IN THE SUPREME COURT OF BERMUDA

CIVIL JURISDICTION

2010: No. 55

CARLOS MEDEIROS **Plaintiff**

-v-

ISLAND CONSTRUCTION SERVICES CO. LTD. **1st Defendant**

-and-

ANTWONE LEROY SIMONS **2nd Defendant**

-and-

THE BERMUDA HOSPITALS BOARD
3rd Defendant/3rd Party

-and-

DR STEVEN DORE
4th Defendant/1st 4th Party

-and-

DR. MATTHEW ARNOLD
5th Defendant/2nd 4th Party

RULING ON STRIKE-OUT APPLICATION

(in Chambers)

Strike-out application-claim in negligence-contractual relationship-whether concurrent liability in contract and tort exists-judicial precedent

Date of hearing: November 9th, 2016

Date of Ruling: November 25th, 2016

Mr. Craig Rothwell, Cox Hallett Wilkinson Ltd., for the Plaintiff
Mr. Jeffrey Elkinson and Mr. Scott Pearman, Conyers Dill & Pearman Ltd., for the Defendants
Mr. Allan Doughty, Beesmont Law Limited, for the 3rd Defendant/3rd Party ("BHB")
Mr. Paul Harshaw, Canterbury Law Ltd., for the 4th Parties and 5th Defendants

The Application

1. By a Summons dated June 22, 2016, BHB applies to strike-out the Plaintiff's Amended Generally Endorsed Writ and Amended Statement of Claim, as they relate to the 3rd Defendant/3rd Party and the 1st and 2nd Defendants' Amended Third Party Notice on the grounds that they disclose no reasonable cause of action. The application arises against the following background, which is helpfully set out in Mr Doughty's Written Submissions.

2. The Plaintiff was seriously injured in a road traffic accident when his vehicle was struck by a truck owned by the 1st Defendant and driven by the 2nd Defendant. The Defendants admitted negligence but denied responsibility for the damage sustained by the Plaintiff subsequent to the operation on the Plaintiff on 10 December 2008. They issued a Third Party Notice against BHB on or about March 16, 2011 (which was amended on or about April 27, 2011) alleging that BHB was negligent. An indemnification was sought in respect of damage sustained by the Plaintiff "[a]*s a consequence of the negligence and breach of duty of the Third Party*".

3. Paragraph 7 of BHB's Amended Defence dated June 21, 2012 averred as follows:

> "*(d) That the relationship between the Plaintiff and the First Fourth Party and Second Fourth Party was contractual, therefore any cause of action against the First Fourth Party and Second Fourth Party by the Plaintiff should be pursued as being a breach of contract. The relationship between the Plaintiff and the Third Party was the subject of a separate contract whose implied terms allowed for the provision of drugs, dressings and whatever else was necessary to assist the patient in his recovery from the surgery. As the Third Party is a stranger to the contract between the Plaintiff and the First Fourth Party and Second Fourth Party, it is averred that the Third Party cannot be held liable for any breach of duty which did in fact transpire.*"

4. This plea formally addressed the liability to the Plaintiff only, but by necessary implication addressed the corresponding liability to the 1st and 2nd Defendants as well, being pleaded in response to their Third Party Notice. BHB's Re-Amended Fourth Party Notice advanced the central plea that its relationship to the surgeons was merely contractual so that it could not be vicariously liable for their negligence in tort.

5. On January 22, 2014, I ruled that BHB owed the Plaintiff a non-delegable duty of care following, *inter alia*, the decision of Hellman J in *Williams-v- Bermuda Hospitals*

Board [2013] Bda LR 1 (at paragraphs 85-86). Hellman J's finding that this duty of care was breached (at paragraph s 93-108) was upheld by the Court of Appeal for Bermuda (Sir Austin Ward JA) and the BHB cross-appeal on the scope of the duty of care was summarily dismissed (*Bermuda Hospitals Board-v-Williams* [2014] Bda LR 22 at paragraphs 43-44). On July 21, 2014, the Plaintiff himself joined BHB as 3rd Defendant alleging, *inter alia*, the breach of a non-delegable duty of care. On August 8, 2014 BHB sought Further Better Particulars of the Plaintiff's claim against it. On December 10, 2014 the limitation period for a contractual claim by the Plaintiff against BHB expired. On April 8, 2016, the Plaintiff finally served his Further and Better Particulars. Mr Doughty explained that service of these Particulars, combined with the long awaited judgment of the Judicial Committee of the Privy Council in *Williams-v- Bermuda Hospitals Board* [2016] UKPC 4 (January 25, 2016, a judgment which dealt solely with the issue of causation), focussed the attention of BHB once more on the significance of the character of the Third Party claim. BHB filed its Amended Defence to the Amended Statement of Claim on or about May 20, 2016.

6. It was in short contended by BHB in its present application that both the Amended Writ and Statement of Claim and the Amended Third Party Notice were liable to be struck-out because they pleaded the wrong claim, namely a claim in tort rather than a claim in contract.

The respective arguments

7. Mr Doughty argued that "*if one has a claim against a professional man with whom one holds a contract, a claim for breach of duty against that professional man should only be brought in contract*" ('Written Submissions of the Third Party/Third Defendant', paragraph 3.2). He relied in this regard in terms of broad principle upon the speech of Lord Scarman in *Tai Hing Cotton Mills-v-Liu Chong Hing Bank* [1986] AC 80 at 107 (Privy Council) as approved by the Court of Appeal for Bermuda in *White-v- Conyers Dill & Pearman* [1994] Bda LR 9. More specifically, by way of illustrating the application of these general principles to the particular context of medical negligence claims, BHC's counsel relied upon their application by Hellman J in *Snowden-v-Emery, Dyer and Bermuda Hospitals Board* [2014] Bda LR 92 (at paragraph 52).

8. Mr Elkinson, after (to my mind unconvincingly) contending that a claim in contract had already been pleaded, vigorously contested the umbrella principle contended for by BHC's counsel. His arguments were adopted by the Plaintiff's counsel. In paragraph 7 of his 'Submissions of the First and Second Defendants', he argued that the true legal position was that "*a party can, in addition to its contractual duties, have also owed a concurrent duty of care in tort. However, the content of that duty of care would be determined by the terms of the contractual relationship.*" The current Bermudian law position was primarily supported by reference to the persuasive House of Lords decision in *Henderson et al-v-Merrett Syndicates Ltd. et al* [1995] 2 AC 145, the binding Privy Council decision in *FFSB Limited-v-Seward & Kissel LLC* [2007] WL 711470 and my own decision in *Patton and Cook-v-Bank of Bermuda Limited* [2011] Bda LR 34. The English law position was clearly articulated by '*Clerk & Lindsell on Torts*', 21st edition (2014) at paragraph 10-06:

> "*…Since Henderson, it has been accepted that any professional is prima facie liable to his client in both contract and tort. However, a converse point should be noted; even if there is a contractual duty to the client, the duty in tort will not extend further than the contractual one, save in very exceptional circumstances.*"

Legal findings

9. Mr Doughty seemed to beat the nationalist Bermudian law drum while Mr Elkinson seemed to raise the imperial English law flag. This application, however, turns on more prosaic orthodox legal considerations. The starting point in any analysis of decided cases is to clarify what the authorities relied upon truly decided. Common law courts are primarily concerned with the task of applying general legal principles to the facts of the case before them. It is often easy to blur the lines between binding operative findings (*ratio decidendi*) and non-binding other judicial observations (*obiter dicta*). It is also important to accurately identify the true nature of findings in decided cases, as well as to take into account the extent to which the force of the findings reached and relied upon may be weakened by the lack of full argument.

10. When all of these factors are taken into account and the key authorities relied upon by Mr Elkinson are carefully considered, it ultimately becomes apparent that there is no compelling support at all for the proposition that concurrent liability in contract and tort does not exist under Bermuda law. On the contrary, there is binding authority in support of the contrary position.

Tai Hing Cotton Mills-v-Liu Chong Hing Bank [1986] AC 80

11. The *Tai Hing* case's factual and legal focus is best illustrated by the opening words of Lord Scarman's judgment (at 96-97):

> "*This is an appeal by a company against a decision of the Court of Appeal in Hong Kong whereby its action to recover from three banks sums of money alleged to have been wrongfully debited against its current account with each was dismissed. The appeal raises a question of general principle in the law governing the relationship of banker and customer. Additionally, the appeal calls for consideration of a number of questions arising from the particular circumstances of the company's business relationship with each of the three banks.*"

12. The central issue in controversy was not whether a party to a contract could only sue in contract and not in tort, but whether they could use the law of tort to impose a broader extent of liability than the contractual counterparty had agreed to accept. The crucial passage in Lord Scarman's judgment (at 107) subsequently approved by the Bermudian Court of Appeal reads as follows:

"*Their Lordships do not believe that there is anything to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship. This is particularly so in a commercial relationship. Though it is possible as a matter of legal semantics to conduct an analysis of the rights and duties inherent in some contractual relationships including that of banker and customer either as a matter of contract law when the question will be what, if any, terms are to be implied or as a matter of tort law when the task will be to identify a duty arising from the proximity and character of the relationship between the parties, their Lordships believe it to be correct in principle and necessary for the avoidance of confusion in the law to adhere to the contractual analysis: on principle because it is a relationship in which the parties have, subject to a few exceptions, the right to determine their obligations to each other, and for the avoidance of confusion because different consequences do follow according to whether liability arises from contract or tort, e.g. in the limitation of action. Their Lordships respectfully agree with some wise words of Lord Radcliffe in his dissenting speech in Lister v. Romford Ice and Cold Storage Co. Ltd. [1957] A.C. 555. After indicating that there are cases in which a duty arising out of the relationship between employer and employee could be analysed as contractual or tortious Lord Radcliffe said, at p. 587:*

> *'Since, in any event, the duty in question is one which exists by imputation or implication of law and not by virtue of any express negotiation between the parties, I should be inclined to say that there is no real distinction between the two possible sources of obligation. But it is certainly, I think, as much contractual as tortious. Since in modern times the relationship between master and servant, between employer and employed, is inherently one of contract, it seems to me entirely correct to attribute the duties which arise from that relationship to implied contract.'*

Their Lordships do not, therefore, embark on an investigation as to whether in the relationship of banker and customer it is possible to identify tort as well as contract as a source of the obligations owed by the one to the other. Their Lordships do not, however, accept that the parties' mutual obligations in tort can be any greater than those to be found expressly or by necessary implication in their contract." [Emphasis added]

13. I find that that the *Tai Hing* case did not establish the proposition that wherever parties are in a contractual relationship, the only claim which may be asserted is a contractual one. It is also important to note that *Tai Hing* was not deciding a matter of Hong Kong (or Commonwealth) law but was deciding issues which the parties were agreed were governed by English law. As Lord Scarman noted at page 108:

"*It was suggested, though only faintly, that even if English courts are bound to follow the decision in Macmillan's case the Judicial Committee is not so constrained. This is a misapprehension. Once it is accepted, as in this case it is, that the applicable law is English, their Lordships of the Judicial Committee will follow a House of Lords' decision which covers the point in*

> *issue. The Judicial Committee is not the final judicial authority for the determination of English law. That is the responsibility of the House of Lords in its judicial capacity.*"

14. This legal context is crucial to assessing the status of this Privy Council decision today. The Privy Council decision never purported to decide anything other than the English law position. So if the English law position has subsequently changed, so has the effect of the *Tai Hing* decision.

White-v-Conyers Dill & Pearman [1994] Bda LR 9

15. Ground J (as he then was) at first instance struck out the claim against the law firm on the grounds that it failed to plead a cause of action which was not time-barred. The claim was pleaded in tort. The opening paragraph of the Court of Appeal judgment summarised the holdings as follows:

> "*On the 25th day of September 1993 Ground J. struck out the writ and the Statement of Claim herein as vexatious and an abuse of the process, and dismissed the action with costs to the defendants. The basis for the learned judge's decision was that the Amended Statement of Claim failed to state a cause of action which was not clearly statute barred under the Limitation Act 1984. He further held that any cause of action would have been completely overtaken and expunged by the novation of the original note in July 1989 with which the defendants were not involved."*

16. On appeal the issue of an alternative claim in contract was only incidentally considered as the strike-out application was primarily determined on limitation grounds. As da Costa (Acting President) observed at page 7:

> "*The stark fact was that whether Mr. McMillan, who appeared for the appellant, pitched his case in contract or in tort he faced the obstacle of the statute dealing with the limitation of actions.*"

17. Approval of the *Tai Hing* case was, in my judgment, strictly *obiter*, and not binding on this Court. It did not form the basis of the strike-out decision at first instance or on appeal. This may be why the Court of Appeal, in distinguishing the English law position from the Bermudian law position as supposedly established by the *Tai Hing* case, failed to appreciate that the Privy Council was, atypically, deciding an English law question. The Court of Appeal acknowledged that English case law post-*Tai Hing* clearly established that a solicitor could be sued in contract or tort and assumed that the Bermudian position was different without actually deciding the issue. As da Costa JA observed (at pages 4-5):

"*There was in fact an additional ground for striking out the amended Statement of Claim <u>but this was not pursued either below or before us</u>.*

In England it appears to be still the law that a solicitor may be liable to his client both in contract and in tort for negligence in failing to exercise a reasonable amount of skill, diligence and knowledge…

In our view however so far as Bermuda is concerned, the point has now been settled by the decision of the Privy Council in Tai Hing v Liu Chong Hing Bank (1986) A.C. 80…" [Emphasis added]

18. I accordingly am bound to conclude that *White-v-Conyers Dill & Pearman* is not binding authority for the proposition that where a contractual relationship exists no concurrent tortious claim may be pursued.

<u>Snowden-v- Emery et al [2014] Bda LR 92</u>

19. *Snowden and Emery* is the only case which directly supports Mr Doughty's central submission, a holding which he helped to establish, as counsel for BHB in that case, apparently with no or no effective opposition. Hellman J found, after citing *Tai Hing* and *White-v-Conyers Dill & Pearman* but without recording any arguments or referring to any authorities in opposition to this proposition:

"*52. The relationship between doctor and patient is not the same as the relationship between banker and customer or attorney and client. But I can see no basis, where that relationship is governed by contract, for holding that concurrent duties in tort and contract exist in the one case if they do not exist in the others. I am therefore satisfied that in Bermuda, where the doctor/patient relationship is governed by a contract between them, a claim by the patient that the doctor has breached her duty of care towards that patient lies solely in contract.*"

20. For the reasons set out above in discussing *Tai Hing* and *White-v-Conyers Dill & Pearman* and set out below in considering three important authorities to which Hellman J ought to have been but was not referred, I respectfully decline to follow this aspect of *Snowden-v-Emery*.

<u>Henderson and Others-v- Merrett Syndicates Ltd et al [1995] 2 AC 145</u>

21. The House of Lords decision in *Henderson* clearly establishes the current English law position that a contractual relationship is no bar to concurrent tortious liability the scope of which is not inconsistent with the terms of the contract. The Judicial Committee in *Tai Hing* was merely articulating the English law position and accepted that the House of Lords had ultimate competence to determine matters of English law. Accordingly, the *dicta* in *Tai Hing* deprecating the idea of concurrent liability in contract and tort issue ceased to have even persuasive force after this 1995 decision.

The following passage in Lord Goff's speech (at 186) and to which Mr Elkinson referred suffices to make good this point:

> "*It is however right to stress, as did Sir Thomas Bingham M.R. in the present case, that the issue in Tai Hing was whether a tortious duty of care could be established which was more extensive than that which was provided for under the relevant contract.*
>
> *At all events, even before Tai Hing we can see the beginning of the redirection of the common law away from the contractual solution adopted in Groom v. Crocker [1939] 1 K.B. 194, towards the recognition of concurrent remedies in contract and tort.*"

FFSB Limited-v- Seward and Kissel LLP [2007]UKPC 16

22. The Privy Council decision in *FFSB Limited* concerned whether or not jurisdiction had been established for obtaining leave to serve a defendant abroad via the "*tort committed within the jurisdiction*" gateway under Order 11 of the Rules of the Supreme Court of The Bahamas. The proposition of concurrent duties being owed in contract and in tort under Bahamian law was not even the subject of any dispute. Lord Hoffman stated as follows:

> "*24. In the present case, there was a contractual relationship between the Fund and S & K. That was evidenced by the fact that S & K charged the Fund for its services. Mr Smith accepts that, in addition to its contractual duties, S & K could also have owed the Fund a concurrent duty of care in tort: see Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp [1979] Ch 384; Henderson v Merrett Syndicates Ltd [1995] 2 AC 145. But the content of that duty of care would be determined by the terms of the contractual relationship (see Lord Browne-Wilkinson in Henderson at p. 206) and therefore the breach of duty cannot be said to arise 'independently of contract*'."

23. This legal finding formed part of the Privy Council's decision that the judge was right to grant leave to serve out in respect of a negligence claim. It is binding on Bermuda's courts albeit not a decision on appeal from Bermuda as the Court of Appeal for Bermuda have confirmed: *Grayken-v-Grayken* [2011] Bda LR 14 at paragraph 18 (Zacca P).

Patton and Cook-v- The Bank of Bermuda Limited [2011] Bda LR 34

24. The third case to which Hellman J ought to have been referred in *Snowdon* but was not is my own decision in *Patton and Cook*. My primary finding was that the contractual terms between the parties had excluded any tortious liability in

negligence. In that case, it is true, I was myself not completely immune to the charms of *Tai Hing* and cited it with only somewhat qualified approval:

> "24. *Outside of the sort of context considered by the House of Lords in Henderson v Merrett Syndicates Ltd. [1995] 2 AC 145, which is far removed from the present case, the utility of seeking to rely upon a concurrent tortious duty of care owed between parties to a contract will ordinarily be doubtful. As Lord Scarman opined in a Privy Council decision which has been followed in Bermuda at all court levels, Tai Hing Cotton Mill Ltd. v Liu Ching Hong Bank Limited [1986] AC 80 at 107B:*
>
> > *'Their Lordships do not believe that there is anything to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship. This is particularly so in a commercial relationship."*"

25. However my primary finding on this issue in *Patton and Cook* is what I adopt as reflecting the correct Bermudian law position for the purposes of the present case:

> "*23…. In fact the true legal position is, as Mr. Hargun contended, that concurrent duties may be owed in contract and tort in the sense that (a) a plaintiff may choose whether to sue in contract or tort, but (b) the extent of tortious liability will be qualified by the extent of the contractual liability. As Lord Goff opined (giving the leading judgment of a unanimous House of Lords) in Henderson v Merrett Syndicates Ltd. [1995] 2 AC 145 at 194:*
>
> > *'…I do not find it objectionable that the claimant may be entitled to take advantage of the remedy which is most advantageous to him, subject only to ascertaining whether the tortious duty is so inconsistent with the applicable contract that, in accordance with ordinary principle, the parties must be taken to have agreed that the tortious remedy is to be limited or excluded…*"

Conclusion

26. The 1st and 2nd Defendants' Third Party Notice does disclose a reasonable cause of action because both they and the Plaintiff were entitled to advance a claim in negligence against BHB despite the existence of a concurrent contractual relationship between the latter two parties. The strike-out Summons is dismissed.

27. Unless any party applies within 21 days by letter to the Registrar to be heard as to costs or the terms of the final Order, BHB shall pay the costs of the Plaintiff and the 1st and 2nd Defendants, to be taxed if not agreed.

Dated this 25th day of November, 2016

IAN RC KAWALEY CJ