



# In The Supreme Court of Bermuda

## COMMERCIAL JURISDICTION

2018 No: 74

**BETWEEN:**

**FIDELITY NATIONAL TITLE INSURANCE COMPANY**

Plaintiff

**And**

**TROTT & DUNCAN LIMITED**

Defendant

## RULING

Dates of Hearing: Wednesday 23 October 2019

Date of Judgment: Friday 17 January 2020

Plaintiff: Mr. Keith Robinson / Mr. Sam Stevens (Carey Olsen Bermuda Limited)

Defendant: Mr. Mark Diel / Ms. Katie Tornari (Marshall Diel & Myers Limited)

*Application to Stay Proceedings  
Court's Powers of Case Management  
Exercise of the Court's Powers of Inherent Jurisdiction*

RULING of Shade Subair Williams J

### **Introduction**

1. This Court is presently concerned with an application brought by the Defendant for a stay of these proceedings which were commenced by a Specially Indorsed Writ of Summons filed on 13 March 2018 followed by an Amended Statement of Claim filed on 28 August 2018.

2. The Plaintiff's pleaded case is built on allegations of contractual breaches of a retainer agreement for client legal services and professional negligence asserting that the Defendant failed to exercise the care and skill to be expected of reasonably competent attorneys in the performance of their duties pursuant to the retainer. In my previous ruling on a strikeout application in these proceedings (*Fidelity National Title Insurance Company v Trott & Duncan* [2019] Bda LR 8), I detailed the factual and procedural background which need not be fully restated, save to say that this action fits into a wider puzzle of litigation with pieces in Bermuda, London and New York.
3. The Defendant's stay application is in the form of an amended summons dated 21 August 2019 and is prayed in the following terms:

*That these proceedings be stayed generally pursuant to the Court's inherent jurisdiction and in furtherance of the overriding objective, pending determination by the Supreme Court of Bermuda (and any appeal Court) of the proceedings with case reference Mexico Infrastructure Finance LLC v The Corporation of Hamilton, Civil Jurisdiction 2017 No. 295 and the proceedings currently pending in the United States District Court Southern District of New York with case reference Mexico Infrastructure Finance LLC v The Corporation of Hamilton and The Bank of New York Mellon, No. 17-cv-06424 (VSB)....*

4. The summons is supported by the third affidavit of Mr. Delroy Duncan, a Director of the Defendant law firm. The opposing side also filed affidavit evidence from Mr. Rodolfo Rivera, the Chief International Counsel and Vice President of the Plaintiff Company.
5. Having heard oral arguments from Counsel for both sides, I reserved my ruling which I now provide together with these reasons.

### **Summary of the New York Proceedings and the Mortgage Action**

6. Mr. Duncan explained in his evidence that the proceedings in *Mexico Infrastructure Finance LLC v The Corporation of Hamilton and The Bank of New York Mellon*, No. 17-cv-06424 (VSB) ("the New York proceedings") started with a Complaint issued by Mexico Infrastructure Finance LLC ("MIF") on 19 July 2017 against the Bank of New York Mellon ("the BNYM") and the Corporation of Hamilton ("the COH"). The allegations made against the COH are for breach of an escrow agreement which set forth the terms of the disbursement of the \$18,000,000.000 loan proceeds ("the Escrow Agreement"), and for negligent and fraud related claims. A similar platform of complaints is mounted against the BNYM, save any allegations of fraud.

7. A detailed narrative on the New York proceedings is unwarranted as the Defendant's Counsel accepted, notwithstanding the passage at paragraph 20 of Mr. Duncan's third affidavit, that those proceedings have no potential of being dispositive of these proceedings. This is explained further by Mr. Rivera at paragraph 6 of his third affidavit where he states:

*This statement is incorrect (referring to paragraph 20 of Mr. Duncan's third affidavit). The quantum of MIF's claim for damages in the New York Proceedings against the Corporation and the Bank of New York Mellon is \$13 million plus interest. As pleaded at paragraph 37 of Fidelity's Re-Amended Statement of Claim, under Fidelity's Title Policy (Policy), it may be liable to MIF for losses up to \$18,000,000.*

8. As for the Bermuda proceedings brought by MIF against the COH ("the Mortgage action"), I provided the following summary of MIF's pleaded case in my ruling in *Mexico Infrastructure Finance LLC v The Corporation of Hamilton* [2020] SC (Bda) 3 Civ (17 January 2020) at paras 8-16:

***Summary of the Plaintiff's Pleaded Case and the Proposed Amendments***

8. *The Plaintiff's currently pleaded case comprises of a contractual claim for breach of the mortgage agreement under which the Defendant conveyed the Car Park to the Plaintiff. On the proposed draft of the amended writ, the Plaintiff seeks to add a claim of negligence for breach of duty of care.*
9. *The contractual claims in the Writ are in part tied to clauses 2(a), 4(a) and 7 of the Mortgage.*
10. *Relying on clause 2(a), the Plaintiff avers that the Defendant covenanted to observe and perform its obligations under the Guarantee which entailed payment upon demand of all sums due under the terms of the Guarantee and under the terms of the loan agreement dated 9 July 2014 ("the loan agreement").*
11. *Invoking clause 4(a), the Plaintiff seeks to hold the Defendant to its agreement that if PLV defaulted on the loan, the Plaintiff would be lawfully entitled to sell the Property and appoint a receiver.*
12. *In relation to clause 7, the Plaintiff avers that the Defendant represented and warranted that it had the necessary power and capacity to enter the Mortgage.*

13. *The proposed amendment at paragraph 3 also deals with the Defendant's representations on its capacity to enter the relevant agreements. It states:  
At all material times the Defendant represented to the Plaintiff that it had the capacity to enter into the Guarantee and Mortgage and obtained an opinion to this effect from its attorneys, Terra Law Limited, upon which it was expressly agreed by the Defendant that the Plaintiff could rely ("Capacity Statements").*
14. *The proposed amendment at paragraph 6 aligns with paragraph 3 on the subject of the Defendant's representations on capacity. At paragraph 9 the Plaintiff seeks to include an assertion that the Defendant knew or ought to have known that the Plaintiff would and did rely on those 'Capacity Statements'.*
15. *The intended new claim of tortious negligence appears at paragraphs 11 and 16 where the Plaintiff says that the Defendant owed a duty of care in making the 'Capacity Statements' and that in respect of the Guarantee, those statements were made wrongly and negligently, amounting to a breach of duty of care.*
16. *At paragraph 15 and in the prayer, the Plaintiff seeks equitable title to the Property, in the event that the Court finds that the Mortgage is not legally valid and enforceable. The Plaintiff further seeks new declaratory relief that the Defendant is estopped from denying the validity of Mortgage given that this was not pleaded in case No. 241 of 2016. A new claim for damages is also sought by the Plaintiff.*

9. In the above ruling from the Mortgage action, I granted the Plaintiff's application to amend the writ in the fullness of the terms proposed.

### **The Court's Inherent Jurisdiction and Case Management Powers to Grant a Stay of Proceedings**

10. The Defendant has asked the Court to have regard to its general case management powers under the Overriding Objective and pursuant to its inherent jurisdiction.
11. The Overriding Objective is stated at RSC Order 1A:

#### *1A/1 The Overriding Objective*

- (1) These Rules shall have the overriding objective of enabling the court to deal with cases justly.*
- (2) Dealing with a case justly includes, so far as is practicable-*
  - (a) ensuring that the parties are on equal footing;*
  - (b) saving expense;*

*(c) dealing with the case in ways which are proportionate-*

- (i) to the amount of money involved;*
- (ii) to the importance of the case;*
- (iii) to the complexity of the issues; and*
- (iv) to the financial position of each party;*

*(d) ensuring that it is dealt with expeditiously and fairly; and*

*(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases*

*1A/2 Application by the Court of the Overriding Objective*

*2 The court must seek to give effect to the overriding objective when it-*

- (a) exercises any power given to it by the Rules; or*
- (b) interprets any rule.*

*1A/3 Duties of the Parties*

*3 The parties are required to help the court further the overriding objective.*

*1A/4 Court's Duty to Manage Cases*

*4 (1) the court must further the overriding objective by actively managing cases.*

*(2) Active case management includes-*

- a) encouraging the parties to co-operate with each other in the conduct of the proceedings;*
- b) identifying the issues at an early stage;*
- c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;*
- d) deciding the order in which issues are to be resolved;*
- e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure;*
- f) helping the parties to settle the whole or part of the case;*
- g) fixing timetables or otherwise controlling the progress of the case;*
- h) considering whether the likely benefits of taking a particular step justify the cost of taking it;*
- i) dealing with as many aspects of the case as it can on the same occasion;*
- j) dealing with the case without the parties needing to attend at court;*
- k) making use of technology; and*
- l) giving directions to ensure that the trial of a case proceeds quickly and efficiently*

12. In my earlier judgment in *Minister of Health et al v M Seaman* [2018] Bda LR 80 the Court was concerned with the source and scope of its inherent jurisdiction and cited with approval *Re Celestial Nutrifoods* [2017] Bda LR 11 per Kawaley CJ where sections 12 and 18 of the Supreme Court Act 1905 were relied upon as the original sources of the Court's inherent jurisdictional powers.
13. While no opposing legal arguments were raised between the parties on the extent of the Court's case management powers; Counsel were of much assistance in placing relevant extracts of law before the Court from previous decisions and editorials.
14. Mr. Robinson pointed to the English High Court decision in *Reichhold Norway A.S.A and Another v Goldman Sachs International (a Firm)* [1999] 1 ALL ER (Comm) 40 as the lead English authority on the exercise of the Court's inherent jurisdiction to grant an application for a stay of proceedings on the grounds of case management. In *Reichhold Norway* Moore-Bick J (as he then was) held at pages 46-47:

*The court's power to stay proceedings is part of its inherent jurisdiction which is expressly preserved by s.49(3) of the Supreme Court Act 1981. It is exercised under a wide range of circumstances to achieve a wide variety of ends. Subject only to statutory restrictions, the jurisdiction to stay proceedings is unfettered and depends only on the exercise of the court's discretion in the interests of justice. I am in no doubt, therefore, that I do have jurisdiction to stay the present proceedings; the question is whether it would ever be right to do so in a case such as the present, and if so under what circumstances.*

*As a starting point I accept that in principle a plaintiff who has claims against a number of different people is entitled to choose for himself whom to sue and whom not to sue... However, choosing whom to sue is one thing; choosing in what order to pursue proceedings against different defendants may be another, especially when two related sets of proceedings are being, or could be pursued concurrently. In such a case the court itself has a greater interest, not only because the existence of concurrent proceedings may give rise to undesirable consequences in the form of inconsistent decisions, but also because the outcome of one set of proceedings may have an important effect on the conduct of the other. A situation of that kind can arise even when none of the parties to the actions are common, as happened, for example, in the case of the recent Lloyd's litigation where many names on different syndicates managed by different agents brought broadly similar claims...In those circumstances the court considered it desirable to identify a small number of cases which raised issues of fact and law which were common to very many of the actions and to direct that they proceed as 'lead actions' while staying the others. That was done in the reasonable expectation that decisions in the lead actions would enable the others to be resolved without the need for a full hearing. It is relatively easy to justify taking steps of that kind to manage litigation where all the actions*

*are pending before the same court, because the court has both the right and the duty to manage its own business with due regard to the resources available to it and the interests of other litigants, as well as the interest of the immediate parties themselves...*

15. Moore-Bick J's decision and analysis in *Reichhold Norway* was later upheld by the English Court of Appeal as reported in *Reichhold Norway A.S.A. v Goldman Sachs (C.A.)* [2000] 1 WLR 173.

16. Citing from Halsbury's Laws of England / Civil Procedure Volume 12 (2015) para 1039:

*A stay of proceedings arises under an order of the court... which puts a stop or 'stay' on the further conduct of the proceedings in that court at the stage which they have then reached, so that the parties are precluded thereafter from taking any further step in the proceedings... The object of the order is to avoid the trial or hearing of the claim taking place, where the court thinks it is just and convenient to make the order, to prevent undue prejudice being occasioned to the opposite party or to prevent the abuse of process...*

*The court's power to stay proceedings may be exercised under particular statutory provisions..., or under the Civil Procedure Rules...or under the court's inherent jurisdiction...or under one or all of these powers, since they are cumulative, not exclusive, in their operation.*

17. The Court was also referred to the English High Court decision in *The Royal Bank of Scotland Ltd v Citrusdal Investments Ltd* [1971] 3 All ER 558 per Plowman J. In the general holding of the case, it is reported:

*Where matters involving substantially the same issues were raised in two different courts it was desirable that they should be debated in only one of those two courts if by that means justice could be done; in the present instance, since the parties and the subject-matter were the same in both suits and the issue to be tried was also substantially the same (i.e. whether the defendants' tenancy was a business tenancy or not), the two sets of proceedings should not be allowed to proceed concurrently; accordingly the plaintiffs' originating summons would be stayed on terms until the defendants' application in the county court had been finally disposed of...*

## **Analysis and Findings**

18. The Defendant's grounds for a stay of these proceedings are more dependent on the Mortgage action than the New York proceedings. If the Court ultimately finds in favour of MIF, the Defendant says that this will significantly reduce the Plaintiff's claim under the underlying insurance policy of 18 August 2014 in respect of the \$18,000,000.00 loan.
19. However, the Mortgage action will not decide the question of liability in this cause. At best, the Mortgage action might be decided in such a way so as to forcibly reduce the claim for quantum of loss. I see no good reason to prevent the Plaintiff from prosecuting its claim on this basis. The potential for an inordinate period of time to lapse between now and the final tier of litigation in the Mortgage action is high. It would thus be unfair to hold these proceedings hostage because of another claim which will raise significantly different issues of fact and law, in terms of liability. The same analysis applies in respect of the New York proceedings.
20. The pleadings, evidence and arguments in this case will, no doubt, be far more aimed at the issue of liability than quantum so I am not persuaded that there is any likelihood that the progress of these proceedings would result in wasted time or costs that might have been otherwise avoided had the Mortgage action or the New York proceedings been fully disposed of first.
21. In my judgment, the *Royal Bank of Scotland* decision is to be distinguished on the basis that English High Court in that case was concerned with two sets of legal proceedings both tasked with deciding whether the defendants' tenancy was a business tenancy. That is a very different matter than the case before me now. In these proceedings, the Court is concerned with allegations of professional negligence and breach of a retainer agreement. Such issues will not be adjudicated in the Mortgage action or in the New York proceedings.
22. For these reasons, I refuse the application to stay in the exercise of this Court's discretion.
23. I would add only this: should the time come for this matter to be set down for trial prior to the final determination of the Mortgage action, I would be open to hearing from Counsel on the possible need for a split trial in this action between liability and quantum.

## **Conclusion**



24. The Defendant's summons dated 21 August 2019 is refused.

25. Either party may be heard on the issue of costs upon filing a Form 31TC within 7 days of the date of this Ruling. Otherwise, costs of this application should follow the event and be granted in favour of the Plaintiff on a standard basis to be taxed if not agreed.

Dated this 17<sup>th</sup> day of January 2020

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**HON. MRS. JUSTICE SHADE SUBAIR WILLIAMS**  
**PUISNE JUDGE OF THE SUPREME COURT**