



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2024 : No. 285

BETWEEN:

**CHARLES N. L. BROWN
GLENWOOD G. BROWN**

(For the Ancestors and Beneficiaries of the late John Augustus Alexander Virgil)

Plaintiffs

-and-

THE BANK OF N. T. BUTTERFIELD & SON LIMITED

Defendant

RULING

Strike out application of Writ on grounds that they disclose no reasonable cause of action, the Writ is frivolous, vexatious and an abuse of process. Fiduciary Duty. Attempt to re-litigate issues that are res judicata. Fresh Evidence.

Date of Hearing: 21 April 2025

Date of Judgment: 8 May 2026

Appearances: Plaintiffs as Litigants in Person

Kyle Masters, Carey Olsen Bermuda Limited, for the Defendant

RULING of Mussenden CJ

Introduction

1. By a Summons dated 10 January 2023, the Defendant (the “**Bank**”) seeks to strike out the Plaintiffs’ Specially Endorsed Writ of Summons dated 3 October 2024 (the “**Writ**”) filed on behalf of the ancestors and beneficiaries (the “**Beneficiaries**”) of the late John Augustus Alexander Virgil (“**Mr. Virgil**”). The Bank applies to do so pursuant to Order 18, rule 19 of the Rules of the Supreme Court 1985 (“**RSC**”) and/or the Court’s inherent jurisdiction on the following grounds:
 - a. The Writ discloses no reasonable cause of action because the Plaintiffs (acting on behalf of the Beneficiaries) have no valid legal claim against the Bank;
 - b. The Writ is frivolous, vexatious, and an abuse of process because it was filed despite the Plaintiffs knowing that the Beneficiaries’ claim was time barred approximately 40 years ago due to the expiry of the statutory limitation; and
 - c. The Writ is an abuse of process because it is barred by the doctrine of *res judicata*, and the Writ otherwise seeks to re-litigate identical issues which were or could have been raised in at least six previous legal proceedings commenced by the Beneficiaries against the Bank and others.
2. The Bank’s position is supported by the First and Second Affidavits of Kevin Dallas (“**Dallas 1**” and “**Dallas 2**”) sworn 13 November 2024 and 6 February 2025 along with Exhibits KD-1 and KD-2.
3. The Plaintiffs oppose the application to strike out the Writ. Their position is supported by the rebuttal affidavit of Glenwood Brown (“**Brown 1**”) sworn 26 November 2024 along with its exhibit CB/GB-1. They also filed a second rebuttal affidavit (“**Brown 2**”) sworn 14 April 2025 which states it was in reply to the strike-out application.

Background

4. The Writ sets out that the Plaintiffs’ claim on behalf of the Beneficiaries relates to two alleged “fraudulent land transactions” which occurred in 1962 and 1969 with respect to land in Spring Benny, Sandys Parish (the “**Real Property**”). The Real Property was owned

at the time by Mr. Virgil but was sold prior to his death. It is claimed that the Bank “*deliberately covered up and sought to conceal*” the fraudulent sale of the Real Property from the Beneficiaries after becoming Executor of Mr. Virgil’s estate. As a result, the Plaintiffs allege that the true ownership of the Real Property was concealed and the Beneficiaries were denied their rightful inheritance (ie, the value of the Real Property).

The Will and Death of Mr. Virgil and the Beneficiaries’ initial claim to the Real Property

5. Dallas 1 and Dallas 2 set out the history of the matter as follows:
 - a. On 21 May 1964, Mr. Virgil named the Bank as the sole executor of his Estate pursuant to his Last Will and Testament. The Will states that it was prepared by the law firm Appleby, Spurling & Kemp (“**Appleby**”) and witnessed by lawyer Robert Motyer of Appleby.
 - b. The Will named Mr. Virgil's nieces and nephews as the Beneficiaries. The Plaintiffs, Charles Brown and Glenwood Brown, are the sons of one of the Beneficiaries named in the Will, the late Barbara Brown.
 - c. On 17 January 1972, Mr. Virgil died. Probate was granted to the Bank on 24 March 1972 pursuant to the Trustee Act 1876 (the “**1876 Act**”), now repealed. I note here that the Grant of Probate states that the Will “... *was admitted to probate in common form in the said Court and the administration of the personal estate of the said deceased was granted by the Court to ...[the Bank]*” [emphasis added]. Dallas 1 states that the Bank of Butterfield Executor and Trust Company Ltd. (“**BETCO**”) subsequently acted as executor of the Estate during the period material to the Writ.
 - d. In or around 1972, the Beneficiaries complained to BETCO, as executor of the Estate, about the Beneficiaries’ entitlement to ownership of the Real Property, which had been sold prior to Mr. Virgil's death. BETCO retained Appleby to investigate the title to the Real Property in response to the Beneficiaries’ complaints (the “**Appleby Investigation**”).
 - e. On 30 October 1978, Appleby completed a report about its investigation of title to the Real Property (the “**Appleby Report**”). The Appleby Report was signed by

Neil A. Orman of Appleby. The Bank's position is that there is no evidence of Mr. Motyer being involved with the Appleby Report.

- f. The Appleby Report concluded that the Beneficiaries had no claim to the Real Property. It also included that BETCO, as executor of the Estate, had no legal obligation as part of the administration of the Estate to deal with the Real Property, even if it had been owned by Mr. Virgil at the time of his death, or any other real property. That is because, in 1972, Bermuda law held that any real property owned by Mr. Virgil automatically devolved to the Beneficiaries upon his death and did not form part of his Estate.
- g. On 1 November 1978, BETCO sent a copy of the Appleby Report to Barbara Brown on behalf of the Beneficiaries ("**1978 BETCO Letter**"). The 1978 BETCO Letter was copied to three other Beneficiaries, as well as to Mr. Orman of Appleby among others. The letter states that BETCO considered the matter of the property to be closed and, in any event BETCO, as executor of the Estate, "*had neither a duty, or even the right, to deal with, or attempt to deal with, any real estate of ...*" Mr. Virgil.

The History of the Beneficiaries' legal claims with respect to the Real Property

6. It will be important to set out the previous legal claims in respect of the Real Property. Dallas 1 and Dallas 2 set out the history. I will also set out the Plaintiff's position (per their submission dated 14 April 2025) where it differs on the previous legal claims.
7. 1976 BPS Report - In or around 1975, Barbara Brown made a complaint to the Bermuda Police Service ("**BPS**") about the title to the Real Property and, in response the BPS prepared a report dated 7 February 1976 (the "**1976 BPS Report**"). It stated under the conclusion header that "*it is possible*" there were issues with the signatures on the documents related to the sale of the Real Property prior to Mr. Virgil's death. It also concluded that "*I'm of the opinion that a civil suit could be instituted against Russell Levi Pearman for failing to make full [payment] of value to Virgil land.*"

8. 1982 Claim - On 22 September 1982, the Beneficiaries commenced their first legal claim against the Bank (among others) in Supreme Court Civil Jurisdiction 1982: No. 252 (“**1982 Claim**”. In *Re Virgil: Brown and Others v Bank of NT Butterfield & Son and Others* [1988] Bda LR 100 (SC) (“**1982 Claim Decision**”) at page 80, Justice M. Ward noted that the 1982 Claim alleged the Beneficiaries were entitled to ownership of the Real Property and was struck out as against the Bank (the “*1st Defendant*”) on 6 January 1983 because the Beneficiaries’ claim “*disclosed no reasonable cause of action against [the Bank].*”

9. On 16 June 1989, Michael Scott of Browne & Wade Chambers sent a letter on behalf of the Beneficiaries to the Commissioner of the BPS. The letter references the 1976 BPS Report and requests that the criminal investigation into the sale of the Real Property prior to Mr. Virgil’s death be re-opened by the BPS.

10. 1989 Claim - Also in 1989, the Beneficiaries commenced a new legal claim against John Alfred Virgil, John W Swan Ltd., Russell L. Pearman, and John Augustus in Supreme Court Civil Jurisdiction 1989: No. 450 (“**1989 Claim**”). The 1989 Claim sought to recover the Real Property from its then-owners for the Beneficiaries. The un-filed Statement of Claim alleged that the Bill of Sale by which Mr. Virgil sold the Real Property prior to his death was “*false or untrue in a material particular*” because it included forged signatures. The Bank’s position is that it is not aware of the outcome of the 1989 Claim, although it was presumably dismissed given the history of subsequent legal claims.
 - a. The Plaintiffs submitted that the Bank was not a defendant in this case.

11. 1990 Claim - In 1990, the Beneficiaries commenced another legal claim against John Alfred Virgil, John W Swan Ltd., Russell L Pearman, and John Augustus in Supreme Court Civil Jurisdiction 1990: No. 226 (“**1990 Claim**”). It sought to recover ownership of the Real Property from its then-owners for the Beneficiaries. Dallas 2 explains that the Supreme Court Cause Book states that the 1990 Claim was consolidated into another claim and then discontinued on 25 February 1994.
 - a. The Plaintiffs submitted that the Bank was not a defendant in this case.

12. 1991 Claim - In 1991, the Beneficiaries commenced another legal claim against the Bank in Supreme Court Civil Jurisdiction 1991: No. 163 (“**1991 Claim**”). The Amended Writ alleged that the Bank, as executor of the Estate, was negligent in administering the Estate due to the failure to investigate properly and identify the fraudulent sale of the Real Property (which had occurred in the 1960s, long before Mr. Virgil's death). The 1990 Claim was eventually consolidated into the 1991 Claim. The Amended Statement of Claim for the consolidated 1991 Claim alleged that the Bank committed a “*breach of trust*” by retaining Appleby to investigate the title to the Real Property. That was because Mr. Motyer of Appleby had allegedly been involved in the fraudulent sale of the Real Property prior to Mr. Virgil's death, and the Appleby Report allegedly concealed that fraud from the Beneficiaries.
13. BETCO and Appleby appear to have been added as Defendants to the 1991 Claim along with the Bank (among others) pursuant to the Beneficiaries’ Re-Amended Statement of Claim. Dallas 2 states that the Supreme Court Cause Book states that the 1991 Claim was struck out by the Court due to the Beneficiaries failure to comply with a Court Order dated “3/02/94”.
14. 1991 Claim Costs Order - The Bank’s records indicate that the 1991 Claim was struck out as against the Bank due to disclosing no reasonable cause of action. That dismissal resulted in a “*Court Order dated 1st September 1994 to pay the Bank’s taxed costs in the amount of \$7,234.75, by way of monthly installments of \$250 commencing on the 30th September 1994 until fall and final payment*” (“**1991 Claim Costs Order**”). The Bank's records indicate that the Beneficiaries have only paid \$250 of the \$7,324.75. However, the Bank was unable to locate a copy of the 1991 Claim Costs Order.
15. The Bank's records and the Supreme Court Cause Book are consistent with the Amended Bill of Costs dated 9 October 1995 that was filed by the Second Defendant (John W Swan Ltd.) in the consolidated 1990/ 1991 Claim. That Bill of Costs states it was filed pursuant to the “*Order made by Puisne Judge Mr. Justice Meerabux on 3rd of February 1994.*” The

date of Meerabux J.'s Order corresponds with the Supreme Court Cause Book's reference to an Order dated "3/02/94" which resulted in the Court striking out the 1991 Claim.

- a. The Plaintiffs submitted that the consolidated 1991 Claim was struck out because the plaintiff had not complied with the 3 February 1994 Court Order to pay the costs of the defendant. They submitted that the alleged unpaid bill of tax relates to a separate and distinct legal matter and unrelated to the Beneficiaries' new claim.

16. 1998 Claim - In 1998 the Beneficiaries commenced another legal claim against John William David Swan in Supreme Court Civil Jurisdiction 1998: No. 60 ("**1998 Claim**"). In *'The Devisees' of the Estate of the late John Augustus Alexander Virgil v John William David Swan*, [1998] Bda LR 41 (SC), Justice Meerabux found that the 1998 Claim constituted an attempt by the Beneficiaries to obtain "*discovery prior to the commencement of proceedings*" with respect to the ownership of the Real Property. That was improper and the Beneficiaries' 1998 Claim was dismissed.

- a. The Plaintiffs submitted that the Bank was not a defendant in this case.

17. 2001 Claim - In around April 2001, the Beneficiaries appealed the dismissal of the 1998 Claim to the Court of Appeal in Appellate Jurisdiction 1998: No. 16. The Bank is not aware of the outcome of that appeal. Also in 2001, the Beneficiaries commenced another legal claim against John William David Swan in Supreme Court Civil Jurisdiction 2001: No. 435 ("**2001 Claim**"). It was ultimately struck out pursuant to the Order of Assistant Justice Warner dated 3 December 2002 due to disclosing no reasonable cause of action.

18. Additionally, in 1990, 1997, 1998, 2000, and 2009 Barbara Brown (either on behalf of or in conjunction with the other Beneficiaries) sent letters, telephone, and met in person with representatives of the Bank about the ownership of the Real Property. The details of those interactions are summarized in Dallas 1.

The Beneficiaries' claim to the Commission of Inquiry into Historic Losses of Land in Bermuda

19. In or around 2020, Charles Brown made a complaint on behalf of the Beneficiaries to the Commission of Inquiry into Historic Losses of Land in Bermuda (the “**Commission**”) about the ownership of the Real Property. The Commission subsequently considered oral and written submissions from both the Plaintiffs and the Bank in relation to the Bank's obligations with respect to the Real Property.
20. On 31 July 2021, the Commission released its final report (“**Commission Report**”) which made certain conclusions about the Beneficiaries' claim to the Real Property. The Commission Report stated that there was probable wrongdoing by several third parties in relation to the sale of the Real Property prior to Mr. Virgils' death. However, the Bank's position is that it was not found to have committed any wrongdoing.
21. The Commission Report also recommended that legal action should be commenced against the wrongdoing third parties. However, the Commission noted that all the wrongdoers were deceased. The Bank's position is that contrary to the Plaintiffs' argument, the Commission Report did not recommend that the Beneficiaries bring a new legal claim against the Bank. The Bank's position is that the only adverse finding made against it is found at paragraph 12(ii) of the Commission Report, which questions whether the Bank “*should be considered as having acted without due regard for its fiduciary duty*” with respect to the investigation of title to the Real Property.
22. The Bank's position is that the Commission posed that question because it was alleged that BETCO may not have conducted “*a thorough investigation*” of the title to the Real Property in the 1970s. That was due to the Appleby Report's failure to determine the authenticity of the signatures on the documents evidencing Mr. Virgil's sale of the Real Property prior to his death. However, the Bank's position is that the Commission Report did not actually conclude that the Bank had breached any fiduciary duty it was alleged to have owed to the Beneficiaries.

The Evidence from the Commission Report

23. It is useful to set out some of the evidence in this case that was contained in the Commission Report.
24. The Establishment of the Commission and its Terms of Reference are set out [at page 21] of the Commission Report. It was chaired by The Hon. Justice (Ret.) Norma Wade-Miller, OBE.

“Establishment of COI

... the Commission to Inquire into Historic Losses of Land in Bermuda [COI] was appointed by the Premier, the Hon. E. David G. Burt, JP, MP, following the acceptance of a Ministerial Statement in the House of Assembly on 19th June, 2019 and public notification in the Official Gazette of 1st November, 2019.

Terms of Reference

- 1. Inquire into historic losses of citizens’ property in Bermuda through theft of property, dispossession of property, adverse possession claims and/or such other unlawful or irregular means by which land was lost in Bermuda;*
- 2. Collect and collate any and all evidence and information available relating to the nature and extent of such historic losses of citizens’ property;*
- 3. Prepare a list of all land to which such historic losses relate;*
- 4. Identify any persons, whether individuals or bodies corporate, responsible for such historic losses of citizens’ property; and*
- 5. To refer, as appropriate, matters to the Director of Public Prosecutions for such further action as may be determined necessary by that Office.”*

25. The Commission Report addressed the Estate of John Augustus Alexander Virgil as Case 015 at pages 230 to 343. Mrs. Barbara Brown, Mr. Charles Brown and Mr. George Brown (the “Claimants” in the Commission) submitted a claim on behalf of the Beneficiaries of the Estate of John Augustus Alexander Virgil in respect of land at Spring Benny, Sandys Parish and two transactions 1961 – 1962 and 1968 – 1969¹. As a result of adverse notices, the Bank was granted standing at the Commission and was represented by counsel. Along with others, the Bank “*vigorously denied all of the allegations submitted by the claimants*”². The Commission Report set out the documentary evidence it had considered

¹ Commission Report page 230

² Commission Report 232

and it had sections on the “Lay of the land at the time of the Will”, the “1961 – 1962 Transaction – the Southern Portion”, the “Northern Portion”, the “Pursuit of Justice 1972 – Today”, “Cross-Examination and Evidence”, “Adverse Parties’ Responses to the Claimants”, “Discussion”, and “Conclusions”. There were findings of fact beginning at page 333.

26. In the Findings of Fact section, it stated [at page 333 – 334]:

“iv. The Bank of Butterfield Executor & Trustee Company Limited (see Appendices for report) Hamilton, Bermuda were sole Executors of the Estate of John Augustus Alexander Virgil who died on 17th January, 1972.

v. The Executors’ fiduciary duty began on the death of the testator.

vi. The Executors commissioned a report as a result of complaints made to them by certain persons (COI emphasis) that those who claim title to the parcel of land, the subject 334 hereof, do so in error, or by fraud to the exclusion of the aforsaid certain persons (COI emphasis).

vii. It is subject to serious debate and contemplation whether the Bank, then, as it was constituted in the course of its investigation in 1978, should be considered as having acted without due regard for its fiduciary duty. For example, the statement in the 1st November, 1978 report that, “...we do not direct our minds to the authenticity of any deeds which had been produced to us. So far as we can see, all documents purporting to be original documents appear to be genuine i.e. they appear to be what they purport to be, and we have no reason to doubt that they were signed by the persons whose purported signatures appear therein.” The Bank determined that all documents purporting to be original appear to be genuine, which is unfortunate, having not conducted a thorough investigation regarding the authenticity of the signatures despite the complaint by the beneficiaries of the estate.

viii. The COI does not share the view that the following was not of importance as indicated in the Butterfield Report: “As a matter of interest, although not of importance to this report, a sub-division of “Brownacre” into eight lots and a roadway, had been approved by the Central Planning Authority on 7th March, 1969, that is, before John Augustus Alexander Virgil sold “Brownacre” on 15th April, 1969.” The COI is of the view that this matter is of material importance as it clearly illustrates that the Bank became aware of the subdivision of the Virgil land before.

The whole parcel of land originally owned by the late Augustus Virgil at the time of death on 17th January, 1972, he did not own any part, except for such residual ownership or rights which he had and the other devisees of Augustus Virgil may have retained over certain of the roadways referred to in the various deeds. (Butterfield Report 1978 Chapters 6, 7&8).

27. In the section on Robert Motyer, it stated [at page 337]:

“8.11 Robert Motyer

i. The COI accepts that Robert Motyer drafted the 21st May, 1964 Will of John Augustus Alexander Virgil and that he signed as witness to the Will.

ii. The COI accepts that on 26th January, 1962 Robert Motyer wrote on behalf of Eric Jones to “Mr. John Virgil” regarding the Southern portion and the payment of a balance to Mr. Virgil by Mr. Eric Jones.

iii. The COI accepts that on 19th February, 1969, Robert Motyer wrote to David Wilkinson, “advising that on the instructions of Mr. John Augustus Alexander Virgil we forward to you herewith the title deeds of a property in Sandys Parish which we understand that Mr. Virgil has contracted to sell to your client Mr. Russell Levi Pearman at a total price of 7000 pounds.” The COI does not accept that it was the original deeds that were forwarded by Robert Motyer to David Wilkinson as the beneficiaries are to this day in possession of the original deeds.”

28. In the Conclusions section, it did not find any wrong doing by the Bank or BETCO, rather it stated [at page 338]:

“9.0 Two major transactions are fraudulent:

a. The 9th December, 1962 acquisition of the Southern portion by Eric Arthur Jones

b. The 15th April, 1969 sale of the Northern portion by John Augustus Alexander Virgil to Russell Levi Pearman

9.1 The evidence from Document Examiner Expert Miss Brenda Petty was not challenged by any of the parties. The Expert through her testimony opined that documents were probably falsified and the COI concludes that the claim ought properly to be referred to the Director of Public Prosecutions to determine if the public interest requires that any person is criminally charged for their conduct. However being mindful of the fact that the persons we deem culpable are deceased, a referral to the Director of Public Prosecutions is an exercise in futility.”

9.2 It is probable that David Edmund Wilkinson, David Motyer and Russell Levi Pearman conspired together with persons unknown and fraudulently signed the conveyance of 15th April, 1969.

9.3 It is probable that David Edmund Wilkinson, Robert Motyer and Russell Levi Pearman conspired together with persons unknown and signed the sales agreement of 11th January, 1969.

9.4 David Edmund Wilkinson, Algernon Doers, Eric Arthur Jones, Robert Motyer, Russell Levi Pearman and others unknown participated in a criminal conspiracy to dispossess John Augustus Alexander Virgil.

9.5 The Central Planning Authority's role in the criminal conspiracy to dispossess John Augustus Alexander Virgil of Lot 4 is tantamount to a corruption enabling mechanism facilitating the wrongdoing. 9.6 There is no evidence that "Appleby" was hands-on with the 1961/62 fraud surrounding the Southern portion and then signed off on the Will in 1964.

*9.6 There is no evidence that "Appleby" was hands-on with the 1961/62 fraud surrounding the Southern portion and then signed off on the Will in 1964.
..."*

29. I note here the Commission Report did not recommend legal action be taken against the Bank or BETCO. However, in an un-titled section 10, it stated the following:

"10.0 Due regard is to be given to a mechanism being established to consider an award of compensation for loss through theft of property, dispossession of property or such other unlawful or irregular means by which land was lost in Bermuda. The recommendation is being made acknowledging that this falls outside of the remit of the COI.

10.1 Legal advice must be sought with a view to instituting legal action against the Estate of Russell Levi Pearman, the Estate of David Wilkinson, the Estate of Robert Motyer and the Central Planning Authority (Government of Bermuda)."

30. In the Adverse Findings Section, it stated [at page 342]:

12.0 ADVERSE FINDINGS

i. An Adverse finding notification is to be issued to the Estate of Russell Levi Pearman, Estate of David Wilkinson, Estate of Robert Motyer, Estate of Eric Jones.

ii. Adverse finding to be sent to Butterfield Bank - whether the Bank, then, as it was constituted in the course of its investigation in 1978, should be considered as having acted without due regard for its fiduciary duty. For example, the statement in the 1st November 1978 report that, "...we do not direct our minds to the authenticity of any deeds which had been produced to us. So far as we can see, all documents purporting to be original documents appear to be genuine i.e. they appear to be what they purport to be, and we have no reason to doubt that they were signed by the persons whose purported signatures appear therein." The Bank determined that all documents purporting to be original appear to be genuine, which is unfortunate, having not conducted a thorough investigation regarding the authenticity of the signatures despite the complaint by the beneficiaries of the estate

The Plaintiffs' current claim against the Bank

31. On 15 October 2024, the Plaintiffs served the Bank with the Writ, which the Bank submits is substantially the same allegations against the Bank as were struck out by the Court pursuant to the 1991 Claim. That claim per the Writ is that the Bank breached its “*fiduciary duty of care*” to the Beneficiaries due to the alleged negligent administration of the Estate, because it “*engaged in constructive fraud and reckless conduct, by taking intentional and deliberate steps to obstruct the pursuit of justice and conceal and cover up the fraudulent behaviour of their legal agent, that is, Appleby, and others as it relates to two fraudulent land transactions – one in 1962 and another in 1969 [that is, Mr. Virgil’s sale of the Real property prior to his death].*”

32. On 12 November 2024, the Bank filed its Summons to strike out the Writ. The Bank filed various search praecipes to search court files and the Cause Book, which revealed the 1989, 1990 and 1991 Claims. Further searches of those files revealed documents and the Plaintiffs provided the Bank with some pleadings from the various claims. Some search requests were not processed by the Supreme Court Registry which on 4 March 2025 informed the Parties that “*the files that have been requested have either been archived, or may be housed at the Court’s former location (11 Front Street) and would be inaccessible due to mold. We are confirming the position.*”

33. The Bank submitted that the Court should review its records to confirm various facts. I refer to the preceding paragraph and state herein that the position has not changed, as it has not been possible to obtain the files as they have either been archived or are inaccessible due to mold as they are housed at the Court’s former location.

Law on Strike Out

Rules of the Supreme Court (RSC) 1985 – Striking Out

34. 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.”

35. The Supreme Court Practice 1999 (the “**White Book**”) commentary at 18/19/26-28 and 34-35 confirms that the Court also has the inherent jurisdiction to stay or dismiss a claim which is obviously frivolous, vexatious, or an abuse of process. The Court is permitted to consider fulsome affidavit evidence and the facts when exercising its inherent jurisdiction to strike out a claim.

36. In *Hill-Cross v Bermuda Hospitals Board* [2015] Bda LR 4 (SC) at paragraph 12, Hellman J confirmed the principles applicable to strike out pursuant to Order 18, rule 19 of the RSC:

*“12. The principles applicable to striking out are not in dispute. 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”. [emphasis added]

37. 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.

38. 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.’

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 Automotive Holdings Ltd [2005] Bda LR 12.”*

39. *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 where the allegation that is being made is of bad faith or dishonesty ... Of course, the allegation of fraud, dishonesty or bad faith must be supported by particulars. The other party 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 may be struck out.”

The Plaintiffs' Position on the strike Out

40. In addition to Brown 1 and Brown 2, the Plaintiffs submitted written submissions. In all those documents there is a mix of evidence and legal submissions. There is also a comprehensive bundle of Exhibits which contain copies of indentures, Mr. Virgil's Will, correspondence, submissions to the Commission and extracts from the Commission Report. The complete Commission Report was exhibited to Dallas 1. In Court, the Plaintiffs also made a powerpoint presentation to assist with their submission which I found to be novel and very useful. I commend the Plaintiffs for exercising their access to justice by using such a method.
41. The Bank through its counsel, made submissions in respect of the various grounds for strike-out as set out below. The Plaintiffs have based their case against the strike-out application first in general terms and then on specific grounds. It will be useful to set out their general case here. Where they have specifically addressed a ground against strike out, I have considered it as part of the specific ground.

The General Objections to the Strike Out

42. Generally, the Plaintiffs submitted that their Writ was grounded in newly discovered evidence of fraud and the Bank's deliberate concealment, as confirmed by the 2021 Commission of Inquiry and expert testimony. They submitted that justice demands that the case proceed to trial to address an historic wrong that has deprived the Virgil Beneficiaries of their inheritance for over half a century. They submitted that the Court should exercise its inherent judicial discretion as they understood that there is judicial reluctance to dismiss cases prematurely, especially when factual disputes exist that could be resolved at trial.
43. The Plaintiffs referred to the Appleby Investigation and Appleby Report which they described as a "whitewash" and fraud upon the Court, on the basis that the Appleby Investigation was conducted by the perpetrators, that is, Appleby reviewed its own suspect transactions, which the Plaintiffs submit should have been independently scrutinised. They referred to Appleby billing sheets in 1994 as evidence that proved that Mr. Motyer continued advising the Bank through the 1990 litigation. Also, the Plaintiffs submit that

the Bank knew of red flags but still hired Appleby to conduct the investigation. The Plaintiffs submitted that the Bank had displayed unclean hands by retaining Appleby, with Mr. Motyer's conflict, and withholding documents, thus leading to wilful default under the Trustee Act 1876. On this basis, the Plaintiffs submitted that that created an estoppel, namely that the Bank cannot deny Mr. Motyer's central role, who they described as the Bank's accomplice. Thus, they argue that the Bank and Appleby formed an unlawful means conspiracy, citing the House of Lords case of *OBG Limited and others v Allan and others* [2007] UKHL 21. That case was three appeals which were principally concerned with claims in tort for economic loss caused by intentional acts.

44. The Plaintiffs submitted that the Commission Report is transformative and along with the handwriting expert Brenda Petty's analysis, provide first-time proof of forged signatures in the 1960's land transactions.
45. The Plaintiffs also submitted that there were extenuating circumstances which justified any delay including: (i) the Beneficiaries lacked funds for litigation; they had instructed inadequate prior counsel who had failed to pursue fraud claims; and (ii) there was political interference where systemic bias had hindered earlier progress.

The Writ discloses no reasonable cause of action because the Plaintiffs have no viable claim against the Bank

The Bank's Submissions

46. Mr. Masters submitted that the Writ should be struck out as there is no valid legal claim against the Bank for two reasons: (i) neither the Bank nor BETCO (as the actual Executor of the Estate) could owe the Beneficiaries a fiduciary duty with respect to real property, thus there is no realistic prospect of the Plaintiffs proving its claim against the Bank at trial; (ii) the Bank did not owe the Beneficiaries a non-fiduciary common law duty of care because BETCO acted as executor of the Estate (and therefore owed that duty). Further, even if the Bank did owe such a non-fiduciary duty of care to the Beneficiaries, the Trustee Act 1876 includes an implied statutory liability exclusion which prevents the Bank from being liable to the Beneficiaries for negligence in the administration of the Estate. Thus, it is impossible for the Plaintiffs to prove negligence.

The Plaintiffs' Submissions

47. The Plaintiffs submitted that the Beneficiaries' claim contains the elements of a *prima facie* case in that there was a reasonable cause of action in that the Bank owed a fiduciary duty to the Beneficiaries and that the limitation period can be extended if the defendant deliberately conceals material facts. Further, the claim is supported by documented evidence as illustrated during the Commission and the findings and conclusions of the Commission that there was now new, fresh and compelling evidence of fraud from an experienced handwriting expert. Further, the Bank's investigation was compromised, fraudulent and there was a conflicted legal agent in the midst of it, the result being that the investigation by the Bank, as Executor of the Estate with a fiduciary duty of care, was unsatisfactory. Thus, in combination with the principle that fraud unravels all, the case should not be struck out, but should proceed to trial.
48. The Plaintiffs also submit that the Bank had always maintained that its fiduciary duty of care began when Mr. Virgil passed in 1972, referring to a statement by the Bank that it had no responsibility to the Beneficiaries until he passed and therefore could not have been involved in the land transfers. They also rely on the Commission Report which stated that the Bank's fiduciary duty began in 1972, when Mr. Virgil passed. The Plaintiffs outlined the duties taken by the Bank in respect of Mr. Virgil's death, including taking possession of the title deeds from Appleby and giving them to Beneficiaries, advertising in the Official Gazette for any claimants against the Estate to submit any claims – to which the Beneficiaries did present to claim their inheritance and acceding to the Beneficiaries request to hold an investigation. The Plaintiffs referred to the Bank's statement in the report that it could not “direct their minds to the authenticity of the any deeds produced to them”, submitting that the Bank was acknowledging its limitation in conducting due diligence on the property's title or ownership history, instead relying on information provided to them. Thus, the Plaintiff's submit that the Court should determine if this is appropriate conduct of the Estate's Executor with a fiduciary duty of care to the Beneficiaries.

49. The Plaintiffs submitted that Bank now takes a position that, despite its stated historical fiduciary duty of care to the Beneficiaries, it did not have such a fiduciary duty of care, which they describe as an attempt to side-step its institutional accountability and to re-write history. The Plaintiffs submitted that the position is in contrast to the Bank's correspondence in December 2023 and September 2024 wherein the Bank acknowledged its fiduciary duty in writing and claimed to have both met and exceeded it. Thus, the Plaintiffs submitted that based on the Bank's evidence, it (the Bank) had failed to meet the threshold for striking out the Writ on the ground that it disclosed no cause of action because it had no fiduciary duty to the Beneficiaries. To that point, I should make reference to two documents that clarifies the Bank's position:

- a. In the BETCO letter to Mrs. Brown dated 1 November 1978, it stated "Please note carefully that this company as executor of the late John Augustus Alexander Virgil had neither the duty, or even the right, to deal with, or attempt to deal with, any real estate of the late John Augustus Alexander Virgil, even if he had had any at the date of death.³ We feel that we have gone beyond our requirements as Executor to endeavor to assist you and your family in this matter and, in fact, have only done so to be as helpful to you as we possibly could. We have tried on many occasions to advise you that we could have no interest in any real estate, even if it existed, but to our knowledge there was no real estate owned by the late Mr. Virgil on his death. This Report now proves everything this Company has stated from the beginning."
- b. In a letter from Carey Olsen, for the Bank, to the Commission dated 18 January 2021, it sets out the claim by the Beneficiaries, as against BETCO, that acting in its capacity as Executor of the Estate, it failed or was negligent in its fiduciary obligations to the Beneficiaries to properly administer the Estate. Carey Olsen explained that: (i) BETCO and the Bank had found no evidence that its former or current employees, agents or servants participated in or committed any unlawful or unethical activity in respect of the Will, Property or Estate of Mr. Virgil; (ii) BETCO was not Executor of the Estate until after Mr. Virgil's death on 17 January 1972, as prior to his death, there was no "Estate" to be administered, pursuant to the Trustee Act 1876. The letter referred to section of the 56 of the Administration

³ As underlined in the original letter.

of Estates Act 1974 which states “*Save as otherwise expressly provided, this Act does not apply in any case where the death occurred before 1 September 1974.*”; (iii) BETCO had no obligation to the Beneficiaries with respect to the Real Property; and (iv) there was no express power for dealing with the Real Property under the terms of the Will.

50. The Plaintiffs relied on the cases of: (i) *Takhar v Gracefield Developments Limited and others* [2019] UKSC 13. (ii) *Robinson v The Bank of Bermuda Ltd* [2007] SC (Bda) 44 Civ. (iii) *Willcocks v Joseph Wakefield & Wakefield Quin Limited* [2023] SC (Bda) 62 Civ. (iv) *Ralph Gooding v Elizabeth Ellis and National Workers Co-Operative Credit Union Ltd*. 2020/CLE/gen/00272 – a case from the Commonwealth of The Bahamas in respect of fraud must be strictly pleaded and proved and whether a defence should be struck out. I did not find this case to be of assistance. (v) *Lamb v Camden London Borough Council* [1981] EWCA Civ J0318-3 – which concerned whether a property owner could recover damages from the local council for repairs caused by squatters and remoteness. I did not find this case to be of assistance.

The Law

51. The Administration of Estates Act 1974 (the “**1974 Act**”) provides as follows:

Application of Act

56 Save as otherwise expressly provided, this Act does not apply in any case where the death occurred before 1 September 1974.

52. The Trustee Act 1876 provides as follows:

“53. **Every deed, will, or other instrument creating a trust either expressly or by implication shall, without prejudice to the clauses actually contained therein, be deemed to contain a clause in the words or to the effect following: that is to say,**

“That the trustees or trustee for the time being of the said deed, will or other instrument shall be respectively chargeable only for such moneys, stocks, funds, and securities as they shall respectively actually receive notwithstanding their respectively signing any receipt for the sake of conformity, and shall be answerable and accountable only for their own acts, receipts, neglects or defaults, and not for those of each other, nor for any banker, broker, or other person with whom any trust moneys or securities may be deposited, nor for the insufficiency or deficiency of any stocks, funds, or securities nor for any other loss, unless the same shall happen through their own wilful default respectively; and also that it shall be lawful for the

trustees or trustee for the time being of the said deed, will, or other instrument to reimburse themselves or himself, or pay or discharge out of the trust premises all expenses incurred in or about the execution of the trust or powers of the said deed, will, or other instrument.” [emphasis added]

Analysis

53. In my view, the Writ discloses no reasonable cause of action for several reasons. As a starting point, as set out in the White Book at 18/19/10 “A *reasonable cause of action* means a cause of action with some chance of success when only the allegations in the pleadings are considered ... So long as the statement of claim or the particulars disclose some cause of action, or raise some question fit to be decided by a Judge or a jury, the mere fact that the case is weak, and not likely to succeed, is no grounds for striking it out.”

The Bank did not owe the Beneficiaries a “fiduciary duty of care”

54. First, in my view the Bank did not owe the Beneficiaries a “fiduciary duty of care”. In 1972, at the time of Mr. Virgil’s death, Bermuda law did not impose any fiduciary duties on an executor with respect to real property. The Trustee Act 1876 did not impose any specific statutory obligations or powers on an executor in respect of real property in the administration of an estate nor did it require real property to be included in a grant of probate. Thus, the position was that real property would automatically devolve to the beneficiaries of an estate by operation of law.

55. Second, I have considered section 56 of the 1974 Act which expressly stated that the Act does not apply to deaths before 1 September 1974. Thus, it follows that as Mr. Virgil died in 1972, the 1974 Act does not apply to him. I have also considered the Will, which although it appointed the Bank as the Executor of the Will, it did not include any express power or obligation on the Bank to deal with any Real Property in Mr. Virgil’s Estate, but instead it devised his Real Property directly to the Beneficiaries. In my view, there was no statutory or contractual obligations in force in 1972 or thereafter which imposed any obligation on the Bank to deal with the Real Property as part of the administration of the Estate.

56. Third, in respect of BETCO as executor of the Estate, in my view, it would have only owed the Beneficiaries a non-fiduciary common law duty of care in administering the Estate at the time of the investigation of title to the Real Property. Thus, that duty would not form a basis for a claim for breach of a fiduciary duty or breach of trust. In the leading case on fiduciary law and professional negligence of *Bristol and West Building Society v Mothew* [1998] CH 1 (EWCA) in 1988 the defendant solicitor acted for a husband and wife in the purchase of a house and also for the plaintiff to whom the purchasers had applied for a loan. During the process, the defendant solicitor, due to an oversight, made a wrong statement to the plaintiff. Lord Justice Millett stated [at pages 17B-18F) as follows:

“I respectfully agree, and endorse the comment of Ipp J in Permanent Building Society (in liq) v Wheeler (1994) 14 ACSR 109 at 157 where he said:

“It is essential to bear in mind that the existence of a fiduciary relationship does not mean that every duty owed by a fiduciary to the beneficiary is a fiduciary duty. In particular, a trustee’s duty to exercise reasonable care, though equitable, is not specifically a fiduciary duty ...”

The nature of the obligation determines the nature of the breach. The various obligations of a fiduciary merely reflect different aspects of his core duties of loyalty and fidelity. Breach of fiduciary obligation, therefore, connotes disloyalty or infidelity. Mere incompetence is not enough. A servant who loyally does his incompetent best for his master is not unfaithful and is not guilty of a breach of fiduciary duty.”

57. Thus, I agree with the Bank’s submission that the Plaintiffs’ legal basis for its claim for a “fiduciary duty of care” is unclear. I do note in Brown 1 at paragraph 35 that it states that the claim is a natural development of a judicial process that was heard by the COI, which follows the Adverse Finding made by the COI against the Bank in their Report on page 342 where the bank’s fiduciary duty of care to the Beneficiaries was questioned by the Commissioners. This aligns with paragraph 2 of the Statement of Claim. To that point, I reviewed the Adverse Findings section of the Report [page 342], as set out above, and I agree with the Bank that it did not reference a “fiduciary duty of care” or conclude that the Bank breached any fiduciary duty.

58. Fourth, in my view, the non-fiduciary nature of BETCO’s duty of care to the Beneficiaries in administering the Estate does mean that there is no possibility of the Plaintiffs establishing a claim for breach of fiduciary duty or breach of trust against the Bank or

against BETCO. In my view, this does mean that the Beneficiaries' claim against the Bank is effectively that BETCO rather than the Bank negligently administered the Estate, which is denied by the Bank.

The Bank cannot be liable to the Plaintiffs for negligence

59. Fifth, section 53 of the 1876 Act includes a statutory liability exclusion clause (the “**Liability Exclusion Clause**”) which is deemed to be included as a term of the Will. Therefore, in my view, the Liability Exclusion Clause means that neither the Bank nor BETCO can be liable to the Beneficiaries for negligence in the administration of the Estate as set out in the Writ. Any liability would only be possible in the event of “wilful default” which would require proof that the executor acted in bad faith by either knowingly or recklessly committing a breach of duty. The case of *Armitage v Nurse* [1998] Ch 241 (EWCA) concerned a plaintiff aged 17, who became entitled in remainder to settled agricultural land of which her mother was tenant for life. Her portion was to be held on specific trusts until she reached the age of 40. The settlement provided that no trustee should be liable for any loss or damage to the plaintiff's fund or the income thereof at any time or from any cause unless it was caused by his own actual fraud. The main questions which arose in the appeal were concerned with the true construction of a trustee exemption clause in a settlement and the legitimate scope of such clauses in English law. On the issue of wilful default, Millett LJ stated [at 252C] as follows:

“First, the expression wilful default is used in the cases in two senses. A trustee is said to be accountable on the footing of wilful default when he is accountable not only for money which he has in fact received but also for money which he could with reasonable diligence have received. It is sufficient that the trustee has been guilty of a want of ordinary prudence: see, for example, Re Chapman [1896] 2 Ch. 763. In the context of a trustee exclusion clause, however, such as Section 30 of the Trustee Act, 1925 it means a deliberate breach of trust: Re Vickery[1931] 1 h. 572. The decision has been criticised, but it is in line with earlier authority: see Lewis v Great Western Railway Co. (1877) 3 QBD 195; Re Trusts of Leeds City Brewery Ltd.'s Debenture Stock Trust Deed [1925] Ch. 532n; Re City Equitable Fire Insurance Co. [1925] 1 Ch. 407. Nothing less than conscious and wilful misconduct is sufficient. The trustee must be

“conscious that, in doing the act complained of or in omitting to do the act which it said he ought to have done, he is committing a breach of his duty, or is recklessly careless whether it is a breach of his duty or not ” per Maugham J in Re Vickery (supra) at p. 583).

A trustee who is guilty of such conduct either consciously takes a risk that loss will result, or is recklessly indifferent whether it will or not. If the risk eventuates he is personally liable. But if he consciously takes the risk in good faith and with the best intentions, honestly believing that the risk is one which ought to be taken in the interests of the beneficiaries, there is no reason why he should not be protected by an exemption clause which excludes liability for wilful default. [emphasis added]

60. In this context, I have considered the Plaintiffs' case which alleges that it was Mr. Motyer of Appleby who in the 1960s was involved in a fraud related to the sale of the Real Property. The Bank is alleged to have breached its duty of care to the Beneficiaries because BETCO, as executor of the Estate, engaged Appleby – and by extension – Mr. Motyer to investigate the title to the Real Property in response to the Beneficiaries' complaints. As I understand it, that act was negligent because BETCO should have known that Mr. Motyer was involved with the alleged fraud a decade earlier. However, I agree with the Bank that there is no evidence that Mr. Myter was involved with Appleby's investigation of title to the Real Property or in preparing the 1978 Appleby Report; nor did the 1976 BPS Report nor the Commission Report suggest that the Bank or BETCO were involved in or knew about any of the alleged fraudulent activities. Thus, the case of negligence is not enough to constitute wilful default and thereby overcome the Liability Extension Clause.

61. I have considered the case of *Robinson v The Bank of Bermuda Limited*. In that case the defendant bank took the position that it and the plaintiff customer were in a contractual relationship of banker and customer which did not give rise to fiduciary duties on the part of the bank toward the plaintiff customer. The background to the case involved a series of emails that revealed that the bank had placed its own interests before that of its customer to whom it had given some advice in respect of a loan. Simmons J took the view that the ingredients alleging circumstances in which a relationship over and beyond a contractual one arose, and the pleadings raising issues of breaches of fiduciary duties were made out in the plaintiff's customer's statement of claim. She stated that the tortious claims were plainly set out and that whether any of the claims were capable of proof would fall for a closer test in trial. There was a reference to fraud as follows "*Criticisms of the claim in fraud is likewise over stated as it is a trite principle of law that conduct constituting fraud must be specifically alleged however the word 'fraud' need not be pleaded.*" In my view, I

am bound to reject the Plaintiffs' assertion that Robinson supports the establishment of a fiduciary duty of care on the Bank to the Beneficiaries for the reasons I have set out above in this section. The pleadings and the statutory positions do not establish a cause of action.

62. I have considered the case of *Takhar v Gracefield Developments Limited and others* [2019] UKSC 13 which involved some challenged property transfers and a judgment of the Court. After judgment against the appellant, the appellant obtained a report from a hand-writing expert who concluded that there was fraud involved in the hand-writing. The appellant applied to have the judgment set aside. Thus, *Takhar* deals primarily with setting aside a judgment obtained by fraud. Relevant extracts are as follows:

Lord Kerr

“Is fraud “a thing apart”; does it “unravel all”?”

43. In *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] 2 Lloyds Rep 61, para 15, Lord Bingham of Cornhill said that:

“... fraud is a thing apart. This is not a mere slogan. It also reflects an old legal rule that fraud unravels all ... once fraud is proved, ‘it vitiates judgments, contracts and all transactions whatsoever’: Lazarus Estates Ltd v Beasley [1956] 1 All ER 341 at 345, [1956] 1 QB 702 at 712 per Denning LJ. Parties entering into a commercial contract will no doubt recognise and accept the risk of errors and omissions in the preceding negotiations, even negligent errors and omissions. But each party will assume the honesty and good faith of the other; absent such an assumption they would not deal.”

44. This reflects the basic principle that the law does not expect people to arrange their affairs on the basis that others may commit fraud. It also carries echoes of what Lord Wilberforce said in *The Amphill Peerage* [1977] AC 547, 569:

“... any determination of disputable fact may, the law recognises, be imperfect: the law aims at providing the best and safest solution ... and having reached that solution it closes the book ... in the interest of peace, certainty and security it prevents further inquiry ... there are cases where the certainty of justice prevails over the possibility of truth ... and these are cases where the law insists on finality. For a policy of closure to be compatible with justice, it must be attended with safeguards: so the law allows appeals: so the law, exceptionally, allows appeals out of time: so the law still more exceptionally allows judgments to be attacked on the ground of fraud.”

56. At para 26 of his judgment, Newey J said that the principles which govern applications to set aside judgments for fraud had been summarised by Aikens LJ in *Royal Bank of Scotland plc v Highland Financial Partners lp* [2013] 1 CLC 596, para 106. There, Aikens LJ said:

“The principles are, briefly: first, there has to be a ‘conscious and deliberate dishonesty’ in relation to the relevant evidence given, or action taken, statement

made or matter concealed, which is relevant to the judgment now sought to be impugned. Secondly, the relevant evidence, action, statement or concealment (performed with conscious and deliberate dishonesty) must be 'material'. 'Material' means that the fresh evidence that is adduced after the first judgment has been given is such that it demonstrates that the previous relevant evidence, action, statement or concealment was an operative cause of the court's decision to give judgment in the way it did. Put another way, it must be shown that the fresh evidence would have entirely changed the way in which the first court approached and came to its decision. Thus the relevant conscious and deliberate dishonesty must be causative of the impugned judgment being obtained in the terms it was. Thirdly, the question of materiality of the fresh evidence is to be assessed by reference to its impact on the evidence supporting the original decision, not by reference to its impact on what decision might be made if the claim were to be retried on honest evidence."

Lord Briggs

68. This appeal turns on the outcome of a bare-knuckle fight between two important and long-established principles of public policy. The first is that fraud unravels all. The second is that there must come an end to litigation. I will call them the fraud principle and the finality principle. On the facts of this case I agree with Lord Kerr that the fraud principle should prevail. As will appear I also agree with most of his reasoning. But I have been unable to follow him all the way down a path which seeks to erect a reliable bright-line boundary between types of case where one principle or the other should clearly prevail. There will be too many cases where that supposed bright line is either invisible, or so technical that it fails to afford a basis for choosing between the two principles which accords with justice, common sense or the duty of the court to retain control over its own process, and thereby protect it from abuse. I would have preferred a more flexible basis upon which, recognising that many cases will straddle any bright line, the court can apply a fact-intensive evaluative approach to the question whether lack of diligence in pursuing a case in fraud during the first proceedings ought to render a particular claim to set aside the judgment in those proceedings for fraud an abuse of process. This approach would in particular seek to weigh the gravity of the alleged fraud against the seriousness of the lack of due diligence, always mindful of the principle that victims of a fraud should not be deprived of a remedy merely because they are careless."

63. I am sympathetic to the Plaintiffs' reliance on the issue of fraud and the case of *Takhar*. However, whilst fraud may unravel all in relevant circumstances, I disagree with their contention that the proof of fraud, will bring them any closer to establishing a cause of action as against the Bank based on a breach of a fiduciary duty of care. The allegation of fraud, or even, actual proof of fraud based on the opinion of a handwriting expert, does not undermine in any way the findings that I have made earlier in this section, that the pleadings do not disclose a cause of action.

64. I have considered the case of *Willcocks* which involved an application by a lawyer and his law firm to strike out the claim against them. Hargun CJ considered the principles for strike out as set out in the case of *Electra Private Equity Partners v KPMG Peat Marwick* [1999] EWCA Civ 1247. He also considered the issue of the duty of care in tort and the case of *White v Jones* [1995] 2 AC 207. He found as follows:

27. The Court accepts and reiterates its earlier ruling that the Second Defendant could not and did not act as an executor and trustee under the Will (see paragraphs 61 to 64 of the Judgment dated 11 October 2022). Accordingly, the Court directs that the Plaintiff may not pursue the causes of action based upon (i) breach of fiduciary duty as trustee/ constructive trustee; and (ii) breach of fiduciary duty as estate administrator.

28. In conclusion, the Court considers that upon a review of the Amended Statement of Claim the causes of action based upon (i) breach of duty of care in tort; and (ii) dishonest assistance in relation to breach of trust and/or breach of fiduciary duty by the First Defendant, are arguable and should proceed to trial in the usual way. Given that the Plaintiff is a litigant in person it is unnecessary for him to further amend the Statement of Claim as long as it is understood that the Amended Statement of Claim is limited to the two causes of action set out above.

65. In the earlier judgment of 11 October 2022, that is *Willcocks v Wakefield & Wakefield Quin Limited* [2022] Sc (Bda) 76 Civ, the paragraphs referred to above at 61 – 64 are as follows:

“61. The Court also records the Plaintiff’s submission that the First Defendant ceased to be an executor and trustee of the Will when he retired as the senior partner of Wakefield Quin. In paragraph 11 of the Statement of Claim, it is contended that the First Defendant having retired, the Second Defendant then succeeded as executor and trustee of the Estate.

62. Again, the Court is unable to accept this contention. The Court accepts the Second Defendant’s submission that there is no basis in law for the Plaintiff to suggest that on the First Defendant’s retirement from the partnership, the Second Defendant (or its successor senior partner) might automatically succeed the First Defendant as executor. The Court accepts that the grant of probate is personal to the First Defendant and cannot possibly encompass a third party who: (a) did not actively seek a probate; (b) did not swear to the requisite oath to the Court and so accept the extensive fiduciary duties that flow from the appointment; and (c) did not fulfil the requirement of the Will (not being the senior partner of Wakefield Quin at the qualifying date (i.e. the death of the late Mr Peter Willcocks).

63. Furthermore, had any other partner of the Second Defendant been nominated as a coexecutor, he or she would have had a complete discretion not to seek the probate.

The Court accepts that it is settled law that any executor named in a will may decline to seek a grant of probate, even in circumstances where he or she had previously agreed to act.

64. Finally, the Second Defendant could not be appointed as a trustee as it is not, and has never been at all material times, a licensed trust business by the Bermuda Monetary Authority under the Trusts (Regulation of Trust Business) Act 2001. As such, the Court accepts, the Second Defendant was never in a position to assume the status of a trustee in accordance with the Will. The position remains that the First Defendant was properly appointed as the executor and trustee as he satisfied the requirement in the Will at the time of the death of the Testator. The First Defendant has never been formally removed or renounced as executor. Accordingly, he remains the appointed executor and trustee of the Testator's Estate."

66. Thus, in my view, similar to where Hargun CJ found that the second defendant could not and did not act as an executor, I apply a similar approach that based on the legislation at that time, the Bank could not have a fiduciary duty with respect to the Real Property and the Trustee Act 1876 provided the statutory liability exclusion.

67. In light of the reasons set out above, I am satisfied to find that the Writ discloses no reasonable cause of action because the Plaintiffs have no viable claim against the Bank.

The Writ is frivolous, vexatious, and an abuse of process because the Beneficiaries' claim is time barred

The Bank's Submissions

68. The Bank submitted that the Writ should be struck out pursuant to Order 18 rule 19(1)(b) and (d) of the RSC and/or the Court's inherent jurisdiction because the Beneficiaries claim, which is a negligence claim based on the allegations in the Writ, is time-barred due to being filed approximately 40 years after the applicable statutory limitation period expired on 1 November 1984. Further, the fact that the Plaintiffs have once again knowingly commenced a legal proceeding based on a time-barred claim makes the Writ frivolous, vexatious, and an abuse of process.

The Plaintiffs' Submissions

69. In respect of the ground of frivolous and vexatious, the Plaintiffs submitted that there was now expert witness evidence about fraudulent documents authenticating land transactions. Further, they made allegations of corruption, conspiracy and schemes involving the Bank and its agents. They asserted that the COI made adverse findings against the Bank.
70. In respect of the ground of abuse of process, the Plaintiffs submitted that as there was fresh, new and compelling evidence of fraud, such fraud unravels all. Further, none of the five previous claims addressed those facts and evidence, those cases being exclusively concerned with property ownership, whereas the present case was concerned with the recent discovery of fraud, concealment and reckless conduct. Thus, the discovery and concealment of forged documents and material facts had not been litigated. The Plaintiffs submitted that they could have only brought their case to the Court now, not earlier, as the evidence was only recently uncovered, during the COI.
71. The Plaintiffs submitted that the 1782 Limitation Act does not apply because fraud delays the clock until discovery. The Plaintiffs submitted that the Bank buried the truth for decades, thus the clock only started to run as of 2021 which was after the Commission Report and the expert analysis revealed a fraud. The Plaintiffs relied on the case of *Canada Square Operations Ltd v Potter* [2023] UKSC 41 and the case of *Cox v Ministry of Justice* [2016] UKSC 10 which was mainly about vicarious liability in tort, whether the Ministry of Justice, through the prison service, could be held liable for the negligence of a prisoner working in a prison kitchen.

The Law

72. The Limitation Act 1984, at page 28, sets out that it was brought into operation on 1 December 1987 by BR 49/1987.
73. In *Attorney General v Lord and Allen* [1988] Bda LR 112 (SC) [at 192/193] in respect of the statutory limitation and the applicable relevant Limitation Act, Ward J stated as follows:

“The next question which I shall address is whether the claim is statute barred. The Bond was entered into on 26th July 1974. Mr. Blackett was invited to serve as a teacher in a school on 21st of April 1978 but declined. The Writ of Summons against the defendants is dated 7th May 1987, nine years later.

The relevant legislation in Bermuda is the Limitation Act 1782 under which actions of this type shall be commenced “within six years next after the cause of such actions or suits and not after.” The cause of action accrued when Blackett refused the offer of the Board of Education to serve as a teacher in a school in April 1978. At that moment there was a person in existence capable of suing and another person in existence who could be sued. If the Limitation Act 1782 applies, then the Writ should have been filed by April 1984. [emphasis added]

74. Section 1 of the Limitation Act 1782 imposed statutory limitation period various causes of action, stating as follows:

“Be it enacted, that all actions of trespass quare clausum fregit, all actions of trespass, detinue, trover, and replevin for taking away goods and chattels, all actions of accounts, and upon the case (other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants), all actions of debt grounded upon any lending or contract without specialty, all actions of debt for arrearages of rent, and all actions of assault, menace, battery, wounding and imprisonment, or any of them, which shall be sued or brought at any time after the first day of November next shall be commenced and sued within the time and limitation hereafter expressed, and not after: that is to say, the said actions upon the case (other than for slender) and the said actions for account, and the said actions for trespass, debt, detinue, and replevin for goods or chattels, and the said actions of trespass quare clausum fregit, within three years next after the first day of November next; or within six years next after the cause of such actions or suits, and not after: ...”

75. In the case of *White v Conyers, Dill & Pearman* Civil Appeal No. 31 [1994] Bda LR 9 (CA) [at 101-102] DaCosta P (Acting) stated as follows:

“In Bell v Peter Browne (1990) 2 QB 495 the Court of Appeal considered the question of the persistence of a duty of care in tort. The court was of the opinion that the breach of duty in tort occurred at the same time as the breach of contract, that once damage had occurred as a result time began to run even if the damage could still be mitigated (see per Nicholls Learned Judge ubi sup. p. 502).

We agree with Mr. Riihiluoma’s submissions, on behalf of the respondents, that in England, a long line of authorities culminating in Bell v Peter Browne (ubi sup.) establish that so far as damage in tort is concerned -

(i) causes of action for breach of duty accrue the moment there is any quantifiable loss, even if the actual task of quantification would be difficult.

(ii) where a document is executed as a result of a breach of duty which but for the breach would not have been executed or would not have been executed in that form loss is generally sustained at the moment of execution.”

76. In the White Book 1999 at 18/19/11 in respect of limitation, the commentary confirmed that a claim being statute barred by the expiry of the applicable limitation period makes the claim frivolous and vexatious and an abuse of process, stating as follows:

“Where it appeared from the statement of claim that the cause of action arose outside the statutory period of limitation, it was held that the statement of claim would not be struck out unless the case was one to which the Real Property Limitation Acts applied (see Price v. Phillips [1894] W.N. 213). However, if the defendant does plead a defence under the Limitation Act, he can seek the trial of a preliminary issue, or in a very clear case, he can seek to strike out the claim upon the ground that it is frivolous, vexatious and an abuse of the process of the Court (see, per Donaldson L.J. in Ronex Properties Ltd v. John Laing Construction Limited [1983] Q.B. 398). Thus, where the statement of claim discloses that the cause of action arose outside the current period of limitation and it is clear that the defendant intends to rely on the Limitation Act and there is nothing before the Court to suggest that the plaintiff could escape from that defence, the claim will be struck out as being frivolous, vexatious and an abuse of the process of the Court (Riches v. Director of Public Prosecutions [1973] 1 W.L.R. 1019; [1973] 2 All E.R. 935, CA, as explained in Ronex Properties Ltd v. John Laing Construction Ltd, above).”

77. In *Moulder v Cox Hallett Wilkjinson (A Firm) and ors* [2017] Bda LR 82 (SC) Kawaley CJ (as he then was) stated [at 12] that any claim that was clearly time-barred was frivolous, vexatious and bound to fail. He also stated [at 5] that the plaintiff’s baseless allegations of fraud and concealment inevitably contributed to the claim being struck out due to creating too many legal defects.

“5. At the outset a central theme ran through the Plaintiff’s presentation. The word fraud was bandied about so indiscriminately as to strip the word of its legal meaning. It was recited like a ritual incantation, often to merely embrace conduct by the Defendants (and their lawyers) which ranged from entirely innocent acts to simply firmly defending their legitimate rights. The 2010 Action was in large part struck out because the Plaintiff failed to appreciate how narrow a concept fraud is in the legal context. The Defendants effectively contended that the present proceedings were afflicted by the same fatal flaw; a failure to appreciate that the ability of the courts to grant remedies is not open ended but is constrained by established principles of substantive and procedural law. Mr Marshall put the position concisely thus. Any loss flowing from the injunction obtained against the Plaintiff in the 2004 proceedings which he ultimately won could have been recovered by enforcing the undertaking given

the 4th to 5th Defendants in those proceedings. In commencing the 2010 Action the Plaintiff had simply pursued the wrong remedy.

12. It is clear from the judgment as a whole, and the penultimate paragraph of the judgment in particular, that the 2010 Order was based on (a) the pleadings disclosing no reasonable cause of action, and (b) a finding (based on the pleadings and certain evidence) that any claim arising out of the 1999 Conveyance was clearly time-barred (i.e the claim was frivolous and vexatious and bound to fail) :

“42. I therefore strike out the indorsement of the writ and the statement of claim against all the parties on the basis that –

(i) in respect of any and all claims in fraud and/or negligence the pleadings fail to disclose a reasonable cause of action;

(ii) any and all claims in fraud and/or negligence, or indeed any other claim, arising out of the 1999 Conveyance, are now statute barred... ””

78. In *Fidelity National Title Insurance Company v Trott & Duncan Ltd* [2019] Bda LR 8 (SC) Subair Williams J, in respect of when a claim is frivolous or vexatious, stated [at 56] the following:

“Frivolous and Vexatious

22. Justice Meerabux in The Performing Rights Society v Bermuda Cablevision Limited 1992 No. 573 at page 31 considered the meaning of ‘frivolous’ and ‘vexatious’:

“...It is pertinent to mention that the words “frivolous or vexatious” mean cases which are obviously frivolous or vexatious or obviously unsustainable. Per Lindley L.J. in Attorney-General of Duchy of Lancaster v L. & N. W. Railway [1892] 3 Ch. 274 at 277. Also when “one is considering whether an action is frivolous and vexatious one can, and must, look at the pleadings and nothing else... One must look at the pleadings as they stand.” Buckhill L.J. in Day v William Hill (Park Lane) Ld. [1949] 1 K.B. 632 at page 642.”

However, Day pre-dates the 1985 Supreme Court Rules and the new CPR regime which introduced the Overriding Objective. RSC O.18/19(2) only excludes the admissibility of evidence on the grounds that no reasonable cause of action or defence is disclosed. Evidence may now be filed in support of grounds that the pleadings are ‘scandalous, frivolous or vexatious’.”

Analysis

79. I am not satisfied that there is an applicable statutory limitation period for this matter for several reasons. First, all of the relevant acts complained of in this matter, other than the COI and the actions of document examiner Mrs. Brenda Petty, took place prior to the

Limitation Act 1984 coming into operation on 1 December 1987. In my view, I agree with the Bank that the limitation period began to run from 1 November 1978 when the beneficiaries received a copy of the 1978 Appleby Report from BETCO. Thus, that is the date when the Beneficiaries knew that BETCO would not take any further action to investigate or recover the real Property on behalf of the Beneficiaries. To that point, I rely on *White v Conyers, Dill & Pearman* that the cause of action would accrue that point.

80. Second, I agree with the Bank's submissions that at the time that the cause of action for negligence accrued, the Limitation Act 1782 applied, not the Limitation Act 1984. However, I have reviewed the Limitation Act 1782, in particular section 1. In my view, the Limitation Act 1782, whilst it did set out limitations for a variety of causes of action, it did not set out any limitations for the tort of negligence, the cause of action advanced in this case. Later on, section 4 of the Bermuda Limitation Act 1984 did expressly state that an action founded on tort shall not be brought after the expiration of 6 years from the date on which the cause of action accrued. Thus, pursuant to the Limitation act 1782, there was no limitation for the tort of negligence and thus a statutory limitation was not running in respect of the cause of action of negligence.

81. Third, the Plaintiffs seek to rely on section 33 of the Limitation Act 1984 to overcome the time limits due to fraud or concealment. The Bank submitted, and I so agree, that the Limitation Act 1782 did not contain any provision which allowed for a limitation period to be extended due to fraud or concealment. However, in light of my finding in the previous paragraph, the Plaintiffs need not rely on any extension.

82. In light of these reasons I am not satisfied that the Writ is frivolous, vexatious, and an abuse of process because the Beneficiaries' claim is time barred.

The Writ is an abuse of process because it is *res judicata* and seeks to re-litigate stale allegations

The Bank's Submissions

83. The Bank submitted that the Writ should be struck out pursuant to Order 18, rule 19(1)(d) of the RSC and/or the Court's inherent jurisdiction as the Beneficiaries claim is barred by

the doctrines of *res judicata*, and the writ otherwise seeks to re-litigate issues which were or could have been raised in earlier proceedings. The Banks submitted that the Writ makes the same allegations as the Beneficiaries' 1991 Claim, deals with the same issues as the Beneficiaries' 1982 Claim, and makes allegations which could have been raised in the earlier proceedings.

The Plaintiffs' Submissions

84. In respect of the ground of abuse of process due to *res judicata*, the Plaintiffs submitted that there was a two stage test, first, whether the claim is an abuse and then second, if so, should the Court exercise its discretion to allow it, as even if the claim is abusive, the Court may permit the claim if there are exceptional circumstances such as new evidence of fraud.
85. The Plaintiffs submitted that their claim is not an attempt to rehash old disputes, as it was a new claim rooted in discovery of fresh, new compelling evidence of forged signatures on a Sales Agreement and a Property Conveyance as found by the Commission along with the Adverse Finding against the Bank. They asserted that this case is a "best in class" fit-for-trial case given the forged documents, the concealment and reckless conduct that sought to cover up the conspiracy behind the land grab. Further, the Plaintiffs submitted that there has been no prior adjudication on the merits of the case. They submitted that the 1982 and 1991 claims were dismissed on procedural grounds, not substantive rulings. Thus, no Court has ever evaluated the fraud allegations of the Bank's breach of fiduciary duty in a full trial.
86. The Plaintiffs relied on the cases of: (i) *Takhar*. (ii) *Attorney General v Punch Limited* [2002] UKHL 50. The case of *Punch* was about freedom of expression and contempt of Court for breach of an injunction. I did not find it useful in this case. (iii) *Arnold v National Bank* [1991] 2 AC 93 for the premise that the Commission Report and the Bermuda Police Report constitute special and exceptional circumstances that outweighed the application of *res judicata*, especially where the prior cases were dismissed on procedural grounds, such that the core issues of fraudulent conduct were never considered by any Court. (iv) The House of Lords case of *Johnson v Gore Wood & Co (A Firm)* [2002] 2 AC 1 about abuse

of process for the premise that while *res judicata* may bar re-litigation of the same claim, preventing parties from raising new claims that should have been brought in earlier proceedings would be unjust or oppressive. (v) *R v Martin (Alan)* [1998] AC 917 which was about abuse of process in the setting of court-martial proceedings. I did not find this case to be of assistance.

The Law

87. In the White Book 1999 at 18/19/19 the commentary confirms that it is an abuse of process for a plaintiff to litigate again over an identical question which has already been decided against him even though the matter is not strictly *res judicata*. It states as follows:

“18/19/19 ...

It is an abuse of the process of the Court and contrary to justice and public policy for a party to re-litigate the issue of fraud after the self-same issue has been tried and decided by the Irish Court (House of Spring Gardens Ltd v Waite [1991] 1 Q.B. 241: [1990] 2 E.R. 990, CA). It is an abuse of the process of law for a suitor to litigate again over an identical question which has already been decided against him even though the matter is not strictly res judicata (Stephenson v Garnett [1898] 1 Q.B. 677, CA and see Spring Grove Services Ltd v Deane (1972) 116 S.J. 844).

...

It is an abuse of the process of the Court to raise in subsequent proceedings matters which could and should have been litigated in earlier proceedings (Yat Tung Investment Co. Ltd v Dao Heng Bank Ltd [1975] A.C. 581) but the failure of the plaintiff in the first action to join a third person as a defendant in that action under O.15, r.6, is not such an abuse of process and the plaintiff is therefore entitled to bring a second action against that person as a defendant, even though it is contended that the issue in the second action have been adjudicated and determined in the first action (Gleeson v J. Wippell & Co. Ltd [1977] 1 W.L.R. 510; [1977] 3 All E.R. 54).”

...

88. In *Fidelity Subair Williams* set out at [57] when a claim is an 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... ”

Mythical Allegations incapable of proof

25. *The House of Lords in Dow Hager Lawrance v Lord Norreys and Others HL 1890 [Vol XV] 210 held:*

“It cannot be doubted that the Court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the Court. It is a jurisdiction which ought to be very sparingly exercised, and only in very exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved. But the Court of Appeal did not proceed on that ground. They took into consideration all the circumstances of the case. We have, to begin with, a statement of claim which, if it discloses a concealed fraud within the meaning of the statute, does so in the barest fashion, with much that is most material left vague and undefined, when there ought to have been distinctness and precision. Moreover, this is not the first but the third edition of a statement of claim delivered with the object of recovering the Towneley estate; and when we review the history of the litigation there is much to lead to the belief that important allegations now made were an afterthought, the result of criticisms of the earlier form in which the charges of fraud were presented, and that the charges thus raised against persons long dead are wholly incapable of proof. These impressions might have been dissipated by the affidavits filed on behalf of the appellant; but they have not been. On the contrary, I think they have been strengthened. Both in what it says and in what it does not say, Colonel Jaques’ affidavit confirms in my mind the impression that the case has not a solid basis capable of proof, but that the story told in the pleadings is a myth, which has grown with the progress of the litigation, and has no substantial foundation. For these reasons, I concur with the Court of Appeal in thinking that the action is an abuse of process of the Court... ”

89. In *Bentley Friendly Society v Minister of Finance* [2022] Bda LR 9 (SC) I confirmed [at 64] that re-litigating a claim which is *res judicata* constitutes an abuse of process and the Court should strike out such claim. Also [at 65] I confirmed that claims are an abuse of process if they raise issues which should have been raised before, thus, striking out certain claims made in 2022 because those claims could have been raised in a previous 2014 proceeding so that they could have been considered by the Court as part of a 2016 judgment.

“64. Some of the claims are an abuse of process as in my view, paragraphs 2, 5, 6, 8, 9 and 10 have been adjudicated before in the 2014 Case and 2016 Judgment. In that case Hellman J found that the BFS was required to be authorized under the 1943 Act, that the policies that had been issued by the BFS were insurance business within the

meaning of the 1943 Act and provided that the BFS obtained the approval of the Governor, it may be that there is in principle no reason why the BFS or any other friendly society should not carry on insurance business within the meaning of the 1943 Act. The 2016 Judgment also set out what the Governor might consider in respect of any application for approval. The BFS in its submissions made much complaint about the 2016 Judgment. The place for those complaints were by way of an appeal to the Court of Appeal not by re-litigating the same matters from the 2016 Judgment in the present case. Therefore, in applying the principles of res judicata as set out in Yat Tung Investment Co Ltd v Dao Heng Bank Ltd and in Henderson v Henderson these matters should not now be re-litigated. I also rely on the case of Harold Darrell v A Board of Inquiry Appointed under the Human Rights Act 1981 et al where Hellman J stated that “a party should not be twice vexed in the same matter”.”

65. Some of the claims are an abuse of process as they raise issues which should have been raised before. In paragraph 1, the Plaintiff raises an issue about section 2(1) in the 1943 Act which references the BIPA and whether it has application in this matter. Also, in paragraph 4, that the section 2(3A) of the 1943 Act was “precedent” for the Minister to act. In my view, in applying the principles set down by Lord Bingham in Johnson v Gore Wood & Co (a firm) in taking a broad, merits-based judgment which takes account of the public and private interest involved and all the facts of the case, in my view these issues are clearly matters that could have been and should have been raised in the 2014 Case as the legislative references in the 1943 Act could have been considered by the Court in the 2016 Judgment.

90. In the case of *Johnson v Gore Wood & Co (A Firm)*, Mr. Johnson was a businessman who conducted his business affairs through a number of companies, one being property development. Mr. Johnson on behalf of his company instructed his long-time solicitors Gore Wood & Co through a partner in the firm in relation to a property transaction. A dispute arose about it and the company commenced proceedings against its solicitors which settled. Thereafter, Mr. Johnson personally commenced proceedings against the solicitors, who applied to strike out the claim as an abuse of process of the Court. Lord Bingham referred to *Arnold National Bank* about special circumstances. He stated at various stages as follows:

“This form of abuse of process has in recent years been taken to be that described by Sir James Wigram V.-C. in Henderson v. Henderson (1843) 3 Hare 100 at 114 where he said:

“In trying this question I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in

respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

Arnold v. National Westminster Bank Plc[1991] 2 A.C. 93 was a case of issue estoppel. Tenants invited the court to construe the terms of a rent review provision in the sub-underlease under which they held premises. The provision had been construed in a sense adverse to them in earlier proceedings before Walton J., but they had been unable to challenge his decision on appeal. Later cases threw doubt on his construction. The question was whether the rules governing issue estoppel were subject to exceptions which would permit the matter to be reopened. The House held that they were. At page 109 Lord Keith of Kinkel said:

"In my opinion your Lordships should affirm it to be the law that there may an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result, as was observed by Lord Upjohn in the passage which I have quoted above from his speech in the Carl Zeiss case [1967] 1 A.C. 853,947."

In the passage referred to Lord Upjohn had said:

"All estoppels are not odious but must be applied so as to work justice and not injustice and I think the principle of issue estoppel must be applied to the circumstances of the subsequent case with this overriding consideration in mind."

[in the case of Bradford & Bingley Building Society v Seddon [1999] 1 W.L.R. 1482] At page 1492 Auld L.J. continued:

"In my judgment mere re-litigation, in circumstances not giving rise to cause of action or issue estoppel, does not necessarily give rise to abuse of process. Equally, the maintenance of a second claim which could have been part of an earlier one, or which conflicts with an earlier one, should not, per se, be regarded as an abuse of process. Rules of such rigidity would be to deny its very concept and purpose. As Kerr L.J. and Sir David Cairns emphasised in Bragg v. Oceanus Mutual Underwriting Association (Bermuda) Ltd.[1982] 2 Lloyd's Rep. 132,137, 138-139 respectively, the courts should not attempt to define or categorise fully what may amount to an abuse of process; see also per Stuart-Smith L.J. in Ashmore v. British Coal Corporation[1992] Q.B. 338, 352. Sir Thomas Bingham M.R. underlined this in Barrow v. Bankside Agency Ltd.[1996] 1 W.L.R. 257, stating, at page 263B, that the doctrine should not be circumscribed by unnecessarily restrictive rules" since

its purpose was the prevention of abuse and it should not endanger the maintenance of genuine claims; see also per Saville L.J. at page 266D-E.”

It may very well be, as has been convincingly argued (Watt, "The Danger and Deceit of the Rule in Henderson v. Henderson: A new approach to successive civil actions arising from the same factual matter," 19 Civil Justice Quarterly, (July 2000), page 287), that what is now taken to be the rule in Henderson v. Henderson, has diverged from the ruling which Wigram V.-C. made, which was addressed to res judicata. But Henderson v. Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice”

Analysis

91. In my view, the Writ is an abuse of process because it is *res judicata* and seeks to re-litigate stale allegations.

The writ makes the same allegations as the 1991 Claim

92. First, in my view, the Writ makes the same claims that were made in the 1991 Claim. I have reviewed the 1991 Claim Amended Statement of Claim. The claims therein are nearly identical to Plaintiffs' allegations of breach of fiduciary duty in the Writ except that the Writ now makes reference to and relies on the Commission Report. Otherwise, the claims are similar.

- a. The Writ pleads that the Bank, after becoming executor of the Estate, deliberately covered up and concealed the fraudulent sale of the Real Property.
- b. The allegations of breach of fiduciary duty are nearly the same as the allegations in the Amended Statement of Claim from the 1991 Claim. I am satisfied that the Court struck out those allegations because the Beneficiaries 1991 Claim disclosed no reasonable cause of action as against both the Bank and BETCO. In my view the Plaintiffs' same allegations remain incapable of sustaining the claim for breach of fiduciary duty against the Bank. I also agree with the Bank that there is no factual basis to support that the Bank was involved in any fraud or concealment with respect to the Real Property as alleged in the Writ.

93. Thus, I accept that any claim by the Plaintiffs for negligence is *res judicata* because it was already a part of the 1991 Claim.

94. On a separate point, the Bank submitted that a plaintiff who has brought a failed claim against a defendant should be prohibited from bringing a fresh claim against the defendant until the plaintiff has paid the costs of the previous proceedings. In *Dallas 1*, it is asserted that the Beneficiaries have not paid the full amount of the taxed costs of \$7,234.75 of the 1991 Claim Costs Order, acknowledging that only one instalment of \$250 has been made on 30 September 1994. I have reviewed the exhibited letter dated 2 May 2000 from the Bank's legal advisor Michelle Richardson to Conyers for the Beneficiaries in which the point is made. In *Thames Investment & Securities Plc v Benjamin and Others* [1984] 1 WLR 1381 (EWCH) Goulding J stated as follows:

“Quite apart from authority, two propositions would seem to me plain as a general rule. The first is that where an application has been made for particular relief and has been dismissed with costs because of some fault or lack of success on the part of the applicant, then, generally speaking, the applicant ought not to be allowed to apply again for identical or equivalent relief if he is guilty of failure to pay the costs of the previous application. . The first principle is put by Cave J. in a judgment in the Queen's Bench Division in Morton v. Palmer (1882) 9 Q.B.D. 89, where, after speaking of previous authorities both in the Court of Chancery and the common law courts, Cave J. said, Z at p. 92:

“The principle of the practice in each court was the same, viz., that, if a litigant had brought an action or made a motion against another and had failed, he should not bring a fresh action or renew his motion until he had paid the costs of the previous proceeding.”

95. In my view, in the absence of any positive evidence that the Beneficiaries have paid the full amount of the 1991 Claim Costs Order, I am satisfied that they have not done so. Thus, to my mind, following the well-established principle set out herein, apart from the *res judicata* points, the Beneficiaries should not be allowed to proceed with fresh proceedings until the costs of the 1991 Claim Costs Order are paid in full.

The Writ deals with the same issues as the 1982 Claim

96. The 1982 Claim was struck out due to disclosing no reasonable cause of action. In that claim, the Beneficiaries raised the issue that the Bank knew about the fraudulent sale of the Real Property, but had failed to take steps to recover the same for the Beneficiaries. The writ makes essentially the same allegation. I have reviewed the 1982 Claim judgment of Ward J, dated 25 October 1988. Relevant parts are as follows [emphasis added]:

“On 18th November 1982, the 5th Defendant application for the Originating Summons to be struck out so far as she was concerned was allowed with costs against the Plaintiffs. On the 6th January 1983, the 1st Defendant's (ie the Bank's) application in similar terms was also allowed with the same consequence. In both cases, the applications were on the same ground; namely that the Originating Summons disclosed no reasonable cause of action against them. [page 80]

At paragraph five of her affidavit, Mrs. Brown recites incontrovertible facts which do not, of themselves advance the Plaintiffs' case one inch. There is nothing in those facts to show that the Testator owned any real estate at his death: the maxim 'nemo dat quod non habet' [“no one gives what they do not have”] applies. [page 84]

Mr. Scott, for the Plaintiffs, hints that the Indentures which show that there were such dispositions during the lives of those children (and some have been exhibited to Affidavits in the action), from which some of the Defendants derive title, could have been unlawful by reason of fraud, forgery, undue influence or want of form. By the latter I understood Mr. Scott to imply that as all of the children of Augustus Virgil inherited his real estate as tenants in common in equal shares, they all, as coparceners, had to agree to the making of any disposition. His argument would be that if they had not done so, or if they did not have recourse to the machinery provided by law for those reluctant to consent (under the Partitions Act of 1855 and 1914), such dispositions could be set aside. [page 85]

But that argument would be to overlook the maxim ‘omnia praesumuntur legitime fact donec probetur in contrarium’ (all things are presumed legitimately done until the contrary is proved): Co.Litt.232(b). The Plaintiffs have had six years since their Originating Summons, or over sixteen years since the date of their uncle's death, in which to find evidence to support allegations which would bridge the gap between the simple assertions made in paragraphs 6 and 9 of Mrs. Brown's affidavit and the matters of which Mr. Scott hints. Moreover, by having had a number of Defendants dismissed from the action they have been put on notice to do so. But they have not done so. The pleadings as they stand disclosed no cause of action, in my judgment, not only against these Defendants but against any Defendant. [page 85]”

97. Having reviewed those parts of the 1982 Claim judgment: (i) I accept that the Court struck out the 1982 Claim as against certain defendants because it disclosed no reasonable cause of action “*not only against these Defendants but against any Defendant*”; and (ii) I also accept that the Beneficiaries alleged that the sale of the Real Property “*could have been unlawful by reason of fraud, forgery, undue influence or want of form*”. In my view, this is the same issue which is the basis for the Plaintiff’s allegations in the Writ.

98. Thus, I accept that any claim by the Plaintiffs in respect of these allegations are *res judicata* because it was already a part of the 1982 Claim.

The Writ makes allegations which could have been raised in the Beneficiaries’ earlier proceedings

99. The Bank submitted that the allegations made in the Writ are an abuse of process because the Plaintiffs are seeking to litigate issues which could have been raised a part of the Beneficiaries’ 1989, 1998, and 2001 Claims, However, the Beneficiaries failed to name the Bank as a defendant to the 1989, 1998 or 2001 claims. Thus, the Plaintiffs should not be

allowed to litigate the same issues now, which would be contrary to the principles sent out in paragraph 65 of Bentley.

100. I have reviewed the 1989 Claim which sought to recover the Real Property for the Beneficiaries, defendants being several third parties allegedly involved in the 1962 and 1969 sale of the Real Property or who held title thereafter. Two of the Defendants in the 1989 Claim were the same as in the 1982 Claim, namely John W. Swan Limited and John Alfred Virgil. However, I note that although the Bank was named as a defendant in the 1982 Claim, it was not named as a defendant in the 1989 Claim. The thread continues in that the defendants in the 1989 Claim were defendants in the 1990 Claim (1990: No. 226) which was eventually consolidated with the 1991 Claim against the Bank. In essence, the consolidated 1990 and 1991 claims show that the Beneficiaries could have raised their allegations against the Bank as part of the 1989 Claim.

101. I have reviewed the 1998 Claim Judgment dated 22 May 1998 by Meerabux J. That action by “The Devises” of the Estate of the late John Augustus Alexander Vigil, named John Willima David Swan as defendant – but did not name the Bank as a defendant. It was an application for discovery prior to the commencement of proceedings which at that point may or may not actually happen against the defendant. The plaintiff’s application was refused as the Court found that the application amounted to a fishing for information to see if there was anything wrong. The relevance to the present case is that Joh William David Swan was effectively the same defendant as named in the 1982, 1989, 1990 and 1991 Claims. Thus, the Beneficiaries could have raised the Plaintiffs’ current allegations against the Bank as part of the 1998 and 2001 claims.

102. I have considered the case of *Arnold v National Bank* which concerned a landlord and tenant under a long lease with repeated rent reviews. A court determination was made in respect of the first review. Before the second review was due, the plaintiffs raised the first issue again. The defendant brought a strike out application on the basis that the plaintiff was barred by issue estoppel from re-litigating the point already decided. The House of Lords dismissed the defendant’s appeal, holding that although issue estoppel constituted a complete bar to re-litigation between the same parties of a decided point, its operation could

be prevented in special circumstances, that where further material became available which was relevant to the correct determination of a point involved in earlier proceedings but could not, by reasonable diligence, have been brought forward in those proceedings, it gave rise to an exception to issue estoppel, whether or not that point had been raised and decided.

103. I have reviewed the cases of *Arnold* and *Johnson v Gore Wood & Co (A Firm)* which in summary allow for a case to be -relitigated if there are special circumstances. The Plaintiffs assert that the Adverse Finding of the Commission and the fresh evidence of the handwriting expert fall into the category of special circumstances. I disagree. In respect of the Adverse Finding, it appears to me that a question was raised by the Commission, rather than a conclusion. Further, the Adverse Finding was on the basis that there was an established fiduciary duty, for which I have found could not exist. Thus, it would be a fallacy to consider this to be a special circumstance. Additionally, to this point, I rely on the BETCO letter to Mrs. Brown dated 1 November 1978, as set out above, that it was explaining from early on that it, as executors, did not have a right to deal with any Real Property of the Estate. In respect of the fresh evidence of a handwriting expert, I take the view, that the Beneficiaries had always, over decades, advanced a case that there was fraud involved in the conveyances of the Real Property. Thus, while the opinion of the handwriting expert is new evidence, the allegation of fraud or forgery is not new as it was alive and had been advanced since the death of Mr. Virgil. Thus, the evidence of the handwriting expert does not amount to a special circumstance.

Summary

104. In applying the principles as set out in *Bently*, in light of the analysis set out above in this section, I am of the view that the issues raised in the Writ are *res judicata* as they have been determined in the 1982 Claim and the 1991 Claim. Thus, the Beneficiaries should not be allowed to litigate the same issues now in the Writ. Further, the issues in the Writ could have been raised in other claims, namely the 1998 and 2001 claims, thus the Beneficiaries should not be allowed to litigate them now in the Writ.

Conclusion

105. Generally, in my view, this is a case where it is plain and obvious that the Writ should be struck out for the reasons as stated above, namely that:
- a. The Writ discloses no reasonable cause of action because the Plaintiffs have no viable claim against the Bank; and
 - b. The Writ is an abuse of process because it is *res judicata* and seeks to re-litigate stale allegations.
106. I also found that the Beneficiaries should not be allowed to proceed with fresh proceedings until the Costs of the 1991 Claim Costs Order are paid in full.
107. Unless either party files a Form 31TC within 7 days of the date of this Ruling to be heard on the subject of costs and/or damages, I direct that costs shall follow the event in favour of the Bank on a standard basis, to be taxed by the Registrar if not agreed.

Dated 8 May 2026



HON. MR. LARRY MUSSENDEN
CHIEF JUSTICE