In The Supreme Court of Bermuda

CIVIL JURISDICTION
(COMMERCIAL COURT)
2018 No: 390

BETWEEN:

(1) BCT LIMITED
(as Trustee of the A. Eugene Brockman Charitable Trust)
(2) SPANISH STEPS HOLDINGS LTD

Plaintiffs

And

(1) EVATT ANTHONY TAMINE
(2) TANGARRA CONSULTANTS LIMITED

Defendants

RULING

Dates of Hearing:	Wednesday 29 April 2026
Date of Ruling:	Monday 31 August 2026
Plaintiffs:	Mr. Oliver MacKay and Mr. Oliver Nicholas (Carey Olsen Bermuda Limited)
Defendants:	Mr. Paul Harshaw (Canterbury Law Limited)

Application for leave to re-amend Defence – Claims for Breach of fiduciary duty and Breach of Confidence- Distinction between statutory interest and compound interest

RULING of Shade Subair Williams J

INTRODUCTION

1. By summons issued on 18 December 2025, having been filed on 25 November 2025, the Defendants seek to (i) reamend the Defence as a response to the Plaintiffs' post-judgment amendments in the form of a Re-Amended Statement of Claim (the "RASOC") (the "reamendment application") and (ii) to vary the timetable for the directions contained in the Consent Order of 21 September 2023 to allow for service to run from the time of service of the proposed Re-Amended Defence (the "proposed RAD") rather than from the lifting of the stay (the "timetable variation application"). If the directions timetable follows the latter, than the time for service has already expired.

2. The Consent Order of 21 September 2023 provides for the listing of a post-judgment trial with an estimate of two days. The judgment entered in favour of the Plaintiffs in this matter was for the recovery of approximately $28,000,000.00 of misappropriated trust monies. That judgment was followed by a Consent Order made on 1 June 2023 for pre-judgment and post-judgment interest.

3. The outstanding claims to be tried are claims for:

   (i) Payment of compound interest, as a form of equitable compensation, in relation to the misappropriated sums of $16,800,000.00 and $5,395,000.00 carried out in breach of Mr. Tamine's fiduciary duties.

   (ii) Injunctive relief to compel Mr. Tamine to take all reasonable steps to delete and destroy soft copies of trust documents which remain in his possession.

   (iii) Injunctive relief to restrain Mr. Tamine from disclosing any confidential information or any privileged information relating to the A. Eugene Brockman Charitable Trust (the "B Trust").

   (iv) An inquiry into any post 13 September 2028 unauthorized disclosures of confidential or privileged material relating to the B Trust.

(v) Equitable compensation for breach of confidence, misuse of confidential and privileged information, breach of fiduciary duty and dissipation of any trust property.

4. Having heard the parties on the reamendment application and the timetable variation application, I reserved my decision which I now deliver based on the reasons provided in this Ruling.

RELEVANT BACKGROUND

5. In December 2019 St John's Trust Company Limited ("SJTC") was replaced as trustee of the B Trust by Medlands PTC Limited ("Medlands"). However, Medlands did not replace SJTC as the Plaintiff in the present proceedings which were dormant during that period.

6. By the Order of 26 March 2021 in Case No. 376 of 2018 (the "Trust proceedings") BCT Limited ("BCT") replaced Medlands as the new trustee of the B Trust, effective 1 April 2021. Neither of the Defendants in these proceedings were party to the Trust proceedings.

7. By the Order of this Court, dated 19 August 2021, BCT replaced SJTC as the First Plaintiff in these proceedings in its capacity as the trustee of the B Trust. The personal claims advanced by SJTC were ordered to be tried in separate proceedings. In the present proceedings, the Court is concerned with the claims advanced by BCT qua trustee.

8. On 30 June 2022 the Plaintiffs filed and served an Amended Statement of Claim to which the Defendants filed an Amended Defence on 14 July 2022.

9. On 5 August 2022, Mr. Bob Brockman died. Following Mr. Brockman's death but on or prior to 3 November 2022, Mr. Brockman's Will was admitted to probate in Texas. In the Third Affidavit of Mr. Peter Goddard, at paragraph [7], it is said that almost all of the assets held in trust, including Mr. Brockman's beneficial interest in the shares in the Second Plaintiff, were appointed to a new trust, namely the Robert T. Brockman Management Trust (the "B Management Trust"). Mr. Goddard's evidence is that the B Management Trust is a trust governed by the law of the Cayman Islands and that since 15 June 2022, IMG (PTC) Limited ("IMG PTC"), a licensed subsidiary of IMG Trust Company Limited ("IMG") since 28 September 2022, has acted as trustee of the B Management Trust.

10. Against this background, the Defendants query what, if any assets, of Mr. Brockman's estate remain vested in the B Trust. Mr. Harshaw queried that if the remaining assets of the B Trust

are purely in cash currency, the claims against the Defendants are no longer viable as the Plaintiffs would lack standing.

11. By the Consent Order of 21 September 2023, these proceedings were stayed and remained stayed for an approximate period of two years. However, on 14 October 2025, the Plaintiffs took steps to lift the stay, effective 28 October 2025. By letter dated 22 October 2025 Mr. Harshaw wrote to the Plaintiffs' Counsel, Mr. Oliver MacKay of Carey Olsen Bermuda Limited (Carey Olsen), inviting an explanation for the Plaintiffs' decision to resume these proceedings. In that letter, Mr. Harshaw put it to Carey Olsen that there were no longer any substantive issues to be litigated between the parties. As an alternative, Mr. Harshaw sought an agreement that the scope of any disclosure would have to be defined by reference to an agreed list of issues. This was the premise for the Defendants' request for an extension of time to 10 February 2026 to agree a list of issues and comply with their discovery obligations. In a reply letter of 29 October 2025, Mr. Keith Robinson of Carey Olsen, stated that the Plaintiffs declined to reconsider lifting the stay and that the Plaintiffs also declined the request for an extension of time. This was met by a further letter from Mr. Harshaw in which he stated, *inter alia*, that the next step in the proceedings, should the stay be lifted, is for his clients to file a Re-Amended Defence in response to the RASOC. Mr. Hashaw wrote at paragraph [8]:

"*To this end, we propose varying the Consent Order dated 21 September 2023 (the "Consent Order") to include a new clause 3(a) stating:*

"Permission shall be granted to the Defendants to re-amend their Defence in response to the Plaintiff's Re-Amended Statement of Claim. The Defendants shall file and serve a Re-Amended Defence by 4 pm on 19 December".

The directions set out at paragraphs 3 (a) to (f) of the Consent Order will otherwise remain effective, but time will run from service of our clients' Re-Amended Defence rather than from the lifting of the Stay."

THE RE-AMENDMENT APPLICATION

12. Mr. Harshaw submitted that the proposed RAD is necessary to clarify the issues between the parties, such issues being the determining factor on the scope of discovery to be made. He pointed out that the Amended Defence was filed in July 2022, prior to Mr. Brockman's death and prior to the appointment of nearly all his assets to the Management Trust and before the filing of the Re-Amended Statement of Claim in January 2023.

13. Mr. Harshaw explained that a key point made in the Defence is that there was a compromise of the interest claims for statutory interest and equitable interest. The Defendants' case is that those claims are alternative claims rather than concurrent claims. The Plaintiff's case is that the 1 June 2023 Consent Order only settled the statutory interest claims and that the claims for equitable interest remain outstanding.

14. The proposed RAD mounts a case against the Plaintiffs' claims for compound interest as equitable compensation for Mr. Tamine's breach of fiduciary duty in the misappropriation of the sums of $16,800,000.00 and $5,395,000.00. The Defendants propose to challenge the equitable interest claims on the basis that the interest claims were the subject of a binding settlement agreement made between the parties in May 2023. The Defendants say that as a matter of law, it is an abuse of process for the Plaintiffs to pursue the interest claims following the Settlement Agreement, the terms of which were contained in the 1 June 2023 Consent Order.

15. The Plaintiffs' case, however, is that the 1 June 2023 Consent Order only settled the statutory interest claims and that it is accordingly entitled to pursue compound interest under the Court's equitable jurisdiction. The Defendants, on the other hand, contend that a claim for statutory interest is mutually exclusive from a claim for equitable jurisdiction interest and that the Plaintiff's election to recover statutory interest disqualified them from any entitled to pursue compound interest. On that footing, the Defendants also seek a wasted costs order to be taxed on an indemnity basis.

16. Mr. Harshaw relied on the Privy Council's decision from the Court of Appeal of Hong Kong in *Personal Representatives of Tang Man Sit v Capacious Investments Ltd* [1996] as an authority for the principle that a plaintiff must make an election between alternative and inconsistent remedies. Attaching his case to this principle, Mr. Harshaw pointed to the following passages of the judgment of Lord Nicholls of Birkenhead at pages [521] – [522]:

"*Faced with alternative and inconsistent remedies a plaintiff must choose, or elect, between them. He cannot have both. The basic principle governing when a plaintiff must make his choice is simple and clear. He is required to choose when, but not before, judgment is given in his favour and the judge is asked to make orders against the defendant. A plaintiff is not required to make his choice when he launches his proceedings. He may claim one remedy initially, and then by amendment of his writ and his pleadings abandon that claim in favour of the other. He may claim both remedies, as alternatives. But he must make up his mind when judgment is being entered against the defendant. Court orders are intended to be obeyed. In the nature of things, therefore, the court should not make orders which would afford a plaintiff both of two alternative remedies.*

In the ordinary course, by the time the trial is concluded a plaintiff will know which remedy is more advantageous to him. By then, if not before, he will know enough of the facts to assess where his best interests lie. There will be nothing unfair in requiring him to elect at that stage. Occasionally this may not be so. This is more likely to happen when the judgment is a default judgment or a summary judgment than at the conclusion of a trial. A plaintiff may not know how much money the defendant has made from the wrongful use of his property. It may be unreasonable to require the plaintiff to make his choice without further information. To meet this difficulty, the court may make discovery and other orders designed to give the plaintiff the information he needs, and which in fairness he ought to have, before deciding upon his remedy. A recent instance where this was done is the decision of Lightman J. in Island Records Ltd. v. Tring International Pic. [1995] 3 All E.R. 444. The court will take care to ensure that such an order is not oppressive to a defendant.

In the ordinary course the decision made when judgment is entered is made once and for all. That is the normal rule. The order is a final order, and the interests of the parties and the public interest alike dictate that there should be finality. The principle, however, is not rigid and unbending. Like all procedural principles, the established principles regarding election between alternative remedies are not fixed and unyielding rules. These principles are the means to an end, not the end in themselves. They are no more than practical applications of a general and overriding principle governing the conduct of legal proceedings, namely, that proceedings should be conducted in a manner which strikes a fair and reasonable balance between the interests of the parties, having proper regard also to the wider public interest in the conduct of court proceedings. Thus in Johnson v. Agnew [1980] A.C. 367 the House of Lords held that when specific performance fails to be realised, an order for specific performance may subsequently be discharged and an inquiry as to damages ordered. Lord Wilberforce observed, at p. 398: "Election, though the subject of much learning and refinement, is in the end a doctrine based on simple considerations of common sense and equity.""'

17. Mr. Harshaw argued that it is accepted even on the Plaintiff's own pleaded case that the compound interest claim is an alternative remedy to the statutory interest claims, highlighting the following extract from pages [39]-[40] of the Plaintiff's RASOC:

    "*Payment of compound interest to be assessed on the trustee basis (alternatively interest at such rate and for such period as the Court thinks fit) in relation to the sums of USD 16.8 million and USD 5.395 million*."

18. In support of his clients' application, Mr. Harshaw insisted that the proposed RAD is a proper response to the most recent reiteration of the Plaintiffs' pleaded case and that it would be highly unusual for the Court to bar a party from relying on a settlement agreement in defence to a

money claim, particularly in a case involving such a considerable sum. He further argued that the proposed RAD is of no prejudice to the estimated timeframe for the hearing of the trial nor to the listing of a hearing date. In respect of the Defendants' proposed pleading for a wasted costs order, Mr. Harshaw argued that the Court ought not to bar his clients from making this reamendment only to compel the Defendants to later make the same application for a wasted costs order by filing a summons or notice of motion. He said, practically speaking, it is better for all such issues to be pleaded sooner rather than later.

19. Mr. MacKay, on the other hand, submitted that the proposed arguments on the difference between the interest claims pose a threat to the current estimated length of the trial. He submitted that this distinction turns on the issues which have yet to be tried, such issues including the allegations of breach of fiduciary duty and breach of confidence. The Plaintiffs' case is that if those allegations of breach of fiduciary duty and breach of confidence are proven, an entitlement to equitable compensation in the form of compound interest will arise.

20. On Mr. MacKay's submissions, the fact of these untried issues brings an end to any notion that the agreement between the parties, evidenced by the Consent Order of 1 June 2023, settled all issues of interest. The agreement between the parties was on the sums of interest on the sums which had been ordered to be returned by Hargun CJ (as he then was). Mr. MacKay stressed that there has been no adjudication on the allegations as to the nature or reason for of the taking of those sums. Otherwise put, there has been no trial or finding as to whether those sums were innocently or mistakenly taken or whether they were dishonestly taken. Mr. MacKay accepted that his clients are not entitled to any double recovery. He opined that compound interest would likely exceed any statutory interest sums and that in such an event, there would be a need for a set-off.

21. Mr. MacKay also pointed to the procedural history in the present case. He reminded the Court that a previous amendment was sought by the Defendants in January 2021 as a means of withdrawing the admissions made. That application was determined by Hargun CJ (as he then was) who, on 6 May 2022, refused the Defendants leave to withdraw the pleaded admissions and entered judgment against the Defendants for the sums claimed. Mr. MacKay likened those past events to the present application suggesting that the Defendants' application is not made in good faith.

22. Mr. MacKay explained that the amendments made to the RASOC were purposed to remove the matters which were resolved by the judgment of the Court, not to raise the issue of compound interest as a new claim. Mr. MacKay pressed on the Court that the proposed Re-Amended Defence is not, as a matter of substance, responsive to the Plaintiff's RASOC. By way of example, Mr. MacKay relies on the Plaintiffs' claim for relief on pages [39] and [42]

of the RASOC where the claims for compound interest visibly form part of the Plaintiffs' originally pleaded claim.

23. Mr. MacKay argued that one of the three real motives behind the Defendants' application is to defer the Defendants' discovery obligations. A second motive is to reopen the settlement arrangements on the issue of interest and the third motive, says Mr. MacKay on behalf of his clients, is to form a case of abuse of process against Carey Olsen. Mr. MacKay asked this Court to find that the proposed reamendments are thus useless and not made in good faith. From this, he invited this Court to find that the reamendment application is made to embarrass not only his clients but also Carey Olsen as a firm.

THE LAW ON AMENDMENT OF PLEADINGS

24. Mr. Harshaw pointed to section 18 of the Supreme Court Act 1905 which provides for the concurrent administration of law and equity. The section reads:

"*In every civil cause or matter which is pending in the Supreme Court law and equity shall be administered concurrently; and the Court, in the exercise of the jurisdiction vested in it by virtue of this Act, shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as seems just, all such remedies or relief whatsoever, whether interlocutory or final, as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim or defence properly brought forward by them respectively, or which appears in such cause or matter, so that as far as possible all matters in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided; and in all matters in which there is any conflict or variance between the rules of equity and the rules of common law with reference to the same matter the rules of equity shall prevail*."

25. RSC Order 20/5(1) is the relevant governing procedural rule for seeking the Court's leave to amend. These rules provide:

"*20/5 Amendment of writ or pleading with leave*
5 (1) Subject to Order 15, rules 6, 7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.

26. The 1999 White Book commentary on the Court's power to amend appears at para 20/0/2:

"*The overriding principle with regard to amendments is that contained in r.8, namely that, generally speaking, all amendments will be allowed at any stage of the proceedings and of any document in the proceedings (other than a judgment or order) on such terms as to costs or otherwise as the Court thinks just. This principle is subject to the countervailing rule of practice that an amendment will be refused or disallowed when, if it were made, it would result in prejudice or injury which cannot properly be compensated for by costs. Accordingly, as a general rule, either party is allowed to make any amendment in his own pleadings or other proceedings which is reasonably necessary for the due presentation of his case on payment of the costs of and occasioned by the amendment, provided there has been no undue delay on his part, and provided also the amendment will not injure or prejudicially affect any vested rights of his opponent. But if the application is made mala fide, or if the proposed amendment is sought to be made after undue delay, or will in any other way unfairly prejudice or cause detriment to the other party, or is irrelevant or useless or would raise merely a technical point, leave to amend will be refused…*"

27. At para 20/8/6 commentary is provided on the general principles for grant of leave to amend under Rules 5, 7 and 8. Those passages provide:

"*It is a guiding principle of cardinal importance on the question of amendment that, generally speaking, all such amendments ought to be made "for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings" (see, per Jenkins L.J. in G. L. Baker Ltd v Medway Building & Supplies Ltd [1958] 1 W.L.R. 1216 at 1231; [1958] 3 ALL E.R. 540 at 546).*

"It is a well established principle that the object of the Court is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights…I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy…It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected if it can be done without injustice, as anything else in the case is a matter of right" (per Bowen L.J. in Cropper v Smith (1883) 26 Ch. D. 700 at 710-711, with which observations A.L., expressed "emphatic agreement" in Shoe Machinery Co. v. Cultam [1896] 1 Ch. 108 at 112).

In Tildesley v. Harper (1878) 10 Ch. D. 393 at 396 and 397, Bramwell L. J. said: "My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise." However negligent or careless may have *been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs"… An amendment ought to be allowed if thereby "the real substantial question can be raised between the parties" and multiplicity of legal proceedings avoided…*

On the other hand, it should be remembered that there is a clear difference between allowing amendments to clarify issues in dispute and those that provide a distinct defence or claim to be raised for the first time (see, per Lord Griffiths in Ketteman v Hansel Properties Ltd [1987] 1 A.C. 189 at 220)"

28. Kawaley CJ (now President of the Court of Appeal) in *Fifth Street Finance Corporation v Dobbin* BM 2013 SC 52 said:

"*It is well-settled that any amendment which is not liable to be struck-out on the grounds that, inter alia, it discloses no reasonable cause of action or is an abuse of process because it is bound to fail ought ordinarily to be allowed. It remains to consider whether the proposed amendment discloses a legally arguable alternative defence (i.e. a claim for breach of the plaintiff's alleged general duty to act reasonably in relation to its security). Alternatively, the legal viability of the amendment turns on an analysis of whether the plaintiff validly contracted out of the relevant duty so that the proposed defence is bound to fail*."

LIFTING OF THE STAY

29. No serious application or argument was made against the lifting of the stay of these proceedings. In my judgment, there is no basis for refusing the Plaintiffs' the opportunity to prosecute its claims which were stayed with the Consent of the parties.

DECISION ON THE REAMENDMENT APPLICATION

30. The question for this Court's ultimate consideration is whether the case advanced by the Defendants on the proposed RAD is arguable or whether it is instead useless or designed to cause embarrassment to the Plaintiffs and or their attorneys. Mr. MacKay, while accepting that amendments are generally allowed to enable all the issues in dispute to be adjudicated, argued that the proposed reamendments should be refused because they are formulated by ill-motive and because no such arguable case has been established.

31. It is clearly correct that the Court has not yet adjudicated any of the Plaintiffs' allegations of breach of fiduciary duty, breach of confidence, misuse of confidential and privileged information, and dissipation of any trust property. The success of the claim for compound interest is hinged to a successful prosecution of any one or more of those allegations. The 1 June 2023 Consent Order settled the statutory interest claims in the form of pre-judgment and post- judgment interest. However, the Court did not decide the issue of non-statutory entitlements. In those circumstances, I do not see how the Defendants can reasonably argue that the Plaintiffs' pursuit of the remaining unadjudicated claims, which formed part of the originally pleaded case, amounts to an abuse of process.

32. Both parties agree that the Plaintiffs are not entitled to double recovery comprising an award for statutory interest and an award of compound interest in the exercise of the Court's equitable jurisdiction. This is consistent with the Mr. MacKay's conceding that a set-off will be necessary in the event that an order for compound interest is made in a sum exceeding the statutory interest. In any such case, the risk of double recovery is cured by a set-off. On that footing, I find that the Defendants' proposed reamendment advancing a case that a pursuit of compound interest is an abuse of process is bound to fail. It thus follows that the Defendants' pleading for a wasted costs order is equally hopeless.

33. For all these reasons, I am bound to refuse the Defendants leave to reamend.

DECISION ON THE TIMETABLE VARIATION APPLICATION

34. Mr. Harshaw urged this Court to vary the timetable set out in the Consent Order of 21 September 2023 only to the extent that service would run from the time of service of the proposed RAD rather than from the lifting of the stay. He added that discovery would follow based on the matters in issue according to the reamended pleadings. To that, Mr. Mackay pointed out that the timetable variation application, if the reamendment application is allowed, should allow for the Plaintiffs to file a Re-Amended Reply.

35. However, I refused the reamendment application. Having refused the reamendment application, I direct that the timetable shall run from 1 week of the date of this Ruling.

COSTS

36. Unless either party seeks to be heard on the issue of costs, costs shall follow the event in favour of the Plaintiffs.

Dated this 31st day of August 2026

THE SEAL OF THE SUPREME COURT OF BERMUDA

SIGNED

HON. MRS JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT