

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
SAINT VINCENT AND THE GRENADINES

CLAIM NO: SVGHCV2012/0148

BETWEEN:

MAURICE EDWARDS
(SUPERVISOR OF INSURANCE)

Claimant

and

RBTT BANK CARIBBEAN LTD

Defendant

Appearances:

Mr. Anthony Astaphan SC with him Mr. Grahame Bollers and Mr. Sten Sargeant for the Claimant
Mr. Stanley John QC with him Ms. Keisal Peters for the Defendant

2020: October 8
2021: March 2

RULING

[1] **GILL, M.** The matter before the court is an application by the defendant to strike out the claim and/or for summary judgment to be entered for the defendant. An application by the claimant to strike out the defence was withdrawn at the start of the hearing. Further, after some preliminary issues were dealt with, certain grounds of the defendant's application were rendered otiose or redundant.

Background

[2] **The Claim**

By claim form and statement of claim filed on May 14, 2012, the claimant sought the following:

- 1) An order that the defendant account for and deliver to the claimant the assets or the monetary value of the assets held in trust in the sum of ECD135,646,312.07;

- 2) Alternatively, damages for breach of fiduciary duties and/or breach of trust, and/or breach of statutory duty;
- 3) Costs;
- 4) Any further or other relief as the Court thinks fit.

[3] The claimant's case is that the defendant, in breach of its fiduciary duties and/or statutory duties, represented to the claimant that it was holding EC\$140,547,665.57 worth of assets of British American Insurance Company Limited (BAICO) when in reality it was not holding nor did it ever have physical custody of BAICO's assets to that value, and claims against the defendant the sum of \$135,646,312.07 (after deductions including assets actually held). In light of the defendant's submissions on the application, it is prudent to set out parts of the statement of claim. I reproduce paragraphs 16 to 18 in their entirety as follows:

"16. The Defendant's representations contained in its letters to the Claimant and particularly the letter of 16th April 2009 that it held assets totaling ECD140,547,665.57 pursuant to the Trustee Agreement were, if the Defendant's Attorney's statements are true, false and made in breach of the defendant's fiduciary and/or statutory duties and obligations which it owed to the Claimant.

PARTICULARS

Well knowing of its legal and statutory duties and obligations to the Claimant, the Defendant represented to the Claimant by letters dated 24th April 2006, and ultimately by letter 16th April 2009, that it held, and was holding, and/or had possession and /or control over assets constituting BAICO's Insurance Fund totaling EC\$140,547,665.57, with actual and/or constructive knowledge that it in fact only had physical custody or control of only two assets namely the Government of Saint Vincent and the Grenadines Bond Certificate No. 019 Series 14 valued at ECD584,807 and Government of Belize bonds valued as at 31/12/06 at ECD1,490,269.

PARTICULARS OF BREACH OF FIDUCIARY DUTIES AND/OR STATUTORY DUTIES

- (a) In breach of section 31(2) of the Insurance Act, failed to take or keep physical possession and control of BAICO's assets which the Defendant was obligated by law to hold in trust to the order of or on behalf of the Claimant.**
- (b) Recklessly or in breach of its fiduciary duties failed to account for and hold the assets constituting BAICO's Trust Fund.**
- (c) Failing to ensure that the assets which it held in its custody was [sic] valued at \$140,547,665.57 as repeatedly represented by it.**
- (d) Recklessly and in breach of its fiduciary duties permitted BAICO to either sell or encumber the assets which were said to constitute BAICO's Trust Fund.**

17. As a consequence of the Defendant's repeated written representations, the Claimant relied on the Defendant's assurances and undertaking that it held and was holding the assets constituting BAICO's statutory fund as trustee in the sum of ECD\$140,547,665.57 and was induced by these representations honestly believing them to be true that the assets were so held and therefore took no steps as regulator to independently confirm that the assets were so held or seek possession and/or control of these assets and as a consequence has suffered loss and damage.

PARTICULARS OF LOSS AND DAMAGE

Value of Assets constituting BAICO's Statutory Fund	\$140,547,665.57
Less	
Assets held by the Defendant	\$ 2,075,076.00
Princess Julianna Bonds sold by BAICO by Court Order	\$ 2,103,587.50
Statutory Deposit held by the Claimant	\$ 722,690.00
Total Loss	\$135,646,312.07

18. By reasons of the misrepresentations contained in the letters dated 24th April 2006, and other letters, including by letter 16th April 2009, the Defendant is estopped from denying that it represented and assured the Claimant that it held and was holding BAICO's Statutory Fund assets as trustee to the value of \$140,547,665.57.

[4] The Defence

In its defence filed on July 20, 2012, the defendant denies that in relation to the transactions which are the subject matter of this dispute, the claimant is the beneficiary of a trust created pursuant to section 31(2) of the Insurance Act. The defendant denies that it is obligated by law to hold BAICO's assets in trust to the order of or on behalf of the claimant. It denies it is a trustee of an insurance fund but rather states that it is the custodian of the list of investments/assets and relevant certificates in relation to a purported insurance fund. It further denies that it was reckless or acted in breach of fiduciary duties owed to the claimant to hold or account for the assets constituting BAICO's statutory fund. The defence states that apart from its obligations as custodian of the lists of investments/assets and relevant certificates and documents delivered to it, the defendant never had a duty to hold the said assets constituting BAICO's statutory fund. It pleads that the "trustee agreement" (required under the Insurance Act to create a trust) which was approved by the claimant specifically stipulates that the lists of investments/assets along with the relevant certificates and documents, which the defendant agreed to hold as custodian, were to be held by the defendant on behalf of BAICO and the assets to be held in trust were to be maintained in BAICO's name. In essence, the defence contains several denials, including total denials of paragraphs 16 to 18 above.

[5] The Reply

In its reply filed on October 16, 2012 the claimant states that the defendant held the assets and securities as a trustee deemed or otherwise for and on behalf of the claimant as required by law. The defendant is therefore precluded from denying that it is a statutory trustee or a deemed trustee

under the provisions of section 31(2) of the Insurance Act. Further or in the alternative, the defendant, in view of its conduct and/or correspondence by it dated 10 October 2006 to 16 April 2009, is estopped from denying it was and is a trustee for and on behalf of the claimant. In the further alternative, the defendant has admitted that it is a statutory trustee or a deemed trustee under the provisions of the Insurance Act, in High Court claims (named) and is therefore precluded and/or estopped from denying that it is a trustee as claimed by the claimant.

- [6] On February 19, 2013 the claimant filed a notice of application to strike out the defence. As stated earlier, this application was withdrawn.

Application to strike out the claim

- [7] The notice of application filed by the defendant on February 22, 2013 is no longer relevant to these proceedings. The defendant filed an amended notice of application on May 14, 2014 containing forty-one (41) paragraphs identified as grounds of the application to strike out the claim or alternatively for summary judgment to be entered for the defendant. After a sifting of the issues, the defendant proceeded with the application on its main contention that the statement of case does not disclose a legally recognisable claim against the defendant.

- [8] Rule 26.3(1) of the Civil Procedure Rules 2000 as amended (CPR 2000) governs the striking out of a statement of case. It reads:

26.3(1) In addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court that –

- (a) there has been a failure to comply with a rule, practice direction, order or direction given by the court in the proceedings;
- (b) the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim;
- (c) the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings; or
- (d) the statement of case or the part to be struck out is prolix or does not comply with the requirements of Part 8 or 10.

[9] Summary judgment is dealt with in Part 15. Rule 15.2 reads:

15.2 The court may give summary judgment on the claim or on a particular issue if it considers that the –

- (a) claimant has no real prospect of succeeding on the claim or the issue; or
- (b) defendant has no real prospect of successfully defending the claim or the issue.

The Insurance Act (as amended)

[10] This matter revolves around several provisions of the Insurance Act of Saint Vincent and the Grenadines (hereinafter “the Act”)¹ which are integral to the submissions of the defendant. Therefore, it is prudent that the relevant sections be set out at this stage. The Act regulates the carrying on of insurance business and the operation of privately administered pension fund plans, and related matters. Section 4 provides for a Supervisor of Insurance who is responsible for the general administration of the Act. The following sections are relevant to these proceedings.

29. Establishment of insurance funds

- (1) Notwithstanding section 22 [relating to deposits with the Supervisor], every company shall, in respect of each class of insurance business being transacted, establish an insurance fund equal to its liability and contingency reserves in respect of policies in the State in that class of business as established by the revenue account of the company, less the amounts held on deposit with the Supervisor.*
- (2) Within four months of the end of each financial year a company shall place in trust the assets of its long-term insurance fund and of its motor vehicle insurance fund, as the case may be.*

31. Creating a trust

- (1) A trust referred to in section 29(2) shall be created by trust deed the contents and the trustees of which shall be approved by the Supervisor before the trust is created.*
- (2) The Supervisor may, for the purpose of this section, allow the assets required to be placed in trust to be held by a bank in the State or a financial institution approved by the Supervisor to the order of or on behalf of the Supervisor and the assets shall be deemed to be placed in trust and the bank or financial institution shall be deemed to be a trustee.*

32. Restrictions on trustee

¹ CAP. 306 of the Revised Laws of Saint Vincent and the Grenadines as amended

- (1) A trustee may not deal with any assets held in trust by him without the prior general or specific approval of the Supervisor.**
- (2) A trustee shall, as required by the Supervisor, submit a list of the assets held in trust pursuant to section 31.**

(2a) Where pursuant to subsection (2), and whether before or after the commencement of this Act, a list of assets has been submitted to the Supervisor and thereafter, whether before or after the commencement of this Act, it is discovered that the value of the assets in the list no longer represents the total sum stated in the said list, then in any proceedings before a court of law or other judicial or quasi judicial body it shall be conclusively presumed that the trustee has dealt with the assets without the prior general or specific approval of the Supervisor or without an express written approval given by the Supervisor to dispose of or deal with the assets.

(2b) Where the trustee, whether before or after the commencement of this Act, has or is deemed to have dealt with assets without the prior general or specific approval of the Supervisor or without an express written approval as referred to in subsection (2a) and there is a deficiency in the total value of the assets as contained in the list submitted pursuant to subsection (2) the Supervisor shall in writing within a time to be specified by him direct the trustee to make good the deficiency.

(2c) A trustee who fails to comply with the directions given to him by the Supervisor to make good the deficiency within the period stated shall be liable to pay a penalty of five hundred thousand dollars for every day or part thereof during which the failure continues.

(2d) The penalty imposed under subsection (2c) shall constitute a charge in favor of the Supervisor upon all the property of the trustee and may be sued for and recovered in the court by the Supervisor or the Attorney General.

- (3) A trustee who contravenes subsection (1) shall be under the same liability as if the appropriate policy-holder had been the beneficiary of the trust; provided that where a trustee has complied with the directions given to him by the Supervisor under subsection (2b) then the trustee shall have no liability under this subsection towards the appropriate policy holder.**

[11] Pursuant to section 31(1), the claimant relies on the following document as determinative of the terms of a trustee agreement. It is a letter dated May 25, 2006, from BAICO to the defendant outlining the terms upon which the defendant would hold its insurance fund. The letter is set out in the claim. It reads:

May 25, 2006

*Mr. Desmond Austin
Manager
RBTT Bank Caribbean Limited
P. O. Box 118
81 South River Road
St. Vincent*

Dear Sir:

Re: Trustee Agreement

We will be submitting to you a list of investments/assets along with the relevant certificates which we shall be glad if you will hold on our behalf for the purpose of fulfilling the Statutory fund requirements under the provisions of the St. Vincent Insurance Act No. 45 of 2003.

As trustee of our St. Vincent Statutory Fund you will be obligated to provide the following services:

- (a) Reporting to the Registrar of insurers all assets of British-American Insurance Company (St. Vincent) held in trust.*
- (b) The safe-keeping of security items of assets held.*
- (c) Monitoring and updating of records on the release and renewal of the assets.*

It is understood that the assets held in trust shall be maintained in the name of British-American Insurance Company Limited (St. Vincent) and the duties of the Bank shall be purely custodial in nature.

The Bank shall be entitled in respect of its services during the continuation of this arrangement to an annual fee of EC\$1,500 exclusive of out of pocket expenses.

The above arrangement may be terminated by you or by the Registrar of Insurers, St. Vincent at any time on the giving of one (1) month's notice on either side.

SIGNED

DATED July 24, 2006

Defendant's submissions

[12] The defendant contended that the claim has no prospect of success but that the defence has a real prospect of succeeding on the merits, because even if the claimant can establish all of the allegations of fact contained in the statement of claim, the claimant would still not be entitled to arrive at the conclusions of law and to the reliefs claimed against RBTT.

[13] The defendant proceeded with its application to strike out the claim on the following assumptions:

- (1) that the allegations made that it is a statutory trustee pursuant to section 31 of the Act are true and,
- (2) that it is estopped from denying these allegations.

In doing so, the defendant did not admit these assumptions.

[14] Applying these assumptions, the defendant's submissions can be summarised as follows:

1. The claimant has no right of action against the defendant in private law.
2. The only remedy available to the claimant is the recovery of a penalty.
3. There are no statutory or fiduciary duties as pleaded in the claim.
4. The conditions precedent to bringing an action against the defendant have not been satisfied.
5. The claimant has not shown that there are circumstances that give rise to a common law duty of care owed to him by the defendant.

[15] Right of Action in Private Law/Penalty

Learned counsel for the defendant, Mr. Stanley John QC, argued that even if RBTT is deemed a statutory trustee with a statutory duty or obligation to take or keep physical possession and control of and/or maintain possession and control of BAICO's assets as alleged, and it failed to do so, as a result of which the statutory fund has suffered a loss in value from that stated on a list which RBTT submitted to the Supervisor, (all of which is denied), the claimant's only right of action against the defendant as the alleged trustee for breach of this alleged statutory duty, is for the recovery of the penalty provided for under section 32 of the Insurance Act as amended, and the Supervisor is not entitled to bring a private law cause of action against the defendant as alleged trustee. There is no remedy in breach of trust or equitable account available to the claimant. These remedies would only be available where a private trust has been created.

[16] The defendant pointed out that there is no criminal sanction under the Act but instead, there is a penalty. Learned Queen's Counsel relied on the dicta of Lord Browne-Wilkinson in **X (Minors) v Bedfordshire County Council**² to support the argument that the claimant does not have a private right of action against the defendant. His Lordship stated:

"The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action. However a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a

² [1995] 2 AC 633 at 731

private right of action for breach of the duty. There is no general rule by reference to which it can be decided whether a statute does create such a right of action but there are a number of indicators. If the statute provides no other remedy for its breach and the Parliamentary intention to protect a limited class is shown, that indicates that there may be a private right of action since otherwise there is no method of securing the protection the statute was intended to confer. If the statute does provide some other means of enforcing the duty that will normally indicate that the statutory right was intended to be enforceable by those means and not by private right of action: Cutler v Wandsworth Stadium Ltd [1949] AC 398; Lonrho Ltd v Shell Petroleum Co Ltd (No 2) [1982] AC 173. However, the mere existence of some other statutory remedy is not necessarily decisive. It is still possible to show that on the true construction of the statute the protected class was intended by Parliament to have a private remedy.”

[17] Learned Queen’s Counsel asked the questions: If Parliament intended a private law action, would it have imposed a penalty of \$500,000.00 a day? If the trustee fails to make good the deficiency and is liable to pay \$500,000.00 a day, would Parliament also be conferring the additional right to bring a common law action for breach of fiduciary duty and for breach of trust. The defendant posited that this would be draconian so that clearly, in this instance, given the size of the penalty, there is no common law right of action. The penalty is intended to be the means of enforcing the duty.

[18] Learned Queen’s Counsel submitted that the establishment of the statutory insurance fund pursuant to section 31 of the Act is intended, not for the benefit of the Supervisor or BAICO, but rather, it is for the benefit of those sections of the public who are BAICO policyholders and all other persons who may be adversely affected if BAICO became unable to meet its liabilities to such policyholders in any class of business as established by BAICO’s revenue account.

[19] Accordingly, Queen’s Counsel contended that when the Supervisor approves the establishment of the statutory insurance fund, the Supervisor, BAICO and any bank or financial institution who may become trustee, are acting in a public capacity. To the extent that a statutory trust has been created and RBTT was constituted trustee thereof (which is denied), it is not merely a private trustee but rather a trustee for public purposes. Whatever is done in that capacity is governed by public law.

[20] Learned Queen’s Counsel stressed that the duty imposed on the possessor of a statutory power for public purposes is not accurately described as fiduciary because ordinarily, there is no

beneficiary in the equitable sense. Accordingly, if a public duty is breached, there are remedies of judicial review, declaration, injunction and recovery of money if wrongly demanded and paid.

[21] Queen's Counsel posited that this court has held that the statutory nature of the trustee obligations is not in private trust law but in public law. He was referring to the judgment of the court in **Jemima Bacchus and another v RBTT Bank Caribbean Ltd**³ in which the court was tasked to determine whether it was the claimants or the Supervisor of Insurance who had *locus standi* to bring an action against RBTT for breach of trust. After considering the reasoning of Lord Diplock in the decision of the House of Lords in **Ayerst v C & K (Construction) Ltd**,⁴ Actie M. (Ag.), as she then was, stated, "The word "trust" as used in Sections 31 & 32 of the Insurance Act could not have been intended to be, an ordinary private law trust to confer a right of action on the policy holders."⁵ The learned master ruled that it was the Supervisor, and not the claimants, who was clothed with the *locus standi* to bring the claim against RBTT for an alleged breach of trust.

[22] In submitting that the breach of a public law right by itself does not give rise to a claim for damages, and that a claim for damages must be based on a private law cause of action, Mr. John QC distilled the principles laid down by Lord Browne-Wilkinson in **X (Minors) v Bedfordshire County Council**.⁶

[23] No Statutory/Fiduciary Duties as Claimed

The defendant submitted that the statutory and fiduciary duties pleaded in the claim are non-existent. The argument is that the averments made under paragraph (a) of the Particulars of Breach of Fiduciary Duties and/or Statutory Duties that in breach of section 31(2) of the Insurance Act, RBTT failed to take or keep physical possession and control of and/or maintain possession of BAICO's assets which it was by law required to hold in trust to the order of or on behalf of the Supervisor is not an allegation of breach of statutory duty simpliciter, (i.e. irrespective of carelessness). The defendant submitted that section 31(2) does not create any statutory duty but

³ SVGHCV 2001/0254, heard together with Claim No: SVGHCV 2011/280 Dr. Linton Lewis v RBTT Bank Caribbean Ltd and Claim No. SVGHCV 2011/330 Isaac Naaman Legair v RBTT Bank Caribbean Ltd

⁴ [1976] AC 167

⁵ Supra at note 3, at paragraph 56

⁶ [1995] UKHL 9, [1995] 2 AC 633

only deems the bank or financial institution approved by the Supervisor to be a trustee of the assets being held to the order of the Supervisor under the section. There is no statutory duty under section 31(2) which may be breached by the defendant as statutory trustee, nor are the other alleged breaches under sub-paragraphs (b), (c) and (d) of the Particulars recognisable as duties provided for under the Act.

[24] Learned Queen's Counsel posited that the only such statutory or fiduciary duties are those under section 32(1) and 32(2) of the Act. Section 32(1) provides that a trustee may not deal with any assets held in trust without the Supervisor's prior general or specific approval. Section 32(2) obliges the trustee to submit a list of the assets held in trust pursuant to section 31. Section 32(2b) obliges the trustee to make good a deficiency when directed to do so. Queen's Counsel proffered that an argument may be made that the primary allegations of fact amount to a breach of section 32 of the Act. He pointed out that under the principal Act, the duty was only to provide a list. The claim was instituted in 2012 so that amendments made to the Act impact the subject matter of the claim. Queen's Counsel alleged that the amendments made after the proceedings had been filed were clearly intended by the legislature to impact these proceedings. He insisted that they were tailored to buttress the claim that is being made. In any event, Queen's Counsel maintained, even if any of the allegations in the claim can amount to a breach of the statutory obligations which the defendant may have as a statutory trustee, a breach thereof does not give the claimant any right of action in private law.

[25] Conditions Precedent not satisfied

The defendant further submitted that even if the allegations in the claimant's statement of case are true, they do not disclose a legally recognisable claim against the defendant because all conditions precedent which must be satisfied before liability on the part of the defendant as a trustee can properly arise and a cause of action vest in the Supervisor/Financial Services Authority under the Act have not been fulfilled. The conditions precedent are that there must first be:

- 1) the making of a determination by the Financial Services Authority that the defendant is a trustee;
- 2) the determination that there is a deficiency and the amount of that deficiency;
- 3) the issuing of a direction that the trustee should make good the deficiency; and

4) failure on the part of the defendant to comply.

It is a condition precedent to the accrual of any claim being brought against RBTT as alleged statutory trustee for breach of its duty under the Act, that written directions are required to be issued to RBTT after December 13, 2011 (the date from which an amendment to section 32(2) which introduced the relevant provisions came into force). This condition precedent has not been triggered by written directions having been given to RBTT, and with which it has failed to comply. No written directions have been given to RBTT by the Supervisor pursuant to section 32(2)(2b) of the Act. Hence, the defendant submitted, the action has not accrued for the Supervisor to have recourse to which, in any event, would be his sole remedy of recovering the penalty as provided for by the Act.

[26] It should be noted that subsequent to the filing of the claim, by letter dated March 10, 2015, the Financial Services Authority/Supervisor of Insurance wrote to RBTT, making a determination that there was a deficiency, and pursuant to section 32 (2b) of the Act, gave notice requiring RBTT to make good the deficiency in the amount of \$135,646,312.07 in BAICO's statutory fund by June 10, 2015. RBTT instituted judicial review proceedings challenging the legality of this directive. On September 17, 2019, Byer J. granted declarations that the decision and/or determination, and the notice were unreasonable and unlawful.⁷

[27] Duty of care at common law

Moreover, the defendant argued, in order to found a private law cause of action flowing from the careless exercise of statutory powers or duties as alleged, the Supervisor has to show that the circumstances are such as to raise a duty of care at common law. The mere assertion of the careless exercise of a statutory duty or power is not sufficient. Again, the defendant drew the court's attention to the case of **X (Minors) v Bedfordshire County Council**⁸ and highlighted the pronouncements of Lord Browne-Wilkinson as follows:

“If justiciable, the ordinary principles of negligence apply. If the plaintiff's complaint alleges carelessness, not in the taking of a discretionary decision to do some act, but in the practical manner in which that act has been performed (e.g. the running

⁷ SVGHCV2015/0069 RBTT Bank Ltd v The Financial Services Authority and The Attorney General of Saint Vincent and the Grenadines

⁸ [1995] UKHL 9 at 14

of a school) **the question whether or not there is a common law duty of care falls to be decided by applying the usual principles, i.e. those laid down in Caparo Industries Plc. v. Dickman [1990] 2 A.C. 605, 617-618. Was the damage to the plaintiff reasonably foreseeable? Was the relationship between the plaintiff and the defendant sufficiently proximate? Is it just and reasonable to impose a duty of care? See Rowling v. Takaro Properties Ltd. [1988] A.C.473; Hill v. Chief Constable of West Yorkshire [1989] A.C. 53.**

“However the question whether there is such a common law duty and if so its ambit, must be profoundly influenced by the statutory framework within which the Acts complained of were done.”

[28] The defendant elucidated that upon application of the principles enunciated in **Caparo Industries Plc. V Dickman**,⁹ no duty of care as alleged can properly be imposed on the statutory duties alleged under the statement of claim since to do so would be inconsistent with the obligations under the terms of the trustee agreement as pleaded in the statement of claim and also with the proper performance of the trustee duties under sections 32(1) and 32(2) of the Act.

[29] The defendant submitted that pursuant to CPR 26.1(3), this claim does not have any prospect of success as the defendant is of the view that no claim exists.

Claimant's submissions

[30] In urging the court to dismiss the defendant's application, the claimant relied on the general principles applicable to the striking out of a claim and /or the granting of summary judgment. Learned Senior Counsel for the claimant, Mr. Astaphan, assured the court that he did not intend to engage in a mini-trial, as he alleged was done by learned Queen's Counsel, Mr. John. I wish to point out that at the end of the hearing, Queen's Counsel offered, and the court accepted, the submission of the defendant's speaking notes. Subsequently, the claimant objected to this state of affairs but requested the opportunity to put in a response. Likewise, the court obliged, and the claimant submitted a document headed "THE CLAIMANT'S REPLY TO THE DEFENDANT'S SPEAKING NOTE". Given the defendant's accusation that its submissions on the application were deflected, the claimant took advantage of this avenue to bolster his position. To the extent that the

⁹ [1990] 2 AC 605, 617-618

claimant responded to the legal points raised by the defendant, considering the totality of his submissions to the court, I shall follow the headings as set out in the defendant's submissions.

[31] Right of Action in Private Law/Penalty

The claimant submitted that the defendant's argument that the only right of action for breach of the provisions of the Act is the recovery of a penalty has no merit, and there is nothing in the Act that qualifies, restricts or prohibits the right of the claimant to bring civil or other proceedings against the defendant.. The claimant contended that the defendant's reliance on the case of **Jemima Bacchus and another v RBTT Bank Caribbean Ltd**¹⁰ and other cases on statutory trusts is misconceived. The claimant directed the court to paragraph 49 of the judgment to show that the learned master was of the view the Supervisor has *locus standi* under normal contract law to pursue the trustee for an alleged breach of the trust. Further, at paragraph 51, the learned master stated, "The breach of trust must first be established by an action by the Supervisor against the trustee. If the alleged breach is proven then the trustees' (*sic*) liability shall be "as if" the policy holder "had been" the beneficiary. This means that that trustee would be subject to the same liabilities which flow from a breach of a private trust."

[32] The claimant pointed out that the master did not refer to public law remedies and that liabilities that flow from the breach of a private trust include the liability to account and/or pay damages for breach of trust or misrepresentation. The learned master further explained that in the event that the Supervisor fails to pursue the trustee for an alleged breach of the Act or fails to act in accordance with the Act, then the policyholders could seek judicial review, declaration and injunction against him.

[33] The claimant argued that **Bacchus** is clear authority to the contrary that the only remedy for a breach of a trust is the penalty imposed by the Act. The existence of the penalty does not preclude the Supervisor from relying on common law or private law remedies in order to establish a breach of trust.

¹⁰ Supra at note 3

[34] No Fiduciary/Statutory Duties as Claimed

In written submissions, the claimant contended that he has a substantial claim against the defendant for breach of fiduciary duty and/or statutory duties arising from section 31(2) of the Act. At the hearing of the application, Mr. Astaphan SC explained that the claim is not premised solely on section 32(1) of the Act but on the misrepresentations made by RBTT to the Supervisor. He submitted that the statement of claim is very clear as to the purpose of the claim. It is not that RBTT had assets and disposed of them (contrary to the provisions of section 32), but that RBTT falsely represented to the Supervisor that it had received BAICO's assets totaling EC\$140,547,665.57. Senior Counsel made it quite clear that the Supervisor's case is not based on a construction of section 32 of the Act. The claimant accepted that on the assumption that a deficiency exists as contemplated by section 32 of the Act as amended, Parliament provided for the trustee to remedy the deficiency on receipt of notice, and in the event it fails to make good the deficiency, the imposition of a penalty. However, the claimant emphasised that this is not the case before the court but that the claimant's case is **premised substantially, if not wholly**, on misrepresentations and estoppel (emphasis added).

[35] Conditions Precedent not satisfied

This issue was not addressed by the claimant obviously because of the above stated premise of the claim.

[36] Duty of care at common law

The claimant's response to the defendant's legal arguments on this point is to argue that if Queen's Counsel's submissions are accepted by the court, the consequence or effect of such acceptance would be detrimental to the public interest. The court would eradicate by "the stroke of a pen" the application of the common law and equitable principles, which apply to trusts and/or trustees. The claimant warned the court that this would open the gate for RBTT or any other defendant who misleads a Supervisor of Insurance on the critically important matter of the assets held by it, to get away scotch free by simply saying, "Well, I never got the assets, just a list, and guess what, the Act provides no statutory remedy." The claimant insisted that this could never be acceptable or right. Learned Senior Counsel observed that learned Queen's Counsel is asking the court to rule that there is no remedy for a party who has been so seriously misled because the common law would

not apply. Senior Counsel referred to this as “an astounding proposition”. He proffered that if Queen’s Counsel is right, RBTT would have lied and gotten away with it.

[37] Principles on striking out/Summary judgment

The claimant submitted that it is well settled that the exercise of the discretion to strike out under CPR 26.3(1) is to be exercised sparingly and that the court should assume that the facts alleged in the statement of claim are true. Striking out under CPR 26.3(1) (b) and (c) is appropriate where the claim sets out no facts indicating what the claim is about or if it is incoherent or makes no sense, or if the facts it states, even if true, do not disclose a legally recognisable claim against the defendant.¹¹ Senior Counsel advanced that RBTT’s application to strike and/or for summary judgment raises several issues of fact which do not admit a plain and obvious answer. Additionally, the strength of the claimant’s case cannot be judged at this stage of the proceedings because it has not been fully investigated by disclosure or cross-examination.

[38] The claimant also relies on the following principles:

- i. A party is only required to set out the general nature of his or her case in the statement of claim.¹²
- ii. It is entirely premature to strike out a claim before the case management conference.¹³
- iii. The pleaded case is presumed to be true.¹⁴
- iv. The court must proceed cautiously when dealing with an application to strike out.
- v. The court is not required to conduct a mini-trial. The striking out of a statement of claim or defence is a draconian step which a court should take only if there is not even a scintilla of a cause of action. If there are triable issues, the matter ought to proceed to trial.¹⁵

¹¹ See *Citco Global Custody NV v Y2K Finance Inc.* HCVAP 2008/002 (BVI) at paragraphs 12 and 13

¹² See *East Caribbean Flour Mills Limited v Ormiston Ken Boyea and East Caribbean Flour Mills Limited v Hudson Williams* Civil Appeal No. 12 of 2006 (St. Vincent and the Grenadines)

¹³ See *Dr. Ralph Gonsalves v Edwardo Lynch et al and Dr. Gibson Ralph Gonsalves v Kelvin* (Civil Appeal Nos. 9 and 11 of 2003 (St. Vincent and the Grenadines)

¹⁴ *Belize Telemedia Limited v Magistrate Usher* (2008) 75 WIR 138

¹⁵ See *S v Gloucestershire County Council; L v Tower Hamlets London Borough Council and Havering London Borough Council* [200] 3 All ER 346 (CA); *Swain v Hillman and Anor* [2001] 1 All ER 91; *Doncaster Pharmaceuticals Group Ltd. and Others v The Bolton Pharmaceutical Company 100 Ltd.* [2007] FSR 3, EWCA Civ 661 and *Shah v HSBC Private Bank* [2010] Bus LR 1514

- vi. Summary judgment ought not to be granted if there are disputed facts, inferences of fact and/or serious questions of law to be tried by the court.¹⁶
- vii. Summary judgment should be granted only in cases where it is clear that a claim, on its face, obviously cannot be sustained, and cannot be cured or remedied on or before case management with the process of disclosure, exchange of witness statements and cross-examination, or in some way is an abuse of the process of the court.¹⁷

[39] Senior Counsel asked the court to take a good look at the defence, pointing out that RBTT denies factual allegations and gives an explanation in respect of those allegations made in the statement of claim. He submitted that this is a trigger for trial. He took the court through the principles in relation to the granting of summary judgment as expounded in several cases including **Westpac Banking Corp v M M Kembla New Zealand Ltd**,¹⁸ and **Jones v Attorney General**.¹⁹ Senior Counsel argued that it cannot be denied that the claim raises important issues of law and fact.

[40] The claimant therefore submitted that in this case, the issues of (a) whether RBTT was in fact a trustee of the insurance fund, and (b) whether RBTT breached its obligations as trustee of the trust are matters of fact and law to be determined at trial. These are quintessentially issues for the trial judge, as the court will allow a case to proceed to trial especially where there are issues of fact,²⁰ and/or the argument involves a substantial point of law (as in this case) which does not admit a plain and obvious answer.²¹

[41] The claimant contended that the authorities show that it is in the public interest for this matter to go to trial. Alternatively, it would be oppressive for any strike out to take place well before any case management conference. The claimant ought not to be denied his right in this important case to pursue requests for information, disclosure, the filing and exchanging of witness statements, and

¹⁶ See *Easyair Limited (t/a Openair) v Opal Telecom Limited* [2009] EWHC 339 (Ch)

¹⁷ See *Easyair* noted above; *Saint Lucia Motor & General Insurance Co. Ltd. v Peterson Modeste* HCVAP 2009/008 and *Ian Peters v Robert George Spencer* HCVAP 2009/016 (Antigua and Barbuda)

¹⁸ [2001] 2 NZLR 298

¹⁹ [2004] 2 LRC 194

²⁰ See *The Attorney General v Allen Chastanet and Anor* SLUHCVP2015/0016

²¹ See *Dr. Martin G.C. Didier et al v Royal Caribbean Cruises Ltd.* SLUHCVP2014/0024 consolidated with *Royal Caribbean Cruises Ltd v Medical Associates Ltd et al* SLUHCVP2015/0004

the exercise of the important right of cross-examination at a trial. The claimant submitted that the defendant's application should be dismissed with costs.

Analysis

[42] Since the defendant's application is to strike out the claim and/or for summary judgment, it is prudent to highlight the distinction in the principles applicable to the granting of an order in respect of each. In this regard, I am guided by the pronouncements of the Honourable Chief Justice in **Didier**.²² At paragraphs 23 and 24 of the judgment, Her Ladyship stated:

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

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

[43] Addressing the distinction in the requirements for both procedures, Pereira CJ. made it clear that a party applying for summary judgment must file affidavit evidence in support of the application.²³

[44] This application is premised primarily on the striking out of the claim on the basis that it does not disclose a recognisable cause of action against the defendant. The defendant was clear that for the purposes of its application, the facts alleged in the claim are taken as true. Mr. John QC pointed out that the claimant, in its submissions, resiled from its pleaded case in submitting that the instant claim is not framed in breach of statutory duty, but rather is based on misrepresentation. The defendant reiterated that its application to strike is premised on the assumption that all of the facts alleged in the statement of claim are proved, but that the duties alleged and the rights claimed are unrecognisable and/or unavailable to the claimant. Further, learned Queen's Counsel accused the claimant of deflecting the defendant's legal arguments. As mentioned earlier, the claimant sought to answer some of the defendant's points in its reply to the defendant's speaking notes.

²² Ibid

²³ See paragraph 22 of the judgment

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

[46] Right of Action in Private Law/Penalty

The parties have different interpretations of the statements of the court in **Jemima Bacchus** in relation to type of action the Supervisor can bring against RBTT. Whereas the defendant submitted that the learned master opined that the Act did not confer a private law right of action in the policyholders, the claimant contended that the only issue was that of *locus standi*, and that the Supervisor can pursue a private law action against RBTT.

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

[48] The Act provides for a penalty for breach of section 32, that is, for failure of a trustee to comply with directions given to make good a deficiency in the total value of assets contained in the list submitted under subsection 2. The claimant has stated categorically that the claim is not based on a construction of section 32(2). However, the defendant, while contending that there is no statutory breach of section 31(2) as pleaded by the claimant, attempted to infer a possible breach of the provisions of section 32.

[49] In my view, the existence of a penalty for breach of section 32(2b) of the Act has no relevance to the bringing of an action against the trustee for a breach of the trust or a breach of fiduciary duty or,

indeed, a breach of any provision of the Act other than section 32(2b). The penalty is restricted to that particular provision for failure to comply with directions given by the Supervisor. Therefore, I am in agreement with the claimant that the existence of the penalty does not preclude the claimant from relying on common law or private law principles in order to establish a breach of the trust.

No Statutory/Fiduciary Duties as Claimed

[50] I agree with the defendant that the allegation in paragraph (a) of the Particulars of Breach of Fiduciary Duties and/or Statutory Duties does not constitute a breach of section 31(2) of the Act as pleaded by the claimant. For ease of reference, and to illustrate clearly the point being made, I repeat the contents of the section and the relevant part of the statement of claim. Section 31(2) of the Act reads:

The Supervisor may, for the purpose of this section, allow the assets required to be placed in trust to be held by a bank in the State or a financial institution approved by the Supervisor to the order of and on behalf of the Supervisor and the assets shall be deemed to be placed in trust and the bank or financial institution shall be deemed to be a trustee.

Paragraph 16(a) of the statement of claim pleads:

In breach of section 31(2) of the Insurance Act, [RBTT] failed to take or keep physical possession and control of and/or maintain possession and control of BAICO's assets which the Defendant was obligated by law to hold in trust to the order of or on behalf of the Claimant.

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

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

fiduciary responsibility would make the trustee liable to the beneficiaries for any damage caused by such breach".²⁴

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

- (a) Reporting to the Registrar of insurers all assets of British-American Insurance Company (St. Vincent) held in trust.
- (b) The safe-keeping of security items of assets held.
- (c) Monitoring and updating records on the release and renewal of assets.

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

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

Conditions Precedent not satisfied

[56] If a case can be made out that the claimant is alleging that the defendant was in breach of the provisions of section 32(2), I agree with the defendant that the requirement in section 32(2b) of the Act for the Supervisor to give a written directive must be complied with before the imposition of penalty under section 32(2c) can arise. In fact, the claimant accepts this point but does not

²⁴ Black's Law Dictionary, Sixth Edition, at page 625

consider it relevant to his case. In the 'Particulars of Breach', the claimant specified section 31(2). Notwithstanding the defendant's submissions on these provisions, the claimant made no attempt to amend, or suggest a typographical or other error in, any of the paragraphs of the claim citing the sections and sub-sections of the Act.

Duty of Care at common law

[57] The defendant engaged the court on an in-depth analysis as to whether the claimant by his pleaded claim has established that RBTT owes a common law duty of care to the Supervisor. The defendant's submissions conclude emphatically in the negative. The claimant's position is that the common law and equitable principles in relation to trusts and/or trustees are applicable in this case. Learned Queen Counsel alleged that the claimant has studiously avoided replying to the submissions which the defendant raised in relation to the restrictions on the application of a common law duty of care, as established by the **Caparo Industries** case tripartite test in respect of negligent misstatement. Queen's Counsel accused Senior Counsel of not giving the most cursory attention to the principles enunciated by Lord Browne-Wilkinson in **X (Minors) v Bedfordshire County Council**, in trying to persuade the court that it does have a right of action at common law, and how further evidence and/or discovery will assist in establishing the merits of the action.

[58] Lord Jauncey of Tullichettle in **X (Minors) v Bedfordshire County Council**²⁵ also gave guidance on the point when he stated:

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

[59] Notwithstanding the claimant's apparent refusal to respond with a head-on engagement of the legal principles highlighted by the defendant, the seemingly perfunctory manner in which the claimant addressed the issue in his closing reply, in the circumstances of this case, in my view, will suffice to

²⁵ [1995] UKHL 9

block a striking out of the claim. I have already adopted the stance that the claimant can bring a private law action against the defendant. The claim reveals at least a breach of fiduciary duty and/or breach of trust. If the defendant is a trustee (as assumed for the purpose of these proceedings) holding BAICO's assets to the order of and on behalf of the claimant, then a proximate relationship for a duty of care to arise is evident. That being so, loss as identified by the claimant in paragraph 17 of the statement of claim, is a reasonably foreseeable consequence of a false report on the assets held by the defendant as trustee. Therefore, it is fair, just and reasonable to impose a duty of care on the defendant.

Conclusion

[60] On the pleaded claim, RBTT as statutory trustee made misrepresentations to the Supervisor of Insurance that it held and was holding BAICO's statutory fund assets as trustee to the value of \$140,547,665.57 with actual and/or constructive knowledge that, in fact, it had physical control of only 2 assets valued at \$2,075,076.00. As a result, the Supervisor as regulator took no steps to independently confirm that the assets to the tune of \$140,547,665.57 were so held nor did he seek possession and/or control of those assets and therefore pleads loss and damage to the value of the assets not held. The claim is clearly recognisable as one for a breach of the trust created under the trustee agreement and breach of fiduciary duties. The penalty for contravention of section 32 of the Act is not a bar to the Supervisor to bring a private law action against RBTT as a statutory trustee. On the assumption that the facts pleaded in the statement of claim are true, to my mind, there is much more than a scintilla of a cause of action in this claim and the court ought not to, and will not, exercise the nuclear option to strike it out.

[61] On the application in relation to summary judgment, I agree with the claimant that the defendant has not produced any affidavit evidence, which is a complete defence to the claim. It cannot be concluded that the claimant has no real prospect of succeeding on the claim.

Order

- 1) The defendant's application to strike out the claim or, in the alternative, for summary judgment is refused.
- 2) Costs shall be in the cause.

- 3) On the application of the claimant, the statement of claim is to be amended to reflect the change in claimant to The Financial Services Authority.

Tamara Gill

Master

By the Court

Registrar