

**EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS
NEVIS CIRCUIT**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

Claim Number: **NEVHCV2009/0042**

Between

Jonathan David Christenbury

Claimant

-and-

**Keithley F.T. Lake
First Fidelity Trust Limited**

Defendants

Before: His Lordship Justice Ermin Moise

Appearances:

Mrs. Angela Cozier of counsel for the claimant

Mr. Brian Barnes of counsel for the 1st defendant

2021: March 10th, 11th
March 31st (closing submissions)
June 1st

JUDGMENT

- [1] **Moise, J:** This is a claim for damages and other orders and declarations on account of alleged fraudulent misrepresentations made by the defendants. The matter came up for trial on 10th and 11th March, 2021 at which point the court heard evidence from various witnesses. Counsel for both parties subsequently filed submissions in keeping with the court's order to do so. After reviewing the evidence and giving due regard to the submissions filed, I have determined that the claimant has not made out his claim. On that premise the claim is dismissed with costs to the 1st defendant, to be prescribed in accordance with the CPR. These are the reasons for my decision.

The Claim

- [2] In his Particulars of Claim, the claimant seeks the following relief:

- (a) an order declaring the JDC Family Trust invalid in accordance with Part 5, section 23 (1)(a) of the Nevis International Exempt Trust Ordinance No. 1 of 1994, as a result of the fraudulent misrepresentations of the defendants made through the unlicensed insurance company and/or its agents;
- (b) recovery of the sum of \$2,500,000.00US or the equivalent of \$6,750,000.00EC and an order tracing the claimant's funds and compelling the defendants to return to the claimant the said sum of \$2,500,000.00US or \$6,750,000.00EC.
- (c) Interest on the sum of \$2,500,000.00US or the equivalent of \$6,750,000.00EC from 23rd December, 2002 to date;
- (d) general damages for fraudulent misrepresentation;
- (e) costs;
- (f) such further and other relief as the court deems fit.

[3] Essentially, the claimant seeks the above orders on the premise that he was induced into investing in a trust structure in Nevis on account of the fraudulent misrepresentations of the defendants and/or their agents. Before addressing the actual facts of this case, it is important to highlight a number of issues which may affect the court's general assessment of what has been presented in evidence.

[4] The trial of this case has been delayed by approximately 12 years. In such instances, one of the effects of such an extensive delay is that the parties often take the opportunity to throw a number of facts and issues at the court which did not necessarily form part of the original pleadings and were not even disclosed at the initial stage of standard disclosure. With time, the nature and breadth of the litigation changes and evolves into something outside of the narrow scope of what had been pleaded in the first place. This makes it somewhat more challenging to properly identify the issues in the case and to filter out those which are not relevant to the outcome of the proceedings.

- [5] This claim is further compounded by the fact that none of the persons who were involved in the original discussions with Mr. Christenbury were presented to the court for cross examination. Unfortunately however, Mr. Christenbury has himself passed away prior to trial. In his place, Mr. Dwight Cozier appears with a power of attorney to represent the administrator of Mr. Christenbury's estate. The bulk of the evidence, which was provided by Mr. Cozier on behalf of the claimant, was hearsay and rather unreliable, as he was generally not in a position to answer a number of rather pertinent questions. Mr. Cozier speaks in some detail about events which transpired and the state of mind of Mr. Christenbury at a time when the two were not even familiar with each other. In cross examination Mr. Cozier accepted that there is no documentation stating that Mr. Christenbury had ever conveyed any of these facts to him personally. He states that whatever communication he would have had with Mr. Christenbury was in his capacity as an employee of the very law firm representing him in these proceedings. Mr. Cozier states that his witness statement speaks to the knowledge that he had because of the representations made to Cozier & Associates in terms of documents after the retainer was agreed. He also claims that he is aware of those facts because they were contained in Mr. Christenbury's witness statement, despite no such witness statement having ever been filed. What was filed was a witness summary which was never attested to by Mr. Christenbury.
- [6] From the onset I wish to state that this court does not accept this evidence in its totality. Although a witness summary had been filed by Mr. Christenbury, it cannot now be relied on due to his inability to appear to verify the content of the document and Mr. Cozier cannot certify its authenticity as he himself was merely an employee of the law firm which put that very witness summary together in the first place. This is almost tantamount to the law firm being attorney, litigant and witness in the same cause and amounts to a conflict of interest which had best been avoided.
- [7] It has become somewhat of a habit for Mr. Cozier to swear to affidavits and appear as a witness in cases and applications where the law firm he works for appears as counsel and in which he has no personal interest. However, I am of the view that consistently placing Mr. Cozier before the court as a witness in this way creates a most uncomfortable situation which the court must certainly speak out about and encourage counsel to avoid in the future. It must be observed that when a witness is put forward to the court, it is the duty of the presiding judge to assess the evidence presented by the witness and to rule on the reliability of the evidence and the witness himself. This is a duty which must not be compromised. Such an assessment by the judge can range from the court accepting the

witness as a truthful and reliable witness who gave cogent evidence, to a ruling that this witness was not only unreliable, but was rather dishonest and that he had lied to the court. The court wishes to ensure that its freedom to properly analyse the evidence and rule on the demeanour and integrity of the witness is not hampered by the relationship of proximity between the witness and counsel who appears, as well as chambers on record for either party. Such an approach, and the discomfort which it brings to the proceedings, should be reconsidered in the future.

[8] Notwithstanding this, in the interest of justice in general, the court will attempt to do what it can to distill the facts of this case from whatever admissible evidence is available. In the circumstances, the facts as outlined are as much as one can glean from the evidence as a whole, along with that which is not in dispute between the parties. Where Mr. Cozier's evidence is specifically rejected the court will be sure to indicate, but I do find that it is generally unreliable due to the nature of the case itself and the manner in which he claims to have had any knowledge of the events which transpired.

[9] The court will proceed to address the facts in a chronological order as they have occurred, including the procedural history of the dispute between the parties.

The Facts

[10] Mr. Jonathan David Christenbury was a Lasik Surgeon and resident of North Carolina, USA. He was the sole owner and operator of Christenbury Eye Center PA, which was a professional association formed in the state of North Carolina. It is apparent from the evidence that sometime in 2002, Mr. Christenbury enquired into the possibility of investing \$2,500,000.00US in an offshore trust structure. What is not entirely clear is the full extent of who exactly did Mr. Christenbury communicated with in order to obtain information regarding this type of investment. There is no evidence of him ever having spoken to Mr. Keithley Lake (the 1st defendant) and no evidence that Mr. Lake was directly involved in any way in the decision which Mr. Christenbury came to make. Yet substantively this is a case seeking to hold Mr. Lake personally liable for Mr. Christenbury's alleged losses.

[11] The evidence suggests that Mr. Christenbury was referred to a Terry Lustig (Mr. Lustig), who was an attorney at law from Dallas, Texas. It is also apparent from the evidence that Mr. Lustig introduced Mr. Christenbury to one Stephen Donaldson (Mr. Donaldson) who requested that they meet in the

Bahamas to discuss the nature and implications of Mr. Christenbury's intentions. In an email to Mr. Lustig dated 15th October, 2002, Mr. Donaldson stated as follows:

"I am looking forward to meeting with Jonathan. I'm sure we can accomplish everything at a single meeting in the Bahamas.

Since we will be using an insurance structure to create the tax savings, we will need to have him do a medical exam and stress test in the Bahamas. ..."

[12] There is little to no information as to what precise communication took place between Mr. Lustig and Mr. Donaldson. The Particulars of Claim contains no pleading as to the capacity in which Mr. Donaldson was to meet Mr. Christenbury and what exactly did they communicate to each other. In his witness statement Mr. Cozier states that Mr. Christenbury *"understood Stephen Donaldson to be an agent or representative of the 2nd named defendant and that their discussions would concern the benefits to him of establishing a Nevis asset protection trust in the island of Nevis with the 2nd named defendant, First Fidelity Trust, as trustee of the trust."* Whilst it is evidenced that Mr. Christenbury did discuss issues relating to the establishment of the trust, it is my view that Mr. Cozier is in no position to give evidence as to what Mr. Christenbury understood. At most he can say that this was what was conveyed to him; although even then he has admitted that these were conveyed to chambers with little credible evidence that he had even spoken to Mr. Christenbury about this particular issue. Taken in isolation, that is not enough evidence for the court to determine the precise nature of the communication which took place between Mr. Christenbury and Mr. Donaldson and in what capacity this communication took place.

[13] From the evidence it can also be gleaned that Mr. Christenbury had made a decision to at least set up the trust structure in Nevis after his communication with Mr. Lustig and perhaps even before his meeting with Mr. Donaldson. At the instance of Mr. Lustig, Mr. Christenbury sought a legal opinion from the law firm of Lord Bissell & Brook of Atlanta, Georgia. By way of letter dated 22nd October, 2002, Mr. Brian Casey of the Georgian law firm wrote to Mr. Lustig outlining the terms upon which the legal opinion would be provided. The evidence suggests that Mr. Christenbury agreed to those terms. By email dated 31st October, 2002, Mr. Casey conveyed the following to Mr. Christenbury:

“As a follow up to our discussion yesterday, and in response to your inquiry regarding the legal opinion, please note the following:

- 1. The Atlanta Law Firm (Lord Bissel&Brook) is working on the opinion, and should have it completed before your trip to the Bahamas. All parties understand that the opinion needs to be issued prior to you actually transferring any funds to your offshore trust. Although the Atlanta firm has issued opinions to other individuals on this same structure, your opinion letter will be customized to your specific fact pattern (which is one reason I need your tax returns), so that you are able to rely on their written opinion as it relates to your situation. This law firm is one of the top firms in the country on these types of structures, which is why we use them. If you want, you can check them out at ...*
- 2. You can check out the resort in the Bahamas on their website ...*
- 3. When you meet with Steve, he will have illustrations that show you the income tax advantages with this structure, and how moving assets to this structure it can lower your 2002 income taxes (by generating a 2002 deduction), as well as lower income taxes in future years. The illustrations that Steve will prepare will show you the exact income tax savings, based on the amount of assets you will place in this structure. The opinion letter will support these deductions. You will then be able to make an informed decision on how much to place in this structure to save income taxes.*
- 4. You need to also keep in mind that in addition to the income tax savings, assets in your offshore trust are not subject to US judgments or court orders, whether from a malpractice creditor, a divorce proceedings, or otherwise. Finally, by way of clarification, the offshore trust does not avoid estate tax due at your death (it is estate tax neutral), which is why you will continue to need life insurance so that your kids can pay this tax.”*

[14]As it relates to this email, I make one observation here (with the caveat that no one associated with it was before the court to clarify any of the issues contained therein). It appears that Mr. Christenbury may have been concerned here with ensuring that the structure which was set up in Nevis would have allowed him to avoid some measure of taxation by the authorities in the United States. There

also appears to have been a concern with the reach of the US courts insofar as the enforcement of a potential judgment is concerned. That much seemed to have been a concern of Mr. Christenbury, enough to have it addressed in a number of correspondences between himself and Mr. Lustig as well as the opinion from Lord Bissell & Brook.

[15] Insofar as the correspondence between Mr. Christenbury and Mr. Lustig are concerned, I make further reference to two letters, both issued by Mr. Lustig on 4th December, 2002. One is addressed to Mr. Christenbury and states as follows:

Dear C:

Enclosed is a binder containing copies of your offshore documents that you signed on November, 29, 2002.

As you know, in order to receive the tax benefits and deductions in 2002, the funding must occur prior to December, 31, 2002.

*In that regard, I will need to get with you to go over the mechanics of wire transferring funds from Christenbury Eye Center, P.A. to the Nevis Trust Company, and the transfer from the trust company to **the investments of your choice maintained outside of Nevis (e.g. the 8% Fixed Income 5 year fund)** (my emphasis). Since December, is a very hectic month, and there are many “down days” in both the US and the foreign banking system, it is best we handle this as soon as possible.”*

[16] The other letter of the same date was written by Mr. Lustig to Mrs. Sharon Brantley, who was at the time an employee of the 2nd defendant. The letter states as follows:

Dear Sharon:

Enclosed please find executed originals for the following:

1. JDC Family Trust, a Nevis asset protection trust;
2. Completed Trust Application for JDC Family Trust;

3. *Christenbury Business Protection Company, LLC a Nevis Limited Liability Company- Operating Agreement; and*
4. *Completed LLC Application for Christenbury Business Protection Co, LLC.*

Please register the trust and LLC in Nevis as soon as possible, and furnish me with executed copies of the Certificates of Registration, and Trust Deed and Operating Agreement, duly executed by the Trust Company.”

[17] The first observation to be made here is that these documents, which appeared to have been designed to establish the various components of the trust structure, were executed on 29th November, 2002. These also appeared to have been registered upon the instructions of Mr. Lustig, acting on behalf of Mr. Christenbury. This is important for two reasons. Firstly, there is no evidence of Mr. Keithley Lake being involved in the decision to register these companies up until that point. Mr. Lustig’s communication did not include Mr. Lake. Secondly, the opinion from the law firm of Lord Bissell & Brook was not obtained by Mr. Christenbury until 18th December, 2002. There is also no evidence that he had even met with Mr. Donaldson by that date. I appreciate that as at 29th November, 2002, Mr. Christenbury may not have transferred any money into the trust structure, but he was at least satisfied that the structure could have been set up even before the representations made in the opinion which he received on 18th December, 2002 were conveyed to him.

[18] I make this observation to note, even at this early stage, that the actual incorporation of the JDC Family Trust does not appear to be controversial in any way. There is also little to indicate that the trust was set up on any representation which the defendants had made to Mr. Christenbury or his agents, but rather on the direct instruction of Mr. Lustig, who acted as Mr. Christenbury’s agent in the matter. It is perhaps one reason the court would state from the onset that it sees no basis for an order declaring the JDC Family Trust to be invalid on account of any misrepresentation made by the defendants.

[19] One other important feature of the correspondence is that the trust structure retained for Mr. Christenbury the right to transfer from the structure to ***investments of [his] choice maintained outside of Nevis***. This is a fact which has a significant bearing on the proceedings and to which I

will also return later on in this judgment; as it appears that a significant portion of this investment was managed upon Mr. Christenbury's own instructions and not on the basis of any representations made to him. I turn now to the opinion of Lord Bissell & Brook.

[20] This opinion is dated 18th December, 2002. Much of the substance of this case hinges on it and the role it played in inducing Mr. Christenbury into investing in the trust structure. The court will not replicate the opinion in full, but rather refer to important parts of it. It would suffice to state however, that the court has had sight of the entire document (or at least so much of it as was disclosed in these proceedings) and has read the content in full. The opening paragraph of the letter states as follows:

"You have requested our opinion that, based solely on the summary of proposed transaction and statement of factual assumptions set forth expressly below and subject to all the other assumptions, limitations, qualifications and restrictions contained therein, it is more likely than not that, (1) the taxpayer (as defined below) will be entitled to a federal income tax deduction under section 162 of the code (as defined below) for the amount of the insurance premiums that will be paid by the tax payer to fidelity insurance company limited pursuant to the business risk policy (as defined below) for the 2002 taxable year and; (2) the transaction (as defined below) will constitute a tax shelter within the meaning of section 6111 (c) (1)."

[21] I pause here to repeat my earlier observation that Mr. Christenbury appeared to be concerned with the tax implications of his investments; and in particular the insurance component thereof. That appears to have been the primary purpose of him obtaining this opinion from the firm of Lord Bissell & Brook. That opinion was signed by Mr. Brian Casey, who himself had had discussions with Mr. Lustig on the matter. The tax issue may very well influence the court's perception of some of the other evidence which counsel for the claimant would wish for the court to consider in her quest to introduce a judgment from a criminal court in the United States of America. I will return to that issue later on.

[22] The opinion of Lord Bissell & Brook goes on to highlight the proposed transaction and statement of factual scenarios which informed the conclusions of the law firm. In there the substance of the structure established by Mr. Christenbury was highlighted. It was noted that:

“the taxpayer will purchase, through the payment in 2002 of an amount of cash premium, calculated on an arm’s length, actuarially sound basis, in Freeport, Grand Bahamas, Bahamas, the business risk policy in the form attached hereto, having a coverage period of December, 31, 2002 to December, 31, 2003 ... from Fidelity Insurance Company Limited, a stock insurance company organized under the laws of Saint Vincent and the Grenadines (Fidelity). The Taxpayer will purchase the business risk policy through Christenbury Business Protection Co. LLC ... a Nevis Limited Liability Company. Christenbury LLC will be wholly owned by Taxpayer and will be treated as a disregarded entity for federal tax purposes. The purpose of Christenbury, LLC is to provide risk management services and purchase risk insurance for itself and the taxpayer under the business risk policy...”

[23] I note at this stage, that the opinion does not represent that the insurance policy would be issued out of Nevis. Much of the submissions put forward by counsel for the claimant take issue with the fact that Fidelity Insurance Company Limited was not licensed to do insurance business in Nevis. However, this opinion seems to indicate that Mr. Christenbury was never made to believe this. Rather, it suggests that what was represented was that the insurance would be purchased in the Bahamas through Fidelity Insurance Company Limited, which was a stock insurance company organized under the laws of Saint Vincent and the Grenadines. The insurance was not even to be purchased directly by Mr. Christenbury but by Christenbury LLC. The opinion then goes on to describe the types of risk which was understood to be covered by the insurance policy. Insofar as the premiums were concerned the following was stated:

“The cash insurance premiums that will be received by Fidelity from the taxpayer for insurance provided by Fidelity under the business risk policy will become part of the general assets of Fidelity. Subsequently, Fidelity will enter into a written excess of loss reinsurance on a 95%/5% excess of loss indemnity reinsurance basis, the risk insured under the risk insurance policy with Federation Re Limited, a re-insurance company that is organized and existing under the laws of Nevis.”

[24] I pause at this stage to outline what I understand to be the nature of the various entities referred to so far in this opinion and their relationship to the defendants in this case. This will shed further light

on the relevance of the opinion to the substance of this dispute between the parties. I have already highlighted the various entities which were incorporated at the instance of Mr. Lustig, acting on behalf of Mr. Christenbury. As far as the evidence will allow me to, I will now examine the nature of Fidelity Insurance Company Limited, Federation Re and First Fidelity Trust Limited.

[25] Fidelity Insurance Company Limited (FIC) is an international insurance company originally registered in Saint Vincent and the Grenadines. The incorporation documents (memorandum of association) exhibited at the trial lists the directors of that company as Mr. Duane Chrithfield, a citizen of the United States, Mr. Keithley Lake, a citizen of Anguilla and 1st defendant in this case, and Mr. David Davidson, who is also a citizen of the United States but of whom no further information has been provided to this court. Mr. Lake, in his witness statement, states that FIC obtained its international insurer's license in Saint Vincent and the Grenadines on 16th October, 2000. He exhibits this license and I see no reason to doubt him. That company was later re-domiciled in Anguilla in 2003, with the directorship remaining the same, except that Mr. Davidson was replaced by Mr. Mark Brantley of Nevis. The incorporation documents were again exhibited and I accept them as proof of Mr. Lake's representations to the court.

[26] Counsel for the claimant introduced documentation to show that FIC was never licensed to do insurance business in Nevis. In his oral evidence before the court Mr. Lake readily accepted that. He asserts that this was never the case. When pressed with a document issued from FIC with its address labeled as the same used by the 2nd defendant in Nevis, Mr. Lake states that he could not speak to why the document was so labeled as he had no involvement in day to day management affairs of FIC. His assertion was that FIC operated out of Saint Vincent and the Grenadines and later in Anguilla and never out of Nevis. I note that this was somewhat contrary to one statement made in Mr. Lake's pleaded defence¹. However, taking the evidence in its totality, I accept Mr. Lake's representations in oral evidence as being truthful, at least insofar as his own knowledge is concerned. FIC was not designed to sell insurance in Nevis and was not represented as such to Mr. Christenbury.

[27] I accept Mr. Lake's evidence as I am of the view that the opinion of Lord Bissell & Brook does not contain any allegation that the insurance policies issued by FIC were to be issued in Nevis or under

¹ See paragraph 9(1) of the defence

the licensing laws of this jurisdiction. That does not appear to be a representation made upon which any reliance was placed. What was stated was that the various entities were to ensure that the agreements between them as it related to the business risk policy were to be enforceable under the laws of the various jurisdictions, including Nevis. That is not the same as suggesting that Nevis, as a jurisdiction, was to issue any license to operate insurance business in that country. It seems to me to have been clearly understood that the policies of FIC would have been issued in Saint Vincent and the Grenadines and the Bahamas. The question of whether those were scrupulous policies is a different issue, but on balance I find that the company was in fact licensed, albeit in another jurisdiction.

[28] From the evidence it is apparent that Federation Re was a re-insurance company duly incorporated in Nevis on 6th October, 2000. It was originally named Lloyd's Underwriters Ltd and renamed to Federation Re on 13th July, 2001. There is not much evidence presented to this court as to who was behind this company and what direct involvement or connection it had with the parties to those proceedings other than that which was mentioned in the opinion of Lord Bissell & Brook and the brief description outlined in Mr. Lake's witness statement. Although reference had been made to the incorporation documents of Federation Re in the bundles filed, the documents themselves were not attached. For what it's worth, based on the evidence presented, I see no direct connection between Federation Re and Mr. Lake in terms of his involvement with that company and any representations which had been made to Mr. Christenbury regarding re-insurance.

[29] All of these companies are separate entities from First Fidelity Trust Limited (FFT), which is the 2nd Defendant in this matter. FFT is a trust company incorporated under the laws of Nevis and set up for the purpose of managing offshore trust structures for its clients. I understand Mr. Lake to have been the managing director of FFT. Both FFT and FIC are now defunct and it was Mr. Lake's evidence that he would not be surprised if they were struck off the register in 2015, as by that date the companies had not been in operation for quite some time. Though evidence of them being struck off the register has been presented by the claimant, no evidence is presented to show precisely why this step was taken.

[30] Having established the broad nature of these entities as best as I can, I return to the opinion of Lord Bissell & Brook. That opinion states that the conclusions drawn and submitted to Mr. Christenbury

were based on a total of 37 representations, which I will not repeat in full. In the pleadings the claimant takes issue with the following representations in particular:

- (a) That Fidelity Insurance Company Limited is a corporation duly organized and in good standing under the laws of Saint Vincent and the Grenadines;*
- (b) That Fidelity Insurance Company Limited is a life insurance company duly licensed and in good standing and regulated as such under the laws and regulations of Saint Vincent and the Grenadines and is authorized to sell, issue and deliver the life insurance policy;*
- (c) That Fidelity Insurance Company Limited is also a property and casualty insurance company licensed and in good standing and regulated as such under the laws and regulations of Saint Vincent and the Grenadines and is authorized to sell, issue and deliver the business risk policy;*
- (d) That Fidelity Insurance Company Limited is duly authorized to issue the life insurance policy and the business risk policy;*
- (e) That the life insurance policy will qualify as a life insurance contract under the laws of Saint Vincent and the Grenadines and Nevis, the domiciliary jurisdiction of the trust;*
- (f) that the business risk policy will constitute a property and casualty insurance policy under the laws of Saint Vincent and the Grenadines and the Bahamas, where the Business Risk Policy will be sold, issued and delivered to the taxpayer;*
- (g) That Fidelity and the trust, the parties to the life insurance policy, and Fidelity and the tax payer and Christenbury, LLC parties to the business risk policy will observe all the terms and conditions of the business risk policy and the life insurance policy in both substance and effect;*
- (h) That the re-insurer, Federation Re, is a corporation duly organized and in good standing under the laws of Nevis and is authorized to enter into the reinsurance agreement;*
- (i) that all necessary corporate action will be taken by each of Fidelity Insurance Company Limited and the re-insurer to authorize the reinsurance agreement and the re-insurance agreement will constitute a binding contract between Fidelity Insurance Company Limited and the re-insurer*

enforceable by Fidelity against the re-insurer in accordance with its terms under the laws of Saint Vincent and the Grenadines and Nevis;

- (j) that the guarantee will be a binding contract between SA 0234, LLC and the re-insurer under the laws of Nevis enforceable by the re-insurer against SA 0234, LLC in accordance with the terms of the guarantee;*
- (k) That the risks that will be insured under the business risk policy are risks of the taxpayer and Christenbury, LLC and not risks of the shareholder (the claimant). The shareholder, the Claimant will not be an insured or additional insured under the policy.*

[31] As it relates to the representations contained in the opinion, Mr. Casey goes on to state as follows:

“In rendering our opinions therein, we have reviewed the representations and advice, including financial information, from various parties to the transaction and made certain assumptions, which representations, advice and assumptions are referred to herein. We have examined such documents, and we have made such other inquiries of owners, directors, officers and representatives of the entities involved in the transaction, as we have considered necessary to render the opinions set forth herein. We have made no independent verification of any such representations, advice, assumptions, documents and responses to such inquiries.”

[32] I note here that these representations relate directly to the insurance component of the trust structure.

Much has not been represented here about the JDC Family Trust and FFT in any detail. The opinion seemed to have been centered on the tax implications of taking out a business risk policy as well as a Life insurance policy with FIC. The claimant asserts that, based on these representations, Mr. Christenbury was advised that it was safe to make this investment. On 23rd December, 2002, Mr. Christenbury transferred the sum of \$2,500,000.00US to an account at the National Bank of Anguilla in the name of FFT. On that same date a letter of wishes was also sent to FFT with specific instructions on what was to be done with the funds. FFT was directed to transfer the sum of \$500,000.00US to FIC as a premium towards the Business Risk Policy for the LLC. The sum of \$2,000,000.00US was to be transferred to Westminster Hope and Turnberry Ltd (Westminster Hope). I understand these wishes to have been carried out by FFT as it was instructed to.

[33] It is important now to further place these transactions into context. As far as one can glean from the evidence, FFT was never instructed to retain Mr. Christenbury's money. It was a trust management company which apparently was designed to specifically follow the instructions as to where the funds were to be placed. FFT was the trustee for the JDC Family Trust which itself was established even before the opinion from Lord Bissell & Brook was obtained. Insofar as the Business Risk Policy is concerned, there is no evidence on the court's record that FFT was ever directly involved in advising Mr. Christenbury about the benefits of such a policy. The same can be said for the life insurance policy. Although the opinion of Lord Bissell & Brook states that the firm had *made such other inquiries of owners, directors, officers and representatives of the entities involved in the transaction*, it does not fully identify who these entities were or who, among the directors were part of this enquiry.

[34] It is apparent that no documentation was provided to Mr. Christenbury substantiating these assertions, as the opinion itself made it clear that no independent verification took place. The opinion does not even state that every director of these entities was consulted, but rather such persons as the firm saw fit to consult with. Even as the contentions and prospect of litigation grew, Lord Bissell & Brook refused to provide any further information than the scant representations made in its opinion. The court can find no evidence that Mr. Lake, or even FFT for that matter, was involved in those discussions. Mr. Lake asserts that he was not and, after considering all of the evidence presented in this case, I accept his evidence as being the truth.

[35] As it relates to the investment of \$2,000,000.00US in Westminster Hope, I return to an issue of fact outlined in paragraph 19 of this judgment. The court referred to a statement from a correspondence of Mr. Lustig to Mr. Christenbury on 4th December, 2002. There Mr. Lustig states that the trust structure would incorporate ***"investments of [Mr. Christenbury's] choice maintained outside of Nevis (e.g. the 8% Fixed Income 5 year fund)***. In his evidence, Mr. Lake asserts that these investments were made on the instructions of Mr. Christenbury, in accordance with his letter of wishes. I note that up until this point, nothing in the evidence suggests that Westminster Hope was an unsound or unscrupulous investment. The claimant provided no pleading or evidence of what this company was and what it was designed to do, despite the fact that it was Mr. Christenbury who instructed that his funds be transferred to that entity. There is evidence on the record that Mr. Christenbury had spoken directly to the President of Westminster Hope. There is no link established

between FFT, Mr. Lake and Westminster Hope other than the fact that \$2,000,000.00US was initially invested there upon Mr. Christenbury's instructions. It is appreciated that this is a case of fraudulent misrepresentation, rather than one of actual fraud in the management of the funds, but for reasons which I will explain later, this is an important fact in the broad context of this case as there appears to have been nothing fraudulent about this transaction and it was not made upon any representation of the defendants in any way.

[36] In his witness statement, Mr. Lake states that by letter of wishes dated 15th April, 2003 Mr. Christenbury requested that the \$2,000,000.00 which was invested in the 8% fixed account be used for the initial premium payment for the claimant's life insurance policy issued by FIC. He goes on to state that the life insurance policy was executed between Mr. Christenbury and FIC for the benefit of Mr. Christenbury and by his instructions on 14th April, 2003. Those instructions were carried out and Mr. Lake states that FFT advised Mr. Christenbury that the interest should remain in the trust and this initial premium payment should be reinvested in the 8% Fixed Account. I confess, for my part, that I am unclear as to the true financial implications of that evidence. Very little effort was made, even in cross examination, to clarify what Mr. Lake meant as it related to the letter of wishes dated 15th April, 2003. It seems to me that an additional investment was made out of the \$2,000,000.00 into the life insurance policy. As to exactly how much was paid, it is somewhat unclear, as the evidence suggests that there remained a substantial amount of money invested with Westminster Hope.

[37] At this point it appears that the defendants were acting on Mr. Christenbury's instructions and there was generally no complaint about the management of the funds. That changed on 12th September, 2003 when the law firm of Lord Bissell & Brook wrote to Mr. Christenbury resiling from the opinion which it had issued to him in December, 2002. In that letter, Mr. Brian Casey notes that "*subsequent to the issuance of the opinion, we have learnt that some of the material facts regarding the BP Policy and the related reinsurance and guarantee structure do not appear to be as they were represented to us as stated in the opinion and in related representation letters provided to us in connection with our issuance of the opinion.*" This court is not privy to the representation letters to which Mr. Casey refers. He however goes on to give more detail about his concerns. He states as follows:

"There are a number of respects in which material facts regarding the BP Policy and the related reinsurance and guarantee structure do not appear to be as they have been represented to us.

Most importantly, perhaps, it was represented to us that the Company retained all liability for the first 5% of any losses under the BP Policy, and that an independent third party reinsurer ... retained all liability for 20% of any losses in excess of the first 5%. We now have reason to believe that these representations may not have been true at the time we prepared the opinion. It now appears that all or nearly all losses insured under the BP Policy were intended to be funded by the limited liability company in which the insurance premiums paid for the select investment plus variable life policy issued by the company to the family trust 1 were invested. This circumstance would provide the tax payer with an incentive not to file claims for losses covered under the BP Policy, with the result that the BP Policy potentially lacks sufficient substance to support the opinion.”

[38] I observe that the allegations here do not suggest that FIC was unlicensed and incapable of issuing such policies. Mr. Casey's concerns rested more so on the substance of the policy issued and its effect on Mr. Christenbury's tax obligation to the US Federal Government. Mr. Casey expressed the concern that *“the Company may not have taken all life insurance premiums into account when testing the life policy for compliance under section 7702 of the Code, with the result that, contrary to the company's representations to us, the life policy may not have complied with section 7702.”* The Company to which Mr. Casey refers is stated to be FIC. He makes no allegation against FFT or Mr. Lake. Mr. Casey then goes on to state that Lord Bissell & Brook would not have issued the opinion had these representations not been made.

[39] It appears from the evidence that the concerns raised in this opinion prompted Mr. Christenbury to seek a termination of the trust structure and all underlying policies. In an email dated 7th January, 2004, Mr. Christenbury wrote to one Steve Foster and copied Mr. Terry Lustig. Mr. Christenbury notes in that email that his firm and final objective was the termination of the trust structure. He states however that *“the only concern I have at this time is the rather high level of fees which I am being informed that I will incur in this respect.”* He goes on to request a reduction in those fees.

[40] In a letter dated 16th January, 2004, Mr. Lustig acknowledges Mr. Christenbury's desire to terminate the trust and informs him that he had communicated with FFT and its agent in the US with a view to facilitating this request. He goes on to advise Mr. Christenbury on ways in which he can minimize

and/or eliminate the early redemption fee. However, the following comment in Mr. Lustig's letter is of importance to an assessment of the facts in this case:

"As you know from the documentation provided to you and Chris Frederick by the institution where your funds are invested, Westminster Hope and Turnberry, there is a 90 day early redemption call period before the investment can be redeemed. This would cause a timing problem with your deadline of next Wednesday. Given the fact that you know and have visited personally with the president of Westminster Hope and Turnberry, Mr. Charles D'Angelo, I have suggested to you and to Chris Frederick that you visit directly with Mr. D'Angelo, to see if the 90 day call period can be waived, and see further if he would consider waiving a portion of the interest reduction as a result of your early redemption. I have told Mr. D'Angelo to expect your call."

[41] This is an important aspect of the evidence for a number of reasons. As I have indicated earlier, there is no allegation being made here against Westminster Hope and Turnberry. There is no suggestion that either defendant or their agents had advised Mr. Christenbury to have his money invested in that institution through the trust structure. On balance I find this investment to have been made on Mr. Christenbury's own volition. This investment also appears to have very little connection to the insurance component of the trust structure for which concerns were now raised by Lord Bissell & Brook. Therefore, despite the concerns raised with Mr. Christenbury, he seems to have been perfectly aware that the termination of the trust structure to the point where all of his funds were returned to him must have been hampered by the financial implication imposed by Westminster Hope. This was not merely a demand of FFT, but rather a feature of the investment which he himself had directed FFT to make. It is also unclear to me as to whether Mr. Christenbury had ever taken Mr. Lustig's advice and met with Mr. D'Angelo in an attempt to reduce the reductions made on account of his early redemption of the investment.

[42] Secondly, the content of Mr. Lustig's letter lends credence to Mr. Lake's own evidence at paragraph 35 of his witness statement where he states that *"the defendants ... were not in possession of the claimant's trust funds, and in any event could not release same without complying with the agreed termination protocols."* Before addressing Mr. Lake's evidence on that issue in more detail I turn to the witness statement of Mr. Dwight Cozier where he addresses this issue. I note however, that what

Mr. Cozier had to say is rather unreliable as his direct knowledge on these discussions is rather limited.

[43] At paragraph 33 Mr. Cozier states that *“the letter of wishes addressed to the 2nd defendant also authorized the 2nd defendant to transfer the amount of \$2,000,000.00 to an 8% per annum fixed interest bearing account administered by the 2nd defendant on behalf of the JDC trust.”* That much is not controversial, as Mr. Lake readily accepts this and the evidence is that these instructions were followed. However, Mr. Cozier goes on in paragraph 38 to state that after a conversation with Mr. Lustig on the issue of the redemption *“the claimant’s understanding from this was that any penalties to be charged from this policy for early redemption would be charged on the 8% yield and not on the principal funds invested. As he was to discover later, however, the early redemption fees were instead deducted by the 2nd named defendant from the trust fund, namely the 2 million dollars.”*

[44] In cross examination however, Mr. Cozier vacillated somewhat on the question of precisely what Mr. Christenbury knew about this investment. He stated at one point that Mr. Christenbury did not know where his money was when the evidence was quite clear that some of the money was invested in Westminster Hope at his instructions and the remainder in the various insurance policies taken out with FIC. Letters from Mr. Christenbury’s lawyer, Mr. Lustig, clearly show that he was aware that the bulk of his money had been invested in Westminster Hope which would require some form of penalty for early redemption of the investment. Given the relatively high interest rate, even a penalty on the interest may very well be somewhat significant. It also appears that Mr. Christenbury had met with the president of Westminster Hope to discuss his investment; or at least he was advised to do so by Mr. Lustig. If that did take place, there is no disclosure on the record as to the nature of those discussions and to precisely what Mr. Christenbury was told about the penalties involved in the early liquidation of that particular investment. It is also apparent that some of the \$2,000,000.00US initially invested may have been diverted to the life insurance taken out with FIC on Mr. Christenbury’s instructions in April, 2003.

[45] In light of this, I continue to express grave concern about the veracity of this evidence given by Mr. Cozier. This is hearsay evidence which is clearly of little assistance in determining salient issues relating to the transactions under review. It appears to me to be entirely unjust for the court to rely on Mr. Cozier as the source of that information as the defendants were simply not parties to any of these

conversations with Mr. Lustig, Mr. Christenbury and the President of Westminster Hope. As has been complained of by counsel for the 1st defendant, this evidence is tenuous and the defendants simply cannot properly cross examine Mr. Cozier on what may have been the state of mind of Mr. Christenbury at the time and what had actually induced him into entering into the various arrangements. These highlight some of the gaps in the evidence which the court finds difficult to reconcile without Mr. Christenbury or anyone on his behalf being present and able to speak more directly to them.

[46] On the other hand, Mr. Lake stated in cross examination that Westminster Hope was not selected by FFT but rather by Mr. Christenbury. He stated that the relationship was negotiated directly between Mr. Christenbury and Westminster Hope and the nature of that structure was developed outside of any input from FFT. Indeed there is no evidence that FFT encouraged that investment or initiated the placement of Mr. Christenbury's funds there. Yet that was the bulk of the investment made into the trust structure. According to Mr. Lake, the difficulty arose when Mr. Christenbury requested the return of his money. He states that *"we went to Westminster Hope and they said that they were entitled to redemption fees under the agreement. Dr. Christenbury would not sign the standard waivers."* When balanced against what Mr. Lustig himself had to say in his correspondence to Mr. Christenbury, I accept the evidence of Mr. Lake and find that at least some of what was being held back in redemption fees was a demand from Westminster Hope and not entirely from FFT or FIC.

[47] On 4th February, 2004, Mr. Christenbury wrote to Mr. Lustig demanding that all funds in the JDC Family Trust be transferred into an account of his choice. He also modified his initial desire to terminate the trust structure but now requested that FFT be replaced as the trustee of the JDC Family Trust. He appears to have been of the impression that without the need to terminate the trust the release provided for by the trust deed would no longer be required. He attached to that letter his letter of wishes directed to FFT in which he states that *"I would like all funds currently invested in Westminster, Hope and Turnberry in the Fixed 8% account to be liquidated."*

[48] The court has been presented with an email from Mrs. Sharon Brantley to a Mr. Chris Frederick, who I understand to be a legal representative of Mr. Christenbury. Mrs. Brantley acknowledged receipt of Mr. Christenbury's letter of wishes and stated that *"the agreement to transfer assets and release will no longer be applicable based on the amendment to the letter of wishes. However, a transfer to*

another trustee will require drafting new documents. In order to do this we will need the name of the new trustees, the address of the new trustees and the new jurisdiction.” In a further email dated 24th February, 2004 further information was requested from Mr. Christenbury and a JDC Family Trust termination summary was presented. It is apparent from that document that the amount of \$2,121,797.73 would be paid to Mr. Christenbury. The document also seems to indicate that the sum of \$1,698,706.10 was redeemed from the Westminster, Hope and Turnberry Trust and \$424,653.36 was redeemed from the insurance policy investments with FIC.

[49] From there the parties remained at variance regarding the liquidation of these assets. On 10th March, 2004 Mr. Christenbury wrote to Mr. Lake complaining that the sum of \$378,202.27 was being forfeited to FIC. He asserts that Mr. Lake was aware that his intention as the Grantor of the JDC Family Trust was to grow and protect his assets. Mr. Christenbury also asserted that in accordance with *“[your] advice as trustee an insurance scheme using Fidelity Insurance Company Limited as the insurer was devised, ostensibly to satisfy this objective.”* He went on to state that he had now become aware that Mr. Lake was the managing director for both FFT and FIC. He refused to sign any release documents until all of his money was returned to him.

[50] Mr. Lake responded on 11th March, 2004. He denied that FFT had ever given advice to Mr. Christenbury about his investments. It was his assertion that the company had only acted on the instructions of Mr. Christenbury, who in turn made his decisions based on his own advisors’ input. Mr. Lake goes on to state that Mr. Christenbury was *“specifically advised on more than one occasion that early redemption penalties would apply if [he] terminated the insurance policy.”* This appears to me to be an additional redemption fee to that imposed by Westminster Hope, since Mr. Lake refers directly to the policy here. Mr. Lake also denied being the managing director of FIC. When presented with a document from FIC in which Mr. Lake was represented as the managing director, he states that this was an error and questioned whether it was his signature on the document. He states that this error had since been rectified. It was his evidence that he was never involved in the day to day management of FIC. He was merely a director and would sign documents and engage when called upon to do so. He acknowledged that he was the Managing Director of FFT.

[51] Having examined the evidence in total, I accept Mr. Lake’s evidence that he was not the managing director of FIC, especially in light of the fact that Mr. Duane Chrithfield acknowledged that it was he

who acted as executive director and president of FIC. I also accept Mr. Lake's evidence where he refutes what Mr. Christenbury had to say about the advice given to him. The assertion in the letter of 10th March, 2004 that the insurance policy was set up on the advice of Mr. Lake or FFT is not substantiated. There are far too many documents to indicate that this investment was made on the advice of Mr. Lustig and the opinion of Lord Bissell & Brook and after discussions with Mr. Donaldson. There is no evidence that Mr. Lake or FFT were involved in advising on such issues.

[52] At this stage, I wish to make some further observations as it relates to the content of the last two letters referred to and their relevance to the issues in this case, given certain specific questions put to Mr. Lake by counsel for the claimant in cross examination. Counsel pointed to clause 38(g) of the trust deed which indicated that the redemption fees would not be charged if the trust was being liquidated on account of fraud. However, up until Mr. Christenbury's letter of 10th March, 2004, the court can find no evidence that his attempt to liquidate the investments were communicated to FFT as being for any specific cause, much less fraud. To my mind, there must surely be a distinction between the rescinding of the agreements establishing the trust structure as a result of some allegation, such as fraudulent misrepresentation, on the one hand and the mere liquidation of the trust assets and termination of the trust in keeping with the agreement on the other. Indeed, the relationship of trustee and beneficiary is one founded on the principles of utmost good faith. One would be perfectly entitled to demand the rescinding of a trust arrangement if it turns out that this duty has been breached. However, that is separate and apart from a letter of wishes demanding the liquidation of the trust and termination of the trust structure in keeping with the arrangements. The two cannot be conflated in this way.

[53] It seems to me that Mr. Christenbury in his letter of wishes and his emails to Mrs. Brantley did not attempt to rescind the agreement on allegations of misrepresentation; nor did he do so on allegations of fraudulent breach of trust in keeping with section 38(g) of the trust deed. The evidence suggests to me that the letter from Lord Bissell & Brook dated 12th September, 2003 was written to Mr. Christenbury. He certainly had discussions about it with Mr. Lustig and the court can find some evidence that Mr. Donaldson knew about it as he had written to Mr. Christenbury in an attempt to defend the integrity of the investment. Mr. Lustig also referred to a letter of 6th January, 2004 which was not exhibited in this case. However, despite the concerns arising from the rescinding of the opinion of Lord Bissell & Brook, it is entirely unclear to me as to whether FFT had ever been directly

confronted with the specific allegations of fraudulent misrepresentation contained in the letter of Lord Bissell & Brook as the basis for the liquidation of the trust. It is unclear as to whether FFT had ever responded to such allegations prior to Mr. Christenbury's demands. Save for the fact that Mr. Christenbury refused to sign the release waivers, the communication simply did not state that the arrangements were to be terminated on account of fraudulent misrepresentation or fraudulent breach of trust as is provided for in section 38(g) of the trust deed.

[54] Mr. Christenbury had expressed some concern that the redemption fees he had to pay were too high and sought an alternative route to obtaining his money while simply replacing FFT as the trustee. Indeed in another letter dated 22nd March, 2004, Mr. Christenbury stated that the request for removal of the trustee was in keeping with clause 34 of the trust deed and not 38 as FFT had previously intimated. He did not raise the allegations of misrepresentation as his motive for doing so in his correspondence with Mrs. Brantley. On balance, I find that, at least up until that point, the liquidation of the trust was to take place within the terms of the contractual arrangements then in place, of which the redemption fee appears to have been a fundamental part. The issue at that point seems to be more associated with an interpretation of the deed and the contractual obligations of the parties upon the retirement of the trust, rather than the issues of misrepresentation which forms the basis of this case. These should not be conflated, as notwithstanding the letter from Lord Bissell & Brook the evidence does not suggest that Mr. Christenbury was attempting to do anything other than liquidate the trust and terminated the arrangements within the provisions of the trust deed rather than for cause/fraud; at least up until his letter of wishes and further correspondence between him and FFT in March of 2004.

[55] It is at this point that the divergent views of the parties took a rather more litigious turn. Mr. Christenbury sought the assistance of counsel who wrote letters to FFT and various entities on his behalf. This eventually resulted in the lodgment of a claim in the High Court in Nevis against FIC, FFT and Mr. Lake. Although the pleadings in that case were not exhibited, a judgment rendered by the court on 15th May, 2007 was disclosed and insofar as the issues raised by the defendants are concerned, the court intends to give some regard to this judgment as they have sought to rely on the doctrine of res judicata. I say so with the one caveat that the issue of res judicata was not pleaded in the defence but rather raised in witness statements and legal submissions. However, insofar as the

chronology of the events in this case is concerned, a brief mention of that earlier case remains relevant.

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[56] As I indicated earlier, Mr. Christenbury eventually retained the services of counsel to pursue a resolution of the dispute. After a series of legal letters, a claim was filed on 17th July, 2004 (The 2004 claim). The parties to the claim were Christenbury Eye Center, Christenbury Business Protection LLC and Jonathan David Christenbury as claimants and First Fidelity Trust Limited, Fidelity Insurance Company Limited and Keithley Lake as defendants. Essentially, with the exception of FIC the defendants are the same as in the present claim. From what has been presented to me it appears that, save for the fact that the claimant has abandoned a pleading of negligent misrepresentation and breach of trust, the remedies sought in the 2004 claim are identical to the relief being sought in the particulars of the present claim.

[57] On 1st April, 2005, FFT and Keithley Lake filed an application for an order striking out the 2004 claim against them. The application was heard on 14th December, 2005. A decision was unfortunately not rendered until 15th May, 2007, when the court agreed with these two defendants and ordered that the case against them be struck out. In his closing submissions, counsel for the 1st defendant referred the court to a number of authorities on the doctrine of res judicata. However, the defendants did not plead a defence of res judicata and their silence in the pleadings must be taken to mean that they have acquiesced in the court considering the issues de novo. I would therefore not be inclined to dismiss the claim on this ground.

[58] Despite this, I am of the view that the issues raised by Mr. Barnes in his submissions are important. To my mind, there is an overlap between the doctrines of res judicata and stare decisis. There is something to be said about the court being called upon to rule on matters which have already been determined to the extent that conflicting principles and findings of law and fact may emerge from the same court sitting in the same jurisdiction. In a common law system, where judicial precedent is a foundational principle, this is a situation which the court strives to avoid, as not only must there be finality to litigation, but certainty in the law and procedure is of paramount importance. The court in its 2007 judgment had ruled on a number of issues which were not merely based on the deficiency

of the pleadings. What has happened in this case is that although the claim was re-filed and embellished somewhat, the evidence which was actually presented at trial does not, in my view, alter some of the pronouncements made in the 2004 claim. However, even after evaluating the evidence anew, I have come to no different a conclusion than the judge came to in her own ruling delivered in 2007.

Pre-Trial Developments

[59] I wish at this stage to also return to the procedural history of this case as a number of issues have arisen after the claim was filed, which both parties would wish for the court to consider.

[60] On or about 11th and 17th March, 2017, the 1st defendant filed a request for further information from the claimant. This touched and concerned proceedings commenced in 2011 in Dallas, Texas in the United States of America between Mr. Christenbury and the law firm of Lord Bissell & Brook and Mr. Brian Casey. The proceedings related to the opinion which had been issued to Mr. Christenbury prior to him investing in the trust structure in Nevis. The defendant had obtained certain documents which related to those proceedings. There appeared to have been a settlement arrived at, not only in that case, but in a separate case against Mr. Lustig. I understand the settlement with Mr. Lustig to have been a confidential settlement agreement. The claimant resisted any attempt to disclose any information about the case against Lord Bissell & Brook and even filed a notice in opposition to the request for information highlighting the fact that it is a separate case with no bearing on the instant litigation.

[61] Although the court dismissed the application seeking an order to compel the claimants to provide this information, the court's basis for doing so was on account of the 1st defendant's failure to comply with various court orders in the prosecution of that application. However, in its order dated 27th February, 2019, this court noted that *"the information requested by the 1st defendant addresses the issue of proceedings which were conducted in the United States. It appears to the court that the issues raised by the 1st defendant are legitimate issues."* The 1st defendant was therefore unsuccessful in its quest to seek this information by way of application due to his own failure to comply with court orders, not on account of the substance of the application. To my mind, that does not negate the claimant's own duty of full and frank disclosure, which is an ongoing duty throughout

the life of the claim, as at one point in the process Mr. Dwight Cozier swore to an affidavit acknowledging that chambers had been informed of the result of the US claim. It appears that chambers simply did not wish to disclose whatever information it had received.

[62] However, what ensued thereafter was that on the eve of trial itself, the claimant then wished to tender a judgment in separate criminal proceedings in the United States in which Mr. Duane Crithfield, who was the executive director and president of FIC, was convicted of tax fraud. Having perused the judgment, the court is left with more questions than answers and is of the firm view that the selective disclosure of information regarding proceedings in the US in this way weighs somewhat against the claimant in this case. Why would the court be called upon to consider criminal proceedings against Mr. Chrithfield and Mr. Donaldson on the one hand and not also consider proceedings which had a more direct bearing on the allegations of misrepresentation being made by Lord Bissell & Brook?

[63] In that judgment it states that Mr. Chrithfield and Mr. Donaldson were both indicted under United States Federal Law for conspiracy to defraud the United States and for willfully aiding the submission of a false and fraudulent tax return. The allegations against these two individuals touched and concerned the Business Protection Plans issued by FIC. In coming to his conclusions, the trial judge made some very damning remarks about Mr. Chrithfield and Mr. Donaldson's use of the various entities such as FIC and Federation Re as part of their enterprise in assisting clients to evade federal income tax.

[64] However, having perused the judgment in detail, I express some concern in placing much reliance on it for a number of reasons. It must be observed that when a judge in another court, in another jurisdiction, conducts a trial, he or she has the benefit of examining the evidence based on the representations made before him or her. This does not create an obligation on this court to simply adopt the findings of fact without more. In fact, one may argue that it would be inappropriate to do so. The judge would have observed the demeanour of the witnesses, examined the evidence and come to his or her own conclusions based on the peculiar circumstances of the case before him or her. This is not the same as what is presented before me. With the exception of Mr. Chrithfield, not one of the persons involved in the discussions with Mr. Christenbury were presented to this court and no one who gave evidence before the criminal court in the US is before me. Insofar as that is the

case, I repeat the need to proceed with caution in assessing the relevance of this case to the outcome of the current proceedings.

[65] Further, something must be said for the observance of the basic rules of natural justice and the need for fairness in all proceedings before the court. An individual, who has been accused of wrongdoing, must be given a proper and fair opportunity to confront his accuser. This is the case whether the proceedings are civil or criminal. What must be observed here is that there has not been one single allegation made that Mr. Lake, in particular, was ever involved in any of the discussions taking place between Mr. Christenbury, Mr. Chrithfield, Mr. Donaldson or even Mr. Lustig for that matter. There is no evidence that he was ever involved in making any representation to Lord Bissell & Brook. The judgment of the US court does not mention his name at all and casts no aspersions on his character or integrity. Mr. Lake was not a party to the US proceedings to the extent that he was able to present any evidence or representation on his own behalf regarding his involvement in the various companies and entities which were the subject of the judge's criticism.

[66] Based on the evidence presented to me in this case, Mr. Lake stated that his involvement in FFT and FIC was merely operational. He states that he had no specific expertise in insurance and his role with the company involved the execution of the various documents whenever he was called upon to do so. The evidence only suggests that he sat on FIC's board, but does not show that he had any involvement in the day to day management of the company; neither does it show that he was actively involved in persuading others to take out any policy with FIC. As it relates to FTT, Mr. Lake states that as managing director he executed documents and played a role in the establishment of the trust when he received instructions to do so.

[67] Mr. Chrithfield also made it clear in his own evidence that Mr. Lake was not involved in those discussions with Mr. Christenbury or his agents. He goes on in his witness statement to explain the basis upon which FIC's policies were sold and insisted that there was no need to be licensed in Nevis for that purpose. I do not find it necessary to reconcile that issue in any detail, as it does not appear to me that the policies were sold to Mr. Christenbury on that basis. What is important is that in assessing the evidence as a whole, I do not doubt Mr. Lake's assertions and find that the evidence does not establish that he had made any representations to Mr. Christenbury or his representatives,

sufficient to allow this court to simply import the findings of a judge in a foreign court and hold it against him in this way.

[68] Also, after examining the judgment from the US court, it appears to me that Mr. Christenbury had himself given conflicting accounts of the representations made to him by Mr. Donaldson in separate proceedings. The judge, though accepting Mr. Christenbury's evidence, was careful to point out that he had sworn to a deposition in 2012 which contradicted what he had to say before the US criminal court. Yet, counsel for the claimant would wish merely to disclose the findings of the judge in the criminal case, without full disclosure of the other occasions in which Mr. Christenbury gave any evidence as to precisely what was represented to him and by whom. It is unclear to me as to what these other proceedings were and what would have motivated Mr. Christenbury to contradict what he had said in the proceedings before the US courts.

[69] The general substance in the judge's findings appears to suggest that many of the persons who actually invested in the BPP knew full well that they were doing so in order to defraud the US government. The judgment does not find the registration of the various companies to be illegal. Neither did it find that there was no license to issue insurance policies. What was found there was that the motive behind the investments was that they were designed to defraud the Federal Government of the United States. There is therefore a wide gap in terms of how Mr. Christenbury came to give evidence before that court and what were his motivations for contradicting himself in a deposition that he gave in other proceedings; the substance of which has not been disclosed. He is not present to be cross examined by the defendants in this case, further highlighting the need for the court to proceed with caution in relying on this judgment, given the fact that neither defendant was present to participate in those proceedings in which no allegations were made against them directly.

[70] I do accept however, that the fact of him having been convicted in the US means that the court may consider this when assessing Mr. Chrithfield's credibility as a witness. However, I find that as it relates to the facts of this case, there is some documentary evidence to support what Mr. Chrithfield had to say in relation to Mr. Lake's involvement with the companies. Insofar as the US judgment is concerned I would not simply adopt the findings of fact and hold them against the defendants in this way as it would not be in the interest of justice to do so.

[71] It is against this backdrop that the court expresses concern that the claimant had refused to answer questions or give any information regarding the civil proceedings in which Mr. Christenbury was involved. Why should one form of proceedings be disclosed and not the other? In documents disclosed and tendered by the 1st defendant, the court is given some information regarding the proceedings against the law firm of Lord Bissell & Brook in Dallas, Texas, USA. As in the case of the judgment disclosed by the claimant, the court proceeds with caution with these documents as the authors and persons involved in the matter were not available to give evidence before the court in order to provide any further clarification. What is important to note however, is that there has to some extent been a lack of candor and full and frank disclosure of all which had taken place between Mr. Christenbury and the persons who, at least on the face of it, had actually made representations to him. Mr. Cozier, during cross examination acknowledged that there had been proceedings in the US. When confronted with the documents he noted that the claim had been settled. However, this court would wish to rely on the evidence presented before it and would refrain from simply adopting facts and pleadings from foreign proceedings where the parties involved are not before me to answer any questions arising therefrom.

[72] I therefore repeat my earlier comment that, based on the evidence presented to it, this court comes to no different a conclusion than what the learned judge had determined in the 2004 claim. The substance of the allegations of fraudulent misrepresentation rests with FIC and I see no evidence that Mr. Lake or FFT had made any such representation. This is enough to dismiss this claim on its substance. However, I will address, as briefly as I can, some of the legal arguments put forward by counsel in order to be as thorough and complete as I can in communicating the basis for the court's decision in this case. I do make the observation however, that some of what has been submitted by counsel takes the claim somewhat outside of the realm of what has been specifically pleaded.

The Law

[73] Perhaps a useful starting point is to outline the law relating to fraudulent misrepresentation, which is the primary ground upon which this claim is based. One of the earlier common law authorities is the case of ***William Derry et al v. Sir William Henry Peek***² where Lord Herschell made the following statement:

² (1889) 14 App Cas 337.

“Fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth.”

[74] As our court of appeal noted in the case of ***East Pine Management Limited v Tawney Assets Limited et al***³, the basis of the outcome of the House of Lord’s decision in ***Derry v. Peek***, was that the mental element of the tort of deceit had not been made out. Their Lordships were of the view that the directors who had made the various representations in that case held an honest but mistaken opinion and that others had no intention to deceive. Although the law on misrepresentation has since evolved into two separate limbs, making some of what had been said in that case somewhat obsolete, the case before me is one premised on fraudulent, rather than negligent, misrepresentation. In such an instance, as was observed in the case of ***Nocton v. Lord Ashburton***⁴, ***“if based on fraud, then, in accordance with the decision in Derry v Peek, the fraud proved must be actual fraud, a mens rea, an intention to deceive. It is an action of deceit.”***

[75] The obvious difficulty here is that the claimant has not even cleared the hurdle of proving that Mr. Keithley Lake and FFT had made any representation to Mr. Christenbury or his legal advisors at all; far less providing evidence to prove an actual intention to deceive, or even recklessness to that effect. There is simply just no evidence of this here. The question therefore, is that even if the court were to have found that a fraudulent misrepresentation was made, then what is the basis upon which Mr. Lake and FFT ought to be found liable for such? Counsel for the claimant refers the court to section 512 of the ***Companies Ordinance***⁵ where the following is stated:

³ BVIHCVAP2012/003

⁴ [1914] AC 932

⁵ CAP 7.06 of the Revised Laws of Saint Christopher and Nevis.

“where a body corporate is struck off the register, the liability of the body corporate and of every director, officer or shareholder of the body corporate continues and may be enforced as if it is had not been struck off.”

[76] Counsel argues that it is “clear and obvious that the fact that the 2nd defendant is struck off the register does not exclude the 1st defendant of liability where the 2nd defendant is found to be liable to the claimant for the trust funds.” She also argues that Mr. Lake is by law a third party solicitor who is liable for the acts of the 2nd defendant as a struck off company. With the greatest respect to counsel, it seems to me to be quite clear and obvious that the section referred to creates no such liability. The section simply highlights the fact that any liability which the corporation or the directors, officers or shareholders had prior to being struck off the register remains in effect thereafter. What the section does not do is to make the director personally liable for anything he would not have been liable for had the company not been struck off. It doesn’t even attempt to lift the corporate veil here. In addition, there is nothing in the evidence to suggest that Mr. Lake had ever acted as a solicitor for FFT or FIC. He acted at all times as managing director and a director respectively. The claimant must certainly turn elsewhere in the law if he wishes to make the defendants liable for fraudulent misrepresentation in this case. This section is of no assistance in determining whether Mr. Lake or FTT are personally liable for fraudulent misrepresentation.

[77] Counsel goes on to refer to the case of ***Twinsectra v. Yardley***⁶ in support of the proposition that “the representations made by Fidelity were untrue and as a director of fidelity and a director of the 2nd defendant, the 1st defendant cannot escape liability, particularly in light of the fact that he is a well-seasoned attorney of many years standing and much experience in his personal capacity and will therefore be held to the relevant professional standard of care.” However, after examining that judgment, I can find no support in it for counsel’s proposition, as the arguments are not in line with the test referred to by the judges. In fact, the House of Lords was quite careful to point out that “**a finding of accessory liability ... was only permissible if, applying what Lord Hutton has called the combined test, it were established on the evidence that Mr. Leach had been dishonest.**”⁷ Lord Hoffman, who gave the majority decision in that case, in considering the principles outlined in

⁶ [2002]UKHL

⁷ see Lord Steyn’s decision at paragraph 11 of that judgment.

the case of ***Royal Brunei Airlines Sdn Bhd v. Tan***⁸ went on to state that ***“I consider that those principles require more than knowledge of the facts which make the conduct wrongful. They require a dishonest state of mind, that is to say, consciousness that one is transgressing ordinary standards of honest behavior.”***

[78] Even though Mr. Leach in that case was an attorney, the court did not hold him to any other standard than what was required by law. Dishonesty had to be proven and it was found not to have been established in that case. I see no reason to decide otherwise in the case of Mr. Lake. Counsel for the claimant also refers extensively to the case of ***Royal Brunei Airlines Sdn Bhd v. Tan***. However, after assessing the clear implications of that decision, I do not find it to be in support of the claimant's case. In that case, the Privy Council came to consider the proper role of equity in commercial transactions and how far it can go in providing a remedy to a claimant when the person in default is an insolvent company. The board there acknowledged the difficulty when what is being sought is to fasten fiduciary obligations directly onto officers, agents or advisors of the insolvent company.

[79] In his decision, Lord Nicholls placed the issue into two categories. The first is “knowing receipt” for which the remedy being sought is restitution. The second is “knowing assistance” for which the remedy is not restitution but damages as directly against the 3rd party whether he benefited from the breach or not. The circumstances of that case fell into the latter category and so do the submissions of counsel in this case. There is no evidence or even a pleading of the defendants having knowingly received or benefited from trust property as 3rd parties. The arguments of counsel for the claimant fall into the realm of knowing assistance. I say this with the one caveat that, unlike the authorities counsel has referred to, this case before me was not pleaded as one of knowing assistance but as one where misrepresentations were made by the defendants *“through the use of an unlicensed insurance company.”* That was the essence of the pleaded case.

[80] Lord Nicholls went on to note that ***“... a trust is a relationship which exists when one person holds property on behalf of another. If, for his own purposes, a third party deliberately interfered in that relationship by assisting the trustee in depriving the beneficiary of the property held for him by the trustee, the beneficiary should be able to look for recompense to***

⁸ [1995] 2 AC 378

the third party as well as the trustee.” What must be appreciated here is that Lord Nicholls was clear in stating that there must be evidence to show that the 3rd party, “deliberately interfered” in the trust relationship in order to assist with the breach of trust. There is a clear indication here that proof of the *mens rea* is necessary. One cannot simply attach such liability by default in arguing that merely because Mr. Lake is a seasoned attorney he must therefore be liable as an accessory to a breach of trust. That is simply not the test. Lord Nicholls went on to conclude that:

“Drawing all the threads together, their lordships’ overall conclusion is that dishonesty is a necessary ingredient for accessory liability. It is also a sufficient ingredient. A liability in equity to make good resulting loss attaches to a person who dishonestly procures or assists in a breach of trust or fiduciary obligation... “Knowing” is best avoided as a defining ingredient of the principle, and in the context of this principle the Baden scale of knowledge is best forgotten.”

[81] This judgment seems to make it very clear that the claimant carries a burden to prove dishonesty if he wishes to attach liability to a third party on the premise of accessory liability. Lord Nicholls goes on to attempt to define dishonesty; which to my mind is a rather daunting task. He notes that dishonesty must be ***“equated with conscious impropriety”*** and outlines a number of hypothetical issues which, to his mind, would not be the actions of an honest man. He states that an honest man ***“does not participate in a transaction if he knows it involves a misapplication of trust assets to the detriment of the beneficiaries”*** and neither does he ***“deliberately close his eyes and ears, or deliberately not ask questions, lest he learn something, he would rather not know...”***

[82] In the circumstances of that case there appeared to have been no doubt that money held on trust for the claimant was diverted to the private use of the defendant company. This was certainly not authorized by the beneficiary. Mr. Tan, who was the directing will and mind of the company, was held, whether intentionally or passively, to have known that this was being done, or perhaps authorized it himself. The company went bankrupt and was unable to return the trust funds which were wrongly appropriated. It was therefore decided that equity would not allow Mr. Tan to hide behind the cloak of separate legal personality, therefore leaving the beneficiary without an effective remedy. To my mind this is a far cry from the circumstances of the case before me.

- [83] Firstly, I observe that the claimant has not even been able to present sufficient evidence of the very misrepresentations which were allegedly made and by whom. The allegations of misrepresentation are, for the most part, contained in the opinion of Lord Bissell & Brook and its recantation letter. That law firm did not appear before me and did not provide any information to satisfy this court as to who they spoke to and what was actually represented to them. No one involved in these discussions were presented to the court as witnesses, except Mr. Crithfield, who clearly indicated that those discussions took place with agents of FIC and denies the allegations contained in the retraction letter of Lord Bissell & Brook. The evidence cannot even establish the liability which the claimant seeks to rely on in the first place. The first hurdle of even proving liability is not met.
- [84] Even if that were not the case, there is no evidence here of dishonesty on the part of Mr. Lake or FFT, sufficient to allow equity to step in and hold them personally liable as third parties for the alleged wrongs done. There is not one iota of evidence to prove that Mr. Lake had ever spoken to Lord Bissell & Brook or Brian Casey or even Mr. Lustig in the matter. His name is not mentioned in any of the proceedings outside of Nevis and there is no evidence to suggest that he deliberately interfered in those discussions sufficient to find the necessary *mens rea* outlined by Lord Nicholls above. It seems to me that Mr. Lake's actions, and that of FFT, were to simply execute the trust documents and act in accordance with Mr. Christenbury's letters of wishes. In addition, the facts of the case are not such that the funds were invested in any other way than in accordance with those wishes. The substance of the letter from Lord Bissell & Brook was not that the funds were fraudulently appropriated in any way. It was merely that the tax advantages which Mr. Christenbury thought he had enjoyed by making such an investment would not materialize and that the nature of the policy was one which appeared to them to lack substance. I see no basis on the facts presented to me to hold Mr. Lake and FFT liable for any such representation.
- [85] Counsel for the claimant also seeks to rely on the case of ***Craig Harwell v. Kevin Laurent***⁹ in support of the argument that it is to be assumed that *"an attorney placed in the factual circumstances of this case, had sufficient proximity of relationship with fellow director of Fidelity to know that the misrepresentations were made and that they were untrue and fraudulent. In fact the special relationship that existed was that of a fellow director in both Fidelity and the 2nd defendant trustee."*

⁹ BVICAP2000/0024

Again, with due respect to counsel, this argument is simply unsustainable, given the specific facts of this case. The case of ***Craig Harwell v. Kevin Laurent*** is of no direct bearing to the pleaded case before me. The principles established there are simply not applicable to what has been presented here. Counsel's proposition is contrary to the test laid down in the authorities referred to above. No doubt there may be circumstances where the defendant's knowledge of the fraud may be inferred, either by his conduct or by his proximity to the facts which give rise to the fraud, but for the reasons which I have already explained I am not satisfied that these alleged misrepresentations can be attached to Mr. Lake and FFT in this way. I therefore agree with counsel for the 1st defendant where he argues that the claimant's case is simply not made out and I have therefore found in the defendants' favour.

Conclusions

[86] In closing I am of the view that the case ought to be dismissed for the following reasons:

- (a) That the JCD Family Trust was a valid trust, incorporated at the instance of Mr. Lustig, even prior to any representations being made to Mr. Christenbury. There is no basis upon which it should be declared invalid. As Mr. Christenbury himself was aware, he was perfectly entitled to simply replace the trustee if he had concerns about FFT's honesty;
- (b) That notwithstanding counsel's reliance on the various sections of The Exempt Insurance Act of 1986 and Insurance Act in force in Nevis, there was never any representation that FIC was licensed to do insurance business in Nevis. The Company was clearly licensed elsewhere and Mr. Christenbury could not have relied on any representation to the contrary. There is therefore no basis to hold that FFT or Mr. Lake made any representation to Mr. Christenbury through an unlicensed insurance company;
- (c) That given the state of the evidence, the court is unable to find that Mr. Christenbury was induced to enter into the trust structure on account of fraudulent misrepresentation. The viva voce evidence presented by Mr. Cozier cannot be relied on for that purpose. Having examined the documentary evidence, it is this court's view that it cannot simply import into these proceedings allegations made by Lord Bissell & Brook and findings of fact from a foreign tribunal as its main

source of evidence, when, for the most part, none of the persons who were involved in these discussions were available to give evidence or provide any clarity to the court on these issues;

- (d) That in any event, even if the court were to have found that there was any misrepresentation, there is no evidence that Mr. Lake or FFT was involved in those discussions or made any representation to Mr. Christenbury, whether vicariously or otherwise. Even if counsel was right to rely on the doctrine of knowing assistance, the mental element of the test laid down in equity has not been met in this case;
- (e) There is no basis for an order for the tracing of the funds as against Mr. Lake and FFT; and
- (f) The relationship of proximity and Mr. Lake's professional qualifications and practice as a solicitor are not sufficient to lead this court into lifting the corporate veil and simply attach liability to him in this way.

[87] In the circumstances therefore, the case is dismissed. An award of prescribed costs is made in favour of Mr. Lake only as FFT had played no part in the trial, despite having filed a defence in the matter.

Postscript

[88] It would be remiss of me if I did not address the extensive and, in my view, unnecessary delay in bringing this case to trial. The matter was lodged in the system on 17th March, 2009 and did not come to trial until 10th March, 2021. As is far too common in our jurisdiction, the case management process had been bogged down in a plethora of applications, appeals and an adversarial approach to pre-trial litigation which continues to threaten the very integrity of the justice system as a whole as it contributes significantly to unnecessary pre-trial delay. It is therefore worth taking some time (perhaps even more than is usual for such circumstances) to address this issue in more detail in the hope that this court's persistent advocacy for a different approach to litigation will someday bear fruit.

[89] In his evidence, Mr. Cozier indicated that the claimant first contacted the law firm in September, 2003. Despite what I consider to be the narrow nature of the case, it took over 17 years from the date on which Mr. Christenbury first called on the office of counsel in Nevis to assist him with this dispute to the date of this trial. As I have noted, a previous case filed on rather similar pleadings in 2004 was

struck out by the court as having no reasonable grounds for bringing it in the first place. Appeals against that decision were also dismissed by the court of appeal. However, the matter was re-filed in 2009 with rather similar pleadings. Between 2009 and 2011 both the high court and court of appeal were engaged in applications for summary judgment and appeals from the refusal of the grant of summary judgment as applied for by the claimant. These applications and appeals were filed even after case management directions had already been given by the master as far back as 2009.

[90] I pause here to state that it would have only taken a matter of a few months, if not weeks, to embark on a trial on the substance of the evidence; bearing in mind that the trial only lasted for two days once it finally took place over a decade later. Yet, the claimant filed an application for summary judgment on what can only be described as the eve of a pre-trial review phase in the process. Having presided over the trial and heard the evidence myself, I express doubt as to whether a summary judgment application at that late stage was a fruitful course to pursue. However, even after the ruling that summary judgment would not be granted, as is within the discretion of the master, the decision was appealed. The court of appeal ruled in 2011 dismissing the appeal. Yet, it took 6 years between the dismissal of the appeal and the listing of the matter for further hearing. The matter did not return to case management before the high court until 2017.

[91] It is apparent that certain administrative challenges occurred which contributed to the delay in rescheduling the matter for trial. The court must acknowledge the delay occasioned by these challenges in a bid to improve on its own processes. However, despite these administrative challenges, I am of the view that a different approach by counsel for the parties could have better assisted the court in this process. This would however require some co-operation between counsel; a feature which is far too often missing in our jurisdictions where more can be done to develop better collegiate relationships in order to assist the court in fulfilling its mandate. The case management process need not be unnecessarily adversarial and better assistance from counsel can help, even where administrative challenges do exist.

[92] In the years since the filing of the claim, Mr. Christenbury unfortunately died having only had a witness summary filed on his behalf. In addition, the 2nd defendant was struck off the roll of companies here in Nevis and apparently has no assets in the territory. I also understand from the evidence in this case that Westminster Hope and Turnberry may also be bankrupt and no longer in existence.

What this means is that after over 17 years of litigation (inclusive of a previous case filed in Nevis), regardless of the outcome of this case, Mr. Christenbury or his estate may very well be left with nothing to recover from these proceedings, even if he had been successful . All this in light of the fact that at least \$2,121,797.73 US was possibly available to him at the commencement of the dispute between the parties. That too may have been lost forever as a result of the delay in this litigation as I am unaware of any effective steps taken in the preliminary stages to preserve those assets; as the summary judgment application would have certainly not fulfilled that purpose.

[93] Cases such as these remind me of the words of former PCCJ Sir Dennis Byron in the case of **Systems Sales Limited v. Brown-Oxley**¹⁰ where he laments the extensive delays in the justice system and states that ***“Something must be done to correct this harm to litigants.”*** Delay is not merely an irritant; it is harmful and continues to be a thorn in the flesh of the justice system. Such extensive delay is damaging to the interest of those who engage the system; like Mr. Christenbury, who for over 17 years has been left without a result in his claim, having died before the matter could even be brought to trial. It is damaging for those who are brought to court; like the defendants, who have had to defend themselves against litigation and allegations of fraudulent misrepresentation for in excess of 17 years. It is damaging to the court’s integrity in its inability to manage cases with expedition while judicial officers are burdened with the need to research and write judgments on applications which really ought not to have been brought in the first place. It is damaging to the public in general as delay of this nature can certainly work against the jurisdiction in attracting investment if the justice system is deemed to be too slow and ineffective. Finally this delay is potentially damaging to the reputation of the attorneys who appear before the court, as it inhibits their own ability to obtain any result which is favourable to the client within a time frame which is reasonable.

[94] No one benefits from this unbridled adversarial approach to pre-trial litigation; yet it persists, despite the court’s best efforts at times to simply move the matter to trial on its substance. Had a trial simply taken place in 2010 after the initial case management directions were given, this case would likely have long been determined one way or another and the court would have ruled on the substance of the allegations after having heard the evidence. If the parties are unhappy with the outcome at trial, then they can move to the court of appeal on the substance of the case, rather than occasioning

¹⁰ [2015] CCJ 1 (AJ)

delay in unnecessary pre-trial applications. As it now stands, there can be no outcome which can ever mitigate against the negative effects of this extensive and shameful delay; and it is important for the court to highlight this and continue to call on those who engage the system, whether as litigants or officers of the court, as well as the court itself, to ensure that this damage which is being done to the integrity of the justice system is brought to an end once and for all. Hopefully the court's new E-litigation portal will militate against challenges such as misplaced files and delayed listings, but it must be noted that such mishaps are often the effect of unnecessary delay, when cases simply go into abeyance for too long a period on account of pre-trial applications which perhaps were best not pursued in the first place.

**Ermin Moise
High Court Judge**

By the Court

Registrar