In The Supreme Court of Bermuda

CIVIL JURISDICTION
(COMMERCIAL COURT)

2019: No. 306

BETWEEN:

THOMAS DOCTOROFF

Plaintiff

- and -

1. CROWN GLOBAL LIFE INSURANCE LTD. (BERMUDA)
2. PAUL GAMBLES
3. MBMG INVESTMENT ADVISORY COMPANY LTD. (THAILAND)
4. MBMG GROUP SINGAPORE PTE (SINGAPORE)
5. MBMG INTERNATIONAL CUSTODIANS LTD. (BVI)
6. MBMG ASSET MANAGEMENT LIMITED (MAURITIUS)
7. GARMOR ASSET MANAGEMENT LTD. (MAURITIUS)

Defendants

RULING

Application for summary judgment, strike-out of the Defence and parts of the Statement of Claim, pleading breach of statutory duty, pleading dishonest assistance

Date of Hearing: **9, 13 April 2021**
Date of Ruling: **7 June 2021**

Appearances: **Alex Potts QC, Conyers and Laura Williamson, Kennedys Chudleigh Ltd. for the Plaintiff**

Steven White, Sam Riihiluoma, Appleby (Bermuda) Limited for 1st Defendant

RULING of Mussenden J

Introduction

1. These matters came before me in respect of applications by both the Plaintiff Mr. Doctoroff and the First Defendant Crown Global Life Insurance Ltd ("**Crown Global**").

Plaintiff's Applications

2. The Plaintiff's Summons dated 30 January 2020 seeks:
    a. summary judgment against Crown Global pursuant to Rules of the Supreme Court ("**RSC**") Order 14, rule 1 and/or RSC Order 27, rule 3 in the sum of US$3.5 million plus interest on the basis that:
        i. Crown Global has no defence to the Plaintiff's claims, on a true construction of the Deferred Variable Annuity Policy and taking into account the passage of time to date; and/or
        ii. Crown Global has effectively admitted liability to the Plaintiff, by its letters dated 22 February 2019 and 10 May 2019;
    b. to strike out Crown Global's Defence (and, in particular, the denial of liability at paragraph 25 of the First Defendant's Defence), pursuant to RSC Order 18 rule 19(a), on the basis that it discloses no reasonable defence, and judgment be entered accordingly in favour of the Plaintiff;
    c. default judgment and/or summary judgment entered for the Plaintiff against the Second to Seventh Defendants (jointly and severally, or against each of them as the Court thinks fit), in the sum of $3.5 million plus interest and costs, pursuant to RSC Order 13, rules 1 to 6, on the basis that:
        i. None of the Second to Seventh Defendants have entered an appearance to the Concurrent Writ within the time limit for doing so; and/or

ii. None of the Second to Seventh Defendants have filed or served a Defence to the Plaintiff's claims; and/or

iii. None of the Second to Seventh Defendants have any defence to the Plaintiff's claims;

d. Further or alternatively, Crown Global to provide Further and Better Particulars of its Defence, pursuant to RSC Order 18, rule 12(3), in response to the Plaintiff's Request dated 1 October 2019. Since issuing the January 2020 Summons, Crown Global has provided Further and Better Particulars of its Defence and this application is therefore no longer pursued.

3. The Plaintiff's Summons dated 23 September 2020 seeks to amend the Statement of Claim ("**SoC**") as set out in the draft Amended Statement of Claim ("**ASoC**"), pursuant to RSC Order 20, rule 5, in the event that the Plaintiff's primary relief is not granted.

4. The evidence filed by the Plaintiff in support of its applications are the first, third, fourth and fifth affidavits of the Plaintiff ("**Doctoroff1**, **Doctoroff3"**, "**Doctoroff4"**, "**Doctoroff5"** for short hand) and their exhibits in particular the Policy and the Placement Memorandum.

Crown Global's Applications

5. Crown Global's Summons dated 23 September 2020 seeks the following:

a. Leave for the First Defendant to amend its Defence as set out in the Draft Amended Defence attached to the Summons. This application is not opposed by the Plaintiff.

b. Pursuant to RSC Order 18, rule 19(1)(a):

i. Paragraph 44b of the Plaintiff's SoC be struck out as it does not disclose a reasonable cause of action; and

ii. The allegations by the Plaintiff as to breaches of the statutory duty by the First Defendant be struck out as they do not disclose a reasonable cause of action.

6. The evidence filed by Crown Global in response to the application for summary judgment and in support of Crown Global's applications are the first, second and third affidavits of Alex Seldin, Senior Vice President and General Counsel of Crown Global, ("**Seldin1**, **Seldin2"**, "**Seldin3"**) and their exhibits and the first and second affidavits of Damien Rios ("**Rios1**" and "**Rios2**").

The Plaintiff

7. The Plaintiff is an individual currently residing in New York, United States of America. He previously lived and worked in Asia for a number of years as an advertising executive.

The First Defendant Crown Global

8. Crown Global is an exempted company incorporated in Bermuda on or about 4 April 1994 pursuant to the provisions of the Companies Act 1981.

9. Crown Global was first incorporated by way of a private act known as the Investors Variable Life Insurance Company Limited Act 1994, which was subsequently amended by the Investors Variable Life Insurance Company Limited Amendment Act 1998, the Scottish Annuity & Life International Insurance Company (Bermuda) Ltd. Consolidation and Amendment Act 2001, and then the Crown Global Life Insurance Ltd. Act 2015.

10. The business of Crown Global includes long term insurance (including life insurance and deferred variable annuities). As such, Crown Global is registered as a Long Term Class C Insurer with the Bermuda Monetary Authority ("**BMA**"), and the conduct of its business is subject to the Insurance Act 1978 (and regulations made thereunder) as well as the Life Insurance Act 1978.

Second to Seventh Defendants

11. The Second Defendant Mr. Paul Gambles ("**Mr. Gambles**") is an individual currently thought to be resident and doing business in Thailand, although originally domiciled in the

UK and a UK citizen, apparently doing business internationally and in a number of different jurisdictions. Mr. Gambles held himself out to the entire world, including through his website www.mbmg-investment.com, as being expert in the areas of investment management, asset management, asset allocation, tax structuring, tax advice and economic analysis, with a particular focus on providing investment management services and tax advice to expatriate professionals working in Asia.

12. In or about 1994, Mr. Gambles established what he describes as the "**MBMG Group**" of companies. The MBMG Group includes a variety of entities trading under the MBMG or Garmor names (or some variation thereof) in jurisdictions such as Thailand, Singapore, Mauritius, the British Virgin Islands, and The Bahamas (including the Third to Seventh Defendants). At all material times, Mr. Gambles has acted or held himself out as the Chief Executive Officer and/or the Chief Investment Officer and/or owner and controller of all such entities including through some websites.

13. The Third Defendant is or appears to be a company incorporated by Mr. Gambles in Thailand on or about 2 January 2014, engaged in investment management activities and services.

14. The Fourth Defendant is, or appears to be, a company incorporated by Mr. Gambles in Singapore on or about 15 March 2009, engaged in investment management activities and services. According to the Plaintiff, it may have been struck off the Singapore company register on or about 5 November 2017.

15. The Fifth Defendant is, or appears to be, a company incorporated by Mr. Gambles in the British Virgin Islands ("**BVI**") on or about 2 January 1996 engaged in investment management and services. According to the Plaintiff, it may have been struck off the BVI company register at some point after 3 April 2016. According to Crown Global's Defence, the Fifth Defendant served as investment manager of the Policy initially from when the Policy commenced in 2012 to December 2015.

16. The Sixth Defendant is, or appears to be, a company incorporated by Mr. Gambles in Mauritius on or about 11 March 2010, engaged in investment management activities and services. According to Crown Global's Defence, the Sixth Defendant was appointed as the investment manager of the Policy in December 2015 in place of the Fifth Defendant at the Plaintiff's request.

17. The Seventh Defendant is, or appears to be, a company incorporated by Mr. Gambles in Mauritius on or about 17 August 2017, engaged in investment management activities and services. According to Crown Global's Defence, the Sixth Defendant and Seventh Defendant are the same entity as the Sixth Defendant changed its name to Garmor Asset Management Ltd.

Email received by the Court on behalf of Mr. Gambles

18. The hearing of these applications took place on 9 April 2021 and 13 April 2021. Prior to resuming the hearing on 13 April 2021 the Court received an email from Janjira Sumanus, of Hua Hin Accounting & Law, on behalf of Mr. Gambles. Mr. Potts and Mr. White had also received the email. The email requested an adjournment of the hearing of the applications before the Court. Mr. White submitted that the email was a matter for Mr. Potts to deal with.

19. Mr. Potts submitted that the email was from a Thai lawyer. He noted that there had been no appearance filed in the Court by any counsel for Mr. Gambles or the other Defendants or as litigants in person. The Summons for the hearing had been served for over a year and notice was sent to Mr. Gambles and the other Defendants as a courtesy but they had never engaged with the process. Further, the email was from someone who stated that he/she was a lawyer, a shareholder and a director, but that he/she was making assertions that were not on oath in affidavit form before this Court.

20. Mr. Potts read the email for the record and then submitted that it was inappropriate for Janjira Sumanus to request an adjournment, Janjira Sumanus had no right to be heard, any

adjournment would be an enormous prejudice and cost to the Plaintiff and the request was not consistent with the Overriding Objectives. The request should be rejected.

21. In light of the above, I ruled that Mr. Gambles and Janjira Sumanus were not properly before the Court, that the matter had started with one full day of hearings and that I would not adjourn the matter. I indicated that I would have the Learned Registrar communicate my decision to the lawyer who sent the email.

The Policy and Withdrawal Request Background

22. On or about 28 March 2012, and on the advice of Mr. Gambles, the Plaintiff entered into a Deferred Variable Annuity Policy with Crown Global ("**the Policy**") in which he invested the total sum of US$4,798,011.28 during the period between March 2012 and February 2017. The Policy is a type of annuity policy that combines features of an investment account with features of a pension plan and a life insurance policy. The Policy documents include a Confidential Private Placement Memorandum dated 28 June 2011 and the Policy wording, issued on 28 March 2012, with its Data Page and various Endorsements.

23. On 9 January 2018, the Plaintiff issued instructions to Crown Global to withdraw or partially surrender US$3,000,000 from the Policy ("**the Withdrawal Request**"). Crown Global accepted the Plaintiff's Withdrawal Request.

24. In or about March 2018, pursuant to the Withdrawal Request, the Plaintiff received a payment of US$1,000,000 and then in or around June 2018, he received a further payment of US$300,000.

25. To date, the Plaintiff has not received payment of the balance of US$1,700,000 of his Withdrawal Request. In the circumstances, the Plaintiff is no longer confident of the continued existence and/or value of the balance of the Policy investments above the $3,000,000, approximately US$1,800,000. The sum of these two figures is US$3,500,000, namely the amount of the claim.

The Relevant Factual Background according to the Plaintiff

26. The Plaintiff in his evidence in Docotroff1 states that investigations on his behalf revealed a number of circumstances as follows:
    a. That the Second to Seventh Defendants were closely associated with Belvedere Management and Lancelot Investments between about 2004 and 2015. That information was not disclosed by Mr. Gambles to him.
    b. In March 2015, the website 'Offshore Alert' published an article accusing the principals of Belvedere Management and Lancelot Investments of promoting or managing one or more international Ponzi Schemes, involving the alleged promotion of falsely valued offshore hedge funds and the potential misappropriation or mismanagement of client assets and investments. That information was not disclosed to him either.
    c. That during the period October 2014 to August 2016 The Four Elements PCC and The Two Seasons PCC and other funds managed or administered by Belvedere Asset Management (in which the Second Defendant had invested his assets) were the subject of regulatory enforcement action and/or liquidation and/or adverse publicity, including regulatory actions by the Mauritius Financial Services Commission ("**the MFSC**") and reports by an independent auditor BDO querying the existence of The Four Elements PCC's underlying assets. Again that information was not disclosed to him.
    d. That the consequences of the MFSC liquidation actions paralysed the Mauritius funds leading to a restructuring that in 2019 created mirror funds, including The Basinghall PCC – Artemis Fund ("**Basinghall Fund**") with a new administrator Dolphin Management Services ("**DMS**").

27. The Plaintiff submits that when the Withdrawal Request was made in January 2018, Crown Global should have taken steps to liquidate the Policy assets in order to make the full payment to the Plaintiff and then force receiverships as necessary. Instead, Mr. Gambles is stringing the Plaintiff along going on now for three years as a smokescreen because of the underlying investments in illiquid assets. In Doctoroff1, he states that as at 31 December

2018, 31 March 2019 and 30 June 2019 Crown Global issued account statements to him suggesting that the Separate Account of the Policy currently held assets as follows: (a) 977,798.2284 redeemable preference shares in **The Four Elements PCC – Peak XV Venture Fund**, which appears to be a Mauritius investment fund, structured as a protected cell in a Protected Cell Company ("**PCC**"); (b) 10,800.0517 shares in **GAA Investment Funds Ltd.'s GAA USD Alpha Fund**, which appears to be a Bermuda investment fund; (c) 403,469.0799 participating shares in **The Two Seasons PCC – the UK Property Owner Fund**, which appears to be a Mauritius investment fund, structured as a PCC; and (d) 975,534.0745 shares in The Two Seasons PCC – Artemis Fund, which appears to be a Mauritius investment fund, structured as a PCC.

28. Mr. Potts submits that the evidence and exhibits in Doctoroff1 show that in a series of emails in 2019, Mr. Gambles was deploying smokescreens to the Plaintiff and Crown Global, which knew very little about the assets, almost a year after the Withdrawal Request. Some emails were as follows:

    a. 5 January 2019 email to the Plaintiff - Mr. Gambles gave various information including telling the Plaintiff that "*Your money is there – Peak has cash and should soon be ready to start distributing this. I really hope that this is clear enough and sets your mind at rest.*";
    b. 7 February 2019 email to Alex Seldin of Crown Global – Mr. Gambles promised an update;
    c. 13 February 2019 email from Alex Seldin of Crown Global to legal counsel Debevoise – informing that they *"... doubt very much we will get answers from Gambles. We have made some progress interacting with the folks managing the GAA Fund, but have gotten nowhere with Peak. You can see in my other emails that we are trying to increase pressure on Ganbles.*". This email was in reply to a Debevoise email to Alex Seldin about an update that the Plaintiff had received from Mr. Gambles but which was not informative.

29. In submissions, Mr. Potts submitted that in respect of the January 2021 and April 2021 evidence of Damien Rios, Senior Vice-President and General Counsel of Crown Global and his various exhibits, in particular a February 2021 Steadfast Fund Managers report on the Basinghall Fund, it is demonstrated that Mr. Gambles was still trying to delay or conceal information that the assets are illiquid and worthless, that some of the contents of the report are utter nonsense, and that it is all contrived misinformation by Mr. Gambles and a smokescreen to hide the earlier bad investments – all while Crown Global has been issuing Policy valuations.

The Plaintiff's application to enter summary judgment against Crown Global

The Plaintiff's application

30. The Plaintiff submits that, as a matter of contractual interpretation, Crown Global has no defence to the Plaintiff's contractual claim, and there is no issue or question in dispute with respect to the contractual claim which ought to be tried, nor any other reason that there ought to be a trial of the contractual claim against Crown Global, and the Court ought to enter summary judgment on the Plaintiff's contractual claim against Crown Global accordingly for several reasons.

31. First, the Plaintiff submits that on a true interpretation of the Policy, and by reference to uncontroversial facts, it is clear that Crown Global is in breach of its contractual payment obligations to the Plaintiff, and it has been in breach of its contractual payment obligations for a period of 3 years, and on an ongoing basis.

32. Second, section 4.1 of the Policy Wording obliges Crown Global to establish a Separate Account "*to hold assets that fund obligations arising*" under the Policy. Section 4.9 of the Policy obliges Crown Global to require any investment manager to comply with an investment restriction (4) to the effect that the investment manager will not invest Separate Account assets in any mutual funds or collective investment funds which are managed, advised or distributed by the investment manager or any affiliates. Section 4.12 of the Policy obliges Crown Global to determine the Policy Account Value on the last business

day of each calendar quarter, by reference to the "*net fair market value of all assets in the Separate Account*" as determined on each Liquidity Date. The facts that the relevant date is described as a "Liquidity Date" and the valuation requires a determination of "*fair market value*" necessarily requires that the assets be liquid assets – not illiquid assets. If the assets are illiquid then their "*fair market value*" should be marked down to reflect their illiquidity, but this has not been done by Crown Global.

33. On the contrary, Crown Global has repeatedly acknowledged and asserted that the Policy Account Value is and remains in excess of US$2.79 million. Crown Global's Quarterly Policy Statement dated 30 September 2020 determined the net Account Value to be US$3,085,004.82. Inexplicably Crown Global has failed to liquidate the Policy assets and make payment to the Plaintiff, but conversely, Crown Global has never marked down the value of the Policy assets to reflect any alleged state of illiquidity or insolvency. Further, as Crown Global was obliged to account for and pay the Policy Account Value as determined on the Liquidity Date following the Plaintiff's withdrawal request, it is not possible for Crown Global to re-determine the Policy Account Value retrospectively.

34. Third, section 8.1, 8.2 and 8.3 of the Policy provides that "*the Policy Account Value which is the subject of the Surrender will be determined as of the Next Available Liquidity Date occurring after the Insurer receives the request to Surrender*". Section 8.1 of the Policy further obliges Crown Global to use "*reasonable efforts to pay Surrender proceeds as soon as practicable*", that is, after they have been determined on the relevant Liquidity Date which is now long past due. In respect of determining that the meaning of *"as soon as practicable*" ordinarily means "*no later than 30 days*" in the investment fund context, Mr. Potts relies on the case of *Culross Global SPC Ltd v Strategic Turnaround Master Partnership Ltd (Cayman Islands)* [2010] UKOPC 33, in which the redemption payment obligation was as follows:

> *"Payment of the Redemption Price will be made as soon as practicable but, except in cases otherwise described herein, a shareholder who is making a redemption will*

receive at least 90% of the Redemption price no later than 30 days following the date of redemption."

35. Mr. Potts submits that there are no reported authorities as far as the Plaintiff is aware that suggest that a period of 3 years – or an entirely indefinite period – would fall within the scope of a time limit said to be "*as soon as practicable*". Mr. Potts also submits that it is well recognised that "*practicable*" imposes a stricter requirement than "*reasonably practicable*", citing the case of *Nikonovs v HM Prison Brixton & Anor* [2005] EWHC 2405 (Admin):

"21. Whether or not the claimant was brought before the judge at Bow Street as soon as practicable is a question of fact. Two points should be noted. First, the criterion is practicable rather than the more elastic reasonably practicable. Second, …"

36. Mr. Potts submits that section 12.5 requires Crown Global to "*take reasonable steps to execute allowable request for a transfer, Full Surrender, or Partial Surrender by [the Plaintiff] in a timely fashion* ...". Although section 12.5 contemplates the unlikely possibility that liquid assets "*may take longer than 180 days*" to be converted to cash "*for a variety of reasons*" outside the control of Crown Global, Crown Global nonetheless has an obligation to "*take reasonable steps to comply with such requests at the earliest time possible*". It is clear from the facts that no payment has been made on the outstanding balance, and from Crown Global's own evidence and the chronology that Crown Global has not complied with its own contractual obligations, in that, shortly after receipt of the Plaintiff's Withdrawal Request dated 9 January 2018, it contacted the custodian Kaiser Bank in January and February 2018 but really only did several superficial follow-ups from the period 28 November 2018 to 18 February 2020 in response to pressure applied by the Plaintiff. Mr. Potts submits that the purported attempts to secure payment of the surrender proceeds do not satisfy Crown Global's obligations under section 8 of the Policy, especially where payment has not been made of the balance some 3 years later.

37. Fourth, Mr. Potts submits that Crown Global cannot say, as it does in its Defence at paragraphs 25 and 43[1] – 45 and in Seldin2, that it was the responsibility of the investment manager (Garmor Asset Management Ltd) to liquidate the investment positions following the redemption request and that Crown Global has no control or influence over the process. Similarly, it is no answer for Crown Global to say it has "*no responsibility for the acts or omissions of the investment manager (Mr. Gambles) or that it "shall have no liability whatsoever for delays in fulfilling such requests*". Further, Crown Global's reliance in its Defence on certain "risk factors" summarised in the Confidential Placement Memorandum is utterly misconceived; amongst other things, these are not risks relevant to the Plaintiff's claim for payment, and the Confidential Placement Memorandum expressly states that "*the terms of the Policy … will govern*".

38. Mr. Potts submits that the absurd and uncommercial logic of Crown Global's position would be that (a) Crown Global could take advantage of its own breaches of contract and its own failures to make payment with impunity; and (b) Crown Global could indefinitely suspend its own payment obligations to the end of time, without any liability whatsoever. Essentially, Crown Global's argument would be to denude the Policy of any legal enforceability whatsoever.

39. Mr. Potts also submits that the fact that Crown Global's liability may be alleged to be limited to the Policy Account Value is immaterial; the Policy Account Value represents the minimum value of the Plaintiff's claim, and it has been determined and communicated repeatedly by Crown Global itself as recently as 30 September 2020. Therefore, it is not open to Crown Global to seek to resile from its own determination of the Policy Account Value as at the Liquidation Date or subsequently.

40. Fifth, Mr. Potts submits, further or alternatively, that in its own letters of 22 February 2019 and 10 May 2019, Crown Global implicitly acknowledges and admits its liability to make payments to the Plaintiff according to the evidence in Doctoroff1. In the letter of 22 February 2019, Crown Global suggested there were "*no available funds in the Account*"

[1] Crown Global indicates this reference to paragraphs should be 41 – 45 as the section starts with paragraph 41.

and offered to assign the Policy assets to the Plaintiff by way of payment "*in kind*", despite the fact that the Policy did not allow any payment "*in kind*" and the Policy assets are non-assignable. In the letter dated 10 May 2019, Appleby, on Crown Global's behalf, re-iterated its proposal to make payment "*in kind*" but acknowledged that the Policy assets were non-assignable.

The First Defendant's Response

41. The First Defendant submits that the application for summary judgment is without merit for several reasons as this is not a case where it can even remotely be said that "*there is no reasonable doubt*" that the Plaintiff is entitled to judgment. Further, the bar for a defendant on a summary judgment application is a low one.

42. First, Mr. White submits that the Plaintiff plainly knew Crown Global had an arguable defence, based on the Policy and the factual matrix, before filing its application as it had already received Crown Global's Defence four months before. Crown also had filed significant evidence in reply which should have led to the application being withdrawn. Further, it is evident that a number of factual issues arise from the evidence ("**Crown Global's Factual Issues**") which are not suitable for summary determination, including (i) the true nature of the relationship between the Plaintiff and Mr. Gambles; (ii) the extent of their communications (in breach of the terms of the Policy) and the effect of this on the nature of the investments – whether highly illiquid and long term; (iii) the Plaintiff's insertion of himself into the withdrawal process – going to delay; and (iv) the factual application of the "*reasonableness efforts"* obligation in section 8.1 of the Policy. These are all matters where discovery is required and where the Court would need to hear oral evidence at trial.

43. Second, Crown Global takes issue with the Plaintiff's contention that it is obliged to pay the Plaintiff, in cash and in a timely manner, the Policy Asset Value of the Separate Account assets. This is pleaded at paragraph 39a of the SoC, which Mr. White submits is a formulation that relies on a severely strained construction of section 8.1 of the Policy and attempts to impose an absolute obligation for payment to be made in a timely manner. It

attempts to gloss over the existence of the important express qualification in the clause that Crown Global's obligation is tempered by a "*reasonable efforts*" provision. Mr. White submits that reading section 8.1 and section 12.5 of the Policy together, Crown Global's obligation is to use "*reasonable efforts*" to execute the Withdrawal Request. That payment of the surrender proceeds may take some significant time due to the illiquid nature of the assets and/or underlying restrictions on redemption is also made abundantly clear in the contractual terms, which also contain an exclusion of liability for any delays.

44. Mr. White submits that in ascertaining the meaning of a contractual provision, the court will look to both the language of the clause and the commercial context in which it is drafted, with the starting point being the natural and ordinary meaning of the clause. Other factors include consideration of any other relevant provisions of the contract, the overall purpose of the clause and contract, the facts and circumstances known or assumed by the parties at the time the contract was executed, and commercial common sense. He relied on the case of *Rainy Sky SA & ors v Kookmin Bank* [2011] UKSC 50 where Lord Clarke stated "*Where the parties have used unambiguous language, the court must apply it*" and further, that it was not for the court to improve the position of the parties by re-writing the contract "*… in an attempt to assist an unwise party or to penalize an astute party*" per Lord Neuberger in *Arnold v Brittan* [2015] UKSC 36.

45. Mr. White submits that the Plaintiff's gloss is hopeless and that the words used are clear and unambiguous and therefore must be followed. Even if there was ambiguity, then commercial commonsense would lead back to the same interpretation. According to the evidence in Seldin2, Crown Global can only pay surrender proceeds from the liquid assets in the Separate Account and the policy holder is only entitled to be paid out of what is in this account, minus deduction of Crown Global's fees and expenses. Where there is no cash, cash must be generated from realization of the underlying assets by the policyholder's investment manager. These assets are held, not by Crown, but by the custodian chosen by the Plaintiff, namely Kaiser Bank. The time taken to realize assets will depend on a variety of factors, including illiquidity of the underlying assets and restrictions on redemption, including intervening events such as fund insolvency. He relies on sections of the Placement Memorandum entitled "Risks" and "Illiquid Assets".

46. Further, he submits that as the Plaintiff omits the "*reasonable efforts*" provisions from his formulations; his pleadings simply equate failure to pay the outstanding withdrawal amount with breach of contract. The Plaintiff does not say what Crown Global ought to have done by way of reasonable efforts which it has not done. However, Crown Global has submitted evidence that it processed the Withdrawal Request promptly, returned US$1.3 million within a few months, and has made and continues to make reasonable efforts to liaise with the investment manager, the Plaintiff and Kaiser Bank to achieve further realizations, with a possible $600,000 being realized soon on an expedited basis. He relies on the evidence in Rios1 – "*It has not been possible to satisfy the balance of the Plaintiff's withdrawal request for reasons beyond Crown Global's control*" – citing difficulties with the Mauritius Funds, illiquidity in Basinghall's assets, which are property based, and the liquidation of the Alpha Fund. Crown Global submits that it has been working for three years to satisfy the Withdrawal Request, there has been no inertia and it has not given up as it continues its reasonable efforts, all of which are not superficial but should be tested on evidence at trial.

47. Third, Crown Global takes issue with the Plaintiff's contention that Crown is obliged to ensure that the investment manager is properly and validly appointed, contractually accountable, and performing in accordance with its obligations under the relevant Investment Management agreement and all associated investment restrictions. Mr. White submits that again the Plaintiff has ignored express terms of the contract, as well as the facts of the case as to appointment. He relies on the evidence in Seldin2 that: (a) the Plaintiff is responsible for selecting the investment manager and Crown Global has always followed the Plaintiff's express instructions to appoint Mr. Gambles' companies as investment manager; (b) the Plaintiff had appointed Mr. Gambles as he had been his personal financial advisor and investment advisor for over a decade in 2012; (c) each of the Fifth and Sixth Defendants has been properly and validly appointed; and (d) Crown Global's investment duties are strictly limited and Crown Global does not make any recommendation to the policyholder in relation to the selection of investment manager or

options, and it is not responsible for monitoring or evaluating the investment manager's performance per section 4.6.

48. Mr. White submits that these points are consistent with the Placement Memorandum in the section entitled "*Other purchaser information*" where it provides that the policyholder represents that he can bear the economic risk of losing his entire investment and that he has (with his investment advisor) "… *substantial experience in making investment decisions of this type*". Further, Mr. White submits that the SoC fails to identify any contractual duty on the part of Crown Global to monitor the investment manager's performance and simply ignores the express terms in the Policy to the contrary.

49. Fourth, Crown Global takes issue with the Plaintiff's contention that Crown Global is obliged to take care at all material times that Separate Account Assets and Policy investments actually exist and are properly valued. Mr. White submits that this allegation is legally and factually unsubstantiated. Legally, per the Policy, Crown Global was not the custodian of the cash and investments in the subaccounts. Kaiser Bank, as the custodian, provided regular reports about the assets and their valuation. Crown Global was entitled to, and did, rely upon these reports. He relies on Section 12 of the Policy. He takes a similar position in respect of the Placement Memorandum in the section entitled "*Periodic Reports*" where Crown Global is entitled to take the reports provided to it by the investment manager and custodian at face value.

50. Mr. White submits that contractually, the insurer has no responsibility for the location, identity and security of the underlying assets – that these are matters for the investment manager and custodian. He adds that factually, Kaiser Bank is one of the largest banks in Liechtenstein, authorized and supervised by the Financial Markets Authority and thus it can be inferred by the Court that Kaiser Bank is highly unlikely to be complicit in some scheme to misrepresent the value and existence of policy assets. Further, Mr. White submits that assets do exist, with US$1.3 million liquidated in 2018 and various other assets have been confirmed by other entities.

51. Fifth, in respect of the letters that the Plaintiff asserts are admissions, Crown Global submits that the letters do not contain any admission of liability let alone clear admissions and no such admissions are repeated in the Defence. Therefore, the letters fail to meet the requirements of RSC Order 27 rule 3, as to amount to admissions, they must be "*clear and unequivocal*". He submits that the letter dated 22 February 2019 simply suggested that the Plaintiff submit a full surrender request and accept an assignment of Crown Global's rights against the investment manager to enable him to pursue the investment manager directly as he saw fit. This proposal made practical and commercial sense for several reasons to the benefit of the Plaintiff. The letter dated 10 May 2019 reiterated the proposal and the reason behind it. Significantly, the letters do not admit that any money is currently due and owing to the Plaintiff, or that the Policy assets do not exist. Mr. White submits that the Plaintiff does not have the courage of his convictions as the Summons and evidence in Doctoroff3 describe the letters as "*effective admissions*" while the SoC pleads "*de facto admissions*", neither which meets the requirements to engage the Court's summary jurisdiction to enter judgment on an admission, namely the need for a clear admission.

52. Sixth, Crown Global submits that, in respect of the Plaintiff's application to strike out paragraph 25 of the Defence, that paragraph responds to the assertions in paragraph 25 of the SoC to the effect that: (i) the Plaintiff has not received the balance of the Withdrawal Request; and (ii) the Plaintiff has no confidence that he will receive any further sums from Crown Global. Mr. White submits that paragraph 25 of the Defence accepts that the Plaintiff has not yet received the balance of the Withdrawal Request but denies that the balance is presently "due and owing" for the reasons specified in paragraphs 41 to 45. This defence places specific reliance on the express wording of the Policy, and prays in aid the corresponding supporting sections of the Placement Memorandum. Mr. White submits that Crown Global has a robust defence grounded firmly in express contractual provisions and supported by the fact that it is not responsible for delays affecting withdrawal payment sin any event.

The test for summary judgment and legal principles

53. Order 14 rule 1(1) of the Rules of the Supreme Court 1985 states:

> *"Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has entered an appearance in the action, the plaintiff may, on the ground that the defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against that defendant."*

54. Order 1A of the Rules of the Supreme Court 1985 states the 'Overriding Objective' including the principles of active case management by the Court:

> *"deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others."*

55. In respect of summary judgment applications, in the case of *Mehta and MFP-2000 LP v Viking River Cruises Ltd* [2014] Bda LR 99, Hellman J stated as follows:

> *"15. The provisions of RSC Order 14 are well known. Where a statement of claim has been served on a defendant and the defendant has entered an appearance in the action, a plaintiff may apply for judgment on the ground that the defendant has no defence to all or part of a claim included in the writ. A defendant may show cause against an application for summary judgment by affidavit or otherwise to the satisfaction of the Court. What the defendant must show is that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of all or part of that claim. The Court may give the defendant leave to defend all or part of the action either unconditionally or on such terms as it thinks fit.*
>
> *…18. It has been said that leave to defend should be given where a difficult question of law is raised. See Campbell v Vickers [2002] Bda LR 3, SC, per Meerabux J at page*

3, citing Electric Corporation v Thompson-Houston 10 TLR 103. On the other hand, there will be cases where the Court has heard full argument on the question and where the facts necessary to resolve it are not in dispute. In such cases, if there is no reasonable doubt that the question should be resolved in favour of the plaintiff, who would in that event be entitled to judgment, then, absent a compelling reason to the contrary, the Court should in my judgment grasp the nettle and decide the question at the summary judgment stage."

56. In respect of applications for judgment upon admissions, RSC Order 27, rule 3 states:

> *"Judgment on admission of facts*
>
> *Where admissions of fact are made by a party to a cause or matter either by his pleadings or otherwise, any other party to the cause or matter may apply to the Court for such judgment or order as upon those admissions he may be entitled to, without waiting for the determination of any other question between the parties, and the Court may give such judgment, or make such order, on the application as it thinks just."*

Analysis on Application for Summary Judgment

57. I am not satisfied that summary judgment should be entered for the Plaintiff against the First Defendant for either the Withdrawal Request balance of US$1.7 million or for the Policy balance of US$1.8 million for several reasons.

58. First, in my view, there is an arguable defence along various lines primarily that Crown Global denies that the balance of the Withdrawal Request is presently due and owing. This plank of the Defence is set out at paragraph 25 of the Defence which further refers to paragraphs 41 – 45 of the Defence. Although Mr. Potts urges that on a commercial basis, Crown Global cannot shirk its responsibilities including failing to make payment, without any liability or legal enforceability, Mr. White on the other hand presents Crown Global's defence based on specific reliance on the express wording of the Policy and relevant sections of the Placement Memorandum. His contention is that a proper interpretation will delineate the specific responsibilities and duties of the various entities in the Policy scheme,

such that Crown Global will not be found liable for the non-payment of the balance of the Withdrawal Request. I find this to be an arguable defence such that it not appropriate to strike our paragraph 25 of Crown Global's Defence or to enter summary judgment for the Plaintiff against Crown Global.

59. Second, in my view, there are issues or questions in dispute that ought to be tried. Mr. White set out Crown Global's Factual Issues as referred to above. He also submitted that these are all matters where discovery is required and where the Court would need to hear oral evidence at trial. I agree. In following *Mehta and MFP-2000 LP v Viking River Cruises Ltd* I am satisfied that summary judgment would not be appropriate in light of the disputed matters.

60. Third, in my view there is some reasonable doubt as to the interpretation and effect of the "*reasonable efforts*" provisions in the Policy and supporting documents. Additionally, there is the factual matrix of the conduct of Crown Global's efforts, successful or otherwise. I note Mr. Potts' submissions in respect of the balance of the Withdrawal Request and the authorities he cites in support of the interpretation of the phrase "*as soon as practicable".* However, in my view, on the evidence, there are other events that have affected the ability to pay the balance of the Withdrawal Request. These matters should be fleshed out at trial so that the factual disputes can be resolved and the proper interpretation and principles of the case authorities can be applied. I recognise there is some force in Mr. Potts' submission that there are no reported authorities as far as the Plaintiff is aware that suggest that a period of 3 years – or an entirely indefinite period – would fall within the scope of a time limit said to be "*as soon as practicable*"; however this must be tempered by Mr. White's submissions that the Policy and wording including section 8.1 and 12.5 provided for the eventualities that have happened and the Court will look to both the language of the clause and the commercial context in which it is drafted. Accordingly, in following *Rainy Sky SA & ors v Kookmin Bank* on interpreting the provisions, I have reasonable doubts that summary judgment should be entered against Crown Global.

61. Fourth, in my view, I have some reasonable doubt at this stage about the responsibilities and duties of Crown Global and all the other parties. Mr. Potts' submissions suggest that the duties are straightforward such that judgment can be entered against Crown Global. However, Mr. White's submissions call upon a strict interpretation of the Policy Wording and supporting documents to resolve the issues of which entity was responsible for what duties, further submitting that Crown Global had properly executed its duties pursuant to the Policy. On that basis, I am not satisfied that I should enter summary judgment on this point as there are substantial factual issues which can only be resolved at trial.

62. Fifth, I am not satisfied that the letters amount to admissions. In my view, I prefer Mr. White's submission that the letter puts forth a proposal to the Plaintiff in search of a practical and commercial solution to extricate itself from between the Plaintiff and the investment manager. Also, I accept Mr. White's submissions that there were not admissions about various points, such as it was not an admission of fraud, not an admission that Crown Global breached the duties of reasonable efforts, and not an admission of breach of contract. As Roskill LJ stated in *Technistudy Ltd. V Kelland* [1976] 1WLR 1042 "*As the cases show, an order should only be made under that rule if it is plain that there are either clear express, or clear implied, admissions. I can see no clear express admissions; I can see no clear implied admissions*." In my consideration of the submission from both parties and review of the letters in evidence, I fail to see clear express or implied admissions of liability such that I can rely on them to enter judgment pursuant to RSC Order 27, rule 3.

63. Sixth, I am not satisfied that summary judgment should be given for US$3.5 million as claimed in the SoC. I have already set out reasons why I am not satisfied to enter judgment for the US$1.7 million. In respect of the balance of the investment, put at US$1.8 million by the Plaintiff, the undisputed evidence is that there has been no further partial or full surrender request. It seems arguable then that there are no breaches of the Policy in respect of that balance such that summary judgment should be given. Crown Global at paragraph 56 of its Defence denies paragraph 41 of the SoC which avers that Crown Global has acted in breach of its contractual and statutory obligations to the Plaintiff in respect of the US$1.7 million balance of the Withdrawal Request and Crown Global's inability to establish, by

reference to satisfactory evidence, the existence or location or value of the balance of US$1.8 million. Additionally, the Plaintiff is asking for a return of what he had paid in, suggesting that the Policy is not an investment with fluctuations of value. It seems to me that there should be evidence and examination at trial of the value of the remaining investment beyond the Withdrawal Request amount. Therefore, I have considerable doubt that judgment should be entered against the First Defendant in favour of the Plaintiff for the amount of US$1.8 million.

64. In light of the above reasons, I have a reasonable doubt that the matter should be resolved in favour of the Plaintiff by entering summary judgment against Crown Global. I acknowledge the factual basis of the Withdrawal Request, the payment of US$1.3 million made thus far and the balance outstanding. I also appreciate the concerns of the Plaintiff about both the balance of the Withdrawal Request and the remainder of the Policy investment on the backdrop of the apparent conduct of Crown Global and the time taken to make payment. On the other hand, a number of issues create doubt in my mind that summary judgment should be granted, including: (a) the true meaning and effect of all the relevant provisions of the contractual and statutory documents and terms; (b) Crown Global's Factual Issues that require determination; (c) the responsibilities and duties of all the various participants in the scheme, including the Plaintiff, Crown Global, Mr. Gambles, the investment managers and the Custodian; and (e) the conduct of all those parties.

The Plaintiff's Application to enter judgment against Second to Seventh Defendants

The Plaintiff's Submission

65. The Plaintiff submits that, as the Second to Seventh Defendants have been validly served but have failed to enter an appearance or to file and serve a Defence, the Court should enter judgment in default against them under RSC Order 13 rules 1, 2 and 5 in the sum of US$3.5 million, plus interest and costs or such other sum as the Court thinks fit.

66. Mr. Potts also submits that, the Court could and should enter summary judgment against them on the basis that none of them has a defence to the claims against them set out in the SoC.

67. Mr. Potts submits that the application for default judgment against the Second to Seventh Defendants is wholly without prejudice to the Plaintiff's claims against Crown Global and the Plaintiff will give credit to the various Defendants in due course for any sums actually received from any of the Defendants, subject to his claims being satisfied in full, such that there will be no double recovery by the Plaintiff.

Crown Global's submissions

68. Crown Global submits that summary judgment should not be entered against the Second to Seventh Defendants but rather default judgment should be entered.

Analysis on Application for Judgment against Second to Seventh Defendants

69. I am of the view that judgment in default of an appearance and in default of a defence being filed is appropriate against the Second to Seventh Defendants, jointly and severally. In light of the reasons for not granting summary judgment against Crown Global, I am of the view that it is not appropriate to enter summary judgment against the Second to Seventh Defendants at this time. After a trial of the issues involving Crown Global, it is most likely that issues will be resolved one way or the other, which can then further inform a consideration of entering summary judgment against the Second to Seventh Defendants.

70. In respect of the amount of the judgment in default, in my view, the amount of the balance of the Withdrawal Request, namely $1.7 million, is the appropriate amount for judgment in default at this time. I am not satisfied that in the absence of a further surrender request, partial or full, it can be said that more funds are due and owing. Again, after a trial of the issues involving Crown Global, it is most likely that issues will be resolved one way or the other, which can then further inform a consideration of entering summary judgment against the Second to Seventh Defendants in respect of the balance of the Policy amount.

The Plaintiff's Application for permission to amend and Crown Global's cross application to strike out

The Plaintiff's Submissions

71. The Plaintiff seeks permission to amend its SoC at paragraph 44(b) with six (6) additional paragraphs as set out in the Draft ASoC on the basis that the proposed amendments add detail, colour and further particulars to the allegation that Crown Global dishonestly assisted the Second to Seventh Defendants in their wrongdoing. The amendments are supported by Doctoroff1, Doctoroff4 and Doctoroff5 and their respective exhibits as well as the inferences to be drawn from Crown Global's own unsatisfactory evidence.

72. The Plaintiff seeks permission to amend pursuant to RSC Order 20 rule 5. The Court is invited to find that it is just and proportionate and in accordance with the overriding objective at RSC Order 1A rule 1 to permit the Plaintiff to amend his claim to add further detail and particulars to the allegations rather than striking out these aspects of the Plaintiff's claim and denying him the opportunity to seek justice. Mr. Potts submits that Crown Global will not be prejudiced by the amendments and the proceedings are not so far advanced as to render amendment at this stage unduly costly, nor will such amendments cause disproportionate delay in progressing the litigation.

73. The Plaintiff invites the Court to grant the Plaintiff permission to amend his SoC as a proportionate response to the criticisms made by Crown Global, rather than an order striking out part of the claim. This action would be consistent with the Overriding Objective, as set out in RSC Order 1A rule 1 and it would cause no prejudice to Crown Global. On that basis, the Court is invited to dismiss Crown Global's strike out application.

Crown Global's Submissions

74. Crown Global has applied to strike out the allegations by the Plaintiff as to breaches of statutory duty by Crown Global at paragraph 36 of the SoC on the basis that it does not disclose a reasonable cause of action. Mr. White submits that the Plaintiff has neglected to identify a single specific statutory provision which supports his case. The failing is repeated in paragraphs 38 – 39. At paragraph 41 the Plaintiff then blithely pleads breach of statutory

obligations "as set out above, having not set out anything. The pleading is bad and should be struck out.

75. Crown Global has applied to strike out the Plaintiff's pleading of a dishonest assistance claim at paragraph 44b of the SoC on the basis that it does not disclose a reasonable cause of action and it is fundamentally bad. Mr. White submits that the allegation is vague and wholly unparticularized for a serious allegation of this nature, thus the claim is prima facie entirely speculative. He submits that the Plaintiff must identify who was assisted, what was the dishonesty and what was the assistance or contribution to the dishonesty. He relied on the rules of pleading in this area, submitting that the Plaintiff has breached each of the rules in his pleading. Noting that the Plaintiff has applied to amend his claim, Mr. White opposes such amendments and submits that the proposed amendments do nothing to alleviate the failures but rather compound them, adding that the Plaintiff has not taken the issue seriously as the Plaintiff described Crown Global's objections as "*a technicality*" and further, the claim of dishonest assistance is only pleaded at the end. The rules of pleading referred to are:

    a. Allegations involving fraud or dishonesty must be fully and carefully pleaded – "*it is well established that allegations of fraud are in a class apart and they must be clearly stated as such*", per Zacca JA in *Grayken v Grayken* [2011] Bda LR 14;
    b. Where proper particulars are not set out, the allegations should be struck out;
    c. In a claim of dishonest assistance, the statement of claim must identify: (i) (where the defendant is a corporate entity), a particular individual or individuals (by their role if their name is not known) as having acted dishonestly; (ii) what the defendant did to assist the breaches of fiduciary duty or trust; (iii) how the assistance caused, contributed or resulted in the plaintiff's loss; and (iv) how the defendant is alleged to have acted dishonestly in assisting the main perpetrator, per Williams J in *Ritter & Geneva Insurance SPC Ltd v Butterfield Bank (Cayman) Ltd* [2018] 1 CILR 529;
    d. It is not enough to use a so-called '*rolled up*' plea and claim that the corporate entity was or should have been aware of fraudulent actions by the main perpetrator to establish dishonest assistance, ibid at [187];

e. A dishonest assistance claim should not be tacked on to a less serious claim of breach of contract and negligence. Where dishonesty and breach of contract are pleaded on similar facts, the dishonesty must be pleaded first and clearly – '*dishonesty is a serious allegation and it is not to be pleaded lightly*', ibid at [185 – 186] and [200].

The Plaintiff's Reply

76. Mr. Potts submits that, contrary to Crown Global's submissions about lack of particularization, everything that the Plaintiff alleges is in the knowledge of Crown Global and that discovery will reveal much more information. He referred to the affidavit evidence Seldin1, sworn 22 August 2019, wherein Alex Seldin requested more time for Crown Global to file its Defence as more time was needed to review and work through the numerous complex issues in the SoC including serious allegations of dishonestly assisting wrongdoings committed by other defendants. He submitted that Crown Global has known about the dishonest assistance claim since August 2019 but that it was never suggested that the pleadings were defective, with the strike-out application only being filed once the Plaintiff had issued the summons for summary and default judgment. He submits further that Crown Global always knew what the case was because when substantial funds were caught up in regulatory issues, Crown Global and Mr. Gambles did not inform the Plaintiff and although the Plaintiff and Crown Global do not know what happened to his investment, Mr. Gambles knows as he was central to what had happened. Upon discovery, more information will come to light.

77. Mr. Potts accepted that that the pleadings should particularize the people who played parts in the dishonest assistance, noting that in the case of *Ritter & Geneva Insurance SPC Ltd v Butterfield Bank (Cayman) Ltd* [2018] 1 CILR 529, Butterfield Bank was a large bank with a large number of employees whereas in the present case, there is Mr. Gambles and another employee. Also the Plaintiff had discovered that Crown Global had been censured by the Bermuda Monetary Authority in respect of failures and breaches in relation to its KYC policies. For these reasons, it is not necessary to provide further particulars but the Plaintiff should be allowed discovery and then move to trial.

78. In respect of the breach of the statutory duty, Mr. Potts submitted that the Policy itself is part of a private Act which sets out the duties of Crown Global and such it is not necessary to plead law.

The law on dishonest assistance

79. In *Ritter & Geneva Insurance SPC Ltd v Butterfield Bank (Cayman) Ltd* Williams J stated as follows:

> *"179 The law on what constitutes dishonesty for the purposes of dishonest assistance in the cases before me is conveniently set out in an uncontentious manner by Rose, J. in her recent judgment in Singularis Holdings Ltd.[26] v. Daiwa Capital Markets Europe Ltd. (17),[27] in which she stated ([2017] EWHC 257 (Ch), at paras. 143–147):*
>
> > *"143. The test for dishonesty in this context is that set out by the House of Lords in Twinsectra Ltd v Yardley and others [2002] UKHL 12. There Lord Hutton, with whom Lord Slynn of Hadley, Lord Steyn and Lord Hoffmann agreed, described the three possible standards which can be applied to determine whether a person has acted dishonestly. There is a purely subjective standard whereby a person is only regarded as dishonest if he transgresses his own standard of honesty even if that standard is contrary to that of reasonable and honest people; there is the purely objective standard whereby a person acts dishonestly if his conduct is dishonest by ordinary standards of reasonable and honest people, even if he does not realise this, and there is a combined standard:*
> >
> > > *'. . . which combines an objective test and a subjective test, and which requires that before there can be a finding of dishonesty it must be established that the defendant's conduct was dishonest by the ordinary standards of reasonable and honest people and that he himself realised that by those standards his conduct was dishonest.'*
> >
> > *144. His Lordship, having considered the test that had been applied by Lord Nicholls of Birkenhead in the earlier case of Royal Brunei Airlines Snd Bhd v*

Tan [1995] 2 AC 378 confirmed that dishonesty is a necessary ingredient of accessory liability and that (at paragraph 36):

> *'dishonesty requires knowledge by the defendant that what he was doing would be regarded as dishonest by honest people, although he should not escape a finding of dishonesty because he sets his own standards of honesty and does not regard as dishonest what he knows would offend the normally accepted standards of honest conduct.'*

145. In Barlow Clowes International Ltd v Eurotrust International Ltd [2005] UKPC 37, Lord Hoffmann considered whether it must be shown that the alleged dishonest assister turned his mind to the ordinary standards of honest behaviour and to whether his conduct fell below those standards. He held that it was not necessary. It was only necessary to show that the defendant's knowledge of the transaction rendered his participation contrary to normally acceptable standards of honest conduct. He did not need to be shown to have had reflections about what those normally acceptable standards were.

146. It is clear that wilful blindness will satisfy the test for dishonesty. An honest person does not 'deliberately close his eyes and ears, or deliberately not ask questions, lest he learn something he would rather not know, and then proceed regardless': Royal Brunei, per Lord Nicholls at p. 389F-G. It is therefore no defence for a defendant to say that he did not realise that he was acting dishonestly: Starglade Properties Ltd v Nash [2010] EWCA Civ 1314 at paragraph 32 and my judgment in Goldtrail Travel Ltd v Aydin & Ors [2014] EWHC 1587 at paras [143–145].

80. In *Ritter & Geneva Insurance SPC Ltd v Butterfield Bank (Cayman) Ltd* Williams J also stated as follows:

> *"180 In Stokors SA v. IG Markets Ltd. (19),[28] Field, J., after reviewing the judgments in the above cases mentioned by Rose, J. in Singularis (17), helpfully set out the*

following uncontentious principles derived from the authorities ([2013] EWHC 631 (Comm), at para. 11):

> *"(1) It is not necessary for the Court to establish whether or not the defendant considered that he was acting dishonestly. Instead, the defendant's knowledge of the transaction has to be such as to render his participation contrary to normally acceptable standards of honest conduct.*
>
> *(2) An honest person does not deliberately close his eyes and ears, or deliberately not ask questions lest he learn something he would rather not know and then proceed regardless where there may be a misapplication of trust assets to the detriment of beneficiaries.*
>
> *(3) A dishonest state of mind may consist in suspicion combined with a conscious decision not to make inquiries which might result in knowledge.*
>
> *(4) In a commercial setting dishonesty can be found on the basis of commercially unacceptable conduct.*
>
> *(5) Acting in reckless disregard of others' rights or possible rights can be a tell-tale sign of dishonesty.*
>
> *(6) Recklessness is a species of dishonest knowledge and is therefore relevant to the Court's consideration of dishonesty in this context. 'Not caring' does not mean 'not taking care', rather it means indifference to the truth. The moral obliquity of this position is in the wilful disregard of the importance of truth.*
>
> *(7) Someone can know, and can certainly suspect, that he is assisting in a misappropriation of money without knowing that the money is held on trust or what a trust means."*

199 The plaintiffs have failed in the matter before me to identify in the pleadings or at trial any individual(s) either by name or by post with any relevant knowledge of the fraud or who acted dishonestly. Due to the inadequacy of the particularization, the bank and the court are unable to identify, even if not by name(s) but by role(s)/position(s) in the bank, who it is alleged has been dishonest or who should have had knowledge of the fraudulent conduct. In addition, the plaintiffs have failed to plead the dishonesty in the appropriate manner commended by May, L.J. in Lipkin (10).

200 As dishonesty is a serious allegation it is not to be pleaded lightly. There is merit in the bank's submission at para. 445 of its written closing submissions:

> *"Re-reading paragraphs 146 to 147A of the Statement of Claim clearly shows the vague and general terms in which the majority of the so-called 'particulars' have been provided. This is improper both as the Bank and its employees are entitled, when being accused of having acted dishonestly, of knowing more than just in general terms how they are being alleged to have been dishonest. They are entitled to know, pursuant to the Grand Court Rules and as a matter of basic procedural fairness, the particular and specific basis on which the Plaintiffs are asking the Court to make dishonesty findings against them, findings which clearly have very serious ramifications for any individual and business, in particular a highly reputable, regulated Bank, such as the Defendant."*

201 Accordingly as the above principles of pleadings must be strictly observed, and in the absence of any identified person at the bank who has acted dishonestly, the pleadings would not permit the court to make a finding of dishonesty and I dismiss that claim."

The law on striking out

81. RCS Order 18, rule 19(1)(a) provides that:

> *"Striking Out pleading and indorsements*
>
> *"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 …*
>
> *and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be."*

82. As stated in the White Book commentary 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 (per Lord Pearson in Drummond-Jackson v British Medical Association [1970] 1 W.L.R. 688. So long as the statement of claim or particulars (Davey v Bentinck [1893] 1 QB 185) discloses 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 ground for striking it out …"*

Analysis on Plaintiff's Application for permission to amend and Crown Global's cross application to strike out

83. In my view the Plaintiff's application to amend the SoC should be granted for several reasons. First, in paragraph 43 of the SoC, the Plaintiff pleaded that pending the completion of further investigation and discovery of documents, he was reserving the right to avoid the Policy in certain circumstances. Therefore, because of the nature of the relationship between (i) Crown Global and Mr. Gambles and then (ii) between Mr. Gambles and the Third to Seventh Defendants, it seems to me that the Plaintiff always contemplated having to await discovery and further information to assist with supporting and formulating his case. Also, I am attracted to the Plaintiff's submission that discovery will provide more information to support the formulation of the Plaintiff's case.

84. Second, the claim of dishonesty in respect of the Second to Seventh Defendants is pleaded in paragraph 44(a) and the claim for dishonest assistance on the part of the First Defendant is pleaded in paragraph 44(b). In my view, these claims are pleaded significantly separate from the claims of contractual and statutory breach which stand on their own. On the basis that the Plaintiff's case is that the dishonesty and dishonest assistance is in respect of the breach of their statutory and contractual duties, I am satisfied that all the claims are set out separately such that findings can be made about dishonesty after a trial. In noting that dishonesty and dishonest assistance should be clearly pleaded, it seems that a sub-heading above paragraph 44, for example "*Particulars of Dishonesty*" would have helped to set it

out more clearly. For present purposes, I am satisfied that the requirements set out by Zacca JA *in Grayken v Grayken* are met by the draft ASoC.

85. Third, in paragraph 44(b) of the SoC the Plaintiff has already set out the basis for the alleged dishonest assistance by Crown Global to the Second to Seventh Defendants. In my view, the proposed amendments in the ASoC provide particulars of the role and conduct of Crown Global along with the role of the various Defendants in their respective capacities. In considering Crown Global's submission that roles and individuals should be particularized, I am attracted to the submission of Mr. Potts that unlike a big company with many employees, the Second to Seventh Defendants are in reality Mr. Gambles and one employee, therefore, more particularization is not necessary as all fingers point to Mr. Gambles. I find support for this position in the pleadings in paragraph 7 of the SoC wherein it is pleaded that Mr. Gambles "*has acted or held himself out as the Chief Executive Officer and/or the Chief Investment Officer and/or owner and controller of all such entities",* that is, the "MBMG Group" of companies.

86. Fourth, in respect of the individuals within Crown Global who gave dishonest assistance, in my view, the question begs as to how the Plaintiff would know at this stage who specifically in Crown Global gave the dishonest assistance. Therefore, I am attracted to the submission that during discovery, more information may be provided to assist the Plaintiff in formulating its case further, in particular the individuals or the posts who did or did not perform certain duties or functions. In following *Ritter & Geneva Insurance SPC Ltd v Butterfield Bank (Cayman) Ltd* on pleading a post when the identity of the dishonest individual(s) was not known, Crown Global in the draft ASoC, significantly is identifying (a) the post(s) of the individual(s) who were supposed to conduct the "due diligence" process on the due diligence questionnaire submitted by the Sixth Defendant and (b) the posts of the individual(s) who were supposed to conduct the regular "due diligence" of the Second to Seventh Defendants on an ongoing basis.

87. Fifth, in respect of the test for dishonesty, the Plaintiff's pleadings in paragraph 44(b) includes the assertion of Crown Global's knowledge or suspicion of the Second to Seventh Defendants conduct, its conscious decisions not to make appropriate enquiries and

recklessness which is a species of dishonest knowledge. In my view, these pleadings satisfy the uncontentious principles set out in *Stokors SA* v. *IG Markets Ltd.*

88. Sixth, as Crown Global has known about the claim of dishonest assistance from the outset as it was pleaded in the SoC, in my view it will not be prejudiced now by the amendments. Further, I am satisfied that the proceedings are not so far advanced as to render amendment at this stage unduly costly, nor will such amendments cause disproportionate delay in progressing the litigation.

89. In light of the above reasons, I am satisfied that the claim of dishonest assistance discloses a reasonable cause of action with some chance of success as contemplated in *Drummond-Jackson v British Medical Association*. Therefore, on that basis, I am not satisfied to grant Crown Global's application to strike out paragraph 44(b) on dishonest assistance.

90. In respect of Crown Global's application to strike out the allegations of breach of statutory duty, I reject the application for strike out for several reasons. First, the RSC Order 18 set out the following rules:

> *"18/7 Facts, not evidence, to be pleaded*
> *Subject to the provisions of this rule, and rules 7A, 10, 11 and 12, every pleading must contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement must be as brief as the nature of the case admits.*
>
> *18/12 Particulars of pleading*
> *Subject to paragraph (2), every pleading must contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing words— particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and where a party pleading alleges any condition of the mind of any person, whether any disorder or*

disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies."

91. Second, in proving a breach of a statutory duty, the Plaintiff must prove that there is a statutory duty owed to him, that there was a breach of that duty by Crown Global, that he suffered loss and that that loss was caused by the breach of the statutory duty. In my view, taking a well-rounded view of the pleadings, the pleadings meet these requirements as follows:
    a. In paragraph 3 of the SoC, the Plaintiff pleads the relevant statutes, firstly a private Act incorporating Crown Global and then other Acts amending it;
    b. In paragraph 4 of the SoC the Plaintiff pleads that the First Defendant's conduct of its business is subject to two other Acts, namely the Insurance Act 1978 and the Life Insurance Act 1978;
    c. In paragraph 36 of the SoC the Plaintiff pleads Crown Global's legal obligations to the Plaintiff in sub-paragraphs (a) – (e), more precisely the Acts set out in sub-paragraphs (b), (c) and (d);
    d. In paragraph 38 of the SoC the Plaintiff pleads its reliance on the Policy wording;
    e. In paragraph 39 of the SoC the Plaintiff pleads *"... that the true legal effect of the contractual and statutory provisions (when read in their proper context) is that ... [a – c]*";
    f. In paragraph 41 of the SoC the Plaintiff pleads that the First Defendant has acted in breach of its contractual and statutory obligations to the Plaintiff as set out above. The pleading also provides the basis that Crown Global has failed to pay to the Plaintiff US$1.7 million and it cannot establish the existence or location or value of the balance of US$1.8 million;
    g. In paragraph 42 of the SOC, the Plaintiff further pleads the failures of Crown Global; and
    h. In paragraph 43 of the SoC, the Plaintiff reserves the right to avoid the Policy for breaches of the Life Insurance Act 1978.

92. Third, in my view, the pleadings set out the breaches of the statutory duty pursuant to the RSC Order 18. The main complaint by Crown Global seems to be that a particular section of the various statutes were not referenced. In my view, that complaint does not strike a fatal blow to the complaint of breach of statutory duty such that it should be struck out. Crown Global can seek further particulars of the breach as necessary.

93. In light of the above reasons, I am satisfied that the claim of breach of statutory duty discloses a reasonable cause of action with some chance of success as contemplated in *Drummond-Jackson v British Medical Association*. Therefore, on that basis, I am not satisfied to grant Crown Global's application to strike out the claims of breach of statutory duty.

Conclusion

94. For the reasons above, my conclusions are as follows:

    a. I decline to make an order for summary judgment against Crown Global on the basis that Crown Global has no defence to the Plaintiff's claims for breach of contract on a true construction of the Policy and/or that Crown Global has effectively admitted liability in its letters dated 22 February 2019 and 10 May 2019;

    b. I decline to make an order that Crown Global's Defence to the contractual claim or paragraph 25 of the Defence be struck out on the basis that it discloses no reasonable defence and therefore I decline to enter judgment in favour of the Plaintiff;

    c. I grant judgment in default of appearance and defence in respect of the Second to Seventh Defendants, jointly and severally, in the sum of US$1.7 million representing the unpaid balance of the Withdrawal Request;

    d. I grant an order for the Plaintiff to amend his SoC as set out in the Draft Amended Statement of Claim;

e. I grant an order for Crown Global to amend its Defence as set out in the Draft Amended Defence. This application was not opposed;

f. I decline Crown Global's application to strike out paragraph 44(b) of the Plaintiff's SoC (alleging dishonest assistance) on the basis that it does not disclose a reasonable cause of action; and

g. I decline Crown Global's application to strike out the Plaintiff's allegations as to breaches of statutory duty by the First Defendant on the basis that they do not disclose a reasonable case of action.

95. 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 the following:

a. In respect of the Plaintiff's Summons dated 30 January 2020 in respect of the application for summary judgment and strike out of Crown Global's Defence, that costs shall follow the event in favour of Crown Global against the Plaintiff on a standard basis, to be taxed by the Registrar if not agreed;

b. In respect of the Plaintiff's Summons dated 30 January 2020 for judgment in default of appearance and defence in respect of the Second to Seventh Defendants, that costs shall follow the event in favour of the Plaintiff against the Second to Seventh Defendants on a standard basis, to be taxed by the Registrar if not agreed;

c. In respect of Crown Global's Summons dated 23 September 2020 to strike out parts of the Plaintiff's SOC, that costs shall follow the event in favour of the Plaintiff against Crown Global on a standard basis, to be taxed by the Registrar if not agreed;

d. In respect of the Plaintiff's Summons dated 23 September 2020 to amend its SoC, that the Plaintiff will be responsible for the costs of and arising from the amendment on a standard basis, to be taxed by the Registrar if not agreed;

e. In respect of Crown Global's Summons dated 23 September 2020 to amend its Defence which was not opposed, that Crown Global will be responsible for the

costs of and arising from the amendment on a standard basis, to be taxed by the Registrar if not agreed.

Dated 7 June 2021

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