In The Supreme Court of Bermuda

COMMERCIAL JURISDICTION
CONSOLIDATED ACTIONS
2017 : No. 467
2018 : No. 38
2018 : No. 66

IN THE MATTER OF CLEARWATER DEVELOPMENT LTD.
AND IN THE MATTER OF THE COMPANIES ACT 1981

BETWEEN:

PAUL AND TERESA RODRIGUES
(Trading as Rodrigues Pools)

Plaintiffs

-and-

CLEARWATER DEVELOPMENT LTD.

Defendant

RULING

Strike out application for pleadings of allegations of fraud on grounds that they are scandalous, frivolous, vexatious and an abuse of process
Application to strike out or limit the scope of expert report on grounds that expert not qualified to be an expert and the opinion of the expert is outside the scope of the Order of the Court

Date of Hearing: **3, 4 April 2023**
Date of Judgment: **11 July 2023**

Appearances: **Grant Spurling of Chancery Legal Ltd, for the Petitioners/Plaintiffs**

Richard Horseman, Terry-Lynn Griffiths of Wakefield Quin Limited, for the Defendant/Respondent

RULING of Mussenden J

Introduction

1. By a Summons dated 10 January 2023, the Plaintiffs applied for an order that all explicit and implicit allegations of fraud as set out in the Defendant Clearwater Development Ltd.'s ("**CDL**") Re-Amended Defence and Counterclaim at paragraphs 3, 3A, 3B, 3C and 8 be amended by removal pursuant to Order 18, rule 19 of the Rules of the Supreme Court (the "**RSC**"), on the ground that such allegations are scandalous, frivolous or vexatious; may prejudice, embarrass or delay the fair trial of the action; and constitute an abuse of the process of the Court (the "**Plaintiffs' Application**").

2. By a Summons dated 3 March 2023, CDL applied for an order that the Plaintiffs' expert report prepared by Kroll dated 2 December 2022 be struck out for failing to comply with the Order of Directions which provided for the scope of expert evidence to be filed and/or be limited to the issue to be determined pursuant to the Order for Directions and/or be ruled inadmissible at trial (the "**Defendant's Application**").

3. The Plaintiffs' position is supported by the First and Second Affidavits of Grant Spurling ("**Spurling 1"** and "**Spurling 2**"). CDL's position is supported by the Ninth Affidavit of John Bush ("**Bush 9**") which referred to his witness statement dated 21 June 2022 and by the Fifth Affidavit of Richard Horseman ("**Horseman 5**").

Background

4. The Consent Order for Directions dated 12 October 2021 (the "**Consent Order**") specified the scope of the matter which requires expert evidence. Paragraph 6 stated as follows:

"[6] The parties are at liberty to call one IT expert witness each in relation to the issue of the exchange of emails and culminating in the final Letter of Agreement and in particular, the timing of when "services" was inserted into the Letter of Agreement as alleged in paragraph (xx) of the Statement of Claim."

5. The provision for expert evidence related to paragraphs 3, 3A & 3B of the Re-Amended Defence which alleged that the Plaintiffs inserted the word "services" in the Letter of Agreement (the "**LOA**") without advising the Defendant which widened the scope of the LOA to the Plaintiffs' benefit which was not agreed between the parties. Paragraphs 3, 3A & 3B provide as follows:

"3. Paragraph 3 is denied. The Defendant will aver that the agreement originally drafted and agreed to by the parties by email correspondence on the 14 September 2016, provided that the Plaintiff would be the preferred pool construction contractor and "supplier of other construction and finish materials as appropriate". The Defendant will aver that prior to executing the agreement, the Plaintiff inserted the word "services" into the said clause without notifying the Defendant so that it now read "supplier of other construction ***services*** *and finish materials as appropriate". The Defendant will say that it never agreed that the Plaintiff would become the preferred construction services provider but rather the preferred pool construction contractor. The Defendant will aver that the Plaintiff inserted the word "services" into the agreement without notifying or bringing to the attention of the Defendant that he had done so with the intent to widen the scope of the agreement. The Defendant signed the said agreement without noticing that the Plaintiff had inserted the word "services" into the agreement which widened the scope of the agreement. The Defendant denies that it is bound by the agreement as intentionally manipulated by the Plaintiff.*

3A. The Defendant became aware for the first time in September 2017 that the Letter of Agreement, as altered by the Plaintiff and signed by all parties, did not accurately embody the agreement which had been previously arrived at in that it purported to grant the Plaintiff preferred status for the provision of construction services rather than just the preferred status as the pool contractor. Upon noticing the discrepancy,

the Defendant, through its counsel, wrote to the Defendant [sic] asking for an explanation and noting the alteration which had not been agreed and which did not reflect a common intention of the parties. The Plaintiff and his wife, Tereza Rodrigues, denied and continues to deny in their witness statements that either of them have amended the agreements as alleged.

3B. The Defendant will say on the 23rd September 2017, the Plaintiff fraudulently altered an email from Mr. John Bush to the Plaintiff dated 14th September 2016 by attaching the manipulated Letter of Agreement and forwarding the 14th September 2016 email to the parties in an effort to pass it off his genuine and obtain a financial advantage for his own benefits by deception."

6. CDL's expert report produced by Krys Global (the "**KG Report**") concluded that it was very unlikely, if not impossible for the LOA document that was attached to Mr. Rodrigues' email dated 14 September 2016 to have been sent on that date. That in effect means that it was very unlikely, if not impossible that the word "services" was inserted into the LOA at the time Mr. Bush sent his last draft of it to the Plaintiffs although it does later appear in the LOA attached to an email sent by the Plaintiffs back to Mr. Bush on 23 September 2017.

7. The Plaintiffs' expert report produced by Kroll (the "**Kroll Report**") stated that its instructions were as follows:

"On September 15, 2022, Chancery Legal Ltd. ("Counsel") engaged Kroll on behalf of Rodrigues Pools ("RP") to assist Counsel in determining whether a 2017 email sent by Paul Rodrigues to John Bush, the President of Clearwater Development, Ltd ("CDL"), and copying members of the CDL Management Committee, Counsel, and counsel to CDL, Wakefield Quin, was fraudulently sent by RP to deceive CDL and its Management Committee."

8. CDL's position is that the Kroll Report reluctantly accepted the KG Report's findings that it was highly unlikely that the word "services" was included in the attachment to the 14 September 2016 email. The Kroll Report stated [at paragraph 7] as follows:

   "While Kroll generally agrees with Mr. Sinclair that it is unlikely the Bush 14 September 2016 Email was sent with an attachment whose metadata indicates it was printed 36 days later, we do not believe that this disparity is proof of the assertion by CDL in Paragraph 3B of its Re-Amended Defence that RP intentionally deceived CDL."

9. CDL's position is that the Kroll Report confirmed what CDL had been saying, which was that on 23 September 2017 when Mr. Rodrigues later forwarded Mr. Bush's email dated 14 September 2016 back to Mr. Bush and others, the attachment had been altered to include the word "services" in it. The Kroll Report stated as follows:

   "It appears that Draft Letter Agreement originally attached to the 14 September 2016 email was replaced with the Rodrigues Version which was later signed by the parties on October 27, 2017. The word "services" appears in the final paragraph of both the Executed Letter Agreement and the DLA-Rodrigues Version."

10. CDL's position is that the Plaintiffs have accepted that the attachment was altered with the inclusion of the word "services" in it, however the Kroll Report went on to consider matters that are completely out of scope of the Consent Order providing for expert IT evidence. For example, the Kroll Report stated as follows:

    "Given that least four versions of the contract were floating around, it's reasonable to conclude that confusion existed among the parties as to which version of the agreement was the correct version to be finalized. This is also sufficiently confusing to help explain why Mr. Bush may have forgotten or misremembered various changes to the DLA, but it would also make sense that he would have therefore confirmed he was reviewing the correct version prior to signing it – particularly since the Draft Letter Agreement was effectively one page, and all four differences are readily apparent."

11. CDL stated that Kroll went on to criticize the Defendant's expert Mr. Sinclair of Krys Global for failing to opine on whether the actions of the parties would constitute deception or fraud. The Kroll Report stated as follows:

"Mr. Sinclair does not opine on whether the introduction of a new letter agreement by a sender or recipient of the two emails in question would constitute fraud or deception, or whether the difference in attachment can be attributable to error or oversight. Mr. Sinclair does not address whether Messrs. Bush or Oosthuizen read or recognized the difference in versions prior to the signing of the Executed Letter Agreement."

12. The Kroll Report's final conclusion stated as follows:

"Based on Mr. Sinclair's report and the evidence available to Kroll after investigation, Kroll cannot determine whether the differences between the Draft Letter Agreements attached to the Bush 14 September 2016 Email and the Rodrigues 23 September 2017 Email were, or were not, the result of fraud by Mr. Rodrigues, Teresa Rodriguez, or Rodrigues Pools, nor does Kroll believe, on the basis of Mr. Sinclair's report and the evidence available to Kroll, that anyone could competently make such a determination."

Application to strike out Pleadings

Rules of the Supreme Court 1985 – Striking Out

13. RSC Order 18, rule 19 states as follows:

"18/19 Striking out pleading and indorsements

"(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that—

(a) it discloses no reasonable cause of action or defence, as the case may be; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court;

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be."

The Law on Strike Out Applications

14. In *Bentley Friendly Society v Minister of Finance* [2022] SC (Bda) 9 Civ, I made reference to the case of *Fidelity National Title Insurance Company v Trott & Duncan Limited* [2019] SC (Bda) 10 Civ (5 February 2019) where Subair Williams J set out the law on strike out applications.

15. Subair Williams J set out the general approach and the Court's case management powers.

> *"General Approach and the Court's Case Management Powers*
> *50. In David Lee Tucker v Hamilton Properties Limited [2017] SC (Bda) 110 Civ I outlined the general approach and relevant legal principles applicable to strike out applications. As a starting point, at paragraph 11, I stated:*
>
> > *'The principles of law applicable to the strike-out of a claim were no source of contention between the parties. This area of the law has been well recited in previous decisions of this Court. In general synopsis, strike out applications ought not to be misused as an alternative mode of trial. It is not a witness credibility or fact finding venture and for good reason. The evidence before the Court at this stage is not oral and has not yet been tested through cross examination. A strike out application, in reality, is a component of good case management. Where the pleadings are so bad on its face and so obviously bound for failure, the Court should strike it out.'*
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> *52. At paragraphs 14-16 in David Lee Tucker v Hamilton Properties Limited I considered the Court's case management powers in the context of a strike out application:*
>
> > *'14. The Court's determination of a strike-out application is a component of active case management. Essentially, the Court is required to identify the issues to be tried at an early stage of the proceedings and to summarily dispose of the others. This is aimed to spare unnecessary expense and to ensure that matters are dealt with expeditiously and fairly.'*
> >
> > *16. In Jim Bailey v Wm E Meyer & Co Ltd [2017] Bda LR 5 at paras 14-15 the learned Hon. Chief Justice, Ian Kawaley, examined the impact of the new CPR regime and the Overriding Objective on strike out applications:*
> >
> > > *'…In Biguzzi v Rank Leisure plc [1999] 4 ALL ER 934 (CA), Lord Woolf explained that the CPR introduced an entirely new procedural code. It is true that he stated that pre-CPR authorities would not generally be relevant. But that was in the context of contending that the new regime imposed greater case management powers on the court to prevent delay than under the old Rules. Trial judges, post-CPR, were expected to use these case management powers judicially, only striking out as a last resort. It is also important to remember that this reasoning was articulated in a statutory context in which an entirely*

new procedural code was in force. And the particular strike-out discretionary power which was under consideration in that case was an entirely new one, a power exercisable on grounds of mere non-compliance with the Rules. As Lord Woolf observed (at 939-940): "Under the CPR the keeping of time limits laid down by the CPR, or by the court itself, is in fact more important than it was. Perhaps the clearest reflection of that is to be found in the overriding objectives contained in Part 1 of the CPR. It is also to be found in the power that the court now has to strike out a statement of case under Part 3.4. That provides that: '(2) The court may strike out a statement of case if it appears to the court- (a) that a statement of case discloses no reasonable grounds for bringing or defending the claim; (b) that the statement of case is an abuse of the court's process…' [and, most importantly] (c) that there has been a failure to comply with a rule, practice direction or court order.'

Under Part 3.4(c) a judge has an unqualified discretion to strike out a case such as this where there has been a failure to comply with a rule. The fact that a judge has that power does not mean that in applying the overriding objectives the initial approach will be to strike out the statement of case. The advantage of the CPR over previous rules is that the court's powers are much broader than they were. In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out.'

53. At paragraph 13 in David Lee Tucker v Hamilton Properties Limited I cited Auld LJ's remarks in Electra Private Equity Partners (a limited partnership) v KPMG Peat Marwick [1999] EWCA Civ 1247 p.613 which were previously relied on by the Bermuda Court of Appeal in Broadsino Finance Co Ltd v Brilliance China Automative Holdings Ltd [2005] Bda LR 12."

16. Subair Williams J set out the case law on abuse of process:

"57. The term 'abuse of process' has long been explored and addressed by the Court. Having relied on the persuasive passages stated and approved by learned judges of this Court and those sitting in the English House of Lords, I cited the following at paragraphs 23- 25 in David Lee Tucker v Hamilton Properties Limited:

'Misuse of procedure

23. In Michael Jones v Stewart Technology Services Ltd [2017] SC (Bda), Hellman J considered the meaning of 'abuse of process' by reference to Lord Diplock's passage in Hunter v Chief Constable [1982] AC 529 at 536 C: "It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied…'"

17. In *Hofer v The Bermuda Hospitals Board* [2015] Sc (Bda) 55 Civ Kawaley J (as he then was) referred to the observations of Parker J in *Culbert v Steven v Steven G Westwell & Co Ltd* [1993] 1 P.Q.I.R. P54 where the following statement appears (at page 65):

> *"An action may also be struck-out for contumelious conduct or abuse of the process of the Court or because a fair trial in the action is no longer possible. Conduct is in the ordinary way only regarded as contumelious where there has been a deliberate failure to comply with a specific order of the court. In my view however, a series of separate inordinate inexcusable delays in complete disregard of the rules of Court and with full awareness of the consequences can also be properly regarded as contumelious conduct or, if not that, to an abuse of the process of the Court."*

18. In *Hofer* Kawaley J also referred to the observation of Nourse LJ in *Choraria-v- Sethia* [1998] C.L.C. 625 where this was said (at page 630):

> *"The law as it applies to this case may therefore be stated thus. Although inordinate and inexcusable delay alone, however great, does not amount to an abuse of process, delay which involves complete, total or wholesale disregard, put it how you will, of the rules of Court with full awareness of the consequences is capable of amounting to such an abuse, so that, if it is fair to do so, the action will be struck out or dismissed on that ground. With regard to the facts of this case, I would add that a disregard of a non-peremptory Order must, if anything, be a fortiori to a disregard of the rules."*

<u>The Law on pleading particulars for dishonesty, misrepresentation, deceit etc</u>

19. In *Pitt & Company Ltd and Bgs Ltd v White et al* [2014] SC 17 Hellman J stated as follows:

> *"45. On the question of silence, I was referred to the decision of the House of Lords in Hamilton v Allied Domecq plc [2007] SC (HL) 142. Lord Rodger, giving the judgment of the House, cited with approval an extract from the 16 judgment of Lord Cairns in Peek v Gurney (1873) LR 6 HL 377, a case about alleged fraudulent misrepresentation concerning a company prospectus, at 403:*
>
> > *"Mere non-disclosure of material facts, however morally censurable … would in my opinion form no ground for an action in the nature of an action for misrepresentation. There must, in my opinion, be some active misstatement of fact, or, at all events, such a partial and fragmentary statement of fact, as that the withholding of that which is not stated makes that which is stated absolutely false."*
>
> *48. As to the mental element of deceit, this found classic expression in the speech of Lord Herschell in Derry v Peek (1889) 14 App Cas 337, HL, at 374:*
>
> > *"First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the*

second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.""

20. In *Seaton v Seddon* [2015] EWHC 735 (Ch) Roth J referred to Lord Hope's dictum in *Three Rivers District Council v Bank of England (No. 3)* [2003] 2 AC 1 as follows:

"… as a general rule the more serious the allegation of misconduct, the greater is the need for particulars to be given which explain the basis for the allegation. This is especially so we allegation that has been made is a bad faith or dishonesty …
Of course, the allegation of fraud, dishonesty or bad faith must be supported by particulars. The other part is entitled to notice of the particulars on which the allegation is based. If they are not capable of supporting the allegation, the allegation itself and struck out."

21. The above approach was adopted by Subair Williams J in *Lines and Blades v Pricewaterhousecoopers and Clarien Bank* [2021] SC (Bda) 42 Civ as follows:

"51. The governing procedural rule which was being referred to by the Court of Appeal in Intercontinental Natural Resources Ltd v Conyers Dill & Pearman was Order 19/6(1) of the Supreme Court Rules 1952. This Rule was quoted by the Court of Appeal as follows:

"In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleadings…"

52. While this procedural rule has since which developed, the position remains that an allegation of fraud must be particularised in the relevant pleadings. RSC Order 18/12(1) provides:

"18/12 Particulars of pleading 12 (1) Subject to paragraph (2), every pleading must contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing words— (a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and (b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies."

54. Having addressed the general legal requirement to particularise the pleaded facts underlying an allegation of fraud, the Court of Appeal in Intercontinental Natural Resources Ltd v Conyers Dill & Pearman endorsed the distinction between primary facts and conclusory facts [141]:

> *"A Fundamental Fallacy*
>
> *141. Mr. Lightman rightly states that the Court on a striking out summons must assume that the facts pleaded are true. This is no doubt correct; but facts may be of two sorts. There may be primary facts and there may be conclusory facts; the latter are really no more than conclusions which it may or may not be right to deduce from primary facts…It seems manifestly clear that a statement of claim founded largely on a series of conclusory facts does not inform the defendant of the case he has to meet and is in clear breach of O19, r 4 which requires the party pleading to state in summary form the material facts on which he relies; and in this context material facts mean primary facts; i.e., those facts which the party needs to be informed 23 of in order to know what case he has to meet. Unless the primary facts are pleaded the statement of claim must necessarily be deficient. This is a case in which serious allegations are made against reputable professional men and they are entitled to know what it is that each respondent is charged with wilfully doing or wilfully omitting in the knowledge that he was doing wrong. If they are charged with mismanagement of the company's affairs then facts must be pleaded from which the actual mismanagement complained of can be understood. If a statement of claim is so deficient in particulars that a defendant cannot tell what is the case he has to meet then it becomes a vexatious pleading and should not be* allowed to stand."

55. Mr. Williams cited the case of Robert Sofer v Swissindependent Trustees SA [2020] EWCA Civ 699 to illustrate that the rules requiring an allegation of fraud to be particularised on the pleadings equally apply to allegations of fraud against a company. In that case the English Court of Appeal were concerned with an appeal against an order made by Matthews J, sitting as a Judge of the High Court, whereby he struck out a claim for breach of trust on the ground that it did not sufficiently plead a case of dishonesty. Delivering the unanimously agreed judgment of the Court, Lord Justice Arnold observed [23-25]:

> *"23. More important for the purposes of this appeal are the principles governing the pleading of dishonesty. There was little dispute as to these before either the Judge or us. They were summarized, in my judgment, accurately, by counsel for the Claimant as follows:*
>
> *"i) Fraud or dishonesty must be specifically alleged and sufficiently particularized, and will not be sufficiently particularized if the facts alleged are consistent with innocence: Three Rivers District Council v Governor and Company of the Bank of England (No.3) [2003] 2 AC 1.*
>
> *"ii) Dishonesty can be inferred from primary facts, provided that those primary facts are themselves pleaded. There must be some fact which tilts the balance and justifies an inference of dishonesty, and this fact must be pleaded: Three Rivers at [186] (Lord Millet).*

"iii) The claimant does not have to plead primary facts which are only consistent with dishonesty. The correct test is whether or not, on the basis of the primary facts pleaded, an interference of dishonesty is more likely than one of innocence or negligence: JSC Bank of Moscow v Kekhman [2015] EWHC 3073 (Comm) at [20]-[23] (Flaux J, as he then was)

iv) Particulars of dishonesty must be read as a whole and in context: Walker v Stones [2001] QB 902 at 944B (Sir Christopher Slade)."

24. To these principles there should be added the following general points about particulars: (i) The purpose of giving particulars is to allow the defendant to know the case he has to meet: Three Rivers at [185]-[186]; McPhilemy v Times Newspaper Ltd [1999] 3 ALL ER 775 at 793B (Lord Woolf MR). (ii) When giving particulars, no more than a concise statement of the facts relied upon is required: McPhilemy at 793B. (iii) Unless there is some obvious purpose to be served by fighting over the precise terms of a pleading, contests over their terms are to be discouraged: McPhilemy at 793D.

25. As is common ground, on an application under CPR rule 3.4(2)(a) to strike out particulars of claim as disclosing no reasonable grounds for bringing the claim, the facts pleaded must be assumed to be true. That does not mean, however, that the court will not scrutinize particulars of dishonesty with care to see if they disclose a sustainable case."

22. The White Book at paragraph 18/19/15 states as follows:

"Scandalous – Allegations of dishonesty and outrageous conduct are not scandalous, if relevant to the issue. The mere fact that these paragraphs state a scandalous fact does not make them scandalous. But if degrading charges be made which are irrelevant, or if, though the charge be relevant, unnecessary details are given, the pleading becomes scandalous. The sole question is whether the matter alleged to be scandalous would be admissible in evidence to show the truth of any allegation in the pleading which is material with reference to the relief prayed."

23. The Barristers' Code of Professional Conduct 1981 states as follows:

"41. A barrister instructed to settle a pleading is under responsibilities to the court as well as to his client. He may not make any allegation unsupported by his instructions. He may not allege fraud unless— he has clear instructions in writing to plead fraud; and he has before him reasonable credible material which, as it stands, establishes a prima facie case of fraud."

The Plaintiffs' Submissions

24. Mr. Spurling submitted that the application is to curtail CDL's liberally pleaded accusations of fraud against the Plaintiffs. He argued that throughout the history of these proceedings, CDL has alleged fraudulent misrepresentation, deceit and fraud without providing a basis on which such a ponderous allegation was based, despite the Plaintiffs' efforts to procure such material from the Defendant. He submitted that CDL's approach in their pleadings of fraud/deceit was set out in Bush 9 which pleaded particulars whilst not divulging supposed evidence. He stressed that it was not appropriate in the context of allegations of fraud and deceit to not comply with the Court's order for disclosure by withholding evidence upon which CDL seeks to rely, to launch a 'trial by ambush'.

25. Mr. Spurling submitted that the Defendant's loose approach to justification of such serious allegations merits its excision from the pleadings. He reiterated that the Plaintiffs are entitled to adequate particulars of the allegations so that they can meet the case before them. He submitted that the material that has been disclosed does not amount to reasonably credible material establishing a *prima facie* case of fraud, and it is a clear abuse and an apparent failure to follow the Orders of the Court. Further, he referred to the Barristers' Code of Professional Conduct 1981 and submitted that Counsel for CDL may not allege fraud unless he has before him reasonable credible material which establishes a *prima facie* case of fraud.

26. Thus, the Plaintiffs application is for CDL's Re-Amended Defence and Counterclaim be ordered to have all references, implicit and explicit, to fraud and deceit, removed.

CDL's Submissions

27. Mr. Horseman submitted that as the application to strike out the pleading is based on the grounds that the allegations are vexatious, scandalous, frivolous and an abuse of process then evidence is admissible on the application. He relied on the Court of Appeal judgment in *Broadsino Finance Company Limited v Brilliance China Automotive Holdings Limited*

and others [2005] Bda LR 12 which set out this principle. He stressed that the Plaintiffs have not filed any affidavit evidence in respect of the application, instead relying on their counsel to make a bare denial that there is evidence to support the allegations. Mr. Horseman pointed to Bush 9 which he stated offered a significant amount of evidence which provided a sound basis for making the allegation. In essence, the Defendant believes that it will prove that the Plaintiffs manipulated the LOA by inserting the word "services" in it without notifying Mr. Bush and further, that Mr. Rodrigues attached a false document to Mr. Bush's email of the 14 September 2016 when he forwarded it back to Mr. Bush and other parties.

28. Mr. Horseman submitted that it was trite law that the power to strike out a claim should only be exercised in plain and obvious cases where the case is obviously unsustainable and the Court should not try the case on affidavit evidence which had not been tested in cross-examination. He relied on the judgment of Subair Williams J in *Tucker v Hamilton Properties* and *Line & Blades v PWC and Clarien Bank*.

29. Mr. Horseman submitted that the pleadings are not scandalous, vexatious or frivolous and are not an abuse of the court process. He noted that the IT experts still need to meet in order to see if they can jointly agree facts, however, that would not take place until the Court rules on the Defendant's present "expert". Thus, to strike out the claims now would be wrong in law and would usurp the position of the trial judge and would produce a trial of the case in Chambers on affidavits only without evidence tested by cross-examination in the ordinary way.

Analysis

30. In my view, the Plaintiffs' Application should be denied for several reasons. First, the application is weak on all fronts and unsupported by evidence to show any difficulties that amount to a basis for striking out the pleadings of fraud.

31. Second, the pleadings, which provide dates and events, set out the basis for the alleged fraudulent conduct of the Plaintiffs, in essence inserting the word "services" in the LOA without the Defendant's knowledge and then attaching an allegedly false attachment to the email that was sent back to Mr. Bush and others. To my mind, it is not an allegation of a complex fraud, although the alleged fraud has significant effects on the parties. Thus, the pleadings in this case meet the various formulations of principle as set out in the cases above that the allegations of fraud be particularised, including the cases of *Pitt & Company Ltd and Bgs Ltd, Seaton* and *Lines and Blades*.

32. Third, in my view, the pleadings provide sufficient detail to the Plaintiffs for them to know the case that they need to meet. It seems to me that the Plaintiffs will be in a position to know if, when and how they inserted the word "services" into the LOA. In fact, paragraph 3A of the Re-Amended Defence states that the Plaintiffs deny in their witness statements that they amended the LOA as alleged. Similarly, they will be in a position to know if, when and how a different attachment was attached to the email sent back to Mr. Bush. These are matters that should be dealt with at trial and tested on cross-examination along with any relevant expert evidence.

33. Fourth, in my view, counsel for CDL have not breached the Barristers' Code of Professional Conduct 1981 by pleading fraud. As stated above, this is not an allegation of a complex fraud. However, CDL have before it the circumstances of the relevant emails and attachments dated 14 September 2016 and 23 September 2017. Mr. Bush's own involvement as the author of the 14 September 2016 email that was sent with an attachment, comparisons, CDL's search for an explanation and their allegation that the Plaintiffs stood to benefit from the inclusion of the word "services" in the document has led them to the grounds to allege fraud. They are supported by the KG Report. To my mind, this is a collection of reasonable credible material which, as it stands, establishes a *prima facie* case of fraud.

34. Fifth, in my view, the allegations of fraud are not obviously unsustainable and thus are not vexatious or frivolous. The allegations are also relevant to the issues in the case and would be admissible in evidence to show the truth of the allegations in the pleadings per the *White*

Book paragraph 18/19/15. Thus, they are not scandalous. Also, I agree with Mr. Horseman that there is nothing to suggest that the pleadings are an abuse of the court process. Upon my review, and applying the principles set out in *Hofer*, there is nothing in the pleadings of fraud to suggest that there cannot be a fair trial of the matter or that there has been some form of inordinate and inexcusable delay or disregard of the Rules of the Court.

35. In light of these reasons, as there is no basis to strike out the stated pleadings, I dismiss the Plaintiffs' Application.

Application to strike out the Expert Report

The Law

36. In *Derk Koole v HG (Bermuda) Ltd* [2019] SC (Bda) 89 Civ in respect of limiting the scope of expert evidence, Subair Williams J stated, as follows:

> *"35. So, although parties may agree to the admission of expert evidence under RSC Order 38/36(1), the Rule is subject to the Overriding Objective to enable the Court to deal with cases justly. Dealing with a case justly may sometimes entail restrictions or directions imposed by the Court on the admission of expert evidence so to give proper effect to the considerations outlined under RSC O.1A/1. These considerations pool together to form a customized 'reasonable' test in its own right which is sufficiently comparable, although not entirely, to the 'reasonably required' test stated under CPR Rule 35.1. It is for this reason that English case law may be subject to some limitations in its general persuasive effect."*

37. Also in *Derk Kool*, in respect of where the question involves a point of law or one in which the court is in a position to make the determination, Subair Williams J stated as follows:

> *"46. These principles are not dissimilar from those confirmed in Haynes and Doman [1899] 2 Ch 13 and Bridge v Deacon [1984] 2 ALL ER 19 where an expert opinion on the reasonableness of a contract was rejected as inadmissible. In the English Chancery Court judgment of Evans-Lombe J in Barings plc (in liquidation) and another v Coopers & Lybrand (a firm) and others and Barings Futures (Singapore) Pte Ltd (in liquidation) v Mattar and others [2001] ALL ER (D) 110 (Feb) it was held that otherwise admissible expert evidence could nevertheless be excluded if the issue to be decided was one of law or was otherwise one on which the Court was able to come to a fully informed decision without hearing such evidence.*

47. Evans-Lombe J also referred to the judgments of Jonathan Parker J and the Court of Appeal in Re Barings plc (No. 5) where the expert evidence proposed was directed to the standard of competence to be shown by a director in a case dealing with applications under the Company 12 Directors Disqualification Act 1986. The expert in that case, Sir John Craven, was intended to give evidence establishing that the conduct of an officer of the company had not been of a kind as would justify his disqualification under section 6 of that Act. The expert evidence was ruled out as irrelevant on the basis that the standard of competence to be shown by a director was a question of law for the Court."

38. Also in *Derk Kool*, in respect of the admissibility of the expert evidence, Subair Williams J stated as follows:

"68. I do not accept that expert opinion evidence is rendered inadmissible merely because the opinions stated encroach on facts for the ultimate determination of the Court. Both the criminal and civil jurisdictions of this Court have a long established history of accepting expert opinion evidence which offers a view on factual issues which fall to be determined by the tribunal of fact."

39. In *National Justice Compania Naviera SA v Prudential Assurance Company Limited ("the Ikarian reefer")* [1993] 2 Lloyd's Rep 68, Cresswell J stated as follows:

"[26.] (1) The evidence of such witnesses should be, and be seen to be, independent and uninfluenced in form or content by the exigencies of litigation; 2) Such witnesses should provide independent assistance to the court by way of objective, unbiased, opinion in relation to matters within their expertise and should never act as advocates; (3) Such witnesses should state the facts or assumptions upon which their opinion is based, and consider material facts which could detract from their concluded opinion; (4) Expert witnesses should make it clear when a particular question or issue is outside their expertise…"

<u>CDL's Submissions</u>

40. Mr. Horseman submitted that all the experts were required to do was to express an opinion on whether the word "services" was inserted into the LOA. However, the Plaintiffs' counsel's instructions requested the expert to consider an entirely different question which an "IT Expert" was not qualified to answer. Further, the Plaintiffs were seeking to have their "IT Expert" determine matters of law as to whether the evidence as a whole will satisfy the Court that the Defendant has made good its case. Thus the Kroll Report was flawed from its inception as the question posed was not one that could be answered by an

expert. The issue was one for the Court to decide after a full trial as to whether the Plaintiffs intended to deceive and defraud the Defendant.

41. Mr. Horseman submitted that Mr. Connolly of Kroll is a very qualified lawyer who holds a Masters in Law and is called to the New York Bar and the State of Massachusetts Bar. However, he is not a person who is properly qualified as an IT expert. He argued that there was no mention in Mr. Connolly's CV that he has acquired any formal qualifications relating to forensic information technology. Therefore, the Kroll Report should be ruled inadmissible on the basis that Mr. Connolly is not a qualified IT expert as required by the Consent Order.

42. Mr. Horseman submitted that Mr. Connolly gave an opinion on the state of Mr. Bush's mind during the period in question. He argued that Mr. Connelly however is an expert advocate who produced a legal submission which is biased and not independent. He cited the well established common law principle that experts owe a duty to the Court, and not to the parties who instruct them. He relied on the case of *Mengiste and another v Endowment Fund for the Rehabilitation of Tigray and others* [2013] EWHC 1087 (Ch) where it was held that there was a strong primary case for wasted costs against solicitors where it was found that an expert's evidence was inappropriate and tendentious and the expert did not appear to understand his duty to the Court. Thus, Mr. Connelly's report should be struck out on the further ground that Mr. Connolly has demonstrated a lack of understanding of his duties owed to the Court.

The Plaintiffs' Submissions

43. Mr. Spurling submitted that Mr. Connolly properly expressed opinions on a matter within his expertise as his duty to the Court was to provide evidence of fact and opinion. He argued that the Kroll Report Executive Summary on the instructions it received from the Plaintiffs' counsel amounted to a distillation of the crux of the issue of the exchange of emails and culminating in the final LOA.

44. Further, he submitted that whilst the Court is not bound by experts' opinions, their opinions regarding the context of the exchange of emails culminating in the LOA are just as appropriate to be included as their opinions on discrete technical matters. Thus he was entitled to opine on areas within his own expertise, including his opinion as to the likelihood of an apparent discrepancy being more likely attributable to fraud or deception, or to error or oversight.

45. Mr. Spurling submitted that paragraph 8 of the Consent Order stated that the experts will endeavor to agree any factual issues and file a joint statement of agreed facts and the issues of dispute if appropriate. Thus, CDL's application was premature as factual issues ought to be tabulated in separate meetings of the experts pursuant to the Consent Order.

Analysis

46. In my view, the Kroll Report should be limited in scope for several reasons. First, I do not accept Mr. Horseman's submissions that Mr. Connolly does not qualify as an expert. The main thrust of this argument was because Mr. Connolly is an experienced lawyer and that he does not have any formal qualifications relating to forensic information technology. However, the Consent Order called for an "IT expert witness each in relation to the issue of the exchange of emails …". In my view, I should give the widest scope of what is an IT expert.

47. Also, I should not limit the expertise of an expert to his formal qualifications only. Expertise comes in various forms, including education and experience or a mixture of both. Mr. Connolly's CV shows that he has been called upon as an expert witness in matters involving information technology, digital forensic, electronic discovery and other complex disputes which arise from usage of digital data, computers, software, networks and the internet. I note that Mr. Sinclair, the author of the KG Report, has similar experience in dealing with electronic evidence that has had to be collected, preserved and analysed. Mr. Sinclair also has formal qualifications in the field. To my mind, at this stage I should not go behind the stated qualifications of Mr. Connolly. If necessary, he can be cross-examined

on his qualifications at trial and the Court can give whatever weight to any arguments that arise.

48. Second, in my view, Mr. Connolly does go beyond the scope of the Consent Order in relation to the question asked of the IT Experts. The starting point is that the terms of the Consent Order, in particular, were to the issue of the exchange of emails culminating in the final LOA and the timing of when the word "services" was inserted into it. On the face of it, the Executive Summary's recital of Kroll's task extended the scope beyond the task set in the Consent Order. However, an examination of the Statement of Work entered into between counsel for the Plaintiffs and Kroll shows that the Phase 2 Description of Services was in alignment with the Consent Order in respect of inspection of the relevant email and attachments. Despite the Statement of Works, the Executive Summary does provide an improper proposition which ultimately resulted in opinions beyond the scope of the Consent Order.

49. Third, I am guided by *Halsbury's Laws of England, Civil Procedure, Volume 11 (2020)* which sets out the restrictions on giving of expert evidence. This includes that in applying for permission for expert evidence, the parties must identify the issues which the expert evidence will address and if the permission is granted it will be in relation to the issues so identified. To this point, in this case, the issue for expert evidence is when was the word "services" inserted into the attachment of an email. Although there is a wider issue for the Court of the allegations of fraud, the expert witness was not tasked with addressing any such issues. Therefore, in my view, Mr. Connolly's opinion about why and to some extent how the word "services" may have been in an attachment or whether it involved fraud or not are beyond the scope of the Consent Order. I acknowledge the position of Subair Williams J about the issue of admissibility of evidence when it encroaches upon facts for the ultimate determination of the Court. In my view, at this stage of proceedings and before the experts meet to discuss a joint report, in order to save resources and expense, and for good case management, it is proper to limit the scope of Mr. Connelly's evidence to the issue that required expertise.

50. Fourth, Mr. Connolly ventures outside of the scope of the Consent Order when in the last paragraph of section 5.5 'Limitations on Analysis', he delves into whether anything about the relevant email was altered or fraudulently altered, stating clearly that he was not giving a legal opinion, but then going on to provide the advice of counsel of what the elements of fraud in Bermuda include and the burden and standard of proof.

51. Fifth, Mr. Horseman submitted that Mr. Connolly has demonstrated a lack of understanding of his duty to the Court when giving expert evidence. Thus, he argues the Kroll Report should be excluded in its entirety. I have reviewed the Kroll Report and I do not see a statement from Mr. Connolly where he acknowledges his duty to the Court. However, in my view, the report does contain relevant and admissible opinion evidence based on stated facts in the case. There is no reason why this evidence should not be in evidence.

52. Sixth, thus, it is proper to limit the scope of the expert evidence rather than exclude the Kroll Report altogether. Further, it will assist in providing guardrails for the joint expert report. I find it will be useful to the parties for the Court to reiterate that the expert report and the joint expert report should be confined to the terms of the Consent Order. Subject to any further submissions by the parties to vary the list set out below of the sentences/paragraphs, I am of the view that the following sentences/paragraphs should be excluded from the Kroll Report (using the Kroll Report internal page numbers):
    a. Section 5.4 on page 24 – "*Given that at least four versions of the contract were floating around, it's reasonable to conclude that confusion existed among the parties as to which version of eh agreement was the correct version to be finalized. This is also sufficiently confusing to help explain why Mr. Bush may have forgotten or misremembered various changes to the DLA, but it would also make sense that he would have therefore confirmed he was reviewing the correct version prior to signing it – particularly since the Draft Letter Agreement was effectively one page, and all four differences are readily apparent.*";
    b. Section 5.5 on page 26 – *"Mr. Sinclair does not opine on whether the introduction of a new letter agreement by a sender or recipient of the two emails in question would constitute fraud or deception, or whether the difference in attachment can be attributable to error or oversight."*

c. Section 5.5 on page 29 – "*to say nothing of fraudulently altered*," and footnote 6;

d. Section 6 – the Conclusions paragraph in full.

Conclusion

53. In summary I make the following orders:

a. I dismiss the Plaintiffs' Application in relation to the pleadings for fraud. Unless either party files a Form 31TC within 7 days of the date of this Ruling to be heard on the subject of costs, I direct that costs shall follow the event in favour of the Defendant against the Plaintiffs on the standard basis, to be taxed by the Registrar if not agreed.

b. I grant the Defendant's Application in relation to the expert report that it should be limited in scope as set out above. Unless either party files a Form 31TC within 7 days of the date of this Ruling to be heard on the subject of costs, I direct that costs shall follow the event in favour of the Defendant against the Plaintiffs on the standard basis, to be taxed by the Registrar if not agreed.

c. Various parts of the Kroll Report are to be struck out as set out above. The parties are at liberty to apply within 14 days of the date of this Ruling in respect of the exact parts of the Kroll Report to be struck out.

Dated 11 July 2023

THE SEAL OF THE SUPREME COURT OF BERMUDA

SIGNED

HON. MR. JUSTICE LARRY MUSSENDEN
PUISNE JUDGE OF THE SUPREME COURT