# In The Supreme Court of Bermuda

**CIVIL JURISDICTION**
**COMMERCIAL LIST**
**2010: No. 454**

**BETWEEN:-**

**(1) KINGATE GLOBAL FUND LIMITED (In Liquidation)**
**(2) KINGATE EURO FUND LIMITED (In Liquidation)**

**Plaintiffs**

**-and-**

**(1) KINGATE MANAGEMENT LIMITED**
**(2) FIM LIMITED**
**(3) FIM ADVISERS LLP**
**(4) FIRST PENINSULA TRUSTEES LIMITED**
**(as Trustee of the Ashby Trust)**
**(5) PORT OF HERCULES TRUSTEES LIMITED**
**(as Trustee of the El Prela Trust)**
**(6) ASHBY HOLDING SERVICES LIMITED**
**(7) EL PRELA GROUP HOLDING SERVICES LIMITED**
**(8) MR CARLO GROSSO**
**(9) MR FEDERICO CERETTI**
**(10) ASHBY INVESTMENT SERVICES LIMITED**
**(11) EL PRELA TRADING INVESTMENTS LIMITED**
**(12) ALPINE TRUSTEES LIMITED**

**Defendants**

**RULING ON PLAINTIFF'S APPLICATION OF 13TH AUGUST 2015**
**(In Chambers)**

Date of hearing: 30th November 2015 – 2nd December 2015
Date of ruling: 11th January 2016

Mr Alex Potts, Sedgwick Chudleigh Ltd, for the Plaintiffs

Mr Thomas Lowe QC, Ms Sarah-Jane Hurrion, and Ms Lilla Zuill, Harneys Bermuda Limited, for the Second, Third, Eighth and Ninth Defendants

The other Defendants were not present and were not represented.

**Introduction**

1. By a summons dated 13th August 2015 ("the Plaintiffs' Summons") the Plaintiffs seek an order that the applications contained within paragraphs 1, 2 and 3 of what is now the Re-Amended Summons of the Second, Third, Eighth and Ninth Defendants ("the FIM Defendants") dated 11th September 2015 ("the Re-Amended Summons") be not entertained and/or summarily dismissed, in accordance with the power of the Court exercised in Williams & Humbert v W&H Trade Marks (Jersey) Ltd [1986] 1 AC 368 ("Williams & Humbert") and/or the Court's inherent jurisdiction and/or Order 18, rule 19 and Order 1A, rules 1 and 4, of the Rules of the Supreme Court 1985 ("RSC").

2. Alternatively, the Plaintiffs seek an order that the Re-Amended Summons be stayed generally, pending the final determination of the preliminary issues which are the subject of an appeal to the Court of Appeal from a judgment of this Court dated 25th September 2015 ("the Judgment on the Preliminary Issues").

3. In the further alternative, the Plaintiffs seek directions for the service of evidence with respect to the hearing of the Re-Amended Summons.

4. By the Re-Amended Summons the FIM Defendants seek orders pursuant to RSC Order 18, rule 19 or under the inherent jurisdiction of the Court that:

(1) The fault-based claims and allegations made by the Plaintiffs against the Eighth and Ninth Defendants, Mr Grosso and Mr Ceretti, in paragraphs 126 to 132 of the Re-Re-Re-Amended Statement of Claim be struck out on the basis that they disclose no reasonable cause of action and/or are an abuse of process.

(2) The claims and allegations based on retention of legal title or the proprietary claims made by the Plaintiffs against each Defendant in paragraphs 97 – 103 of the Re-Re-Re-Amended Statement of Claim be struck out on the basis that they disclose no reasonable cause of action.

(3) The claims and allegations based on indirect unjust enrichment made by the Plaintiffs against each of the Fourth to Twelfth Defendants in paragraphs 78 to 96 of the Re-Re-Re-Amended Statement of Claim be struck out on the basis that they disclose no reasonable cause of action.

5. The background to the action is set out in the Judgment on the Preliminary Issues. I need not repeat it.

**Williams & Humbert**

6. Williams & Humbert is the leading authority on when the Court should refuse to permit a strike out application pursuant to RSC Order 18, rule 9 to proceed.

7. Lord Templeman reviewed the relevant case law from which at 435 H – 436 A he extracted the following principle:

> "*... if an application to strike out involves a prolonged and serious argument the judge should, as a general rule, decline to proceed with the argument unless he not only harbours doubts about the soundness of the pleading but, in addition, is satisfied that striking out will obviate the necessity for a trial or will substantially reduce the burden of preparing for trial or the burden of the trial itself.*"

8. Lord Templeman held at 436 C – D that although in the case before the House that test was not satisfied, there were special circumstances which had justified the judge at first instance in entertaining the strike out application:

> "*If the appellants' pleadings and particulars had not been struck out, the appellants would have proceeded to demand discovery before trial and to lead evidence at the trial, harassing to the plaintiffs and embarrassing to the court and designed to support the allegations and insinuations of oppression and bad faith on the part of the Spanish authorities which appear in the amended defences and particulars. These allegations are irrelevant to the trade marks action and the banks' action and are inadmissible as a matter of law and comity and were rightly disposed of at the first opportunity.*"

9. Lord Mackay stated that he agreed with Lord Templeman's analysis of the authorities to which Lord Templeman had referred but at 441 E – F expressed the general rule to be derived from them in his own words:

> "*If on an application to strike out it appears that a prolonged and serious argument will be necessary there must at the least, be a serious risk that the court time, effort and expense devoted to it will be lost since the pleading in question may not be struck out and the whole matter will require to be considered anew at the trial. This consideration, as well as the context in which Ord. 18, r. 19 occurs and the authorities upon it, justifies a general rule that the judge should decline to proceed with the argument unless he not only considers it likely that he may reach the conclusion that the pleading should be struck out, but also is satisfied that striking out will obviate the necessity for a trial or will so substantially cut down or simplify the trial as to make the risk of proceeding with the hearing sufficiently worth while.*"

10. Lord Mackay agreed at 441F that the course taken by the judge in the case before the House was justified by "*the very special circumstances*" to which Lord Templeman had referred.

11. Each of Lords Scarman, Bridge and Brandon stated at 425 E – G that he agreed with both speeches.

12. In summary, therefore, when considering whether to permit a strike out application to proceed the court should ask the following questions:

    (1) *Would the strike out application be likely to involve serious and prolonged argument?* In my judgment it is not helpful to attempt to

define these terms further: the Court will know such an application when it sees it. Various cases were cited to me in which the length or estimated length of the hearing ran to several weeks. Eg Morris v Bank of America Trust [2001] 1 BCLC 771 EWCA (15 days); Mentor Insurance Limited (in Liquidation) v Ocean Drilling & Exploration Company [1991] Bda LR 60 SC (three weeks); and Frogmore Estates v Berger, The Times 1st November 1989 Ch D (four weeks). In Peters v Menzies [2009] EWHC 3709 (Ch), on the other hand, the court held that a somewhat shorter application with an estimated length of two days would undoubtedly involve prolonged and serious argument. These cases are merely examples, and do not purport to establish a rule as to the length of argument necessary to count as "*prolonged*". If a strike out application would not be likely to involve serious and prolonged argument then it should proceed. If it would be likely to, then the Court should consider the following question.

(2) *Does the Court harbour doubts about the soundness of the pleading (Lord Templeman), or, put another way, think it likely that it may reach the conclusion that the pleading should be struck out (Lord Mackay)?* Although Lord Templeman and Lord Mackay formulated this question differently, neither they, nor any of the three Law Lords who agreed with them both, seemed to think that they were laying down different tests. Rather, they were expressing in different ways what was essentially the same thing. That is how their speeches on this point have generally been understood. Thus in Frogmore Estates v Berger Sir Nicholas Browne-Wilkinson V-C (as he then was) quoted the relevant passage from the speech of Lord Templeman before stating that "*the defendants have to demonstrate that their application is likely to succeed*" – a form of words that is closer to Lord Mackay's formulation but rather more definite. That statement by Sir Nicholas Browne-Wilkinson was accepted as accurate by Morritt LJ, delivering the judgment of the Court, in Morris v Bank of America Trust at paras 19 and 22. Using his own words, he stated at para 24 that on a strike out application the applicant must show that its application "*has some prospect of success*". I find that a helpful way to express the idea

underlying all these formulations is to ask whether the applicant has a real prospect of success. If so, then the strike out application should be allowed to proceed. If not, then the court should ask a further question.

(3) *Would the strike out application obviate the necessity for a trial or so substantially cut down or simplify the trial as to make the risk of proceeding with the hearing sufficiently worth while?* In Frogmore Estates v Berger Sir Nicholas Browne-Wilkinson V-C put the question more succinctly as whether the application "*will either be decisive or appreciably simplify the eventual trial*". The underlying question is whether it is likely to be an effective use of court time.

13. If the Court is satisfied that the strike out application would be likely to involve serious and prolonged argument then it will not generally allow the application to proceed unless it: (i) harbours doubts about the soundness of the pleading/thinks it likely that it may reach the conclusion that the pleading should be struck out; and (ii) is satisfied that the application will either be decisive or appreciably simplify the eventual trial. However even if these criteria have not been met, in exceptional circumstances, such as were present in Williams & Humbert, the Court may nonetheless allow the application to proceed.

14. These principles have long been recognised by the courts in Bermuda. Eg in Mentor Insurance Limited (in Liquidation) v Ocean Drilling & Exploration Company.

15. I agree with HH Judge Purle QC sitting as a High Court Judge in Peters v Menzies that the overriding objective to deal with cases justly, which in Bermuda is to be found at RSC Order 1A, "*reinforce[s] the Williams & Humbert approach*". I note that dealing with a case justly involves *inter alia*, so far as is practicable, saving expense, ensuring that it is dealt with expeditiously, and allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other cases.

**Strike out application**

16. When deciding whether a strike out application pursuant to Order 18, rule 9 is likely to succeed it will be helpful to have in mind the principles governing such an application. They were summarised by the Court of Appeal in Broadsino Finance Co Ltd v Brilliance China Automotive Holdings Ltd [2005] Bda LR 12. Stuart-Smith JA, giving the judgment of the Court, stated at 4 – 5.

> "*Where the application to strike-out on the basis that the Statement of Claim discloses no reasonable cause of action (Order 18 Rule 19(a)), it is permissible only to look at the pleading. But where the application is also under Order 18 Rule 19(b) and (d), that the claim is frivolous or vexatious or is an abuse of the process of the court, affidavit evidence is admissible. Three citations of authority are sufficient to show the court's approach. In Electra Private Equity Partners (a limited partnership) v KPMG Peat Marwick [1999] EWCA Civ 1247, at page 17 of the transcript Auld LJ said: 'It is trite law that the power to strike-out a claim under Order RSC Order 18 Rule 19, or in the inherent jurisdiction of the court, should only be exercised in plain and obvious cases. That is particularly so where there are issues as to material, primary facts and the inferences to be drawn from them, and where there has been no discovery or oral evidence. In such cases, as Mr Aldous submitted, to succeed in an application to strike-out, a defendant must show that there is no realistic possibility of the plaintiff establishing a cause of action consistently with his pleading and the possible facts of the matter when they are known….. There may be more scope for an early summary judicial dismissal of a claim where the evidence relied upon by the Plaintiff can properly be characterised as shadowy, or where the story told in the pleadings is a myth and has no substantial foundation. See eg Lawrence and Lord Norreys (1890) 15 Appeal Cases 210 per Lord Herschell at pages 219–220'. In National Westminster Bank plc v Daniel [1994] 1 All ER 156 was a case under Order 14 where the Plaintiff was seeking summary judgment, but it is common ground that the same approach is applicable. Glidewell LJ, with whom Butler-Sloss LJ agreed, put the matter succinctly following his analysis of the authorities. At page 160, he said: 'Is there a fair and reasonable probability of the defendants having a real or bona fide defence? Or, as Lloyd LJ posed the test: "Is what the defendant says credible"? If it is not, then there is no fair and reasonable probability of him setting up the defence'.*"

17. Alex Potts, who appeared for the Plaintiffs, stressed two points in particular. First, a strike out application should not become a mini-trial on the documents. See eg Wenlock v Moloney [1965] 1 WLR 1238 *per*

Danckwerts LJ at 1244 A – C, with whom Diplock LJ (as he then was) agreed at 1244 D – E:

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

18. Second, a strike out application is not an appropriate vehicle for determining controversial points of law in a developing area. See eg Altimo Holdings v Kyrgyz Mobil Tel Ltd [2012] 1 WLR 1804 *per* Lord Collins at para 84:

"*The general rule is that it is not normally appropriate in a summary procedure (such as an application to strike out or for summary judgment) to decide a controversial question of law in a developing area, particularly because it is desirable that the facts should be found so that any further development of the law should be on the basis of actual and not hypothetical facts: …*"

**The present case**

***Would the strike out application be likely to involve serious and prolonged argument?***

19. The strike out application would last for an estimated five to seven days. It would most probably be argued by Queen's Counsel. As will appear from the discussion below, it would involve questions of developing law. In the premises I am satisfied that it would be likely to involve serious and prolonged argument.

***Does the Court harbour doubts about the soundness of the pleading/think it likely that it may reach the conclusion that the pleading should be struck out?***

20. As to the fault based claims against Mr Grosso and Mr Ceretti, Thomas Lowe QC, who appeared for the FIM Defendants, submitted that the issue was whether the pleaded facts were capable of giving rise to a personal duty of care. They were allegedly directors and controlling shareholders of the Second Defendant, FIM Limited, and the principals of the Third Defendant, FIM Advisers LLP. On a strike out application the Court would have to decide whether it was plain and obvious that neither one of them could be liable in tort on the ground that they directed, procured or authorised the commission of a tort by the Second or Third Defendants ("FIM") or assumed responsibility for FIM's actions.

21. As to the proprietary claims against the Defendants, on a strike out application the Court would have to decide whether it was plain and obvious that the Plaintiff's intention to pass property in the fees to the First Defendant, Kingate Management Limited ("KML"), was not vitiated by fundamental mistake. This would involve, *inter alia*, consideration of whether it was properly arguable that KML had received the fees on a constructive trust, whether on the analysis of Goulding J in Chase Manhattan Bank NA v Israel-British Bank (London) Ltd [1981] Ch 105 Ch D or on the alternative analysis of Lord Browne-Wilkinson in Westdeutsche Landesbank Girozentrale v Islington LBC [1996] AC 669 HL, or alternatively a resulting trust.

22. As to the claims against the Fourth to Twelfth Defendants based on unjust enrichment, on a strike out application the Court would have to consider whether, notwithstanding Hone v Canadian Imperial Bank of Commerce (1989) 37 WIR 39 PC, it was plain and obvious that the relevant Defendants had not been directly enriched. Alternatively, the Court would have to consider whether it was plain and obvious that the relevant Defendants had not been indirectly enriched. This would in turn involve a consideration of what was the correct test for indirect enrichment – eg the "direct providers only" rule, "but for" causation, or economic reality – and the relationship between indirect unjust enrichment and the doctrine of corporate personality.

23. This summary of the issues arising on the strike out application is not intended to be exhaustive.

24. I am satisfied that all three limbs of the strike out application, particularly the second and third limbs, would involve developing questions of law which are best decided on the basis of the concrete facts found at trial. The first limb in particular would raise questions which are, as Mr Potts submitted, intensely fact sensitive. I am satisfied that these issues arise on the pleadings as they stand. In the premises I do not harbour doubts about the soundness of the Statement of Claim nor think it likely that I might reach the conclusion that it should be struck out. There are no special circumstances which would nonetheless justify the court in hearing a strike out application. It follows that the strike out application should not be permitted to proceed.

***Would the strike out application obviate the necessity for a trial or so substantially cut down or simplify the trial as to make the risk of proceeding with the hearing sufficiently worth while?***

25. Although in light of my findings on the previous question it is not necessary for me to go on to consider this point I shall do so anyway. The FIM Defendants' legal team prepared a helpful note as to which Defendants would remain in the proceedings under various scenarios. This was in the context that all parties were appealing various aspects of the Judgment on the Preliminary Issues. Mr Lowe submitted that there was a good prospect that if all or part of the strike out application was successful, substantial court time would be saved. Mr Potts did not accept this and submitted that a fault based trial against KML at least would be necessary in any event. There is, then, uncertainty about precisely how the outcome of the strike out application would affect the trial. Nevertheless, if I had been satisfied that the strike out application had any realistic prospect of success I should have concluded that it would have been likely to simplify the trial sufficiently to justify the application going ahead.

**Conclusion**

26. The applications contained in paragraphs 1, 2 and 3 of the Re-Amended Summons are dismissed. It is therefore unnecessary for me to consider the alternative relief sought by the Plaintiffs.

27. I shall hear the parties as to costs.

Dated this 11th day of January, 2016

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Hellman J