In The Supreme Court of Bermuda

CIVIL JURISDICTION

2020: No. 443

BETWEEN:

BENTLEY FRIENDLY SOCIETY

Plaintiff

- and -

MINISTER OF FINANCE

Defendant

RULING

Date of Hearing: **26 October, 2, 9 November 2021**
Date of Ruling: **10 February 2022**

Appearances: **Craig Walls for Plaintiff**

Melvin Douglas, Solicitor General, Attorney General's Chambers, for Defendant

RULING of Mussenden J

Introduction

1. This matter came before me by the Defendant Minister of Finance's (the "**Minister**") Summons filed 21 July 2021 and issued 14 August 2021 seeking an order that the Bentley Friendly Society's (the "**BFS**") Specially Indorsed Writ of Summons (the "**SIW**") be struck

out pursuant to the Rules of the Supreme Court 1985 (the "**RSC**") Order 18 rule 19(1) and/or under the inherent jurisdiction of the Court on the following grounds:

a. It discloses no reasonable cause of action;
b. It is scandalous frivolous and vexatious; and
c. It is otherwise an abuse of the process of the Court.

2. The Minister relied on an Affidavit of the Solicitor General sworn 21 July 2021 which exhibited:
    a. "**MLD1**" - an Agreed Statement of Facts (the "**ASOF**") and supporting documents that had been submitted before the Supreme Court in the case of Bentley Friendly Society and the Director of Transport Control, civil jurisdiction 2014: No. 281 (the "**2014 Case**"); and
    b. "**MD2**" - copies of the court documents filed in the same case together with a copy of the judgment and order of the Court dated 15 June 2016 (the "**2016 Judgment**").

3. The BFS is a friendly society created under the Friendly Societies Act 1868 (the "**1868 FSA**"). It opposed the strike out application and relied on the affidavit evidence as follows:
    a. Affidavit of Kevin Bean-Walls sworn on 3 November 2021; and
    b. Affidavit of Kevin Bean-Walls sworn 12 November 2021 along with a bundle of Exhibits including "**KBW-1**" the Certificate of Registration of the BFS dated 30 October 2013.

Background

4. The BFS filed the SIW with a Statement of Claim (the "**SOC**") dated 8 December 2020 which consisted of 13 short paragraphs. It set out circumstances involving the BFS claiming previously that it had a right/permission to assume third party risks to motor vehicles under the Motor Car Insurance (Third Party Risks) Act 1943 (the "**1943 Act**") and where the permission was revoked without due process of law at the request of private parties. The SOC set out that the Minister was now requesting the BFS to request permission a second time under more onerous conditions.

5. The BFS requested immediate reinstatement to their prior position at the Transport Control Department ("**TCD**") where it claims it was correctly and legally granted the right to assume third party risks in accordance with the 1943 Act by authorised agents of the Bermuda Government on 8 November 2013. The Court was asked in the SOC to determine if the authority to assume third party risks was correctly granted, by whom and why it was halted.

6. Additionally, the SOC requested the Court to determine that the Minister allowed the Attorney General to act outside of her authority in instructing the Director of TCD to refuse to process license applications by applicants who had the BFS as their insurer and that they denied the BFS due process. The BFS requested the Court to determine that damages were due to the BFA as it had been harmed by an abuse of process and denied their legal rights. They requested damages of $20,000,000.

7. The Minister filed a Defence dated 7 April 2021.

The Application for Strike Out

8. The Solicitor General submitted generally that the BFS's case was defective in that the Minister nor the Court should have to speculate as to the BFS's case. The Court should not be required to have to tease out what the complaint is about, rather the Court's primary role was to resolve the controversies that the parties identify by their pleadings. Mr. Douglas submitted that that pleadings are unlikely to be remedied by any amendments as the purported claims are unsustainable, a collateral attack on the 2016 Judgment and was an attempt to raise public law issues as private law claims.

<u>BFS's case discloses no reasonable cause of action and/or is scandalous, frivolous and vexatious</u>

9. Mr. Douglas referred to paragraph 1 of the SOC which BFS asked the Court to determine whether section 2(1) of the 1943 Act was applicable to it as the BFS is a Bermudian entity and not subject to the Bermuda Immigration and Protection Act 1956 (the "**BIPA**"). He

submitted that the BFS seemed to be contending that section 2(1) of the 1943 Act only applied to those persons who are non-Bermudian or subject to immigration control. He argued that such a contention was misconceived and not sustainable as the words "subject to" was used to resolve any conflict between the 1943 Act and the BIPA. As there was no suggestion there was a conflict concerning the BFS, there was nothing to be resolved. Further, if there was, it could have and should have been raised in the 2014 Case, and to raise it now was an abuse of process.

10. Mr. Douglas referred to paragraph 2 of the SOC where the BFS claimed that the Court should determine if this is a case of "double jeopardy" as previously it had a right/permission to assume third party risks to motor vehicles under the 1943 Act where the permission was revoked without due process of law at the request of private parties and where the Minister was now requesting the Plaintiff to request permission a second time under more onerous conditions. Mr. Douglas submitted that the BFS appeared to be suggesting that by its registration as a friendly society, BFS had been granted the right to undertake third party risks insurance for losses sustained by its members by any contingency relative to motor vehicles under the 1943 Act. He argued that this contention was misconceived and unsustainable as "any contingency" meant an event where members sustained loss or damage to their assets not loss or damage to a third party. He submitted that as the BFS advanced the same argument in the 2014 Case which was rejected by the Court, it was now unsustainable but also an abuse of process to advance them again.

11. Mr. Douglas referred to paragraph 3 of the SOC where the BFS claimed that the Minister had abdicated his responsibilities causing the BFS significant and continuing mental and financial harm. He submitted that no particulars were given as to what responsibility of the Minister he was referring to, when it happened and on what basis does the BFS say the alleged abdication gives rise to a cause of action. Mr. Douglas submitted that any alleged abdication is a public law issue which should be dealt with by judicial review and not a civil suit. This was also an abuse of process.

12. Mr. Douglas referred to paragraph 4 of the SOC where the BFS claimed that the Minister relied on erroneous advice in its failure to carry out responsibilities in this matter to the financial detriment of the BFS. Also, the BFS had alleged that the Minister was advised by the BFS that section 2(3A)[1] of the 1943 Act was "precedent" for the Minister to act in this matter. Mr. Douglas submitted that this was unsustainable as section 2(3A)[2] of the 1943 Act applies to any person authorized or purportedly authorized to undertake insurance business prior to 21 March 1990. He informed that BFS was not registered as a friendly society until 30 October 2013. Mr. Douglas argued that the BFS did not dispute that it is required to be authorized under the 1943 Act as found in paragraph 17 of the 2016 Judgment. Further, the 2016 Judgment paragraph 25 also found that "*The policies issued by the BFS are motor car insurance with respect to third party risks within the meaning of the 1943 Act in that they are required to be authorized under that Act. As they have not been duly authorized they do not comply with the requirements of the 1943 Act.*"

13. Mr. Douglas referred to paragraph 5 of the SOC where the BFS claimed that it has a right to be protected from being belatedly pursued in relation to a matter in excess of six years. Mr. Douglas submitted that no facts or particulars have been pleaded as to what right or matter BFS is referring to and on what basis is this is a claim or cause of action known to law.

14. Mr. Douglas referred to paragraph 6 of the SOC where the BFS allege that it has been harmed by parties acting outside of their authority, that the Governor acted outside his authority and directed the BFS to incur costs for a legal opinion and a financial audit. It is further alleged that the Minister relied on incorrect advice from the Attorney General. Mr. Douglas submitted that the BFS has failed to plead any facts for its allegations and even if it did, the facts relied upon do not establish a private right of action against the Minister. He argued that the common law was against any general principle that invalid administrative action by itself gives rise to a cause of action in damages by those who have

[1] The BFS had cited section 3(A) in error

[2] Section 2(3A) states "Any person authorized or purportedly authorized to undertake insurance business prior to 21 March 1990 shall be deemed to have been granted authorization by the Minister under this section upon such terms and conditions as the Minister may, after 20 March 1990, consider appropriate."

suffered loss as a consequence of that action. He relied on the case of *Three Rivers District Council and others v Bank of England* (1998) All ER (D) 687 where the case of *Garrett v The Attorney General* (1997) 2 NZLR 332 is cited as authority for the principle.

15. Mr. Douglas referred to paragraph 7 of the SOC where the BFS allege that the Minister should be prohibited from making "declarations claims" of the BFS pursuant to the Limitation Act 1984 and the Minister's demands should be deemed an abuse of process. Mr. Douglas submitted that it was difficult to ascertain what civil wrong was being alleged, but if it meant that the Court process should not be used by the Minister for determining preliminary issues, then no reasonable cause of action arises and it should be struck out.

16. Mr. Douglas referred to paragraph 11 of the SOC where the BFS allege that the Minister was assessing a "discriminatory tax" on the BFS as there was no evidence that the Minister had requested audited financial statements from other insurers or requested that they prove they have integrity, expertise, competency, resources, qualifications and experience as a condition for processing an application to be an insurer. Mr. Douglas submitted that such claim does not disclose a cause of action known in law and at best it is a public law issue and an abuse of process.

17. Mr. Douglas referred to paragraph 12 of the SOC where the BFS requests the Court to determine that damages were due to the BFA as it had been harmed by an abuse of process and denied their legal rights. Mr. Douglas submitted that no facts or particulars had been pleaded as to what legal right, harm and abuse of process the BFS is referring to and what basis is this a claim or cause of action known to law. He argued no reasonable cause of action has been pleaded.

<u>Whether the pleadings is otherwise an abuse of the process of the Court</u>

18. Mr. Douglas submitted that various paragraphs of the SOC are in relation to matters which were or should have been raised in the 2014 Case. He made submissions about *res judicata* and cited the case of *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* (1972) AC 581 where Lord Kilbrandon cited the classical expression of *res judicata* in Wigram VC in *Henderson v Henderson* (1843) 3 Hare 100 where it was stated:

"… 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."

19. Mr. Douglas also relied on the case of *Harold Darrell v A Board of Inquiry Appointed under the Human Rights Act 1981 et al* SC Civil Jurisdiction 2013:No. 106 where Hellman J considered the principle, noted that the passage of Wigram VC above was approved by the Privy Council in *Yat Tung* and stated:

"… *But nowadays it must be read subject to the gloss given by Lord Bingham in Johnson v Gore Wood & Co (a firm) (2002) AC 1*:

"… 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.

…

It is, however, wrong to hold that because a matter could have been raised in earlier 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."

20. Mr. Douglas submitted that paragraph 1 of the SOC raises an issue about the BIPA that should have been raised in the 2014 Case.

21. Mr. Douglas submitted that paragraphs 2, 5, 8, 9 and 10 of the SOC seeks to re-litigate a part of the 2014 Case. In that case the Court had determined that polices issued by the BFS are motor car insurance with respect to third party risks within the meaning of the 1943 Act in that they are required to be authorized under that Act. Mr. Douglas submitted that it was thus an abuse of process to re-litigate this issue.

22. Mr. Douglas submitted that paragraphs 3 and 4 of the SOC about the Minister abdicating his responsibility is a public law issue that should have been addressed by way of judicial review within the 6 month time limit. It was now an abuse to attempt to circumvent the 6 month time limit by bringing a private claim against the Minister. Further, these issues could have been addressed in the 2014 Case.

23. Mr. Douglas submitted that paragraph 6 of the SOC was resolved in the 2016 Judgment when the Court found that the Governor had not authorized the BFS to undertake third party insurance. Further, it is an abuse of process to now claim that the Governor acted outside of his responsibility on when he requested the Plaintiff to obtain a legal opinion and audited accounts. Mr. Douglas highlighted that at the time of the 2016 Judgment, the Court had referred to the Governor instead of the Minister but that the Attorney General issued a correction dated 20 August 2020[3] (the "**2020 Correction Notice**") about the legislation as published on the online database of the Laws of Bermuda. Mr. Douglas submits that in any event, no civil wrong flows from the error in the published law as it still remained a public law issue that should have been addressed by a prompt judicial

[3] Note at the end of the published 1943 Act: [20 August 2020: It has come to the attention of the Attorney-General that not all of the amendments made by the Motor Car Insurance (Third Party Risks) Amendment Act 1990 with effect from 21 March 1990 were incorporated on consolidation of this Act in the December 1992 loose-leaf edition of the Revised Laws of Bermuda. These errors of omission were carried forward into the online database. Accordingly, the amendments to section 2 (replacing the references to "Governor" with "Minister" in the headnote and subsections (1), (2), (3) and (4) of that section), and to insert words at the end of section 19(1)(b), have been made using the Attorney-General's powers to correct errors in the database in section 20(1) of the Computerization and Revision of Laws Act 1989. Despite the delay in consolidation, these amendments took effect from the date of the Governor's Assent to the 1990 Act on 21 March 1990.]

review challenge. Thus, it is now an abuse to bring a private claim outside of the 6 month time limit for judicial review.

24. Mr. Douglas submitted that paragraph 7 of the SOC is an abuse of process as the Limitation Act 1984 does not apply to the Minister requesting information from the BFS in support of an application.

25. Mr. Douglas submitted that paragraph 11 of the SOC about the Minister assessing a "discriminatory tax" upon the BFS is a public law issue and to bring a private claim is an abuse of process.

26. In light of all the above reasons, Mr. Douglas submits that the BFS's pleadings should be struck out as they disclose no reasonable action, are scandalous, frivolous or vexatious and are an abuse of process of the Court.

The BFS's Reply

27. Mr. Walls objected to the application for strike out for several reasons. He submitted a skeleton argument time/date stamped 4 August 2021 and another written submission dated 13 October 2021 and made oral submissions over several half day sessions. He made extensive references to the Exhibits and documents of both the BFS and the Minister, most of those documents predating and being a part of the 2014 Case and resulting 2016 Judgment. In summary, Mr. Walls submitted that the BFS had the right to insure autos for its members, that TCD processed license applications where it was the insurer for the period 8 November 2013 to 7 April 2014 , then the Government took away the right of the BFS without any hearing at the request of private entities, the Government sent the BFS to the wrong authority for approval, the Government treated them unequally, then and now, as it "bullied" the BFS in seeking further information that was not required from other insurers and the Minister was negligent in refusing to perform his duty thus causing harm to the BFS. All of this amounted to a conspiracy to defraud the BFS. Further, the 2014 case was wrongly decided by way of the 2016 Judgment.

28. First, Mr. Walls gave an extensive background about slavery and friendly societies. He cited section 1 of the Emancipation Act 1834 which states:

> *"All rights, privileges and franchises which upon and from and after 1 August 1834, shall or may be enjoyed by white persons, shall, upon, from and after 1 August 1834, be equally enjoyed by free black and coloured persons; and upon, from and after 1 August 1834, all free black and coloured persons shall be subject to and liable to all the pains, penalties, duties, conditions, restrictions, disabilities and liabilities to which white persons shall be subject and liable."*

29. Mr. Walls then referred to the 1868 FSA, enacted 34 years after emancipation, and to its objects as set out in section 1:

> *"(a) the relief, maintenance, or endowment of the members, their husbands, wives, children, parents, or nominees, in infancy, old age, sickness, infirmity of mind or body, or widowhood;*
>
> *(b) the making good any loss sustained by the members by fire, lightning, tempest or shipwreck, or by any contingency whereby they sustain any loss or damage of their live or dead stock, boats, goods, or stock-in-trade, or of the tools or implements of their trade or calling;*
>
> *(c) for the frugal investment of the savings of the members for better enabling them to purchase food, clothes or other necessaries or the tools or implements of their trade or calling, or to provide for the education or intellectual or industrial improvement of themselves or their children or kindred:*
>
> *Provided that—*
>
> > *"(i) the shares in any such investment society shall not be transferable; and*
> >
> > *(ii) the investment of each member shall accumulate or be employed for the sole benefit of the member investing, or the husband, wife, children or kindred of such member; and*
> >
> > *(iii) no part thereof shall be appropriated to the relief, maintenance or endowment of any other member or person whomsoever; and*
> >
> > *(iv) the full amount of the balance due according to the rules of such society to any such member shall be paid to him or her on withdrawing from the society;*

(d) for any other purpose which is certified to be legal by the Attorney-General, and which is allowed by the RegistrarGeneral (hereinafter referred to as "the Registrar") as a purpose to which the powers and protection of this Act ought to be extended."

30. Mr. Walls submitted that the 1868 FSA granted the BFS the right to conduct insurance operations by the objective of making good any loss sustained by its members by any contingency of any goods. That right was not infringed by section 57(1)(a) of the Insurance Act 1978 which states:

"57(1) Insurance business of any of the following kinds—

"(a) insurance business carried on by a friendly society registered under the Friendly Societies Act 1868 or by a trade union registered under the Trade Union and Labour Relations (Consolidation) Act 2021, being business in which risks of members of the friendly society or trade union, as the case may be, are insured;

...

shall be deemed not to be insurance business within the meaning of this Act."

31. Second, Mr. Walls submitted that the 1868 FSA was granted Royal Assent for the purpose of assisting an underprivileged and under-educated class of people a vehicle and a roadmap by which they could help themselves. He submitted that the BFS was legally granted permission to insure autos in Bermuda in accordance with the 1868 FSA and that the BFS's Certificate of Registration dated 30 October 2013 is conclusive of that fact. Later on, when TCD declined it accepts the policies of the BFS, it was denied natural justice, namely adequate notice, a fair hearing and no bias.

32. Third, Mr. Walls submitted that it was judicial activism for a judge to insert his own beliefs into his judgment as occurred in the 2014 Case and 2016 Judgment. Similarly, he complained that it was judicial activism that led to a judge recommending that a friendly society demonstrate it could pay a claim of $1 million prior to being granted permission to underwrite third party risks. This was on the basis that if the Legislature had believed that requirement was necessary then it would have been legislated. Mr. Walls argued that the BFS had sought help and protection from the Court in order to protect its right to retain a

portion of its statutory insurance expense but to date, no help has been provided and the Court has seen fit to deny the BFS that right.

33. Fourth, Mr. Walls submitted that in the 2014 Case, the BFS resorted to court proceedings as the Governor was taking erroneous advice from the Attorney General. However, the 2016 Judgment did not reflect the issue. As a result the Director of TCD had acted *ultra vires* and the party responsible to act was negligent. Mr. Walls argued that it took seven years for the Minister, the Attorney General and the Governor to admit that they were wrong. On that basis and that the parties who had inflicted financial harm on the Plaintiff have admitted their negligence in writing, their admission of fact that they were wrong should be sufficient evidence for this Court to rule for the BFS. Mr. Walls also took issue with the submissions of the Minister which made reference to the Attorney General "advising" the Director of TCD, instead submitting that the Attorney General had "instructed" the Director of TCD what to do, an authority that the Attorney General did not have.

34. Fifth, Mr. Walls submitted that the application for strike out should fail because of the evidence of the negligent behaviour of the Minister who had a duty to act but failed to do so causing harm to the BFS. He submitted that the Minister has no plausible defence and lacks the skills to execute his duties. Further, the Attorney General lacks the skills to advise the Minister in matters of insurance.

35. Sixth, Mr. Walls submitted that the cause of action was tort, based on the fact that the Minister was negligent in failing to do his duty. As such the Minister's inaction did not meet the standard of care which a reasonable person would meet in the circumstances. As a result, the BFS suffered a financial loss which a reasonable person could have expected to foresee.

36. Seventh, Mr. Walls submitted that due to Bermuda's colonial status, section 2(1) of the 1943 Act reads "*Subject to the BIPA, any person may apply to the Governor for authority to undertake insurance business …*". He argued that the BFS was a Bermudian entity and therefore not subject to the BIPA. As a result, the matter was moot and the BFS should be

returned to its position whereby TCD would accept its policies for third party insurance. Further, he complained that the guardians of Bermuda's system of institutional, structural, economic racism, and white privilege would want to direct the BFS to the Governor, knowing that the Governor was not ever going to grant black Bermudians the right to insure autos for third party risks under any circumstances. This was on the basis that black Bermudians somehow lack the quality of being fit and proper, whatever that meant he stated.

37. Eighth, Mr. Walls referred to section 2(3A) of the 1943 Act, which stated that, in respect of a person authorized or purportedly authorized to undertake insurance business prior to 21 March 1990, "*that person shall be deemed to have been granted authorization by the Minister upon such terms and conditions as the Minister may, after 20 March 1990, consider appropriate.*" Mr. Walls submitted that section 2(3A) became "precedent" for the BFS to act after 20 March 1990. However, I should add at this point that it was not clarified to the Court how this section applied to the BFS which was registered on 30 October 2013 and thus could not have been undertaking insurance business prior to 21 March 1990.

38. Ninth, Mr. Walls submitted that on 20 March 1990 the Minister granted permission to an insurance company[4] which was a bankrupt insurer as per its 1990 qualified audit financial statements. He claimed that clearly the Minister had no objective financial standards for granting the right to insure autos in Bermuda.

39. Tenth, Mr. Walls referred to the 2020 Correction Notice and stated that he had informed the Governor, Minister and Attorney General about it. He submitted that they had admitted that they were wrong to send the BFS to the Governor. He referred to a letter from the Minister dated 8 November 2020 wherein it was stated "… *we were all operating under the misunderstanding that the Governor had the authority to grant permission to underwrite third-party insurance under the Act.*" In any event, Mr. Walls submitted that the BFS suffered harm and financial loss as the Minister's inaction did not meet the standard of care which a reasonable person would meet in the circumstances. As a result,

[4] Mr. Walls named an insurance company. I decline to name the insurance company in this Judgment as in my view it is not necessary to do so.

the BFS suffered a financial loss which a reasonable person could have expected to foresee. As a result of the BFS having been directed to make application to the Governor, who it turns out was the wrong entity, all subsequent actions against it should be deemed null and void and the BFS should be returned to its prior position at TCD. He argued that it was negligent administration of the Government for the online database to have such an error for 30 years.

40. Eleventh, Mr. Walls submitted that the BMA had issued a press release on 20 March 2014 in respect of the BFS with which they took issue and amounted to a defamation of the character of the BFS. He argued that there was no regulation of insurance in Bermuda, but that all insurers are required to comply with liquidity ratios as prescribed by the BMA to demonstrate that they have sufficient cash assets to finance their estimated loss reserves. Further, Mr. Walls submitted that the Government was acting for the benefit of the private interests of the owners of the Motor Insurers Fund (the "**MIF**"), an entity for which he directed serious allegations and referred to a letter of complaint dated 28 March 2014 from the MIF's counsel, Conyers Dill and Pearman. Also, he argued that there was no distinction between first and third party operations for a Bermuda mutual insurer and stressed that the 1868 FSA was essentially Bermuda's mutual insurance act which was consistent with section 10(1) of the Bermuda Constitution Order in respect of Protection of Freedom of Assembly and Association.

41. Twelfth, Mr. Walls submitted that the Minister, in addition to negligence, was refusing to treat the BFS with the same level of leniency afforded to other applicants, namely the bankrupt insurance company. He cited the case of *Dr. Soares and Hamilton Medical Center Ltd. v Bermuda Health Council* [2021] SC (Bda) 27 Civ where in my judgment I said that it was unfair for applicants not to be given the same level of leniency that is afforded to others. For clarity, in that case, I stated as follows:

> *"114. … In my view, it was the height of unfairness to treat the Incumbent Providers with an extension whilst requiring the Applicants to meet the Key Mid-Year Criteria.*
> *…*
> *129. In my view, in these circumstances, to remit the matter for a third appeal hearing would continue the aspect of unfairness that I have already opined upon."*

42. Thirteenth, Mr. Walls submitted that the 2014 Case was simply a claim that the Director of TCD had acted outside of her authority but the case morphed into how the BFS did not have permission from the Governor to issue third party insurance. He then made various submissions about the 2016 Judgment and stated that there were various errors and prayed for the sake of justice that they would be remedied by this Court.

43. Lastly, Mr. Wall submitted that the Plaintiff be allowed to amend the SIW and SOC if it would please the Court and the Minister.

The Law on Strike Out Applications

Guiding Legal Principles

44. In the case of *Fidelity National Title Insurance Company v Trott & Duncan Limited* [2019] SC (Bda) 10 Civ (5 February 2019) Subair Williams J set out the law on strike out applications.

45. 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 preCPR authorities would not generally be relevant. But that was in the context of contending that the new regime imposed greater case management powers on the court to prevent delay than under the old Rules. Trial judges, post-CPR, were expected to use these case management powers judicially, only striking out as a last resort. It is also important to remember that this reasoning was articulated in a statutory context in which an entirely new procedural code was in force. And the particular strike-out discretionary power which was under consideration in that case was an entirely new one, a power exercisable on grounds of mere non-compliance with the Rules. As Lord Woolf observed (at 939-940): "Under the CPR the keeping of time limits laid down by the CPR, or by the court itself, is in fact more important than it was. Perhaps the clearest reflection of that is to be found in the overriding objectives contained in Part 1 of the CPR. It is also to be found in the power that the court now has to strike out a statement of case under Part 3.4. That provides that: '(2) The court may strike out a statement of case if it appears to the court- (a) that a statement of case discloses no reasonable grounds for bringing or defending the claim; (b) that the statement of case is an abuse of the court's process…' [and, most importantly] (c) that there has been a failure to comply with a rule, practice direction or court order.'

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

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

46. Subair Williams J set out the case law on reasonable cause of action.

"54. The rule against the admission of evidence in support of the ground that no reasonable cause of action is disclosed is contained at RSC Order 18/19(2).

55. At paragraphs 18- 20 in David Lee Tucker v Hamilton Properties Limited I referred to the following authorities in support of the rule at RSC Order 18/19(2):

"18. This rule was recognized in Broadsino Finance Co Ltd v Brilliance China Automative Holdings Ltd [2005] Bda LR 12: "Where the application to strike-out (is) 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.

19. In E (a minor) v Dorset CC [1994] 4 All ER 640 at 649, [1995] 2 AC 633 at 693-694, Sir Thomas Bingham MR stated:

'It is clear that a statement of claim should not be struck out under RSC Ord 18, r 19 as disclosing no reasonable cause of action save in clear and obvious cases, where the legal basis of the claim is unarguable or almost incontestably

bad…I share the unease many judges have expressed at deciding questions of legal principle without knowing the full facts. But applications of this kind are fought on ground of a plaintiff's choosing, since he may generally be assumed to plead his best case, and there should be no risk of injustice to plaintiffs if orders to strike out are indeed made only in plain and obvious cases. This must mean that where the legal viability of a cause of action is unclear (perhaps because the law is in a state of transition) or in any way sensitive to the facts, an order to strike out should not be made. But if, after argument, the court can be properly persuaded that no matter what (within the reasonable bounds of the pleading) the actual facts the claim is bound to fail for want of a cause of action, I can see no reason why the parties should be required to prolong the proceedings before that decision is reached."

20. The White Book (1999 edition) provides 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 pleading are considered (per Lord Pearson in Drummond-Jackson v British Medical Association [1970] 1 WLR 688; [1970] 1 All ER 1096, CA). So long as the statement of claim or the particulars (Davey v Bentinck [1893] 1 QB 185) 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 ground for striking it out (Moore v Lawson (1915) 31 TLR 418, CA; Wenlock v Maloney [1965] 1 WLR 1238; [1965] 2 All E.R. 871, CA): …""

47. Subair Williams J set out the case law on scandalous, frivolous or vexatious.

"56. At paragraphs 21- 22 in David Lee Tucker v Hamilton Properties Limited I considered the meaning of these terms and made the following observations:

Scandalous

21. A complaint that a pleading is 'scandalous' necessarily imports an allegation that the pleading is grossly disgraceful, false and malicious or defamatory.

Scandalous claims are irrelevant to the proceedings and are invariably liable to be struck out on the basis that they are improper.

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'."

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

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

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

Analysis of the Defendant's Applications

49. In my view, the Minister's application to strike out the SIW and SOC should be granted for several reasons. First, in applying the principles of good case management as espoused by Subair Williams J in *David Lee Tucker v Hamilton Properties Limited*, in my view, the pleadings in this case are so bad on the their face and so obviously bound for failure that the Court should strike them out. In the same case, Subair Williams J stated that 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.

50. Second, the case law as set out above and the White Book (1999) Edition underscores that the Court is only required to consider the allegations in the pleadings and the case should be struck out where the legal basis of the claim is unarguable or almost incontestably bad. Generally, it appears to me that the SIW and SOC were brought because the 2020 Correction Notice corrected that the Minister was the appropriate authority to give approval to authorize the BFS to offer third party insurance. To that point, the BFS has thrown every other issue they could muster into the claim, most where the claim is unarguable and uncontestably bad.

51. Third, it is clear to me that the BFS are passionate about their purpose and *raison d'etre*. They have provided a historical background about slavery, emancipation, friendly societies

and the honourable intention of offering insurance to the members of friendly societies. However, in the litigation arena, bringing or defending applications requires precision, adherence to the law and procedures and a focus on the issues. A shotgun approach does not work. The BFS submitted a wide range of arguments for the claim and presumably against the strike out, most which were not applicable or persuasive. Thus I was bound to attach little to no weight to extensive criticisms about the 2014 case and 2016 Judgment. I also attached little to no weight to the submissions about the alleged lack of skills of the Minister and the Attorney General and about the Governor not ever considering granting approval to black Bermudians to offer insurance. I also attached little to no weight to the allegations about the BMA, about the Minister not requiring a bankrupt insurance company to do certain things and the allegations that the Government was acting for the benefit of the private interest of the owners of the MIF. The reason for attaching little to no weight to these arguments was because they did not address the specific legal arguments that pertained to the strike out application in this case. The arguments of the BFS were in the main not relevant to the strike out issue and were of little assistance to the Court.

52. In light of those reasons, the Court sought to identify the issues for trial but had great difficulty in doing so. On the contrary, there was little difficulty in identifying the matters that should be disposed of summarily.

BFS's case discloses no reasonable cause of action and/or is scandalous, frivolous and vexatious or unsustainable

53. Fourth, on analysis, most of the claims fell into the category that they disclosed no reasonable cause of action and/or are scandalous, frivolous and vexatious or unsustainable. The analysis by paragraph is set out below.

54. In respect of paragraph 1, about the applicability of the Immigration Act, in my view, I agree with the Solicitor General's reasons that this claim is obviously unsustainable as there is no suggestion that there is a conflict between the BIPA and the 1943 Act. This claim should be struck out.

55. In respect of paragraph 3, about the Minister abdicating his authority, I agree with the Solicitor General that no particulars have been given about the "what and when" of the responsibilities and abdication. Even if they were, I found below that this claim is an abuse of process as it should have been by way of judicial review. On that basis, even an amendment, whilst possibly informative, would not save the claim. I find that there is no reasonable cause of action and this claim would be bound to fail.

56. In respect of paragraph 4, about section 2(3A) of the 1943 Act, in my view this claim is clearly unsustainable. The BFS seem to transmogrify or mutate the application of the section in an inexplicable way of how it applies to the BFS. The BFS did not exist prior to 21 March 1990. This claim is unsustainable and bound to fail.

57. In respect of paragraph 5, about the BFS having a right to not be pursued in relation to a matter in excess of 6 years, no particulars are pleaded and there is no basis for a claim or a cause of action known to law. It should be struck out.

58. In respect of paragraph 6, about the Governor requesting a legal opinion and audited accounts, in my view, the BFS have failed to plead facts for its allegations and even if they did, that would not establish a private right against the Minister. I agree with the Solicitor General that the principles of *Three Rivers District Council and others v Bank of England* apply to establish that invalid administrative action does not give rise to a cause of action in damages to the BFS. In my view there is no reasonable cause of action and it should be struck out.

59. In respect of paragraph 7, about the Limitation Act 1984, I have found below that this is an abuse of process as the Limitation Act 1984 does not apply to a request by a Minister for information to support an application. Additionally, this claim discloses no reasonable cause of action and is unsustainable and a result it should be struck out.

60. In respect of paragraph 11, about the allegation that the Minister was imposing a "discriminatory tax" on the BFS, this claim does not disclose a reasonable cause of action and is clearly unsustainable as the BFS seem to be comparing their treatment by the Minister with the treatment of others. The BFS appear to be alleging unfair treatment which

is a matter to be challenged by way of judicial review. In any event, in my view, this claim disclose no reasonable cause of action and should be struck out.

61. In respect of paragraph 12, about the BFS being harmed, denied their legal right and subject to abuse of process, in my view no facts or particulars have been pleaded other than the references to the 2014 Case and 2016 Judgment. Therefore, there is no reasonable cause of action and the claim should be struck out.

62. Fifth, in following *David Lee Tucker v Hamilton Properties Limited*, for the reasons and analysis I have set out above, I am of the view that for some of the claims there are no reasonable causes of action or they are unsustainable as set out on the face of the pleadings and as such that it is a clear and obvious case for a strike out.

Abuse of Process

63. Sixth, on analysis, most of the claims fell into the category that they were an abuse of process. The analysis by paragraph is set out below.

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.

66. Some of the claims are an abuse of process in that they seek to resolve public law issues by way of a private law claim. In my view, paragraph 3, 4, 6 and 11 of the SOC are such issues where the BFS make complaint about decisions of the Governor or Minister. These issues should have been addressed by way of judicial review within the 6 months' time limit for challenging decisions in judicial review. Further, the BFS make great complaint about the 2020 Correction Notice. I agree with the Solicitor General that no civil wrong flows from the error in the published law. The practical effect is that the Governor was considering the BFS application arising from the 2016 Judgment when it was supposed to be the Minister. This error did not affect the earlier 2016 Judgment in any material way. Since the correction, it has been clarified that the Minister is the authority to process the BFS application. This also does not affect the 2016 Judgment in any material way. The BFS still requires approval from the appropriate authority to undertake third party insurance. If the BFS had issues with the request made by the Governor or the Minister then they could have taken judicial review procedures against them within the time limit for doing so.

67. In my view, there is no merit to the argument by BFS in paragraph 7 of the SOC that the Limitation Act 1984 applies to the requests made by the Minister to provide certain information in support of the BFS application to undertake third party insurance. Mr. Walls

could not show how the Limitation Act 1984 would apply to such a contention only stating that it was his opinion that it does. The Limitation Act 1984 is not within one thousand miles of limiting time for requests of a Minister for information to support an application. It would be an abuse of process for this claim in paragraph 7 to continue.

68. Seventh, in light of the reasoning about abuse of process set out by Subair Williams J in *David Lee Tucker v Hamilton Properties Limited* and Hellman J in *Michael Jones v Stewart Technology Services Ltd* citing Lord Diplock's passage in *Hunter v Chief Constable* in my view the Court holds an inherent power to prevent misuse of its procedure. In my view, the action by BFS is such a case in which I should deploy such inherent power.

Conclusion

69. Generally, in my view, this is a case where it is plain and obvious that it should be struck out. For the reasons above, I grant the Minister's application to strike out the SIW and the SOC.

70. In summary, my findings are as follows;

    a. Paragraph 1 – struck out as the claim is unsustainable and is an abuse of process;
    b. Paragraph 2 – struck out as an abuse of process;
    c. Paragraph 3 – struck out as there is no reasonable cause of action and is an abuse of process;
    d. Paragraph 4 –struck out as the claim is unsustainable and is an abuse of process;
    e. Paragraph 5 – struck out as there is no basis for a claim or a cause of action known to law and is an abuse of process;
    f. Paragraph 6 – struck out as there is no reasonable cause of action and is an abuse of process;
    g. Paragraph 7 – struck out as the claim is unsustainable, there is no reasonable cause of action and is an abuse of process;
    h. Paragraph 8, 9 and 10 – struck out as the claims are an abuse of process;

i. Paragraph 11 – struck out as the claim discloses no reasonable cause of action and is an abuse of process; and

j. Paragraph 12 – struck out as the claim discloses no reasonable cause of action.

71. Unless either party files a Form 31TC within 7 days of the date of this Ruling to be heard on the subject of costs, I direct that costs shall follow the event in favour of the Minister against the BFS on a standard basis, to be taxed by the Registrar if not agreed.

Dated 10 February 2022

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