In The Supreme Court of Bermuda

CIVIL JURISDICTION

2021: No. 417

BETWEEN:

GEOFFREY LYNN RANDALL WILLCOCKS

Plaintiff

-and-

(1) JOSEPH E. WAKEFIELD
(2) WAKEFIELD QUIN LIMITED

Defendants

Before: **The Hon. Chief Justice Hargun**

Appearances: **Mr Geoffrey Willcocks, Plaintiff in Person (assisted by McKenzie Friend Ms Judith Chambers)**

Mr Warren Bank of Cox Hallett Wilkinson Limited, for the First Defendant

Mr Steven White and Ms Izabella Arnold of Walkers (Bermuda) Limited, for the Second Defendant

Dates of Hearing: **16 August 2022**

Date of Judgment: **11 October 2022**

JUDGMENT

HARGUN CJ

Application to strike out the Plaintiff's claim on the ground that the action is time-barred under section 4 of the Limitation Act 1984; relevant principles to be applied by the court; whether the limitation period can be extended under section 23(1) (fraud and fraudulent breach of trust) and section 33(1) (fraud, concealment or mistake); whether the plaintiff should be given an opportunity to replead the statement of claim

Introduction

1. Mr Geoffrey Willcocks ("**the Plaintiff**") is a beneficiary of a trust fund established under the will of his father, Mr Peter Willcocks, who died on 11 July 2005 ("**the Testator**"). The Testator's will dated 20 April 2005 ("**the Will**"), drafted by the law firm Wakefield Quin Limited ("**the Second Defendant**") provided for (i) the appointment of "*the Senior Partner of the law firm Wakefield Quin*" as executor and trustee of the estate ("**the Estate**"); and (ii) the creation of the trust fund in the sum of $480,000 ("**the Trust Funds"** or **"the Loan**"), to be invested for the benefit of the Plaintiff in the form of an annual payment of $30,000 for the duration of his lifetime.

2. At the time of the Testator's death, Mr Joseph Wakefield held the position of "*the Senior Partner of the law firm Wakefield Quin*" and was appointed executor and trustee of the Estate in accordance with the Will. The First Defendant swore an oath of executor on 6 June 2006 and probate was granted by the Supreme Court on 30 June 2006.

3. On 22 October 2010, the First Defendant emailed the accountant of the Second Defendant indicating that he was going to loan the remaining Trust Funds (now standing at $427,259.47) to a Mr Harold Darrell ("**Mr Darrell**") against the deeds of his property at 12 Cedar Avenue in Hamilton ("**the Property**"). Some 7 months after the Trust Funds were transferred to Mr Darrell, Mr Darrell signed a document headed Memorandum of Deposit of Deeds dated 17 May 2011 ("**Memorandum of Deposit**") whereby he agreed that he will deposit the deeds to the Property with the First Defendant when the deeds were received by him from the Bank of Bermuda ("**the Bank**"). The intended object of this document was to provide an equitable mortgage of Mr Darrell's Property as security for the repayment of the Trust Funds.

4. In the event, Mr Darrell defaulted on the Loan and has not made any repayments since 2012. The deeds to the Property were not delivered to the First Defendant because the Bank refused to transfer the deeds to Mr Darrell. The Bank, under an order of this Court, ordered the sale of the Property to satisfy its indebtedness from Mr Darrell and the costs of pursuing legal proceedings against it. It now appears that there is no prospect of recovering any of the Trust Funds from Mr Darrell. The Plaintiff has not received any payments from the First Defendant since 2014 and as a senior citizen is now dependent on Government Financial Assistance for his daily needs.

5. It is in these circumstances that the Plaintiff commenced the proceedings against the First and Second Defendants seeking damages and other relief, principally for breach of fiduciary duties and duty of care, resulting in the loss of the Trust Funds.

6. The present judgment deals with two identical applications made by the First and Second Defendants seeking to strike out the Plaintiff's action under RSC Order 18, Rule 19 and/or the inherent jurisdiction of the Court on the grounds that:

    (1) The action is time-barred under section 4 of the Limitation Act 1984;

(2) The Plaintiff's claim of fraud has not been pleaded in accordance with RSC Order 18, Rule 8;

(3) The claim (i) discloses no reasonable cause of action against the First and Second Defendants, and/or (ii) is scandalous, vexatious and/or frivolous, and/or (iii) otherwise constitutes an abuse of process of the Court under RSC Order 18, Rule 19.

Background

7. The background to this action is set out in the first affidavit of Mr Richard Horseman, a director of the Second Defendant, dated 2 March 2022. As noted above, this action concerns the gift Mr Peter Willcocks left for his son, the Plaintiff, under clause 1 (iv) of the Will which provided as follows:

> *"To my Trustee the sum of Four hundred and eighty thousand dollars ($480,000.00) ("the trust monies") to invest the same for the benefit of my said son Geoffrey Lynn Randall Willcocks and to pay my said son the sum of Thirty Thousand Dollars ($30,000.00) per annum for his lifetime and upon the death of my said son to pay the balance of my trust monies to my grandchildren NEA ALEXANDRA SCARLETT WILLCOCKS and MATTHEW ALEXANDER WISSING in equal shares."*

8. Mr Peter Willcocks was a client of the First Defendant, and the First Defendant drafted the Will for Mr Willcocks. The Will appointed "*the Senior Partner of the law firm Wakefield Quin*" to be the executor of the Will. Mr Willcocks died on 11 July 2005. The grant of probate appointed "*JOSEPH WAKEFIELD the Senior Partner of the law firm Wakefield Quin*" as executor of the Will.

9. On 2 August 2006, the Plaintiff received his first distribution of $43,000 which consisted of his first disbursement of $30,000 under clause 1 (iv) of the Will and $13,000 in respect of his specific gift under clause 1 (iii).

10. On 15 May 2008, the First Defendant retired as a partner of the Second Defendant. He continued to work in an advisory capacity as a consultant for another year until 31 May 2009, at which time he left the employ of the Second Defendant altogether. The First Defendant started his own firm, Wakefield & Associates, in 2010 and was issued with a practising certificate in the name of Wakefield & Associates in 2010 that was then renewed in 2011.

11. In August 2009, the Trust Funds continued to be deposited at Capital G with an interest rate of 1.75%. On 22 October 2010, the First Defendant emailed Anne Walsh, the Second Defendant's accountant, and Mr Horseman advising them that he was going to loan the remaining Trust Funds to Mr Darrell against the deeds to his Property as security. Acting on the First Defendant's instructions, Mrs Walsh produced a cheque in favour of Mr Darrell in the amount of $427,259.47, which was countersigned by Mr Horseman. The entry dated 25 October 2010 in the Second Defendants trust ledger records the disbursement as "*Harold Darrell - Loan against deeds."*

12. For the years 2011 and 2012, Mr Darrell paid to the offices of the Second Defendant funds from two of his businesses, Cedar Construction Co and Designer Flowers Ltd. The funds were allocated to the trust account established by the Second Defendant. In August 2012, Mr Darrell contributed payments of $26,000. The First Defendant personally paid the sum of $4,000 so that the Plaintiff could receive his annual payment of $30,000.

13. Mr Horseman states that in the latter part of 2012, he became aware that Mr Darrell had lost the case against the Bank and by early 2013, he became aware that the Supreme Court had ordered the sale of the Property, on which the Loan was supposedly secured.

14. In January 2013, Mr Horseman became aware of a further judgment in the Supreme Court in which Mr Darrell had failed in his attempt to stay the execution of the sale of the Property and that the Court refused to return the deeds to Mr Darrell.

15. The Plaintiff received his annual payments of $30,000 for 2013 and 2014. No further payments have been received by the Plaintiff as Mr Darrell has made no further payments to the First Defendant under the Loan. The Property, which was supposed to provide security for the Loan, was the subject of an order for sale on the application of the Bank with the result that the Loan to Mr Darrell is entirely unsecured. It is in these circumstances that the Plaintiff commenced these proceedings against the First and Second Defendants on 31 December 2021.

The Pleaded Case

16. The General Endorsement of Claim on the Writ of Summons dated 31 December 2021, states that the Plaintiff's claim is for loss and damage suffered as a result of the breach of fiduciary duty; breach of trust; fraudulent disposal of trust property by trustee; dishonest appropriation of property; and conspiracy to defraud [by] the Defendants.

17. The Statement of Claim dated 14 February 2022, states that the Plaintiff was at all material times a beneficiary of the estate of his father and the beneficiary of a trust created by his Will and that the Will contained a clause that the Senior Partner of the law firm Wakefield Quin or the firm which at the date of his death had succeeded to and carries on its practice be appointed as executor and trustee of his Estate (paragraph 2).

18. In relation to duty of care, it is said that the First and Second Defendants, in their capacity as executor and trustee, owed a duty of care towards the beneficiary of the trust fund, namely the Plaintiff (paragraph 5). Further, the Second Defendant is and was vicariously liable for the acts and omissions of its employees, which includes the First Defendant (paragraph 6). The claim that the Second Defendant is vicariously liable for the acts of the First Defendant has now been abandoned by the Plaintiff.

19. It is said by the Plaintiff that after January 2008, the First Defendant was no longer the Senior Partner of the Second Defendant and that the First Defendant having retired, the Second Defendant then succeeded as executor and trustee of the Estate (paragraph 11).

20. The Plaintiff claims that unbeknownst to him, in October 2010, the First Defendant agreed to "lend" Trust Funds to Mr Darrell, a personal friend and existing client of the First Defendant (who had now left the employ of the Second Defendant) and who was also a former client of the Second Defendant (paragraph 13).

21. In accordance with the Testator's wishes, the Plaintiff was paid $30,000 each year from 2006 until 2014. Since 2014, despite repeated requests, he has received nothing (paragraph 14).

22. None of the Trust Funds transferred to Mr Darrell have ever been recovered by the First Defendant (paragraph 15). The supposed loan was made with no security provided whatsoever and was not an investment for the benefit of the Plaintiff (paragraph 16). Mr Darrell has a long history of litigation and there are a number of judgments against him, including dating back to before he received the Trust Funds (paragraph 17). The First Defendant and the Second Defendant, as attorney and former attorneys for Mr Darrell, were well aware of the said long history of litigation and judgments against Mr Darrell (paragraph 18).

23. The Plaintiff avers that a significant portion of the Trust Funds were used by Mr Darrell to pay legal fees, in particular sums paid on his behalf to a London barrister to secure services in relation to a brief delivered for a hearing held on 5 November 2010 together with subsequent bills and expenses for additional legal services (paragraph 19).

24. Notwithstanding the transfer of the Trust Funds to Mr Darrell in October 2010, the Plaintiff continued to receive $30,000 per year during the years 2010–2014. Although unbeknownst

to him at the time, some of these annual payments were made by the First Defendant out of his own money (paragraph 20).

25. In relation to the supposed "loan" to Mr Darrell, a Memorandum of Deposit ("**the purported mortgage**") addressed to the First Defendant was executed by Mr Darrell in relation to his Property. The purported mortgage is dated 17 May 2011 and was therefore not executed until seven months after the trust money was transferred to Mr Darrell. It is averred by the Plaintiff that the Trust Funds were transferred with no security whatsoever, which is a breach of the Trustees fiduciary duty to the Plaintiff (paragraph 21). Government stamp duty in the sum of $2,136.30 was paid on the purported mortgage by the Second Defendant (paragraph 22).

26. In spite of being described as a Memorandum of Deposit, the purported mortgage was nothing more than an agreement by Mr Darrell to enter into a future mortgage once the title deeds to the Property had been recovered from the Bank. Mr Darrell never recovered the title deeds from the Bank (paragraph 23).

27. The purported mortgage was submitted to the office of the Registrar General on 8 December 2011 and falsely registered in Book of Mortgages No. 773 at page 55 on 9 December 2011. The Plaintiff avers that the purported mortgage is a false instrument and its registration as a mortgage is fraud carried out on the Registrar General as it is not and never has been a valid mortgage. The requisite "Memorandum of Deposit of Deeds" form submitted to the Registrar General was signed by the First Defendant and it, along with the purported mortgage, was submitted for registration by the Second Defendant (paragraph 24).

28. The Plaintiff avers that the purported mortgage was created in an attempt to give legitimacy to the handing over of the Trust Funds, in breach of the trustee's fiduciary duties to the Plaintiff (paragraph 25).

29. The Plaintiff attempted to make contact with the First Defendant on numerous occasions including by going to his place of employment to ask face-to-face why he was no longer receiving these annual payments. The First defendant replied to the Plaintiff by telling him, *inter-alia*, to "*Go to hell and get a job*" and challenge him by asking "*Do you want to take me on?*" (Paragraph 26).

30. Under *Particulars of Negligence/Breach of Duty*, the Plaintiff asserts that the Defendants failed to ensure that the First Defendant was replaced as executor and trustee of the Estate when he ceased to be Senior Partner of the Second Defendant firm (paragraph 29); ceased making annual payments of $30,000 to the Plaintiff since the annual payment due in 2015, which amounted to a breach of fiduciary duty and breach of trust; transferred the trust money to Mr Darrell, which was not acting in the best interest of the Plaintiff, in which amounted to fraudulent disposal of trust property (paragraph 31); transferred the Trust Funds without taking any security, which amounted to a breach of fiduciary duty and breach of trust and fraudulent disposal of trust property (paragraph 32); created a false purported mortgage in an attempt to give legitimacy to Trust Funds, which amounted to breach of fiduciary duty and breach of trust and conspiracy to defraud (paragraph 33); and falsely registered the purported mortgage in the Book of Mortgages, which amounts to conspiracy to defraud (paragraph 34).

31. Under *Particulars of Loss, Injury and Damage*, the Plaintiff states that he is owed $30,000 per annum from 2015 to date in accordance with the trust created by his father plus interest on the said sums (paragraph 35); the Plaintiff is entitled to recovery of the remaining Trust Funds of $427,259.47 in accordance with the trust created by his father (paragraph 36); and that the Plaintiff is a senior citizen who, due to the acts of the First and Second Defendants, is penniless; has been homeless; currently has insecure and unsuitable housing; and is completely reliant on Government Financial Assistance for groceries, the payment of rent, and HIP health insurance.

Strike out application on behalf of the First Defendant

32. Mr Bank, appearing for the First Defendant, referred the Court to *Tucker v Hamilton Properties Limited* [2017] SC (Bda) 110 Civ (11 December 2017) where Subair-Williams J helpfully set out the general principles of law applicable to strike out applications at [11]:

> *"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."*

33. Mr Bank submits that the Plaintiff's claim against the First Defendant is for the alleged misuse of the Trust Funds held by the First Defendant as executor and trustee of the estate of his late father when the payment from the estate of $30,000, paid annually in July of each year, ceased after payment of the July 2014 instalment. The First Defendant's case is that any cause of action accruing to the Plaintiff, arising out of the First and/or Second Defendants' alleged failure to pay over funds from the deceased estate would have accrued no later than July 2015. Mr Bank says that this contention is supported by letter from the Plaintiff addressed to Mr Horseman, dated 6 April 2017 in which the plaintiff acknowledges that "… *It was in July 2015 that I was told that there was no money available to me at all*".

34. Mr Bank contends that the Plaintiff accordingly had 6 years from July 2015 in which to bring an action for negligence or breach of trust against the First Defendant and, at best for the Plaintiff, the final day for him to bring an action would have been at the end of July 2021. As the Plaintiff's Writ of Summons was not issued until 31 December 2021, it is

time-barred, having been issued some 6 months after the limitation period. Mr Bank submits that any cause of action in negligence and/or breach of trust is time-barred and falls to be struck out forthwith, under section 4 of the Limitation Act 1984 ("**the Act**").

35. It seems to the Court that what is said by the Plaintiff in the letter of 6 April 2015, has to be assessed in its proper context. The Plaintiff deals with this letter in paragraph 9 of his affidavit dated 12 May 2022. The Plaintiff's evidence is that he was led to believe that this was a temporary state and it was only a matter of time before the annual payments would resume. In paragraph 9 the Plaintiff states that:

> "*The Defendants make much about having included in my 6 April 2017 letter to the Second Defendant the fact that I was told in July 2015 that there was no money available, but what they fail to mention is that I was led to believe that this was a temporary state as at no time was I told by either of them that my money was permanently gone. Instead, from what I recall, among the things I was told by the Second Defendant were to see the First Defendant and was told by the First Defendant that he didn't have money to give me then but to "call in the fall". I trusted the lawyers who had been entrusted by my father to deal with his estate and relied on the fact that there would be money there once it had been recovered. In that regard the First Defendant told me that the money had been loaned to a Harold Darrell ("HD") (who I did not know, and knew nothing about, but have since then come to learn that he has been involved in litigation for many years, has judgments and liens against him going back to before the trust monies were handed to him, and was made bankrupt a few years ago on the application of the First Defendant) and that he had sued HD for the recovery of the money. I was therefore led to believe that it was only a matter of time before the annual payments would resume but they did not and to this day I have not received the monies due to me. I tried to get clarity by paying another visit to the First Defendant on a later date, but although he was in his office he refused to answer the door and shouted out to me things including "Go to hell" and "Get a job". I was taken aback by what the First*

Defendant had said to me, but was counting on what had been told about checking back and wanted to follow up as instructed."

36. The above evidence from the Plaintiff is consistent with letter from Mr Horseman to the Plaintiff dated 4 April 2013. In that letter Mr Horseman states that:

> *"It appears that the security granted may well be at risk, leaving the Estate exposed. We should clarify however that Mr Darrell has not yet defaulted on the loan and paid the $30,000.00 income payment that was required to be paid last year.* ***Mr Darrell would remain personally liable for the debt to the Estate irrespective of the status of the security and may be able to make the required payments and repay the loan in full from other assets in any event****.*
>
> *…*
>
> ***Again, we would stress that we have no concrete evidence that Mr Darrell will default on the loan and we make no comment in that regard****.*
>
> *…*
>
> *We apologise in advance for any distress this letter may occasion and hope that the matter can be resolved amicably, either by the property being sold in a manner that covers or* ***debts owed by the loan being repaid from other assets of Mr Darrell****."* (Emphasis added)

37. Furthermore, it is the evidence of the Plaintiff that in October 2016, the First Defendant was advising the Plaintiff's McKenzie friend that the First Defendant was trying to sell Mr Darrell's Property by auction and that it should happen soon. At paragraph 13 of his affidavit, the Plaintiff states that:

> "***On or about 17 October 2016****, just after I had returned to Bermuda from Boston…, [Judith Chambers] called the First Defendant at his home… The call was made on a speaker phone, and among other things said by* ***the First defendant was that he was trying to have HD's home (12 Cedar Avenue) auctioned off and that it should happen soon***." (emphasis added)

38. It is also to be noted that in April 2017, the Second Defendant was not taking the position that recovery from Mr Darrell was impossible merely that it was uncertain. By an email sent on 2 April 2017, Mr Horseman advised Ms Chambers that: "*I know Joe started legal proceedings to recover the funds from Darrell but I am also aware that Darrell has several judgments against him* ***so I am not sure what the chances of recovery are****."* (emphasis added)

39. In the circumstances, the Court is unable to conclude that the Plaintiff was told by July 2015 that Mr Darrell would not be able to repay the loan either by the sale of his property or from his other resources. It is the evidence of the Plaintiff that he was "*led to believe that this was a temporary state as at no time I was told by either of them that my money was gone permanently*." The Plaintiff says that the First Defendant in fact told him in July that he did not have the money at that time but to "call in the fall". There is no direct response to this evidence from the First Defendant. It is also the sworn evidence of the Plaintiff that on or about October 2016, the First Defendant advised Ms Chambers that he was trying to have Mr Darrell's Property auctioned off and that it should happen soon. Again, there is no direct evidence from the First Defendant in relation to this assertion by the Plaintiff.

40. The Court of Appeal's decision in *Ronex Properties Ltd v John Laing Construction Ltd* [1983] 1 QB 398, makes it clear that it is only "*in a very clear case*" a court will strike out a claim on the ground that the defendant has a defence under the Limitation Act. At 405A Donaldson LJ stated the position as follows:

> "*Where it is thought to be clear that there is a defence under the Limitation Acts, the defendant can either plead that defence and seek the trial of a preliminary issue or, in a very clear case, he can seek to strike out the claim upon the ground that it is frivolous, vexatious and abuse of the process of the court and sport's application with evidence."*

41. The Court is not satisfied that it is "*very clear*" that by July 2015 it was known to the Plaintiff that Mr Darrell would not be able to repay the Loan either by the sale of his Property or from his other resources. In the circumstances, the Court is unable to conclude at this stage and in this summary proceeding that the Plaintiff's cause of action in this case arose in July 2015 and was statute barred by the end of July in 2021.

42. Further and in any event, in relation to the limitation defence, the Plaintiff also relies upon section 23(1) of the Act (fraudulent breach of trust) and section 33(1) of the Act (fraud, concealment and mistake) in support of his contention that his claim against the Defendants is not statute barred.

Section 23(1) of the Act provides that:

> *"**Time limit; trust property***
>
> *23 (1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action—*
>
> *(a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or*
> *(b) to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his use.*

43. At paragraph 44-008 of *Lewin on Trusts*, 19th edition, the learned editors, dealing with the meaning of "fraud" in this section state that:

> "*Actual dishonesty is required before the exclusion in section 21(1)(a) of the 1980 Act will operate. In that context, it connotes an intention on the part of the trustee to pursue a particular course of action, either knowing that it is contrary to the interests of the beneficiaries or being recklessly indifferent whether it is contrary to their interests."*

44. In *Armitage v Nurse* [1998] Ch. 241, Millett LJ held that "*fraudulent breach of trust*" includes a breach of trust which is reckless. Dealing with the meaning and scope of fraud, Millett LJ held at 251:

> *"The common law knows no generalised tort of fraud. Derry v. Peek, 14 App.Cas. 337 was an action for damages for deceit, that is to say, for fraudulent misrepresentation. In such a case fraud must be proved by showing that the false representation was made knowingly, that is to say, without an honest belief in its truth, or recklessly, that is to say, not caring whether it was true or false."*

45. Dealing with the permitted scope of trustee exemption clauses, Millett LJ held at page 252:

> "*A trustee is said to be accountable on the footing of wilful default when he is accountable not only for money which he has in fact received but also for money which he could with reasonable diligence have received. It is sufficient that the trustee has been guilty of a want of ordinary prudence: see e.g. In re Chapman; Cocks v. Chapman [1896] 2 Ch. 763. In the context of a trustee exclusion clause, however, such as section 30 of the Trustee Act 1925, it means a deliberate breach of trust: In re Vickery; Vickery v. Stephens [1931] 1 Ch. 572. The decision has been criticised, but it is in line with earlier authority: see Lewis v. Great Western Railway Co. (1877) 3 Q.B.D. 195; In re Trusts of Leeds City Brewery Ltd.'s Debenture Stock Trust Deed; Leeds City Brewery Ltd. v. Platts (Note) [1925] Ch. 532 and In re City Equitable Fire Insurance Co. Ltd. [1925] Ch. 407. Nothing less than conscious and wilful misconduct is sufficient. The trustee must be*
> *"conscious that, in doing the act which is complained of or in omitting to do the act which it said he ought to have done, he is committing a breach of his duty, or is recklessly careless whether it is a breach of his duty or not:" see In re Vickery [1931] 1 Ch. 572, 583,* per *Maugham J.*

A trustee who is guilty of such conduct either consciously takes a risk that loss will result, or is recklessly indifferent whether it will or not*." (emphasis added)*

46. At page 260, Millett LJ considered the meaning of fraud in section 21(1) of the Act and held that:

> *"The first is whether section 21(1)(*a*) is limited to cases of fraud or fraudulent breach of trust properly so called, that is to say to cases involving dishonesty. The judge held that it is. In my judgment, he was plainly right for the reasons which he gave. I have explained the meaning of the word "fraud" in a trustee exemption clause, and there is no reason to ascribe a different meaning to the word where it appears in section 21(1)(*a*) of the Limitation Act 1980."*

47. Here, the factual allegations made by the Plaintiff are capable of amounting to recklessness on the part of the First Defendant and any considered view on this issue should, in the judgment of the Court, be taken at the trial of this matter after consideration of all relevant evidence. The factual allegations in support of recklessness include the following:

    (1) The First Defendant paid the Trust Funds to Mr Darrell when there was no enforceable security in place.

    (2) The Memorandum of Deposit was signed by Mr Darrell on 17 May 2011, 7 months after the Trust Funds had been paid to Mr Darrell. During these 7 months, the Loan was entirely unsecured.

    (3) The Memorandum of Deposit merely records Mr Darrell's agreement to deposit the deeds in the future when he recovers them from the Bank. There was no enquiry made by the First Defendant as to whether and if so when, the deeds would be released by the Bank. In fact, the Bank did not release the deeds and the Property was auctioned off to satisfy Mr Darrell's indebtedness to the Bank

and his liability to the Bank in respect of costs. In the result, the First Defendant transferred the Trust Funds to Mr Darrell without any enforceable security.

(4) The First Defendant failed to disclose to the Plaintiff that despite the recording and registration of the Memorandum of Deposit with the Registrar General in the Book of Mortgages under section 3 of the Registrar General (Recording of Documents) Act 1956, there never existed any security which the First Defendant could enforce to ensure repayment of the Trust Funds transferred to Mr Darrell.

(5) The Plaintiff now understands that at the time the First Defendant transferred the Trust Funds to Mr Darrell, Mr Darrell was a client of the First and Second Defendants. In relation to the Loan transaction to Mr Darrell, the First Defendant was in a position of conflict of interest in that (i) as the trustee under the Will the First Defendant owed fiduciary duties to the Plaintiff; and (ii) as the attorney for Mr Darrell the First Defendant also owed fiduciary and duties of care to Mr Darrell. It was not open to the First Defendant to enter into the Loan transaction without the full knowledge and informed consent of all relevant parties including the Plaintiff.

(6) The Plaintiff now understands that it must have been known to the First Defendant that Mr Darrell was in financial difficulties at the time when the First Defendant transferred the Trust Funds to Mr Darrell.

48. In the circumstances, it is plainly arguable that the conduct of the First Defendant in transferring the Trust Funds to Mr Darrell was reckless and accordingly section 23(1) of the Act applies to the facts of this case with the result that no period of limitation prescribed by the Act applies to this action. Accordingly, it cannot be said, as contended by the First Defendant, that it is "very clear" that the Plaintiff's claim is barred by reason of limitation

under the Act. These matters can only properly be determined after full discovery at the trial of this action.

49. Mr Bank, on behalf of the First Defendant, submits that the Plaintiff's allegation of fraud in paragraphs 31, 32, 33 and 34 of the Statement of Claim are without any evidential basis and that they should be struck out.

50. In paragraph 31 of the Statement of Claim, the Plaintiff states that the Defendants transferred the Trust Funds to Mr Darrell, which was not acting in the best interests of the Plaintiff, and which amounted to fraudulent disposal of trust property. The essence of this allegation is that the transfer of Trust Funds in circumstances where the First Defendant was in a position of conflict and where there was no enforceable security for repayment of the Trust Funds was a fraudulent breach of trust in the sense that the First Defendant was recklessly indifferent as to whether it was contrary to the interests of the Plaintiff beneficiary. It would be appropriate for the Plaintiff to make this position clear by an appropriate amendment to paragraph 31 of the Statement of Claim.

51. In paragraph 32 of the Statement of Claim, it is said that the Defendants transferred the Trust Funds without taking any security, which amounted to breach of fiduciary duty and breach of trust and fraudulent disposal of the trust property. The Court repeats its observation and direction in relation to paragraph 31 of the Statement of Claim as set out in the previous paragraph.

52. In paragraph 33 of the Statement of Claim, it is said that the Defendants created a false purported mortgage in an attempt to give legitimacy to the transfer of the Trust Funds, which amounted to breach of fiduciary duty and breach of trust and conspiracy to defraud. It is clear that the Memorandum of Deposit sets out an agreement on part of Mr Darrell to deposit the deeds in the future when received from the Bank. It is an agreement to provide the deeds which, when deposited, would constitute an *enforceable* equitable mortgage. The Court accepts that as a general proposition *an agreement* to deposit title deeds by the borrower, amounts to an equitable mortgage. A written undertaking given in consideration

of a loan to hold title deeds to the order of a lender is an equitable mortgage (See: *Re Heathstar Properties Ltd* [1960] 1 ALL ER 628; and paragraphs 1.22, 1.23 and 1.25 of *Fisher and Lightwood: Law of Mortgage*, 15th edition).

53. The Plaintiff's real complaint is that by having Mr Darrell execute the Memorandum of Deposit and by having that document registered in the Book of Mortgages with the Registrar General the impression was created that the mortgaged Property (12 Cedar Avenue) was available to the First Defendant as security for the Trust Funds advanced to Mr Darrell. However, that impression was entirely false since the deeds were not in the possession of Mr Darrell and were in the possession of another mortgagee of Mr Darrell's Property, namely the Bank. The First Defendant could have no enforceable security against Mr Darrell's Property unless and until Mr Darrell was able to deliver the deeds to the First Defendant. The First Defendant made no enquiries to establish whether the Bank was willing to deliver the deeds to Mr Darrell and thus had no basis for assuming that Mr Darrell could do so. The Plaintiff's real complaint is that this conduct on the part of the First Defendant was reckless, and that the security purported to be evidenced by the Memorandum of Deposit was illusory. It would be appropriate for the Plaintiff to amend paragraph 33 of the statement of claim to reflect this complaint.

54. In paragraph 34 of the Statement of Claim, it is said that the Defendants falsely registered the purported mortgage in the Book of Mortgage, which amounts to conspiracy to defraud. In the Court's view, paragraph 34 of the Statement of Claim does not materially add to the complaint made in paragraph 33. The Court accepts that there is no basis for alleging conspiracy to defraud. Accordingly, paragraph 34 of the Statement of claim should be struck out.

55. The Plaintiff also submits that the limitation defence does not apply by reason of section 33(1) of the Act. Section 33 (1) provides that:

> "***Fraud; concealment; mistake***

33 (1) Subject to subsection (3), where in the case of any action for which a period of limitation is prescribed by this Act, either—

(a) the action is based upon the fraud of the defendant; or

(b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or

(c) the action is for relief from the consequences of a mistake, the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it."

56. At paragraph 44-145 of *Lewin on Trusts* for, 19th edition, the learned editors state that the meaning of the words "deliberately concealed" is broadened by section 32 (2) of the 1980 Act to cover a deliberate breach of duty with the breach is unlikely to be discovered for some time. Deliberate concealment thus comprises (i) a deliberate breach of duty by the defendant which conceals or fails to disclose in circumstances such that it is unlikely to be discovered for some time, and also (ii) the active taking steps to conceal a breach of duty after the defendant becomes aware of it. At paragraph 44-146, the learned editors state that a deliberate failure to disclose a matter where there is a fiduciary or other duty of disclosure of which the trustee is aware will amount to deliberate concealment.

57. In support of the submission that section 33(1) applies to the facts of this case, the Plaintiff relies on the following facts and circumstances:

(1) The First Defendant, as trustee under the Will, failed to disclose to the Plaintiff at the relevant time that Mr Darrell was a personal friend and the client of the First Defendant.

(2) The First Defendant, as trustee under the Will, failed to disclose to the Plaintiff that there was never at any time any enforceable security supporting the repayment of the Trust Funds transferred to Mr Darrell.

(3) The First Defendant failed to disclose to the Plaintiff that despite the recording and registration of the Memorandum of Deposit with the Registrar General in the Book of Mortgages under section 3 of the Registrar General (Recording of Documents) Act 1956, there never existed any security which the First Defendant could enforce in repayment of the Trust Funds advanced to Mr Darrell.

58. The Plaintiff contends that these material facts were only uncovered in 2017 and beyond and it would have been impossible for the Plaintiff to bring his claim prior to that date and on that basis the limitation period will not expire until after 2023 at the earliest. The Court considers that, at this summary proceeding, the Plaintiff's reliance on concealment and section 33(1) of the Act to extend the limitation period is fairly arguable but could and should only finally be determined at the trial of this matter. Accordingly, reliance by the Plaintiff on section 33(1) provides another basis upon which the Court is unable to say that this action should be struck out at this stage on the basis that the defence of limitation is bound to succeed.

59. For the sake of completeness, the Court records that the Plaintiff also submitted that as he was to receive $30,000 per annum, he would have a fresh cause of action each year that the payments were due but not paid. That being the case, the Plaintiff submits, even if the Plaintiff was time-barred with respect to a claim for the money due for 2015 (which he denies), he could not be time-barred for subsequent years as a good early claim for the money due each year as each year passed without him being paid the amount due.

60. The Court is unable to accept this submission. The breach of duty occurred when the First Defendant transferred the entirety of the Trust Funds to Mr Darrell. It is not realistic to say that there was a breach of the First Defendant's fiduciary duties owed to the Plaintiff every

year when he failed to pay the Plaintiff the sum of $30,000 under the Will trust. The Plaintiff's claim is based upon breach of fiduciary duties owed by the First Defendant to the Plaintiff and not upon the breach of contractual obligation by the First Defendant to pay to the plaintiff an annual sum of $30,000.

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

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

63. Furthermore, had any other partner of the Second Defendant been nominated as a co-executor, he or she would have had a complete discretion not to seek the probate. The Court accepts that it is settled law that any executor named in a will may decline to seek a grant of probate, even in circumstances where he or she had previously agreed to act.

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

the Testator. The First Defendant has never been formally removed or renounced as executor. Accordingly, he remains the appointed executor and trustee of the Testator's Estate.

65. The Court is unable to agree with the First Defendant's submission that the Plaintiff's pleaded case ought to be struck out on the basis that the allegations are scandalous and vexatious and constitute an abuse of process. As discussed above, at its core, the Plaintiff's claim against the First Defendant is relatively simple and straightforward. The First Defendant was a trustee of a trust constituted under the Will, of which the Plaintiff was the primary beneficiary. As a trustee, the First Defendant owed the Plaintiff fiduciary duties including duty of care in the management and safekeeping of the Trust Funds. In breach of those duties, the First Defendant loaned the entirety of the Trust Funds to Mr Darrell, who was at the relevant time a client and friend of the First Defendant. The Trust Funds were advanced to Mr Darrell without first ensuring that there was effective and enforceable security for the repayment of the Trust Funds. In the event, Mr Darrell has defaulted on the Loan and he is unable to enforce the security. As a result of the actions of the First Defendant, the Plaintiff has suffered loss and damage. He is now dependent on the Government Financial Assistance to exist.

66. In the circumstances, the Court is unable to agree that the core allegations made by the Plaintiff in this action are scandalous and vexatious and constitute an abuse of process. Accordingly, the Court dismisses the First Defendant's application to strike out the Plaintiff's claim on the grounds set out in the Summons. The Plaintiff's action against the First Defendant must proceed to trial in the ordinary way.

Strike out application on behalf of the Second Defendant

67. On the limitation defence, the Second Defendant submits that the claim in relation to breach of fiduciary duty and breach of trust is time-barred based upon the evidence that (a) in a letter dated 4 April 2013, the Second Defendant advised the Plaintiff that the Trust Funds were no longer available; and (b) in a letter dated 6 April 2017, the Plaintiff stated that in

July 2015 he was made aware of the depleted Trust Funds, citing that the First Defendant told him "*it's all gone*" which was "*due to a loan made to a Harold J Darrell that had not been repaid*".

68. The Court's conclusion in relation to the limitation issue is set out at paragraphs 33 to 48 above. Accordingly, the Court is not prepared to strike out these proceedings at this stage and in this summary fashion on the ground that there is "very clear" limitation defence available to the Second Defendant.

69. The Court accepts Mr White's submission, on behalf of the Second Defendant, that extension of limitation period provided by section 23(1) (fraudulent breach of trust) and section 33(1) (fraud, concealment, or mistake) cannot, on the case is presently pleaded against the Second Defendant, apply to it.

70. The Court has dealt with the allegations of fraud and fraudulent breaches of trust at paragraphs 49 to 54 above.

71. Mr White submits that the Plaintiff's pleaded case against the Second Defendant is not only vague in material parts but incoherent. Mr White argues that where the Statement of Claim is so deficient in particulars that a defendant cannot tell what is the case he has to meet then it becomes vexatious pleading and should not be allowed to stand.

72. Mr White also submits that it is evident that the addition of the claim of fraud is frivolous and vexatious. The Plaintiff's claim is overly vague and incoherent and must therefore be struck out as frivolous and vexatious and on the grounds that no reasonable cause of action has been disclosed.

73. Mr White makes the point that the duties pleaded in the Statement of Claim in paragraphs 5, 6 and 11 are the duties of an executor and trustee. As, for the reasons given in paragraphs 61 to 64 above, the Second Defendant is incapable of assuming the status of an executor and trustee, it is unclear how these duties apply to the Second Defendant. Mr White submits

that the Statement of Claim is seriously deficient and that there is no clear duty pleaded against the Second Defendant and there is no relevant breach pleaded in respect of any such duty.

74. In the Court's view, there is force in the submissions made by Mr White. The difficulty in the pleaded case is that it makes no relevant distinction between the First and Second Defendants. It may be that the case is so pleaded by the Plaintiff on the assumption that the Second Defendant succeeded as executor and trustee on the retirement of the First Defendant. For the reasons set out at paragraphs 61 to 64 above, the Court has held that it is not possible, as a matter of law, for the Second Defendant to assume the status of executor and trustee. In the circumstances, it is essential that the case against the First and Second defendants be separately and distinctly pleaded. The Second Defendant is entitled to know (i) in what capacity the action is being pursued against it by the Plaintiff; (ii) what duties the Plaintiff alleges are owed by the Second Defendant to the Plaintiff; (iii) how and when it is alleged that those duties have been breached by the Second Defendant; and (iv) whether and if so what damage flows from the breaches of duty allegedly committed by the Second Defendant. In relation to the capacity of the Second Defendant it is noted that the Second Defendant was rendering invoices "*for professional services*" and those invoices should be open for inspection by the Plaintiff under, *inter alia*, RSC Order 24 rule 10.

75. Mr White submits that the appropriate course of action for the Court to take in the circumstances is to strike out the Plaintiff's claim against the Second Defendant. The Plaintiff, through his McKenzie friend, urges the Court that if there is such a deficiency, the Plaintiff should be given an opportunity to re-plead to rectify these issues. The Court bears in mind that the Plaintiff is a litigant in person and has obviously suffered much as a result of the matters and events outlined in this judgment. In the end, and in the exercise of its discretion, the Court has come to the view that the Plaintiff should be given an opportunity to amend its existing pleaded case against the Second Defendant so that it complies with the Rules of the Supreme Court and the deficiencies outlined above. The Second Defendant shall have 6 weeks from the date of this judgment to file an amended

Statement of Claim. In the event the Plaintiff fails to file an amended Statement of claim within the next 6 weeks, which complies with the Rules of the Supreme Court and the deficiencies outlined above, the action against the Second Defendant shall be struck out.

Conclusion

76. The Court dismisses the First Defendant's application to strike out these proceedings on the grounds set out in its summons dated 16 March 2022. In relation to the application made by the Second Defendant the court gives leave to the Plaintiff to file an amended Statement of Claim which complies with the Rules of the Supreme Court and the deficiencies outlined in this judgment. In the event the Plaintiff fails to file an amended Statement of Claim, within the next 6 weeks, which complies with the Rules of the Supreme Court and the deficiencies identified in this judgement, the action against the Second Defendant shall be struck out.

77. The Court will hear the parties in relation to the issue of costs, if required.

Dated this 11th day of October 2022

NARINDER K HARGUN
CHIEF JUSTICE