurance money payable, and the conditions under which it becomes payable;
(v) the period of grace, if any, within which the premium may be paid; and
(vi) whether the policy provides for participation in the distribution of surplus or profits that may be declared by the insurer; and

(b) issue to the insured and to each group life insured, a certificate or other document, in which the following particulars are set out:

(i) the name of the insurer and the identification number or other means of identifying the policy;
(ii) the amount or the method of determining the amount, of insurance on the group life insured and on any person whose life is insured under the policy; and
(iii) the circumstances in which the insurance terminates and the rights, upon the termination, of the group life insured or of any person whose life is insured under the policy.

129. Power of group life insured to sue insurer

> A person insured under a group life insurance policy may, in his own name, enforce a right given to him under the policy, subject to any defence available to the insurer against him or against the insured."

[24] Learned Counsel for the 2nd Defendant submitted that the above provision are inapplicable to the insurance contract in this case as these provisions fall under Part VI of the **Insurance Act** which relates to "Long-Term Insurance Business" and that the insurance contract that is the subject of this claim is not a long term insurance contract. Learned counsel submitted that the applicable provisions of the **Insurance Act** for the contract in this case are under Part VII of the **Act** relating to "General Insurance" and that the provisions relating to third party benefits are not reproduced anywhere else in the **Act**, and in particular, they do not appear under the rubric "General Insurance Business" under the **Act**.

[25] Learned Counsel for the 2nd Defendant submitted that the insurance policy contract that is the subject of this claim is not a long-term insurance contract since the contract length is 12 months and must be renewed annually. He submitted that long-term insurance business relates to life insurance policies and the insurance policy in this case is not a life insurance policy. In the circumstances, he submitted that sections 125, 128 and 129 are inapplicable to the insurance contract. No authorities were provided by learned counsel for the 2nd Defendant to support these submissions.

[26] The interpretation section of the **Insurance Act** is unhelpful in defining long-term insurance business and general insurance business. Section 2 provides:

> "general insurance business" means any class of insurance business other than long-term insurance business;
> …
> "long-term insurance business" includes insurance business of all or any of the following classes:
> (a) ordinary long-term insurance business;
> (b) industrial life insurance business; and
> (c) in relation to any insurer, insurance business carried on by the insurer as incidental only to any of the classes of business referred to in paragraphs (a) and (b);

[27] The Court has been unable to ascertain a straightforward answer to the question of whether the insurance policy which is the subject of this claim would fall into the category of long-term insurance business. However, it would seem that long-term insurance would offer protection in the event of a life changing occurrence including death or disability whereby funds are paid out in respect of that life changing occurrence. General insurance would seem to account for shorter

periods whereby there could be multiple payments over a period of insurance. This type of insurance would include medical, motor vehicle, home and marine insurance. Although it is clear that life insurance forms part of long-term insurance business and not general insurance, on the material before the Court, I am unable to resolve whether loss of licence insurance policy would be considered long term insurance or general insurance.

[28] Notwithstanding the above, it could be argued that sections 125, 128 and 129 of the **Insurance Act** are nevertheless inapplicable to the present insurance policy. Those sections seem to apply to life insurance, and there has been no suggestion that the insurance policy subject to this claim is a life insurance policy. The wording of the insurance policy is that it is to cover employees of the insured (the 1st Defendant) for permanent and temporary loss of flying licence. The policy therefore appears to relate to a pilot's disability, not his death.

[29] Although I have sought to comment on these provisions, no authorities have been provided to the Court to assist in the proper interpretation of the relevant sections and no authorities have been provided to me which can lead me to the conclusion that the matter is settled. Resolving the question would require the court to undertake an exercise of statutory interpretation and further material from the parties would be required to determine the applicability of the statutory provisions to the actual insurance policy contract subject to this claim. This would not be an appropriate exercise for the Court to undertake on this application. Further, in my view, there are important legal and policy considerations as to whether the **Insurance Act** confers on a third party the benefit to sue an insurer under insurance policies such as in the present case. On this basis alone it would be inappropriate to strike out the Claimant's claim.

[30] If, however, I am wrong in proceeding with caution to conclude that the aforementioned provisions of the **Insurance Act** do not confer on the Claimant a right to bring an action against the 2nd Defendant pursuant to the insurance policy, and the applicability of the provisions has already been considered and decided by our courts and not brought to this Court's attention, matters do not end here. The absence of contractual liability does not automatically mean that the Claimant has no cause of action against the 2nd Defendant. I will therefore go on to consider whether the Claimant's claim discloses sufficient grounds for an action against it in tort.

Whether the Claimant's Claim discloses a claim against the 2nd Defendant in Tort

[31] The Claimant has argued that even if the Court were to conclude that the Claimant was not a party to the contract, there could still exist a cause of action against the 2nd Defendant in tort. In resisting this argument, the 2nd Defendant has placed reliance on the decision of the Court of Appeal in **Briscoe v Lubrizol**

Ltd and another[4] to support their contention that the Claimant has no reasonable ground for bringing its claim against it.

[32] In **Briscoe v Lubrizol**, both the lower court and the Court of Appeal upheld a strike out application by the insurer on the basis that an employee under an employer's health insurance scheme did not have privity of contract with the insurer and on the basis of the court's finding that there was no other duty between the insurer and the employee, such that the employee could not sue the insurers. Learned counsel for the 2nd Defendant submitted that like the decision in **Briscoe v Lubrizol**, in the case at Bar, the 2nd Defendant's obligations are owed to the 1st Defendant and not to the Claimant. He submitted that the insurance policy requires the 1st Defendant to satisfy the 2nd Defendant that an event has occurred which would trigger a claim under the insurance policy and therefore no duty was owed to the Claimant.

[33] Learned counsel for the Claimant argued in essence on the other hand that notwithstanding any finding in relation to privity of contract, the Claimant also has an action in tort against the 1st Defendant. He relied on the decision of the learned master in **Kasswebb Insurance Limited v Nagico Insurance Company Limited**.[5] In that decision, the learned master found that an insurance broker who was not a party to an insurance contract could owe a duty of care to its client whether a broker is bound by a contract or not. Learned counsel for the 2nd Defendant sought to distinguish the decision of **Kasswebb Insurance Limited** on the basis that the relationship of an insurance broker and insured client lends itself to the finding of a duty of care, but not so in the context of the insurance policy in the present claim which is one of good faith. Learned counsel for the 2nd Defendant accepted that there may be a duty of care as between an insurance broker and an insured client as the nature of the relationship of a broker and his insured client lends itself naturally to tortious liability. Relying on the case of **Briscoe v Lubrizol**, learned Counsel for the Claimant submitted that insurers are not under a duty to act with reasonable care, rather their duty is to make the appropriate payments if the event which triggers the making of such payments has occurred.

[34] Learned Counsel for the 2nd Defendant also submitted that the Claimant's statement of claim does not contain any specific pleading that the 2nd Defendant as an insurer of the 1st Defendant owed a duty of care to the Claimant; nor does the Claimant make a claim for declaratory relief in respect of any such duty. He submitted this is not surprising as a contract of insurance, as between insured and insurer is one of utmost good faith and is not based on tort nor a duty of

[4] [2000] ICR 694.
[5] DOMHCV2011/0356.

care. In support of this submission, learned counsel for the 2nd Defendant relied on the case of **Whiter v. Pilot Insurance Company**.[6]

[35] Learned Counsel for the 2nd Defendant further submitted that whilst it denies the Claimant's assertions in its particulars of claim, the assertions are in any event too vague, with no plea as to when, where or how such comments were allegedly made. Learned counsel for the 2nd Defendant submitted that the Claimant has attached to its pleading no correspondence from the 2nd Defendant to the Claimant and instead it has provided two letters from the 2nd Defendant addressed to 1st Defendant, neither of which is offering to the Claimant anything, particularly not any medical treatment.

Discussions and Analysis

[36] I have read and considered the English Court of Appeal's decision in **Briscoe v Lubrizol**. I do not understand the English court in that case to be making a general statement of law that an insurance company could never owe a duty to a third party to the insurance contract. In **Briscoe v Lubrizol**, the Court of Appeal accepted that the existence of a contractual regime is not fatal to a claim asserting that an insurer owes a duty of care to a beneficiary under a health insurance scheme, as were the circumstances in that case, but the court did observe that its existence was a powerful indication against the existence of a duty.

[37] In **Briscoe v Lubrizol**, the Lubrizol, the employer maintained a permanent health insurance plan underwritten by an insurer, for the benefit of employees accepted by the insurer under the plan. The employee, Briscoe alleged that he was unable to continue to perform his work duties due to illness or disablement in his claim against the employer and the insurer. The insurance plan had provided for the payment of disablement benefits to a disabled employee until the age of 62. Lubrizol started making payments equivalent to the sums due under the plan to Briscoe and subsequently stopped payments until his acceptance by the insurer. The insurer subsequently rejected Lubrizol's claim in respect of Briscoe.

[38] Briscoe commenced proceedings against his employer and the insurer. In his statement of claim, Briscoe alleged against his employer Lubrizol, breaches of his contract of employment and of losses flowing from such breaches. In relation to the insurers his claim alleged that the insurers owed him a duty of care "including a duty to refrain from acts of negligence which caused economic loss to the plaintiff". He further alleged that the insurers were negligent in rejecting his claim based on negligent failures to take proper steps to ascertain whether

[6] 1999, 170 DLR 4TH 280, at para 25

or not the appellant's claim came within the terms of the insurance contract between the insurers and Lubrizol.

[39] The issue that there was no privity of contract between Briscoe and the insurer was accepted by the Parties. The issue to be decided by the court was whether in the circumstances of the case the insurers owed the appellant a duty of care. After examining and considering the provisions of the insurance contract, the judge held that Briscoe was not a party to the contract of insurance; that under the contract of insurance, the insurers' obligations were owed to Lubrizol and not to the appellant. The Court found that the obligations did not include an obligation to obtain medical evidence concerning an employee's alleged illness or disablement or to investigate a claim being advanced by Lubrizol and that Lubrizol was entitled under the policy to be indemnified for payments they were making to one of their employees under their scheme. The Court found that under the contract, it was for Lubrizol to produce evidence of a disablement of such a person so as to satisfy the insurers that the event necessary to trigger payments under the policy by the insurers to Lubrizol had occurred.

[40] The Judge then considered the judgment of Lord Goff in **Henderson v Merrett Syndicates Ltd** as it relates to a duty of care being established by the assumption of responsibility. As stated by the Court of Appeal:

> "The judge found that the insurers were carrying out no task for the appellant; they were not making representations or giving advice to the appellant or to Lubrizol on which the appellant would or might rely. All the insurers had been doing was fulfilling their contractual obligations to Lubrizol, who, if they were persuaded that the risk event had occurred in the appellant's case, could have resorted to arbitration. The judge concluded by saying:
>
> > "In my judgment there are no reasons of fairness or public policy which require the imposition of a tortious duty in respect of matters which essentially are the responsibility of the 1st defendants within the contractual framework."

[41] The Court of Appeal upheld the Judge's decision and agreed with the Judge that the structure of the insurance scheme and the policy in that case was designed to ensure that the insurers did not assume any responsibility to the member for performing any task.

[42] Despite the similarities between this case and **Briscoe v Lubrizol**, there are a few key distinguishing features as it relates to the present proceedings. In **Briscoe v Lubrizol**, the insurers' application was made pursuant to Ord 14A and Ord 18 r 19 of the Rules of the Supreme Court 1965. Ord 14A permitted the

determination by the Court of questions of law or construction at any stage of proceedings. In effect it permitted a mini split trial on an issue of law. Having considered the material before the Court including the contract of employment and the employee handbook incorporating the insurance plan and the insurance contract, the judge in **Briscoe v Lubrizol** decided the preliminary issue in favour of the insurer and subsequently struck out the claim as disclosing no reasonable ground for bringing it against the insurer.

[43] In the present case however, the 2nd Defendant's application is made pursuant to CPR 26.3(b). In considering such an application, a court is examining the pleadings and deciding whether the claim discloses a cause of action against a defendant and thus reasonable grounds for bringing the claim. No additional evidence is adduced and all facts pleaded in the statement of case are assumed to be true for the purpose of carrying out this exercise.[7]

[44] Although the insurance policy document was exhibited to the statement of claim, this Court has not had sight of all the terms of the insurance contract as was before the court and examined in **Briscoe v Lubrizol** when it was determining the insurer's application on a question of law and construction. The Court in that case was able to examine the whole structure of the contract to determine the obligations which arose between the parties and how dispute was to be resolved, which this Court is not tasked with doing at this stage.

[45] The Court is cognizant that the application before it is a strike out application and the court is not tasked with evaluating the Claimant's claim from the point of view of the likely prospect of success of the claim as would be required on an application for summary judgment. The Court is determining whether on the face of the claim a cause of action is disclosed.

[46] Secondly, in **Briscoe v Lubrizol**, the judge found that the insurers were carrying out no task for the appellant, and that they were not making representations or giving advice to Briscoe or to Lubrizol on which the appellant would or might rely and that all the insurers had been doing was fulfilling their contractual obligations to Lubrizol. On this basis he found (and the Court of Appeal agreed) that there was no basis for the imposition of a tortious duty within the contractual framework.

[47] Having considered the Claimant's statement of claim, in my view, it appears that it can be concluded that the Claimant has pleaded a basis for a claim in tort against the 2nd Defendant, not based solely on the nature of the obligations under the contract of insurance, but rather based on his allegation that there

[7] See Dr. Martin G.C. Didier at al v Royal Caribbean Cruises Ltd. ANUHCV2014/0024 consolidated with Royal Caribbean Cruises Ltd. v Medical Associates Ltd ANUHCV2015/0004 (delivered 6th June 2016, unreported) at para. 24.

were direct contacts and engagements between him and the 2nd Defendant and representations made to him by the 2nd Defendant, in seeking to advancing his claim.

[48] In my view, the Claimant's pleadings in relation to the 2nd Defendant seek to establish that the 2nd Defendant owed him a duty of care arising from a voluntary assumption of responsibility to him in relation to the claim for coverage for his loss of license. Such a situation has been well recognized in law and was recognized by the Court in **Briscoe v Lubrizol**. In **Henderson and others v Merrett Syndicates Ltd. and others**,[8] after considering the principles espoused in **Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.[9],** Lord Goff stated:

> "if a person assumes responsibility to another in respect of certain services, there is no reason why he should not be liable in damages for that other in respect of economic loss which flows from the negligent performance of those services.

[49] In **White v. Jones**, Lord Browne-Wilkinson stated: [1995] 2 A.C. 207, 273:

> "Just as in the case of fiduciary duties, the assumption of responsibility referred to is the defendants' assumption of responsibility for the task not the assumption of legal liability. Even in the case of ad hoc relationships, it is the undertaking to answer the question posed which creates the relationship. If the responsibility for the task is assumed by the defendant he thereby creates a special relationship between himself and the plaintiff in relation to which the law (not the defendant) attaches a duty to carry out carefully the task so assumed."
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> In Henderson v. Merrett Syndicates Ltd. [1995] 2 A.C. 145 your Lordships recently applied the concept of assumption of liability to cases where the defendants (the managing agents) had pursuant to a contract with a third party (the members' agents) undertaken the management of the underwriting affairs of the plaintiffs. For present purposes the case is important for two reasons. First, it shows (if it was previously in doubt) that the principle of a special relationship arising from the assumption of responsibility is as applicable to a case of negligent acts giving rise to pure economic loss as it is to negligent statement. Second, it demonstrates that the fact that the defendant assumed to act in the plaintiffs' affairs pursuant to a contract with a third party is not necessarily incompatible with the finding that, by so acting, the defendant also entered into a special relationship with the plaintiff

[8] [1995] 2 AC 145 at p. 181.
[9] [1964] A.C. 465.

> with whom he had no contract. (I should add that I agree with my noble and learned friend, Lord Mustill that this factor should not lead to the conclusion that a duty of care will necessarily be found to exist even where there is a contractual chain of obligations designed by the parties to regulate their dealings.)

[50] In the present case, although the 2nd Defendant contends that no duty of care to the Claimant could arise based on the nature of the insurance contract, the Claimant has pleaded facts to support a claim based not simply on obligations under the contract but on an alleged duty of care arising from the relationship between him and the 2nd Defendant and the involvement of the 2nd Defendant with him in relation to the claim for benefits to him under insurance policy.

[51] Further, the Claimant pleaded that there were averments made to him by the 2nd Defendant that it would change its position were he to obtain specialist advice on the matter and despite those averments the 2nd Defendant failed to make such services available to him resulting in the denial of the claim for insurance benefits. Thus, the facts pleaded appear at the very least to support a claim by the Claimant based on alleged representations to him and averments by the 2nd Defendant that it would assume the task of making available to him the requisite medical tests for his claim, and that the 2nd Defendant breached that duty in failing to make the arrangements and provide the requisite test resulting in his claim for benefits under the insurance policy being denied and him suffering loss and damage.

[52] Thus, having considered the facts pleaded and averments in the Claimant's statement of case, I am satisfied that the claim discloses more than a scintilla of a cause of action against the 2nd Defendant to allow the matter to proceed at this stage.[10]

[53] I have also considered the further observations of Roach LJ in **Briscoe v Lubrizol** in relation to whether if the risk event under the insurance contract in that case had or had not occurred, the approach of the insurer in assessing the medical evidence would not matter and a breach would not entitle the Claimant to damages. I would reiterate that those observations were made in the context of a duty arising in relation to the provisions of the insurance contract in that case and that the Court also had the benefit of construing the contract of insurance that was the subject of the claim to then evaluate Briscoe's prospects on the claim. As I have stated before, there are distinguishing features in this case. Additionally, in my view, it is not appropriate for the court to essentially decide the Claimant's prospects of success at this stage on the present

[10] See Baldwin Spencer v The Attorney-General of Antigua and Barbuda et al Antigua and Barbuda Civil Appeal No. 20A of 1997 (delivered 8th April 1998, unreported) at p. 8; RBTT Bank Caribbean Limited v Financial Services Authority SVGHCVAP2021/0005 (delivered 25th January 2023, unreported).

application when no defence has been filed by the 2nd Defendant and further, where at this stage there are more proportionate case management tools available to the court, which I will discuss below.

[54] As it relates to the arguments by counsel for the 2nd Defendant that there is a lack of specificity in the Claimant's pleadings, and that the correspondence attached to the Claimant's claim does not show the 2nd Defendant offering him any medical treatment, in my view, these matters are not fatal to the Claimant's claim. It must be noted that the 2nd Defendant's application to strike was made even before the first case management conference of this matter. The pleadings are not closed. As was recognized by Lord Woolf MR in **McPhilemy v Times Newspapers Ltd**,[11] pleadings should set out the general parameters of the case that is being advanced by a party and should make clear the general nature of the case that is being pleaded. In my view, the Claimant has done so.

[55] Further, the Claimant still has opportunities to amend his claim. CPR 20.1(1) permits a party to amend its statement of case without the permission of the court at any time prior to the date fixed for the first case management conference of a matter. CPR 20.1(2) permits the court to allow an amendment to a party's statement of case at a case management conference or at any time on an application made to the Court having regard to the factors set out in CPR 20.1(3). Additionally, the 2nd Defendant would still have available to it the case management procedures of requests for further information and disclosure which would no doubt serve to clarify any further doubts about the Claimant's claim. Further, the Parties have not reached the stage in the proceedings whereby they are deploying evidence to support their respective cases. The Claimant will still have to evidence the facts pleaded in his statement of case at the appropriate stage in the proceedings.

[56] I am of the view that there are sufficient facts pleaded by the Claimant to ground a claim in tort against the 2nd Defendant. As was stated by the Court of Appeal and approved by the Judicial Committee of the Privy Council in **Desir and another v Alcide**[12] 'the modern rule is that a party is required only to plead sufficient facts which go to show the existence of a cause of action.' I am satisfied that the Claimant has done so.

Conclusion

[57] Having considered all of the foregoing matters, I believe they are sufficient to militate against the use of the Court's power to strike. At this stage, the case would benefit from case management as the strength (or weakness) of the Claimant's case would become clearer after further investigation including any

[11] [1999] 3 All ER 775.
[12] [2015] UKPC 24 at para. 23.

requests for information and the filing of a defence by the 2nd Defendant. Considering this and my earlier view expressed in relation to the provisions of the **Insurance Act**, I would refuse the 2nd Defendant's application to strike.

[58] I have noted that the 2nd Defendant's application to strike was filed the day before the deadline for filing its defence, effectively staying the proceedings. In the interest of smooth case management of this matter, I would also order that the 2nd Defendant files its defence to the Claimant's claim within 28 days of the date of this decision and order.

Costs

[59] The Claimant, having successfully resisted the 2nd Defendant's application, is entitled to his costs on the application, such costs to be assessed if not agreed within 42 days of the date of this Order.

Disposition

[60] I therefore make the following orders:

1. The 2nd Defendant's application to strike out the Claimant's claim against it is refused.
2. The 2nd Defendant shall pay costs to the Claimant to be assessed if not agreed within 42 days of the date of this Order.
3. The 2nd Defendant shall file and serve its defence within 28 days of the date of this Order.
4. The matter shall thereafter proceed in accordance with the **Civil Procedure Rules (Revised Edition) 2023**.
5. The 2nd Defendant shall have carriage of this Order.

[61] I wish to thank learned Counsel on both sides for their helpful oral and written submissions.

Carlos Cameron Michel
High Court Master

By the Court

Registrar