In The Supreme Court of Bermuda

CIVIL JURISDICTION

2021: No. 417

BETWEEN:

GEOFFREY LYNN RANDALL WILLCOCKS	**PLAINTIFF**
-and-	
(1) JOSEPH E. WAKEFIELD	**DEFENDANTS**
(2) WAKEFIELD QUIN LIMITED	

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

Representation: **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 Mr John McSweeney of Walkers (Bermuda) Limited, for the Second Defendant

Dates of Hearing: **24 May 2023**

Date of Judgment: **11 August 2023**

JUDGMENT

Application to strike out the Re-Amended Statement of Claim on the basis that it does not disclose any reasonable cause of action

HARGUN CJ

Introduction

1. This is a further application by Wakefield Quin Limited ("**the Second Defendant**") to strike out the claim by Mr Geoffrey Willcocks ("**the Plaintiff**"). The background to these proceedings is set out in the Judgment of this Court dated 11 October 2022 ("**the 2022 Judgment**"). For ease of convenience that background is repeated hereunder.

2. 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 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.

3. At the time of the Testator's death, Mr Joseph Wakefield ("**the First Defendant**") 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.

4. 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.

5. 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.

6. 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.

The 2022 Judgement

7. In the 2022 Judgment the Court declined to strike out the claims against the First Defendant on the basis that they were statute barred. The Court declined to strike out the claims against the First Defendant holding that it was 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 Limitation Act 1974 ("the Act") applied with the result that no period of limitation prescribed by the Act applied to this action. The Court so held at paragraphs 47-48:

> *"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."

8. In relation to the application by the Second Defendant to strike out the Statement of Claim the Court noted that the difficulty in the pleaded case by the Plaintiff was that it made no relevant distinction between the First and Second Defendants. The Court further noted that it may be that the case is so pleaded by the Plaintiff upon the assumption that the Second Defendant succeeded as executor and trustee on the retirement of the First Defendant. However, for the reasons set out at paragraphs 61 to 64 of the Judgment dated 11 October 2022, the Court held that it was not possible, as a matter of law, for the Second Defendant to assume the status of executor and trustee. In the circumstances, the Court held, it was essential that the case against the First and Second Defendants be separately and distinctly pleaded. The Court further held that 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. The Court allowed the Second Defendant to file an amended Statement of Claim within six weeks of the date of the Judgment.

The Amended Statement of Claim dated 22 November 2022

9. In response to the Judgement dated 11 October 2022, the Plaintiff has filed its Amended Statement of Claim dated 22 November 2022. In that pleading the Plaintiff asserts against the Second Defendant the following:

(1) The Second Defendant in its various capacities as trustee by conduct, constructive trustees, administrators of the Estate, and by providing dishonest assistance to the First Defendant is liable for the loss and damage suffered by the Plaintiff and is vicariously liable for the acts and omissions of its employees, which include its accountant in 2010, Ms Anne Walsh and Mr Richard Horseman, a director (paragraph 6).

(2**) The Second Defendant, after the First Defendant had left its employ, continued to administer the Estate and the trust monies and to provide the Plaintiff with checks representing the annual sum due to him, and this continued until at least August 2012.** During this period the Plaintiff relied on Mr Horseman and the Second Defendant (and not the First Defendant) as attorneys for the estate responsible for the provision of his annual trust funds (paragraph 12).

(3) **The Second Defendant billed for its services as shown by invoices from 18 August 2006 to 27 August 2010, with time billed by employees including the First Defendant, Mr Horseman and "YH". The said invoices were throughout addressed to "Peter Willcocks, c/o Joseph Wakefield" showing that the client was the Estate of Peter Willcocks. As such, the Second Defendant owed a duty of care to the said Estate and its beneficiaries which included the Plaintiff** (paragraph 13).

(4) At no time did the estate pay any separate invoices rendered by the First Defendant (paragraph 14).

(5) Email instructions to Capital G Bank were given by Mr Horseman of the Second Defendant in February 2009, and acted upon by the said Bank (paragraph 16).

(6) **By its invoice number 32496 dated the August 27, 2010, it is evident that the Second Defendant, through Mr Horseman, carried out acts in August 2010 including "*Review file and letter to G Bank*" and "*Telephone calls and emails to Capital G Bank, attended Capital G Bank to close deposit and conference with beneficiary*". These acts were carried out by Mr Horseman on behalf the Second Defendant and not under the instruction of the First Defendant, and the "*beneficiary*" that Mr Horseman conferred with and took instruction from was the Plaintiff. The Second Defendant submitted an invoice and was paid for such services with the funds received from Mr Darrell and paid into the client trust account in the name of the Plaintiff** (paragraph 17).

(7) On 24 August 2010, $457,791.47 of the remaining Trust Funds were received from Capital G Bank in accordance with the instructions given to the Bank by Mr Horseman and held in the Second Defendants' trust account under the Plaintiff's name. After payments made to the Plaintiff and to Robert Moulder (the latter instruction given by the Plaintiff to Mr Horseman) and after a payment to the Second Defendant for "*services rendered*", the sum of $427,259.47 remained in the client trust account held by the Second Defendant under the Plaintiff's name (paragraph 18).

(8) Unbeknownst to the Plaintiff, in October 2010 the First Defendant agreed to "*lend*" the Trust Funds to Mr Darrell, a personal friend and existing client of the First Defendant and who was also a former client of the Second Defendant. The Trust Funds were transferred by way of a cheque written by the Second Defendant and signed by Ms Walsh and Mr Horseman (paragraph 19).

(9) Although the First Defendant was the appointed Executor and Trustee of the Testator's Estate the Second Defendant by its conduct acted as if it was Executor and Trustee and functioned as administrator of the estate from soon after the death of the Testator until at least April 2013, and as such owed a duty of care to the Plaintiff (paragraph 44).

(10) **The Second Defendant's role in carrying out the administration of the estate (for which invoices were generated and paid) did not cease until sometime after 4 April 2013** (paragraph 45).

(11) Further, due to the circumstances, constructive trust is imposed on the Second Defendant. As constructive trustees the Second Defendant is liable for the misuse and loss of the trust money.

(12) The Second Defendant drew the cheque in favour of Mr Darrell and, through Ms Walsh and Mr Horseman signed the cheque transferring the Trust Funds. Such transfer of the Trust Funds was not acting in the best interests of the Plaintiff and amounted to breach of duty and fraudulent disposal of trust property as such transfer was made in circumstances including that (i) the Second Defendant, as former attorneys for Mr Darrell, had knowledge of his affairs and that such a transfer would put the trust money at risk; (ii) there was knowledge that there was no enforceable security in place for securing repayment of the trust money, and (iii) there was reckless indifference as to whether such a disposal was contrary to the interests of the Plaintiff (paragraph 48).

(13) The Second Defendant, while being in a position of trust and with a duty to protect the Trust Funds, drew the cheque in favour of Mr Darrell without ensuring that there was the taking of adequate security while falsely recording in its client trust ledger that it was a "*Loan against deeds*" whilst in the knowledge that the loan was not in fact secured by deeds. This amounted to breach of duty and breach of trust and fraudulent disposal of the trust property as the transfer of the trust money was made in circumstances including that (i) the Second Defendant was in a position of conflict due to also acting as attorneys for Mr Darrell, (ii) at the time of the transfer there was no form of security taken whatsoever, (iii) the transfer was not an investment for the benefit of the Plaintiff and was therefore contrary to the will made by the Testator, (iv) the First Defendant was recklessly indifferent as to whether such transfer was contrary to the interests of the Plaintiff (paragraph 49).

(14) By paying the stamp duty on the Memorandum of Deposit of Deeds and registering the same the Second Defendant created the false impression that an enforceable equitable mortgage existed over Mr Darrell's property at 12 Cedar Avenue and that the said property was security for the Trust Funds, in an attempt to give legitimacy to the transfer of the trust money in circumstances where the purported security was only an illusion. These acts amounted to breach of duty, breach of trust, and recklessness (paragraph 50).

10. In its 2022 Judgment the Court has held 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. At paragraph 62 of the Judgment the Court accepted 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).

11. The Amended Statement of Claim clearly pleads two causes of action against the Second Defendant: first, breach of duty of care in relation to the services rendered by the Second Defendant in terms of legal advice and the administration of the estate in respect of which the Second Defendant billed the estate and received payment; and (ii) dishonest assistance in aid of breach of trust and/or breach of fiduciary duty on the part of the First Defendant. The issue for the Court to consider in this application is whether these causes of action are arguable.

12. In considering this issue the Court reminds itself that the power to strike out a pleading is only to be exercised in clear and obvious cases and in any other case the action must be allowed to proceed to trial. Thus, in *Electra Private Equity Partners v KPMG Peat Marwick* [1999] EWCA Civ 1247:

> *" It is trite law that the power to strike out a claim under RSC Ord.18, r.19 or in the inherent jurisdiction of the Court should only be exercised in "plain and obvious" cases. That is particularly so where there are issues as to material primary facts and*

the inferences to be drawn from them, and when there has been no discovery or oral evidence. In such cases, as Mr Aldous submitted, to succeed in an application to strike out, a defendant must show that there is no realistic possibility of the plaintiff establishing a cause of action consistently with his pleading and the possible facts of the matter when they are known. Certainly, a judge, on a strike-out application where the central issue is one of determination of a legal outcome by reference to as yet undetermined facts, should not attempt to try the case on the affidavits. See Goodson v Grierson [1908] 1 KB 761, CA, per Fletcher Moulton LJ at 764-5 and Buckley LJ at 766; Wenlock v Moloney, per Sellers LJ at 1242G-1243D and Danckwerts LJ at 1244B ([1965] 1 WLR 1238); and Torras v Al Sabah & others (unreported) 21 March 1997 CA, per Saville LJ. There may be more scope for early summary judicial dismissal of a claim where the evidence relied on by the plaintiff can properly be characterised as "shadowy" or where "the story told in the pleadings is a myth . . . and has no substantial foundation"; see eg Lawrance v Lord Norreys (1890) 15 App Cas 210, per Lord Herschell at 219-220."

Duty of Care in Tort

13. In relation to the Plaintiff's claim that the Second Defendant owed him a duty of care in tort, Mr White points out that the Second Defendant's relationship with the trustee was to provide services, for which the firm was paid out of the Trust Funds. It follows from this, he contends, that the Second Defendant owed the trustee/executor (the First Defendant) duties in contract and in tort in relation to those services. It does not follow, he argues, that these duties were owed directly to the Plaintiff who is a beneficiary. Indeed, Mr White submits that it is a matter of well-established law that such direct duty will only be imposed on an attorney for an estate/trust in exceptional circumstances where there is a lacuna, and the beneficiary would otherwise be left without any claim at all. Mr White relies upon the House of Lords judgment in *White v Jones* [1995] 2 AC 207. He says that there is no such lacuna on the pleaded (and assumed) facts of this case. If there is negligence, the cause of action lies with the trustee (the First Defendant). Liability for breach of trust conversely lies directly in the Plaintiff's hands against the First Defendant.

14. It is indeed the case that in *White v Jones* Lord Goff, giving the leading judgment, held that the duty of care in negligence was owed because the justice demanded that there should be a remedy to fill the lacuna created by the lack of cause of action vested in the estate (page 265D).

In that case the House of Lords (by majority) held that the assumption of responsibility by a solicitor to his client, who had given instructions for the drawing up of a will for execution, extended to an intended beneficiary under the proposed will in circumstances where the solicitor could reasonably foresee that the consequence of his negligence might result in the loss of the intended legacy without either the testator or his estate having a remedy against him. The House of Lords was considering the scope of duty in tort in the context of factual circumstances where there was no relationship between the solicitor and the intended beneficiary, nor did the solicitor do or say anything upon which the beneficiary acted to his prejudice (page 251G, Lord Keith).

15. The House of Lords in *White v Jones* did not lay down a rule that a solicitor, acting for the trustee, could never owe a duty of care in tort to a beneficiary. Indeed, the House of Lords accepted that assuming "s*pecial circumstances*" indicating assumption of responsibility, a duty of care in tort may be owed by a solicitor to a beneficiary. This seems clear from the judgment of Lord Goff at pages 262 A-D and 268 B:

> *"It must not be forgotten however that a solicitor who undertakes to perform services for his client may be liable to his client for failure to exercise due care and skill in relation to the performance of those services not only in contract, but also in negligence under the principle in Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. [1964] A.C. 465 (see Midland Bank Trust Co. Ltd. v. Hett, Stubbs & Kemp [1979] Ch. 379, 384) on the basis of assumption of responsibility by the solicitor towards his client. Even so there is great difficulty in holding, on ordinary principles, that the solicitor has assumed any responsibility towards an intended beneficiary under a will which he has undertaken to prepare on behalf of his client but which, through his negligence, has failed to take effect in accordance with his client's instructions. The relevant work is plainly performed by the solicitor for his client; but,* ***in the absence of special circumstances****, it cannot be said to have been undertaken for the intended beneficiary. Certainly,* ***again in the absence of special circumstances****, there will have been no reliance by the intended beneficiary on the exercise by the solicitor of due care and skill; indeed, the intended beneficiary may not even have been aware that the solicitor was engaged on such a task, or that his position might be affected.*
>
> *...*
>
> *Furthermore, for the reasons I have previously given, the Hedley Byrne [1964] A.C. 465 principle cannot,* ***in the absence of special circumstances****, give rise on* ***ordinary principles to an assumption of responsibility*** *by the testator's solicitor towards an*

intended beneficiary. Even so it seems to me that it is open to your Lordships' House, as in the Lenesta Sludge case [1994] 1 A.C. 85, to fashion a remedy to fill a lacuna in the law and so prevent the injustice which would otherwise occur on the facts of cases such as the present." (emphasis added)

16. In the present case it is, in the judgment of the Court, at least arguable that special circumstances exist which give rise to, on ordinary principles, an assumption of responsibility on the part of the Second Defendant towards the Plaintiff. Unlike the factual position in *White v Jones* where the solicitor had never met the relevant beneficiary, here the Second Defendant had meetings with the Plaintiff and was directly involved in the transaction which resulted in the Trust Funds being advanced to Mr Darrell without any security whatsoever. The facts of this case are capable of constituting special circumstances and include the following:

    (1) The Second Defendant, after the First Defendant had left its employ, continued to administer the Estate and the trust monies and to provide the Plaintiff with checks representing the annual sum due to him, and this continued until at least August 2012. During this period the Plaintiff relied on Mr Horseman and the Second Defendant (and not the First Defendant) as attorneys for the Estate responsible for the provision of his annual Trust Funds.

    (2) The Second Defendant billed for its services as shown by invoices from 18 August 2006 to 27 August 2010, with time billed by employees including the First Defendant, Mr Horseman and "*YH*". The said invoices were throughout addressed to "*Peter Willcocks, c/o Joseph Wakefield*" showing that the client was the Estate of Peter Willcocks.

    (3) Email instructions to Capital G Bank were given by Mr Horseman of the Second Defendant in February 2009, and acted upon by the said Bank.

    (4) By its invoice number 32496 dated the August 27, 2010, the Second Defendant, through Richard T Horseman, carried out acts in August 2010 including "*Review file and letter to G Bank*" and "*Telephone calls and emails to Capital G Bank,*

attended Capital G Bank to close deposit and conference with beneficiary". The Plaintiff contends that these acts were carried out by Mr Horseman on behalf the Second Defendant and not under the instruction of the First Defendant, and the "*beneficiary*" that Mr Horseman conferred with was the Plaintiff. The Second Defendant submitted an invoice and was paid for such services with the funds received from Mr Darrell and paid into the client trust account in the name of the Plaintiff.

(4) On 24 August 2010 the sum of $457,791.47, the remaining Trust Funds, were received from Capital G Bank in accordance with the instructions given to the Bank by Mr Horseman and held in the Second Defendant's trust account under the Plaintiff's name. After payments were made to the Plaintiff and to Mr Robert Moulder (the latter instruction given by the Plaintiff to Mr Horseman) and after a payment to the Second Defendant for "*services rendered*", the sum of $427,259.47 remained in the client trust account held by the Second Defendant under the Plaintiff's name.

(5) The Second Defendant drew the cheque in favour of Mr Darrell and, through Ms Walsh and Mr Horseman signed the cheque transferring the Trust Funds. Such transfer of the Trust Funds was not acting in the best interests of the Plaintiff and the Plaintiff says amounted to breach of duty and fraudulent disposal of trust property as such transfer was made in the circumstances including that (i) the Second Defendant, as former attorneys for Mr Darrell, had knowledge of his affairs and that such a transfer would put the trust money at risk; (ii) there was knowledge that there was no enforceable security in place for securing repayment of the trust money, and (iii) there was reckless indifference as to whether such a disposal was contrary to the interests of the Plaintiff.

(6) The Second Defendant, while being in a position of trust and with a duty to protect the Trust Funds, drew the cheque in favour of Mr Darrell without ensuring that there was the taking of adequate security while falsely recording in its client

trust ledger that it was a "*Loan against deeds*" whilst in the knowledge that the loan was not in fact secured by deeds.

(7) The Second Defendant was advised by the First Defendant in an email of 22 October 2010 that the deeds to Mr Darrell's Property were with the Bank of Bermuda; "*I am drafting a memo of deposit* ***until I get the deeds from the BOB***".

(8) The Second Defendant appreciated that the absence of enforceable security for the Loan to Mr Darrell directly and adversely affected the interests of the Plaintiff. In an email from Mr Horseman, on behalf of the Second Defendant, to the First Defendant Mr Horseman stated that "*Unless* ***we*** *have notice that the security is good or that [Harold Darrell] can make payment,* ***we have to alert the beneficiaries*** *shortly so that they can take the appropriate action*."

(9) It is arguable that the Second Defendant appreciated that the Plaintiff was relying upon the Second Defendant to ensure that there was proper security in place. In a letter from the Second Defendant dated 4 April 2013, the Second Defendant stated to the Plaintiff that:

> *"The funds were secured by memorandum of deposit of the deeds on Mr Darrell's property, namely, #2 Cedar Avenue, Pembroke. This document was stamped and has been registered in the Book of Mortgages. However, at the time of the loan, Mr Darrell did not have possession of his title deeds but maintained that HSBC Bank of Bermuda Limited (HSBC) was withholding them from without cause, having been fully repaid. Mr Darrell and HSBC have been in a long-running dispute, as you may be aware. Mr Darrell agreed to deposit the deeds with the estate representatives once he retrieved them from HSBC's attorneys Conyers Dill & Pearman. Conyers Dill & Pearman claim that HSBC were holding the deeds pursuant to a mortgage, which secures not only the loan but ancillary costs. Mr Darrell disputes this."* (The Plaintiff contends that all the above facts were known or ought to have been known to the Second Defendant at the time the funds were advanced to Mr Darrell.)

> ***"However, in light of our knowledge of the facts and past interaction with you as beneficiaries of the Estate, we feel that we should give you notice that the security may not be good security."***
>
> *"We do, however, have a serious reservations about the manner in which the Estate Representative loaned the money to Mr Darrell without taking traditional security - namely an immediate deposit of the deeds."*

17. The consideration of the issue whether special circumstances exist so as to impose upon an attorney a duty of care towards a beneficiary is highly fact sensitive. The facts outlined above, in the Court's judgment, disclose that it is arguable that the Second Defendant assumed a duty of care towards the Plaintiff in relation to the making of the Loan to Mr Darrell and to advise the Plaintiff about the adequacy and enforceability of the security proposed by the First Defendant and partially implemented by the Second Defendant (by registration of the relevant documents with the Registrar General).

Dishonest Assistance

18. It is common ground that the general requirement of liability for dishonest assistance are: (i) there is a breach of trust or breach of fiduciary duty by the trustee; (ii) the defendant induces or assists that breach of trust or breach of fiduciary duty; and (iii) the defendant does so dishonestly.

19. In the 2022 Judgment the Court held that it was plainly arguable that the First Defendant acted in breach of his fiduciary duties owed to the Plaintiff. The Court declined to strike out the pleaded case on the basis that the allegations were scandalous and vexatious and constituted an abuse of process. The Court held:

> "*As discussed above, at its core, 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 artistry duties including duty of care in the management and safekeeping of the Trust Funds to Mr Darrell, who was at the relevant time client and friend of the First Defendant. 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*."

20. Here, the Second Defendant plainly assisted the First Defendant to make the Loan to Mr Darrell which arguably is in breach of the First Defendant's fiduciary duties owed to the Plaintiff. Thus, the Second Defendant instructed Capital G Bank to transfer the Trust Funds to the trust account of the Second Defendant. As noted earlier, the Second Defendant, through Mr Horseman, carried out acts in August 2010 including "*Review file and letter to Capital G Bank*" and "*Telephone calls and emails to Capital G Bank, attended Capital G Bank to close deposit and conference with beneficiary*." The Plaintiff contends that the reference to conferring with the "beneficiary" is a reference to conferring with the Plaintiff.

21. As a result of the instructions given by the Second Defendant, on 24 August 2010 the sum of $457,791.47 was received from Capital G Bank by Mr Horseman and held in the Second Defendants Trust account under the Plaintiff's name.

22. The Second Defendant drew the cheque in favour of Mr Darrell and, through Ms Anne Walsh and Mr Horseman signed the cheque transferring the trust money. At the time of his transfer to Mr Darrell the Second Defendant noted in its clients trust ledger that it was a "*Loan against deeds*."

23. The above actions by the Second Defendant arguably constitute assistance to the First Defendant's breach of the fiduciary duties owed to the Plaintiff. Assuming the Second Defendant had relevant knowledge of the facts, the provision of the above assistance would arguably be dishonest. As Lord Nicholls pointed out in *Royal Brunei Airlines v Tan* [1995] 2 AC 378 at 389F:

> "*Unless there is a very good and compelling reason, an honest person does not participate in a transaction if he knows it involves misapplication of trust assets to the detriment of the beneficiaries. No order is an honest person in such a case*

deliberately closes eyes and ears, or deliberately not ask questions, lest he learn something he would rather not know, and then proceed regardless."

24. Here, the Plaintiff contends that at the relevant time the Second Defendant knew that (i) the First Defendant was acting as a trustee in respect of the Trust Funds and the Plaintiff was a beneficiary under that trust; (ii) Mr Darrell was a friend and a client of the First Defendant and a former client of the Second Defendant; (iii) the First Defendant was proposing to lend the entirety of the Trust Funds to Mr Darrell against the security of an equitable mortgage constituted by deposit of title deeds to his residential Property; (iv) at the time the funds were transferred by the Second Defendant to Mr Darrell on 25 October 2010 the title deeds were not with Mr Darrell but were with the Bank of Bermuda (the email from Mr Wakefield to Mr Horseman of 22 October 2010 had advised "*I am drafting a memo of deposit* ***until I get the deeds from BOB***"); (v) at the time the funds were transferred by the Second Defendant to Mr Darrell on 25 October 2010, Mr Darrell had not signed any form of security documentation; (vi) at the time the funds were transferred by the Second Defendant to Mr Darrell on 25 October there was no security in place to support the repayment of the loan; (vii) the Memorandum of Deposit was not signed by Mr Darrell until 7 May 2011, 7 months after the Second Defendant had transferred the Trust Funds to Mr Darrell (the Second Defendant was instrumental in registering the document with the Registrar General); (viii) The Memorandum of Deposit expressly acknowledged that the deeds were still with the Bank of Bermuda; "*Harold J Darrell… **will deposit** with the Estate titled this **as soon as you recover them from The Bank of Bermuda Ltd***".

25. Having regard to the above facts the Court considers that it is arguable that the Second Defendant had actual knowledge that the transaction potentially involved misapplication of the trust assets to the detriment of the Plaintiff beneficiary. Alternatively, it is arguable that the Second Defendant had blind-eye knowledge. The facts of this case do not require the Second Defendant to enquire into "*an untargeted or speculative suspicion*" (See: *Stanford International Bank Ltd v HSBC Bank plc* [2021] 1 WLR 3507 at 3518A-B (per Geoffrey Vos MR); *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd* [2003] 1 AC at para 116). Here the facts were targeted and specific. Trust Funds were being lent by the First Defendant to his friend and client on the security of the deeds to his residential Property in circumstances

where the Second Defendant was advised that the deeds were in fact with the Bank of Bermuda, another lending institution.

26. In the circumstances, having regard to the pleaded facts, the Court is satisfied that the causes of action based upon dishonest assistance by the Second Defendant is arguable and should be allowed to proceed to trial in the usual way.

27. The Court accepts and reiterates its earlier ruling that the Second Defendant could not and did not act as an executor and trustee under the Will (see paragraphs 61 to 64 of the Judgment dated 11 October 2022). Accordingly, the Court directs that the Plaintiff may not pursue the causes of action based upon (i) breach of fiduciary duty as trustee/ constructive trustee; and (ii) breach of fiduciary duty as estate administrator.

28. In conclusion, the Court considers that upon a review of the Amended Statement of Claim the causes of action based upon (i) breach of duty of care in tort; and (ii) dishonest assistance in relation to breach of trust and/or breach of fiduciary duty by the First Defendant, are arguable and should proceed to trial in the usual way. Given that the Plaintiff is a litigant in person it is unnecessary for him to further amend the Statement of Claim as long as it is understood that the Amended Statement of Claim is limited to the two causes of action set out above.

Dated this 11th day of August 2023

NARINDER K HARGUN
CHIEF JUSTICE