[2020] JMCC Comm 26

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2018 CD 00503

BETWEEN	**CATHERINE ALLEN**	**CLAIMANT**
AND	**GUARDIAN LIFE LIMITED**	**1ST DEFENDANT**
AND	**ERIC HOSIN**	**2ND DEFENDANT**
AND	**ECKLER LIMITED**	**3RD DEFENDANT**
AND	**CENTRAL BANK OF TRINIDAD AND TOBAGO**	**1ST INTERESTED PARTY**
AND	**TRINIDAD AND TOBAGO SECURITIES AND EXCHANGE**	**2ND INTERESTED PARTY**
AND	**FINANCIAL SERVICES COMMISSION**	**3RD INTERESTED PARTY**
AND	**GUARDIAN HOLDINGS LIMITED**	**4TH INTERESTED PARTY**

IN CHAMBERS

Mr Paul Beswick and Miss Gina Chang instructed by Ballantyne, Beswick & Company for the claimant

Mr Michael Hylton QC, Mr Kevin Powell and Miss Shanique Scott instructed by Hylton Powell for the first and second defendants

Mrs Sandra Minott-Phillips QC and Mr Litrow Hickson instructed by Myers, Fletcher & Gordon for the third defendant

Miss Christine McNeil instructed by the Director of State Proceedings for the third interested party

12 and 28 March 2019, 21 and 28 May 2020, 3 June and 31 July 2020

Summary judgment - Civil Procedure Rules 2002, rule 15.2 (a)

Civil procedure and practice - Application to strike out statement of case - Abuse of process - Res judicata - Civil Procedure Rules 2002, rule 26.3

Costs - Interlocutory proceedings - Application for costs on an indemnity basis- Application for immediate taxation - Civil Procedure Rules 2002, rules 64.6, 64.12, 64.15 and 64.17 (1) and (3)

SIMMONS J

[1] I am tasked with determining three (3) applications for summary judgment. The pleadings and the evidentiary material in the matter are quite voluminous. I will therefore commence by outlining the context in which the claim was brought and the allegations made against each defendant.

Background

[2] The claimant, Ms Catherine Allen (Ms Allen) who is an actuary, was formerly employed to the first defendant Guardian Life Limited (GLL) as a vice president and its Appointed Actuary. GLL is an insurance company and at the material time the second defendant, Mr Eric Hosin (Mr Hosin), was its President. The third defendant, Eckler Limited (Eckler) is a company engaged in the business of providing actuarial consulting services and other related services. Eckler was engaged by GLL to review the 2017 Appointed Actuary's Report and was invited to make recommendations in respect of certain matters.

[3] Having conducted its assessment, Eckler recommended the release of a substantial portion of GLL's reserves which was contrary to the advice given by Ms Allen. GLL acted on Eckler's advice and released approximately US$1.25 billion of its reserves.

[4] By letter dated 15 August 2018 Ms Allen's employment with GLL was terminated with immediate effect by reason of redundancy. Her appointment as GLL's appointed

actuary was also revoked. The letter informing her of GLL's decision was signed by Mr Hosin. Ms Allen was aggrieved by GLL's actions which she has said amounted to a wrongful dismissal.

The claim

[5] On 7 September 2018, Ms Allen filed an Amended Fixed Date Claim Form seeking damages for breach of contract, slander and defamation of character, stigmatization on the employment market for actuaries, tortious interference with her duties as appointed actuary under the **Insurance Act** (the **Act**), interference with business relations and wrongful termination of her contract of employment. Various declarations and other reliefs were also sought. By consent order dated 13 September 2018, Batts J ordered that the claim should be treated as if begun by claim form. Hence, particulars of claim have been filed.

[6] Ms Allen has alleged that at the time when GLL decided to release US$1.25 billion of its reserves, she was its appointed actuary and it was done without her authorisation, approval and/or consent.

[7] According to her, GLL had retained the services of an external actuary employed to Eckler and then acted in accordance with his recommendation even though it was not in the best interest of the company, its policy holders and its shareholders.

[8] She further alleged that notwithstanding her lack of involvement/input in this aspect of decision making of the company, GLL through its representatives, fraudulently misrepresented to the regulatory body, the 3rd interested party, the Financial Services Commission (FSC), that it was done with her agreement.

[9] She alleged that Eckler failed to comply with the Code of Professional Conduct issued by the Society of Actuaries ('the Code of Professional Conduct'), in that its representative Sylvain Goulet, communicated with and made recommendations (the peer review) directly to Mr Hosin without her input or approval. Specifically, she took

issue with Eckler's recommendation for the release of approximately J$1 billion of J$1.9 billion of GLL's reserves.

[10] She also alleged that, as regards her contract of employment, GLL and Mr Hosin breached the implied term of mutual trust and confidence between employer and employee.

[11] Ms Allen stated that as a result of her unwillingness to accept and approve the fraudulent, negligent, reckless, arbitrary and capricious actions of Mr Hosin on behalf of GLL, her open disagreement with his actions and her refusal to certify to the FSC that she had authorised the release of the reserves or support the material misrepresentation to the FSC, she has been wrongfully dismissed from her employment by GLL with immediate effect on 15 August 2018.

[12] She stated that her wrongful dismissal from the post of appointed actuary was effectively an imputation of dishonesty in the exercise of her contractual and statutory functions and that by their actions the defendants have effectively slandered her reputation and character, which has caused her permanent loss and damage. Further, that the said actions amounted to tortious interference with her statutory duty under the **Act**.

[13] It was also pleaded that although her employment was terminated and her appointment as the appointed actuary for GLL was revoked on the grounds of redundancy of the post, Mr. Sylvain Goulet of Eckler was subsequently employed as her replacement.

[14] Ms Allen pointed out, that her appointment as the appointed actuary was in keeping with section 76 (6) of the **Insurance Regulations** (the **Regulations**) and could only be revoked by GLL's board.

[15] She stated that Mr Goulet's engagement as an actuarial consultant was a clear conflict of interest as he was the appointed actuary of Sagicor Financial Corp. Limited, which is a competitor of GLL.

[16] I hope I have effectively summed up her claim.

The defence of the first and second defendants

[17] GLL and Mr Hosin, in their defence filed on 9 November 2018, stated that at the time when the claim was filed, Ms Allen was not an officer or the appointed actuary of GLL.

[18] It was admitted that Mr Hosin was responsible for the operation and decision making of GLL. However, it was stated that it was GLL's board of directors which has ultimate responsibility for its "operation and decision-making".

[19] The engagement of Eckler was admitted but it was denied that any contract of employment was entered into between Sylvain Goulet and GLL.

[20] The defendants also denied that Ms Allen is accountable to the FSC for GLL's release of the reserves.

[21] It was stated that her accountability to that body is to the extent provided for under the **Act** and the **Regulations**.

[22] The defendants admitted that in July 2018 GLL released approximately US$1.25 billion of reserves and that it did so without Ms Allen's "authority". They asserted that GLL did not need her authority to effect a change in its reserves.

[23] It was contended that of the approximately US$1.25 billion of reserves released, US$765 million was from reserves identified by Ms Allen and US$480 million from the reserves identified by Eckler, as capable of being released.

[24] The defence stated that Mr Hosin had told Ms Allen that he agreed that Eckler should engage her in discussions and suggested she send an email to Sylvain Goulet requesting a meeting on his return from vacation.

[25] The defendants denied that GLL's response to the FSC was intended to give or gave the impression that the reserves were released with the Ms Allen's authorization.

[26] They also denied that their actions as alleged are capable of amounting to conduct which was oppressive or unfairly prejudicial to either GLL's shareholders or Ms Allen. In the circumstances, GLL asserted that the allegation that the reserves were released without Ms Allen's consent do not disclose any basis for a claim under sections 213 and 213A of the **Companies Act**.

[27] The defendants further stated that the allegations in paragraph 10(r) of the particulars of claim that they usurped Ms Allen's authority are incapable of amounting to a breach of an implied term of her contract of employment with GLL.

[28] It was denied that GLL decided to employ Mr Goulet as Ms Allen's replacement. The defendants stated that although GLL appointed Mr Goulet as its appointed actuary he is not employed as a member of its staff. It was stated that Ms Allen's post was made redundant and has, therefore, ceased to exist and GLL has outsourced the work for which she had been employed.

[29] The defendants stated that GLL terminated Ms Allen's employment and revoked her appointment as its statutory actuary for the reasons stated in its letter dated 15 August 2018.

[30] The defendants admitted that Ms Allen was appointed as its actuary pursuant to section 76 (6) of the **Regulations** and said that on 15 August 2018, GLL's board of directors decided to revoke her appointment. It was stated that Ms Allen's employment was terminated in accordance with the terms of her contract of employment which expressly provided that either party could terminate it with three (3) months' notice.

[31] The defendants denied slandering Ms Allen as alleged or at all.

GLL's application

[32] By Notice of Application filed on 6 December 2018, GLL requested a grant of summary judgment against Ms Allen in respect of the following issues:

(1) (a) The claims and issues based on the claimant's alleged rights and obligations under the **Act** and/ or the GLL's statutory reserves. (Paragraphs 8, 10 (including the "Particulars of Breach of Duty of Mutual Trust and Confidence"), "Particulars of Fraud" (i), (iii), (v) and (vi) of paragraph 11 and paragraph 31 of the Particular's Claim); and that

(b) The claim that the first and second defendants "fraudulently misrepresented the claimant to the Regulators, the [FSC] herein, as having sanctioned and agreed to the release of [the] reserves and further that the claimant approved the release of the reserves to smooth the profits of [GLL]" (paragraph 11 and "Particulars of Fraud" (ii) and (iv) of the Particulars of Claim).

[33] GLL has also sought the following orders:

(2) Further and/or in the alternative, that paragraphs 8, 10 (including the "Particulars of Breach of Duty of Mutual Trust and Confidence"), 11 (including the "Particulars of Fraud") and 31 of the Particulars of Claim be struck out.

(3) The costs of this application and in relation to those claims and paragraphs[1] be awarded to GLL, to be taxed immediately, and on the indemnity basis with special costs certificate for three counsel.

[34] The grounds on which the orders are being sought are as follows:

In respect of summary judgment on specific issues:

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[1] Outlined in 1 (a) and (b) of the preceding paragraph.

(a) Rule 15.2 (a) of the **Civil Procedure Rules**, 2002 ("the **CPR**") provides that the court may give summary judgment on a particular issue if it considers that the claimant has no real prospect of succeeding on the issue.

(b) The claimant has no real prospect of succeeding on the issues identified in this application because:

(i) The claims and issues identified in paragraph 1 (a) were considered and determined by an order of this Honourable court in these proceedings, on 21 September 2018 and are therefore *res judicata* as between the claimant and GLL.

(ii) Alternatively, as a matter of law the claimant has no real prospect of succeeding on those issues.

(iii) Based on the undisputed documentary evidence and as a matter of law, the claimant has no real prospect of succeeding on the claims and issues identified in paragraph 1 (b).

[35] In respect of the striking out of paragraphs 8, 10, 11 and 31 of the particulars of claim:

(a) Rule 26.3 of the **CPR** provides that the court may strike out part of a statement of case if it appears to the court that the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings (CPR 26.3(1)(b)), or discloses no reasonable grounds for bringing the claim (CPR 26.3(1)(c)).

(b) Paragraphs 8, 10, 11 and 31 of the Particulars of Claim are an abuse of the process of the court, are likely to obstruct the just disposal of the proceedings, and/or disclose no reasonable grounds for bringing the claim, for the reasons set out in ground 2 above.

[36] In respect of costs:

(a) Rule 64.6 of the **CPR** provides that the general rule is that the court must order the unsuccessful party to pay the costs of the successful party. If this application succeeds there would be no basis to depart from the general rule.

(b) Rule 65.15 of the **CPR** provides that the general rule is that costs are not to be taxed until the conclusion of the proceedings, but the court may order them to be taxed immediately.

(c) If this application succeeds some claims would be finally disposed of and it would be appropriate to order that the costs relating to those claims be taxed immediately.

(d) Rules 65.17 (1) and (3) of the **CPR** provide that where the court has a discretion as to the amount of costs to be awarded to a party it should allow the amount the court deems reasonable, and in determining what is reasonable, the court must take into account all the circumstances, including the conduct of the parties.

(e) In determining what is reasonable the court has a discretion as to whether costs should be awarded on the indemnity basis.

(f) The grounds on which the court can and should award costs on the indemnity basis include where the paying party has acted in a highly unreasonable manner or where it has made a claim which is irreconcilable with the contemporaneous documents.

(g) In alleging in these proceedings that GLL was party to a fraudulent conspiracy and in seeking to pursue claims the court has already ruled to be unsustainable, Ms Allen acted in a highly unreasonable manner and made claims which are completely irreconcilable with the contemporaneous documents.

(h) Rule 64.12 of the **CPR** provides that when making an order as to the costs of an application in chambers the court may grant a special costs certificate and may direct that the costs of more than one Attorney-at-Law be allowed.

(i) In view of the numerous claims and the nature of the allegations made against GLL, it was reasonable for it to retain three counsel and it would be appropriate for the court to direct that the costs of three counsel be allowed.

[37] GLL relied on the third Affidavit of Meghon Miller-Brown, sworn to on 5 December 2018, in support of its application.

[38] Mrs Miller-Brown in her affidavit, indicated that she is the Vice President of Finance of GLL. She stated, among other things, that in her capacity as Vice President, she prepared for submission to the FSC, a report responding to, among other things, its query in respect of the movement of the half-year reserves at June 2018 compared to June 2017. GLL's email to the FSC is dated 13 August 2018.

[39] She stated that GLL denies misrepresenting Ms Allen in the report to the FSC. She indicated that the report did not say that Ms Allen had approved the release of the reserves but accurately stated that Ms Allen had agreed with the management decision to commence the year-end review at half year.

[40] In the circumstances, it was stated that the claim against GLL has no real prospect of success.

Claimant's affidavit

[41] In opposing the application for summary judgment, Ms Allen deposed to an affidavit which was filed on 7 March 2019. She also requested leave to refer to and rely upon the affidavits sworn by her and filed in this matter to date.[2]

[42] Ms Allen stated that the email of 9 August 2018 and the accompanying report submitted to the FSC, are not the only bases of her claim for fraudulent misrepresentation and that they have been presented to the court in isolation. It was pointed out that paragraph ten 10 (l) to (p) of the particulars of claim set out the sequence of events surrounding that email. She then referred to the sequence of events.

[43] She stated that she has been employed to GLL for the past thirteen and a half (13 ½) years and up to 15 August 2018, she was the Vice President and Actuary for GLL. Ms Allen further stated that since 2007, she was also the legally designated Appointed Actuary for GLL in accordance with section 44 of the **Act**.

[44] In this regard, she stated that the scope of the duties and responsibilities of the Appointed Actuary cannot be determined summarily and in any event, the court would require greater evidence than a bare denial of an accountant or attorneys-at-law. Additionally, she contended that there are far too many issues in dispute which the court is not likely to resolve without a trial.

[45] Ms Allen expressed the view that the court would benefit from hearing evidence from the FSC which is the oversight body and statutory regulator and actual Actuaries in the form of expert witnesses, to give the court a proper and unbiased understanding of the position of the Appointed Actuary, reserves or any actuarial related issue.

[46] She stated that her claim against GLL should proceed against it, as it has arisen from acts done in usurpation of her role as well as against her personal and/or professional reputation.

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[2] See also paragraph 21 of her affidavit where reference is made to the affidavit filed on September 11, 2018 in support of the Fixed Date Claim Form.

[47] Ms Allen further stated that the basis of her claim is oppression and unfair prejudice under 213A of the **Companies Act** as well as fraud, misrepresentation, conspiracy and defamation and/or slander amongst other torts.

[48] She went on to mention her professional reputation and how it had been injured by the misrepresentation.

[49] She stated that the court has not yet made any determinations as to her status and rights by any judgment or the judgment of Batts J dated 21 September 2018 in ***Allen v Guardian Life Limited et al*** [2018] JMSC Comm 32. According to her, His Lordship specifically indicated that he believed, based on her then interim application for an injunction, that the status quo ought to remain pending trial and that the court would decline to intervene at that interlocutory stage.

[50] In respect of costs, Ms Allen stated that the court in considering the question of costs should bear in mind that GLL and Mr Hosin are represented by the same attorneys-at-law. She pointed out that the claim against GLL and Mr Hosin is for a variety of reliefs under section 213A of the **Companies Act** as well as tort and breach of contract. She stated that there is nothing novel or unusually complex about the matter beyond the actuarial subject matter, and there is therefore no basis for an award of costs for three (3) attorneys-at-law in respect of GLL and Mr Hosin.

[51] Ms Allen stated that there are significant disputes as to the facts and the law and as such, there are serious issues to be tried. The view was also expressed that the claim has a realistic prospect of success and is therefore, not amenable to summary judgment.

Submissions

For GLL

[52] Mr Hylton QC commenced his submissions by directing the court's attention to rule 15.2 (a) of the **CPR**. He also referred to the judgment of Lord Briggs in the case of ***Sagicor Bank Jamaica Ltd v Taylor Wright*** [2018] 3 All ER 1039, specifically,

paragraphs 16 to 18 where it was stated that even where there are disputes of fact a trial will only be necessary if their resolution will affect the outcome of the dispute. The court in that case, also stated that summary judgment may be granted in respect of specific issues.

[53] It was submitted that Ms Allen has no real prospect of succeeding on the issues identified in GLL's application.

[54] In respect of the **Act** and GLL's statutory reserves, Mr Hylton stated that GLL seeks summary judgment on the issues raised in paragraphs 8, 10, 11 and 31 of the particulars of claim.

[55] He argued that these paragraphs all rely on Ms Allen's alleged rights and obligations under the **Act** and challenge the propriety of GLL's decision to reduce its statutory reserves.

[56] Learned Queen's Counsel stated that these issues have already been fully litigated in these proceedings. He pointed out that by an application dated 11 September 2018, Ms Allen had sought an order requiring GLL to reverse the reduction in its reserves. After a contested hearing, Batts J addressed these very issues in his judgment. The application was dismissed on the basis of the learned judge's conclusion that she has no real prospect of succeeding at trial. Reference was made to paragraphs 14 to 19 of the judgment of Batts J in which the learned judge dealt with the claim's likelihood of success.

[57] Mr Hylton indicated that Ms Allen did not appeal that decision and as such, these issues are *res judicata* as between herself and GLL. Alternatively, Mr Hylton argued that Ms Allen has no real prospect of succeeding on these issues for the reasons articulated by Batts J.

[58] Mr Hylton argued that Ms Allen's assertion in her affidavit that the court would require evidence in order to determine the duties and responsibilities of an appointed actuary is misconceived. In this regard it was submitted, that an actuary appointed by a

life insurance company has certain duties and responsibilities as a matter of law. Mr Hylton argued that of all the issues in this case, this is the one most amenable to determination on a summary judgment application. He stated that a trial in respect of Ms Allen's duties is unnecessary as the court is bound by the provisions of the **Act** and evidence cannot affect its meaning.

[59] Mr Hylton pointed out that GLL also seeks summary judgment in respect of the allegation that it "*fraudulently misrepresented [Ms Allen] to the [FSC], as having sanctioned and agreed to the release of [the] reserves and further that Ms Allen approved the release of reserves to smooth the profits of the company"* and in respect of paragraphs (ii) and (iv) of the particulars of fraud. He submitted that based on the undisputed documentary evidence and as a matter of law, Ms Allen has no real prospect of succeeding on these issues.

[60] Learned Queen's Counsel submitted that the modern authorities indicate that allegations of fraud and disputes of fact will not necessarily prevent an order being made for summary judgment. Reference was made to ***Sagicor Bank Jamaica Ltd*** (supra) in support of that submission.

[61] It was also submitted, that factual disputes could be determined summarily where their resolution was dependent on the available documentary evidence. Reference was made to ***Winston Finzi v Jamaica Redevelopment Foundation Inc. and others*** [2017] JMCC COMM 20 wherein the learned judge considered the judgment of Potter LJ in ***ED&F Man Liquid Products Ltd v Patel & Anor*** [2003] All ER (D) 75 (Apr). In the latter case, Potter LJ stated at paragraph 10 that:

> *"10. It is certainly the case that under both rules, where there are significant differences between the parties so far as factual issues are concerned, the court is in no position to conduct a mini-trial: see per Lord Woolf MR in* ***Swain v Hillman****... However, that does not mean that the court has to accept without analysis everything said by a party in his statements before the court. In some ~~cases~~cases, it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents. If*

> *so, issues which are dependent on those factual assertions may be susceptible of disposal at an early stage…"*

[62] Mr Hylton contended that the above statement is applicable to the issues in this application, as the particulars of claim do not quote the words used or even identify the document or occasion in or on which they were stated. It was argued, that despite Ms Allen's statements to the contrary, the alleged misrepresentation to the FSC is based on one document - a report GLL sent to the FSC by email dated 10 August 2018. Mr. Hylton then referred to the contents of the email and submitted that it was insufficient to support Ms Allen's allegations of fraud which, according to Fraser J in ***Beverly Lewis v Cleveland Hartley*** [2016] JMSC Civ. 34 should not be lightly made.

[63] Mr Hylton contended that even without explanation or context, a fraudulent meaning and intention cannot be clearly or even fairly attributed to the words in GLL's report. He pointed out that the report did not say or even suggest that Ms Allen had approved the release of the reserves and even if it could be interpreted in that way, it would not rise to the level of a fraudulent misrepresentation.

[64] Furthermore, he argued that Mrs Miller-Brown's third affidavit explains the context in which the statement was made. Mrs Miller-Brown said in paragraph five (5), that the report accurately stated that Ms Allen had agreed with management's decision to commence the year-end review at half year.

[65] Learned Queen's Counsel pointed out, that Ms Allen's affidavit also asserts, that various particulars in paragraph 10 of the particulars of claim together constitute the alleged misrepresentation. It was submitted that neither separately nor cumulatively can those particulars establish a claim for fraudulent misrepresentation.

[66] In respect of paragraph 10 of Ms Allen's affidavit sworn to on 5 March 2019, in which Ms Allen referred to a conversation with an officer from the FSC, it was submitted that there is no indication that that person was expressing the views of the FSC and it is hearsay and of no probative value.

[67] In the alternative, it was submitted that the court should strike out paragraphs 8, 10 (including "particulars of Breach of Duty of Mutual trust and Confidence'), 11 (including the "particulars of fraud") and 31 of the particulars of claim in accordance with rule 26.3 of the **CPR**. That rule gives the court the discretion to strike out a part of a statement of case where it is an abuse of the process of the court or is likely to obstruct the just disposal of proceedings.

For Ms Allen

[68] Mr Beswick began by reminding the court of the rules which govern summary judgment applications. He also referred to well-known authorities on the subject such as ***Merrick (Herman) Samuels v Gordon Stewart et al***, (unreported), Supreme Court, Jamaica, Claim No 2001/ S-081, judgment delivered 23 December 2004.[3]

[69] He submitted that the general understanding is that summary judgment is meant to be a consideration of the statements of case and not a mini-trial of the claim. He said that although it can never be said to be outside of the purview of the judge to consider the evidence, the primary consideration is whether the statements of case contain a sustainable cause of action which have a realistic prospect of success in either bringing the claim or defending it.

[70] Mr Beswick submitted that ***Merrick (Herman) Samuels v Gordon Stewart et al*** (supra), confirms several important points, namely that:

> a. despite perceived challenges in the pleading or proving the case (which goes to evidence and availability thereon, the prospect of success, which is the main consideration, should still be considered realistic as was concluded in ***Swain v Hillman*** [2001] 1 All E.R. 91;

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[3] See also ***Gordon Stewart et al v Merrick (Herman) Samuels***, (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 02 of 2005, judgment delivered 18 November 2005.

b. even if the evidence at this stage is weak, the worst that could be said is that the chance of success is lower, but not unrealistic; and

c. there should be no mini-trial of the evidence and further any acceptance or rejection of evidence is an inappropriate exercise at the summary stage particularly as that is a trial exercise.

[71] He contended that an evidentiary exercise is inappropriate at this stage, as it may result in determinations which ought properly to be made at the trial and in any event, even if there are weaknesses in the evidence or pleadings, they are best left to be assessed at the trial and only lower the actual chances of success, but not the realistic nature of it.

[72] He too relied on the ***Sagicor Bank Jamaica Ltd v Taylor-Wright*** (supra), and directed the court's attention to paragraphs 17 and 21 of the judgment which dealt with how disputes of fact should be dealt with by the court when considering an application for summary judgment. Mr. Beswick submitted that this case supports the position that where the reliefs sought are justified by Ms Allen's pleadings summary judgment is inappropriate and should not be granted. The test, it was submitted, is a "strong" one.

[73] He further stated that the judgment of Sinclair-Haynes J (as she then was) in ***Lyle v Lyle*** (unreported), Supreme Court, Jamaica, Claim No HCV 02246/2004, judgment delivered 10 May 2005, is also very useful as it reiterates that summary judgment is wholly inappropriate where there are important disputes of fact.

[74] Learned counsel argued that the primary bases of the notices of application seem to be grounded in a divergence in opinion on the pleadings. However, Ms Allen has sufficiently pleaded the case to be met for the causes of action identified in her claim.

[75] Mr Beswick argued that the pleadings as a whole, if proved by evidence through trial, would directly result in the relief sought from the respective parties, therefore the

matter is inappropriate for summary judgment, in the vein of ***Sagicor Bank Jamaica Ltd v Taylor-Wright*** (supra).

[76] It was also stated that the issue of the effect of the statement in the report sent to the FSC by GLL could only be resolved by a tribunal of fact. He argued that the claim for relief in relation to the alleged slander is contained in the fixed date claim form and need not be included in the particulars of claim. He also submitted, that any lacuna in the pleadings can be corrected before the trial and in any event, the pleadings can be amended without permission before the case management conference. Reference was made to ***Winston Finzi v Jamaica Redevelopment Foundation ~~Inc~~Inc. and others*** [2017] JMCC COMM 20 in support of that submission.[4] Mr Beswick also submitted that the issue of the appointed actuary's responsibilities and liability in respect of reserves also needs to be ventilated at a trial.

[77] In respect of whether certain issues were *res judicata*, Mr Beswick submitted that the court has not yet made any meritorious determination as to status and rights by any judgment or the judgment in ***Allen v Guardian Life Limited et al*** (supra). He stated that Batts J specifically indicated that he believed, based on the then interim application for injunction, that the status quo ought to remain as is pending trial and that the court would decline to intervene at the interlocutory stage.

[78] According to Mr Beswick, Batts J indicated that although he did not believe that Ms Allen necessarily had the power to compel action pursuant to the then application nor have final success on the order for a reversal of the decision to release the reserves (which was one of the twenty-five reliefs sought), the entire matter was best reserved for trial given the conflicts especially in the area of actuarial expertise. He then cited the case of ***Liberty Club v. Beacon Insurance Company*** (unreported), Supreme Court, Grenada, Claim No GDAHCV2005/0409, judgment delivered 27 August 2012, in which Ellis J stated:

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[4] Paragraph 102.

"ISSUE ESTOPPEL AND INTERLOCUTORY JUDGEMENTS

[19] While there are interlocutory decisions which determine an issue or question in the course of proceedings and which can be deemed to be final and conclusive for res judicata purposes, in general interlocutory applications are not designed or intended to adjudicate finally on issues of fact or law raised by the pleadings in an action. They are generally intended to simply bring such issues to trial.

[20] The court is of the opinion that the principle of issue estoppel does not apply to an interlocutory application in the nature of the instant application.

[21] There is general support for this view in Phipson on Evidence which provides as follows:

> *'The Rule that a judgement is open to challenge unless final is of importance principally in other proceedings on different substantive questions between the same parties. It also has the important practical effect that the failure of an interlocutory application is no bar to its renewal'."*

[79] Mr Beswick submitted that there is no applicable final ruling of the court which would render any issue in the claim, *res judicata*. He also stated that rulings made in interlocutory proceedings do not generally make that issue subject to the principle of *res judicata*. Furthermore, Ms Allen has not brought any new application for relief that seeks to re-open or ignore a previous ruling of the court.

[80] Learned counsel stated that the burden of proving the entitlement to summary judgment is on the applicant (the defendants herein) and it was submitted that they have not discharged the burden of proving that Ms Allen's claim has no real prospect of success.

[81] In respect of the alternative application for striking out, Mr Beswick submitted that Ms Allen has complied with the rules and no evidence has been led of non-compliance, that would give rise to this sanction under rule 26.3 (1) (a) of the **CPR**; he stated that her claim is not an abuse of process and further there are no issues that are at *res*

judicata between the parties which would aid the disposal of the proceedings under rule 26 (1) (b) of the **CPR**; according to him, Ms Allen's claim has been properly pleaded and supported which puts its outside of the sanction under rule 26 (1) (d) of the **CPR**.

[82] Learned counsel referred to ***Peerless Limited v Gambling Regulatory Authority and others*** [2015] UKPC 29, in which the Privy Council held that considerable caution and proportionality should be exercised where the draconian power to terminate proceedings without hearing on the merits is being exercised. He also cited the case of ***Brown v Rodney and Rodney*** [2017] JMSC Civ.32 in which Anderson J addressed striking out a claimant's statement of case on the ground of abuse of process.

[83] With respect to the allegations that there was a breach of mutual trust and confidence by GLL, learned counsel directed the court's attention to the case of ***Malik and Mahmud v Bank of Credit and Commerce International SA*** [1997] UKHL 23. He stated that in that case the House of Lords unanimously held that the term of mutual trust and confidence would be implied into the contract as a necessary incident of the employment relations.

The law

Summary Judgment

[84] Rule 15.2 of the **CPR** outlines the circumstances in which the court may grant summary judgment. The rule states:

> *"Grounds for summary judgment*
>
> *15.2 The court may give summary judgment on the claim or on a particular issue if it considers that-*
>
> *(a) the claimant has no real prospect of succeeding on the claim or the issue; or*
>
> *(b) the defendant has no real prospect of successfully defending the claim or the issue."*

[85] The following appears in the text, **Civil Procedure**, 2016, Volume 1, (The White Book) at pages 686 and 687:

> *"**no real prospect of succeeding/successfully defending**"*
>
> *In order to defeat the application for summary judgment it is sufficient for the respondent to show some "prospect", i.e. some chance of success. That prospect must be "real", i.e. the court will disregard prospects which are false, fanciful or imaginary. The inclusion of the word "real" means that the respondent has to have a case which is better than merely arguable (**International Finance Corp v Utexafrica Sprl** [2001] C.L.C. 1361 and **ED&F Man Liquid Products Ltd v Patel** [2003] EWCA Civ 472). The respondent is not required to show that that their case will probably succeed at trial. A case may be held to have a "real prospect" of success even if it is improbable. However, in such a case, the court is likely to make a conditional order…*
>
> *The hearing of an application for summary judgment is not a summary trial. The court at the summary judgment application will consider the merits of the respondent's case only to the extent necessary to determine whether it has sufficient merit to proceed to trial. The proper disposal of an issue under Pt 24 does not involve the court conducting a mini-trial (per Lord Woolf M.R. in **Swain v Hillman** [2001] 1 All ER 91….*
>
> *At a trial, the criterion to be applied by the court is probability: victory goes to the party whose case is the more probable (taking into account the burden of proof). This is not true of a summary judgment application. "The criterion which the judge has to apply under CPR Pt 24 is not one of probability; it is the absence of reality." (Lord Hobhouse of Woodborough in **Three Rivers DC v Bank of England (No.3)** [2001] 2 ALL E.R 513).*
>
> *Where a summary judgment application gives rise to a short point of law or construction, the court should decide that point if it has before it all the evidence necessary for a proper determination and is satisfied that the parties have had an adequate opportunity to address the point in argument. The court should not allow a case to go forward to trial simply because there is a possibility of some further evidence arising…*

> *Conversely, an application for summary judgment is not appropriate to resolve a complex question of law and fact, the determination of which necessitates a trial having regard to all of the evidence…*

[86] It continues:

> *In practice it is often more difficult to apply the "no real prospect of success" test on an application for summary judgment than it is to try the case in its entirety. The decision-maker at trial will usually have a better grasp of the case a whole, because of the added benefits of hearing the evidence tested, or receiving more developed submissions and of having more time in which to digest and reflect on the materials."*

[87] As can be gleaned from the foregoing extract, the relevant principles which guide the court in summary judgment applications can be found in the well-known cases of ***Swain v Hillman*** (supra), ***Three Rivers DC v Bank of England*** (supra) and ***ED & F Man Liquid Products Ltd v Patel*** (supra), among others.

[88] In ***Island Car Rental Ltd (Montego Bay) v Headley Lindo*** [2015] JMCA App 2, Brooks JA, cautioned, that in considering an application for summary judgment, the court must also bear in mind that granting summary judgment is a serious step. He stated that the words of Judge LJ in ***Swain v Hillman*** (supra) are to be considered. He (Judge LJ) said, in part, at page 96:

> *"To give summary judgment against a litigant on papers without permitting him to advance his case before the hearing is a serious step…"*

[89] I must also point out that in ***Sagicor Bank Jamaica Ltd v Taylor-Wright*** (supra), the Privy Council made some useful pronouncements in respect of summary judgment applications. Lord Briggs stated as follows:

> *"16. Part 15 of the CPR provides, in Jamaica as in England and Wales, a valuable opportunity (if invoked by one or other of the parties) for the court to decide whether the determination of the question whether the claimant is entitled to the relief sought requires a trial. Those parts of the overriding objective (set out in*

Part 1) which encourage the saving of expense, the dealing with a case in a proportionate manner, expeditiously and fairly, and allotting to it an appropriate share of the court's resources, all militate in favour of summary determination if a trial is unnecessary.

17. ***There will in almost all cases be disputes about the underlying facts, some of which may only be capable of resolution at trial, by the forensic processes of the examination and cross-examination of witnesses, and oral argument thereon. But a trial of those issues is only necessary if their outcome affects the claimant's entitlement to the relief sought. If it does not, then a trial of those issues will generally be nothing more than an unnecessary waste of time and expense.***

…

19. The court will, of course, primarily be guided by the parties' statements of case, and its perception of what the claim is will be derived from those of the claimant. This is confirmed by Part 8.9 which (so far as is relevant) provides as follows:

"(1) The claimant must include in the claim form or in the particulars of claim a statement of all the facts on which the claimant relies.

…

(3) The claim form or the particulars of claim must identify or annex a copy of any document which the claimant considers is necessary to his or her case."

Para.8.9A further provides:

"The claimant may not rely on any allegation or factual argument which is not set out in the particulars of claim, but which could have been set out there, unless the court gives permission."

20. Nonetheless the court is not, on a summary judgment application, confined to the parties' statements of case. Provision is made by Part 15.5 for both (or all) parties to file evidence, and Part 15.4(2) acknowledges that a summary judgment application may be

> *heard and determined before a defendant has filed a defence. Further, it is common ground that the requirement for a claimant to plead facts or allegations upon which it wishes to rely may be satisfied by pleading them in a reply, not merely in particulars of claim..."* [My emphasis]

[90] In sum, the above case is authority for the position that a trial of disputed issues will generally be nothing more than an unnecessary waste of time and expense if their outcome will not affect Ms Allen's entitlement to the relief sought.

Striking Out

[91] Rule 26.3 (1) of the **CPR** states as follows:

> *"In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court -*
>
> *(a) that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings;*
>
> *(b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;*
>
> *(c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim; or*
>
> *(d) that the statement of case or the part to be struck out is prolix or does not comply with the requirements of Parts 8 or 10.*

[92] In the text **Civil Procedure**, 2016, Volume 1, (The White Book) at pages 71 and 72 it is stated as follows:

> *"…A statement of case may be struck out (in whole or in part) if:*
>
> *(a) it discloses no reasonable grounds for bringing or defending the claim;*

(b) it is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or

(c) there has been a failure to comply with a rule, practice direction or court order

…Grounds (a) and (b) cover statements of case which are unreasonably vague, incoherent, vexatious, scurrilous or obviously ill-founded and other cases which do not amount to a legally recognisable claim or defence…

Ground (c) covers cases where the abuse lies not in the statement of case itself but in the way the claim or defence (as the case may be) has been conducted. The strike out can even be made where there was nothing in the rule, practice direction or court order which specified that this might happen as a consequence of a breach. In many circumstances such a strike-out would seem unduly harsh unless the party concerned was warned…of the risk of their statement of case being struck out if they did not comply with the rule, practice direction or court order in question.

Statement of case discloses no reasonable grounds for bringing or defending the claim (r. 3.4 (2) (a))

Paragraph 1.4 of the Practice Direction (Striking Out a Statement of Case)…, gives examples of cases where the court may conclude that particulars of claim disclose no reasonable grounds for bringing the claim: those claims which set out no facts indicating what the claim is about; those claims which are incoherent and make no sense; and those claims which contain a coherent set of facts but those facts even if true, do not disclose any legally recognisable claim against the defendant…

Statements of case which are suitable for striking out on ground (a) include those which raise an unwinnable case where continuance of the proceedings is without any possible benefit to the respondent and would waste resources on both sides…A claim or defence may be struck out as not being a valid claim or defence as a matter of law…However, it is not appropriate to strike out a claim in an area of developing jurisprudence, since, in such areas, decisions as to novel points of law should be based on actual findings of fact…A

statement of case is not suitable for striking out if it raises a serious live issue of fact which can only be properly determined by hearing oral evidence…An application to strike out should not be granted unless the court is certain that the claim is bound to fail…

Where a statement of case is found to be defective, the court should consider whether that defect might be cured by amendment and, if it might be, the court should refrain from striking it out without first giving the party concerned an opportunity to amend (In Soo Kim v Young [2011] EWHC 1781 (QB)).”

[93] On page 73 it continues:

“***Statement of case is an abuse of the court’s process or is otherwise likely to obstruct the just disposal of the proceedings (r.3.~~4.~~(4. (2)(b))***

Although the term “abuse of the court’s process” is not defined in the rules or practice direction, it has been explained in another context as “using that process for a purpose or in a way significantly different from its ordinary and proper ~~use”…~~use” …The categories of abuse of process are many and are not closed. The main categories which have been recognised in the case law to date are described in the following paragraphs. The court has the power to strike out a prima facie valid claim where there is abuse of process. ~~However~~However, there has to be an abuse, and striking out has to be supportive of the overriding objective. It does not follow from this that in all cases of abuse the correct response is to strike out the claim. The striking out of a valid claim should be the last option. If the abuse can be addressed by a less draconian course, it should be…

Attempts to re-litigate decided issues

As a general rule a party should not be allowed to litigate issues which have already been decided by a competent jurisdiction*…”* [My emphasis]

[94] On page 77 the learned editors, note:

> *"In Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd [2013] UKSC46…a patent infringement case, Lord Sumption set out the principles of res judicata. He stated that Arnold v National Westminster Bank plc [1991] 2 AC 93…was authority for the following propositions. (1) Cause of action estoppel is absolute in relation to all points which had to be and were decided in order to establish the existence or non-existence of a cause of action. (2) Cause of action estoppel also bars the raising in subsequent proceedings of points essential to existence or non-existence of a cause of action which were not decided because they were not raised in earlier proceedings, if they could with reasonable diligence and should in all the circumstances have been raised. (3) Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised but unsuccessfully. If the relevant point was not raised, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised. Lord Sumption rejected the proposition that recent case law had re-categorised* ***Henderson v Henderson*** *so as to treat it as concerned with abuse of process and not res judicata. He said that the principle in* ***Henderson v Henderson*** *has always been thought to be directed against the abuse of process involved in seeking to raise in subsequent litigation points which could and should have been raised before but that was an application of the law of res judicata."*

Discussion and analysis

[95] GLL has asked for summary judgment (or in the alternative, striking out) in respect of paragraphs 8, 10, 11 and 31 of the particulars of claim. Summary judgment is also being sought in relation to Ms Allen's Particulars of Breach of Duty of Mutual Trust and Confidence and the Particulars of Fraud.

[96] In paragraph 8 of the particulars of claim the duties of Ms Allen as the appointed actuary under section 44 of the **Act** are outlined.

[97] Paragraph 10 indicates, in part, that between April to August 2018, GLL, through the actions of Mr Hosin, released J$1.25 billion of its reserves without the authority and

approval of Ms Allen. It is also averred that by their actions GLL and Mr Hosin have carried on the business of GLL and exercised the powers of its directors in a manner which was oppressive or unfairly prejudicial to its shareholders and Ms Allen as an officer of GLL. Ms Allen outlined her version of events and the actions of Mr. Sylvain Goulet of Eckler features strongly throughout. She also spoke to communication between GLL to the FSC.

[98] Paragraph 10 also outlines the particulars of GLL's and Mr Hosin's breach of mutual trust and confidence. They are:

(i) Engaging an actuarial consultant where he was aware that Sylvain Goulet of Eckler was the Appointed Actuary of Sagicor Financial Corp. Limited, the competitor of GLL, and it would therefore be a clear conflict of interest;

(ii) Knowingly putting GLL at risk by engaging Eckler who would be privy to its finances as well as that of a competing company;

(iii) Failing to heed the expert opinion of GLL's consulting actuary, Mr. Kyle Rudden pertaining to the engagement of Mr. Goulet and the reduction of the reserves;

(iv) Failing to consult with GLL's Board of Directors or Ms Allen prior to the engagement of Eckler;

(v) Failing to afford and/or ensure Ms Allen the opportunity to be consulted concerning the terms of reference pertaining to the engagement of Mr. Goulet to conduct a peer review of her work in breach of the Code of Professional Conduct governing actuaries;

(vi) Failing to ensure that Ms Allen was consulted prior to the engagement of Eckler;

(vii) Failing to check the accuracy of any of the assumptions underpinning the work of Eckler;

(viii) Failing to review the methodology and assumptions underpinning the work of Eckler;

(ix) Failing to review the reasonableness of the results provided by Eckler;

(x) Failing to ensure the results provided by Eckler adhered to the Insurance Act, the Insurance Regulations, the Insurance (Actuaries) (Life Insurance Companies) Regulations and the Insurance (Actuaries (General Insurance Companies) Regulations and other applicable regulatory and/or legislative requirements;

(xi) Usurping, superseding and undermining Ms Allen's role and function as Appointed Actuary;

(xii) Failure to consult Ms Allen to confirm the validity of Eckler's assumptions and methods, including calculations and recommended changes based on its findings;

(xiii) Failing to appreciate the significant implications of releasing actuarial reserves of such magnitude at once; being possible oppression to insured persons as the reduction actuarial reserves would threatens (sic) GLL's ability to pay its claims which should be the first call upon the reserves;

(xiv) Failing to ensure that Ms Allen was satisfied with the basis upon which the recommendations were made prior to accepting them;

(xv) Failure to obtain approval of Ms Allen regarding the release of the reserves;

(xvi) Failure to appreciate Ms Allen's familiarity with the rules and regulations of the FSC, her knowledge of the insurance business in general in

Jamaica and particularly with GLL, where she has worked for more than a decade;

(xvii) Recklessly and negligently and in breach of ss. 44 (1) and (2) of the Insurance Act and s.4 of the Insurance (Actuaries) (Life Insurance Companies) Regulations 2001, which compositely provide that only the Appointed Actuary can determine the actuarial reserves of GLL, accepting the unilateral assessment of an external actuary who has not carried out his due diligence to consult with the Appointed Actuary prior to his coming to a finding on such a significant issue as advising on the reserves a company providing long term insurance can make available;

(xviii) Fraudulently misrepresented Ms Allen to the FSC as having sanctioned and agreed to the release of these reserves and further that Ms Allen approved the release of reserves to smooth the profits of the company; and

(xix) Recklessly, negligently and carelessly dissipating the actuarial reserves of GLL which purpose is to ensure its ability to settle future claims by policyholders, and which exists for the protection of the policyholders.

[99] Paragraph 11 alleged that GLL and Mr Hosin "fraudulently misrepresented" to the FSC that she had agreed to the release of the reserves in order to "smooth profits".

[100] The particulars of fraud were stated to be as follows:

(i) Employment of Eckler under the guise of a 'peer review' of Ms Allen;

(ii) Fraudulently misrepresenting to the FSC that Ms Allen sanctioned and agreed to the release of these reserves and further that she did so to smooth the profits of the company;

(iii) Usurping, superseding, and undermining Ms Allen's role and function as Appointed Actuary;

(iv) Materially misrepresenting Ms Allen's role as having any part to do with, smoothing of the profits of the company and further the explanation for the variance of JM$1.2 billion was completely false;

(v) Releasing the reserves of JM$1.2 billion to meet targets for profits of GLL; and

(vi) Inflating the profits to be profitable at a time when the Guardian Group being the 4th Interested Party herein, was being sought to be acquired by the National Commercial Bank Financial Group (NCBFG) in order for it to be viewed an attractive investment.

[101] Paragraph 31 alleged tortious interference with Ms Allen's statutory duty under the **Act**.

[102] Bearing the above principles in mind, I will now turn to consider the issues that arise in GLL's application.

Authorisation for the release of reserves

[103] In respect of the release of the reserves, Mr Hylton has argued that the issue of whether or not GLL needed to obtain Ms Allen's consent or authorisation to release the reserves is *res judicata* and those aspects of claim ought to be struck out. Alternatively, the matter is worthy of summary disposal as a matter of law.

Res judicata

[104] An issue is said to be res judicata where it has already been determined. In ***Catherine Allen v Guardian Life Limited and others*** [2018] JMSC Comm 32, Batts J in his consideration of Ms Allen's application for injunctive relief in this claim, found that this aspect of the claim has no real prospect of success. He stated:

> *"[14] [Ms Allen's] counsel relied on the Companies Act and the Insurance Act to ground the cause of action. Sections 212 and 213A of the Companies Act conferred jurisdiction on,*

among others, officers or former officers of the company to seek relief where the company acts in a manner that 'is oppressive or unfairly prejudicial to, any shareholder or debenture holder, creditor, director or officer of the company'. [Ms Allen], asserted Captain Beswick, has a statutory duty, pursuant to Section 44 of the Insurance Act and the Regulations thereunder, to determine the amount an insurance company ought to withdraw from its reserves. The company had no power to disregard the advice of an actuary appointed pursuant to section 44. In so doing, and in the failure of the consultant and/or the Defendant to consult with [Ms Allen], the Defendants acted unlawfully and in an oppressive and unfairly prejudicial manner. The court, he submits, should therefore act to protect [Ms Allen]and the Defendant's policyholders and shareholders. Counsel cited ***BCE ~~Inc~~Inc. v 1976 Debenture Holders*** *[2008]3SCR 560 (Supreme Court of Canada) and* ***Ervin Moo v Debbian Dewar*** *et al [2016] JMSC Comm 16, in support of the proposition that oppression and/or unfair prejudice is established if there was a reasonable expectation, which was disappointed in circumstances of unfair conduct and, which resulted in prejudicial consequences. That legal submission is sound.*

[15] ***However the argument fails because there is no liability, to which [Ms Allen] is exposed, in consequence of the alleged act of withdrawing reserves against advice and without consultation. There is therefore no relevant consequential oppression or unfair prejudice to [Ms Allen]****. In this regard counsel's written submission repeatedly references [Ms Allen's] professional liability and of her being "liable" for the release of reserves.* ***In fact, neither the Insurance Act nor the Regulations, make the actuary liable if the company acts contrary to, or without, the actuary's advice…***

[16] ***Whilst there is no doubt about the statutory responsibility of the actuary it does not, I think, follow that there is a cause of action created in the actuary.*** *This is not an application by a minority shareholder who claims to*

be oppressed; nor is this an application for Judicial Review to compel the regulator to act. The claim relies almost entirely on the fact that the Insurance Act accords to [Ms Allen] certain duties in relation to the fixing of reserves. ***There is however nothing, in the Insurance Act or elsewhere, to modify or restrict or curtail the role of directors and their responsibility to take such decisions. A company acts through its Board of Directors and its officers. The directors determine that which is in the best interest of a company and its shareholders. Ultimately, however, the Board must account to the shareholders. In the case of insurance companies the Insurance Act places a responsibility on the Commission to monitor, supervise and, where necessary, take relevant corrective action for wrongful conduct.*** *The "Commission" is defined as the Commission appointed under section 3 of the Financial Services Act (the 3rd Interested Party to this Claim). The Insurance Act also gives the Commission power to prescribe the reserve requirement, see Sections 117 and 118:*

> *'117. (1) every insurer shall include among the liabilities provided in its annual statement of account reserves as prescribed by the Commission.*
>
> *(2) .....*
>
> *118. No ~~shareholders~~shareholder's dividend shall be paid by any local company while its assets are less than the amount required for solvency by Section 53 nor shall any dividend be paid that would reduce its assets below the same amount or impair its capital.'*

[17] ~~It~~] It is manifest that the scheme of the legislation, and the regulations made thereunder, is for insurance companies to employ an actuary who, by notification to the Commission, is specifically designated. The said actuary has a statutory responsibility to, when advising the company, take into account the interest of its policyholders. The duty of the designated actuary includes making reports to the Chief Executive Officer, the Chief Financial Officer, the Company Directors and to the Commission, see generally: The

Insurance Act, section 44(10) (11) (12), section 45; and the Regulations, numbers 4(4), 17(10), 19(1), 19(2), 19(3), 19(6),20(1),21(4), 22(2) (d), 22(2) (~~e)~~e), 22(6),and 22(7). Regulation number 24 imposes a duty on the Commission to review the actuary's report. The Insurance Act offers the actuary, in section 44 subsections (14) and (15), protection for statements made in good faith. If terminated or asked to resign the actuary must notify the Commission of the reason "to the best of his knowledge." ***There is no provision which compels a company to comply, or act in accordance, with the advice of the actuary.***

[18] ***Even if such a duty could be implied it is clear that it is the Commission, not the court, which is imbued with the authority to take corrective action****. This is understandable because the question of whether reserves are adequate is highly technical and dependent on specialist and at times sensitive analysis. The court is really not the appropriate forum for such determinations to be made in the first instance…*

[19] …. The statutory duty of [Ms Allen] is to advise the company and to report to the Commission. In her report she may, and perhaps should, inform on the Company's decision to disregard her advice. This duty, by her letter dated the 10th September 2018, she appears to have discharged. ***I do not see a cause of action which gives [Ms Allen] a right to compel the Defendants to act in accordance with advice given by her****."* [My emphasis]

The Insurance Act

[105] Section 44[5] of the **Act** speaks to the appointment of an actuary by a registered insurer and subsection (2) indicates that, subject to subsection (3), the actuary shall value (a) the actuarial reserves and other policy liabilities of the insurer as at the end of

[5] See also sections 44 (7), (8), (9), (10), (11) and (12).

each financial year; and (b) any other matter specified in any direction given by the FSC.

[106] Mr. Hylton has argued, that in relation to the rights and responsibilities of the Appointed Actuary under the **Act**, no trial is necessary as the resolution of the factual disputes will not affect the outcome of this aspect of the claim. I agree with that submission.

[107] Based on ***Sagicor Bank Jamaica Ltd v Taylor Wright*** (supra) where the resolution of issues which are in dispute will not affect the outcome of the claim, a trial will be a waste of time and resources. In those circumstances an order for summary judgment will be appropriate. Lord Briggs who delivered the decision of the Board stated:

> *"**[18]** The criterion for deciding whether a trial is necessary is laid down in Part 15.2 in the following terms:*
>
> > *'The court may give summary judgment on the claim or on a particular issue if it considers that –*
> >
> > *(a) the claimant has no real prospect of succeeding on the claim or the issues; or*
> >
> > *(b) the defendant has no real prospect of successfully defending the claim or the issues.'*
>
> *That phraseology does not mean that, if a defendant has no real prospect of defending the claim as a whole, that there should nonetheless be a trial of an issue.* ***The purpose of the rule in making provision for summary judgment about an issue rather than only about claims is to enable the court to confine and focus a necessary trial of the claim by giving summary judgment on particular issues which are relevant to the claim, but which do not themselves require a trial****."* [My emphasis]

[108] Based on my examination of the **Act**, I agree with Mr. Hylton that no evidence is required for a determination to be made in respect of the duties and responsibilities of

an appointed actuary. In my view, his submission that an actuary appointed by a life insurance company has certain duties and responsibilities as a matter of law is correct.

[109] With respect to the issue of the authorization of the release of the reserves, like Batts J, I too have been unable to find anything in law or in the documents submitted, which indicate that Ms Allen's authorization/consent/approval was required by GLL. Whether given the appointed actuary's role it would be good practice or courteous to do so, is a different matter altogether. The valuation of the actuarial reserves which is clearly within the ambit of her responsibilities is an entirely separate matter from the authorization for its release.

[110] In the circumstances, I am of the view that GLL would be entitled to summary judgment in respect of those aspects of the claim which allege that GLL released the reserves without Ms Allen's authority or approval.

[111] I am also of the view, that those aspects of the pleadings could also be struck out on the basis that they are *res judicata,* in light of the fact that the decision of Batts J in ***Catherine Allen v Guardian Life Limited and others*** (supra), has not been appealed and as such, his findings in relation to this issue remain unchallenged. Mr. Hylton has submitted that any attempt to re-litigate those issue would be an abuse of the process of the court. I agree.

[112] I am however mindful of the fact that the striking out of a party's statement of case is a draconian measure which should be sparingly applied. It is reserved for plain and obvious cases.[6] The term abuse of process was defined by Lord Diplock in ***Hunter v Chief Constable of the West Midlands Police and others*** (1982) AC 529 as the misuse of the court's *"…procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a*

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[6] Per Edwards J in ***Jebmed S.R.L. v Capitalease S.P.A. Owners of M/V trading Fabrizia*** [2017] JMSC Comm 22 at paragraph 23.

party to litigation before it, or would otherwise bring the administration of justice into disrepute among right thinking people….[7]

[113] His lordship further stated:

> *"The circumstances in which abuse of process can arise are very varied; … It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power."*[8]

[114] In this matter, the complaint is that certain issues have already been the subject of adjudication and findings made. McDonald-Bishop J (as she then was) in ***Fletcher & Company v Billy Craig Investments Limited*** [2012] JMSC 128 stated:

> *"[142] …The doctrines of estoppel, res judicata and abuse of process, even if different, are all geared towards achieving the same goal, that is ensuring that there is an end to litigation.*
>
> *[143] In **Johnson v Gore Wood**, Lord Bingham made the point, in speaking of the **Henderson v Henderson** principle and exalting its virtues, that:*
>
> > *'…It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one*

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[7] Page 536.

[8] Page 536.

> *cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not… While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice." (Emphasis added).*

[115] Lord Griffiths in ***Administrator General of Jamaica v Rudyard Stephens and others*** (1992) 41 WIR 238 stated that "…*[t]here comes a time when it is oppressive to allow a party to litigation to re-open a matter that has been judicially determined against him at an interlocutory stage of the proceedings*."[9] Whilst the issues in this matter have not been revisited with the same zeal and tenacity as was done by the litigants in the above case, the principle is the same.

Fraudulent misrepresentation

[116] This allegation was raised in paragraph 11 of the particulars of claim. Sub paragraphs (ii) and (iv) of the particulars of fraud also deal with this issue. The FSC in its email,[10] to Ms Diana Thomas-Morris, Manager, Compliance & Risks of GLL stated:

> *"…It is noted that Net Actuarial Liabilities decreased by $1.28 in comparison to the corresponding period of June 2017. The rational*

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[9] Page 243.
[10] Email dated August 9, 2018, written by Ms Tamara Francis Malcolm (FSC). See the exhibit for the third affidavit of Meghon Brown-Miller.

> *for this, based on the 10% variance report submitted, was "owing mainly to lower actuarial reserves or $1 B for the individual life portfolio and $135M for the Annuities portfolio." Please indicate the rationale as well as the supporting documentation for this basis that outlines the appropriateness or the release."*

[117] The offending words are contained in the response given by GLL which was in the following terms:

> *"Variance of $1.28 in Net Actuarial Liabilities over June 2017*
>
> *It has been GLL's custom to make material adjustments to actuarial reserves at year end, post the reviews of actuarial assumptions and other modifications/fixes conducted by the Actuarial Department. In order to smooth the profits of the company over the financial year, a management decision was taken, with the agreement of our Appointed Actuary, to commence the year-end review at half-year for those items that could reasonably be brought forward to June 2018. It was also agreed that the remaining analyses would be completed closer to year end…"*

[118] I can certainly appreciate Ms Allen's unease with the response that was provided by GLL. According to Ms Allen's pleadings, the response from GLL (which was not immediately disclosed to her), gave the clear impression that the said reserves were released with her authorization in her capacity as Appointed Actuary and that she had sanctioned and agreed to the release of those reserves in order to smooth profits.

[119] I agree with Mr Hylton that the response does not explicitly convey that the release of the reserves was done with Ms Allen's consent. However, in my view, the email when read as a whole, is capable of implicitly conveying that Ms Allen agreed with the decision taken by GLL and the reason therefor.[11]

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[11] See AIC ***Ltd v ITS Testing Services (UK) Ltd; The Kriti Palm*** [2007] 1 All ER (Comm) 667, paragraph 253.

[120] In the sphere of contract law, fraudulent misrepresentation is usually alleged where a claimant has been induced by that representation to enter into a contract or alter its position in respect of a particular matter. In such a case, a claim in tort is maintainable by the representee (in this case the FSC) for fraudulent misrepresentation/deceit. In order to succeed the representee is required to prove that the representation was:

(1) false;

(2) material and made with the intent to influence the representee;

(3) influenced the representee; [12]

(4) fraudulent; and

(5) caused damage to the representee.

[121]In light of the above, I agree with Mr. Hylton that the facts as alleged by Ms Allen do not amount to fraudulent misrepresentation. Accordingly, there is no realistic prospect of success on this issue.

Fraud

[122] In ***Davy v. Garrett*** (1877) 7 Ch. D. 473 it was clearly stated that fraud must be specifically pleaded and proved. Thesiger, L.J. stated:

> *"…In the Common Law Courts no rule was more clearly settled than that fraud must be distinctly alleged and as distinctly proved,*

[12] Tort of deceit - the representation must be intended to be acted upon by the claimant, it must be made with the intent that it shall be acted upon by the claimant. See also the 27th edition of 'Chitty on Contracts: General Principles, para 6-019, page 347.

and that it was not allowable to leave fraud to be inferred from the facts…." [13]

[123] In ***Harley Corporation Guarantee Investment Company Limited v Estate Rudolph Daley et al (consolidated with) RBTT Bank Jamaica Limited v Estate Rudolph Daley*** [2010] JMCA Civ 46 Harris JA said:

> *[53] In placing reliance on an allegation of fraud, a claimant is required to specifically state, in his particulars of claim, such allegations on which he proposes to rely and prove and must distinctly state facts which disclose a charge or charges of fraud.*
>
> *[54] At the time of the commencement of the actions the Civil Procedure Code, was the relevant procedural machinery in place. Section 170 stipulated that certain causes of action, on which a party seek to rely, must be expressly pleaded. The section reads:*
>
> > *"In all cases in which the party pleading relies on any misrepresentation fraud shall be stated in the pleading."*
>
> *[55] In* ***Wallingford v The Directors of Mutual Society*** *[1880] 5 AC 685 at 697 Lord Selbourne succinctly defined the principle in this way:*
>
> > *"With regard to fraud, if there be any principle which is perfectly well-settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice. And here I find nothing but perfectly general and vague allegations of fraud. No single material fact is condescended upon, in a manner which would enable any Court to understand what it was that was alleged to be fraudulent. These allegations, I think, must be entirely disregarded …"*
>
> *[57]* ***The Civil Procedure Rules however do not expressly provide that fraud must be expressly pleaded. However, rule***

[13] Page 489.

> ***8.9 (1) prescribes that the facts upon which a claimant relies must be particularized. It follows that to raise fraud, the pleading must disclose averments of fraud or the facts or conduct alleged must be consistent with fraud.*** *Not only should the requisite allegations be made but there ought to be adequate evidentiary material to establish that the interest of a defendant which a claimant seeks to defeat was created by actual fraud.*
>
> *[58] Fraud had not been pleaded in Daley's claim nor does it disclose any allegations of fraud. It had not been expressly pleaded in Walters' claims but Miss Smith contends that the particulars of claim disclose fraudulent acts on the part of Harley Corporation on which the learned trial judge had properly relied.* ***It is perfectly true that although fraud has not been expressly pleaded, it may be inferred from the acts or conduct of a defendant*** *- see Eldemire v Honiball (1990) 27 PC 5 of 1990 delivered on 26 November 1991."*
>
> [My emphasis]

[124] In ***Re CD*** [2008] UKHL 33, Lord Carswell said:

> *"28…. The seriousness of the allegation requires no elaboration: a tribunal of fact will look closely into the facts grounding an allegation of fraud before accepting that it has been established. The seriousness of consequences is another facet of the same proposition: if it is alleged that a bank manager has committed a minor peculation, that could entail very serious consequences for his career, so making it the less likely that he would risk doing such a thing. These are all matters of ordinary experience, requiring the application of good sense on the part of those who have to decide such issues. They do not require a different standard of proof or a specially cogent standard of evidence, merely appropriately careful consideration by the tribunal before it is satisfied of the matter which has to be established."*[14]

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[14] Cf. in ***Re H and others (Minors) (Sexual Abuse: Standard of Proof)*** [1995] UKHL 16; [1996] AC 563 per Lord Nicholls at page 586, ***Re B (Children)*** [2008] UKHL 35 per Baroness Hale and ***Secretary of***

[125] The approach of the court in dealing with issue is also evident from the following passage in ***Beverly Lewis v Cleveland Hartley*** (supra) where G. Fraser J stated:

> *"[19] Fraud, it should be remembered, has to be specifically pleaded and it has to be done with particularity….*
>
> *Attorneys-at-law dealing with civil litigation have traditionally been admonished to treat the issue of alleging fraud very cautiously and carefully. Lord ~~Selborne~~ ;' LC in* ***John Wallingford v Mutual Society and the Official Liquidator*** *(1880) 5 App Cases 685 at page 697 stated the general rule, He said:*
>
> > *"With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice."*
>
> *In* ***Associated Leisure Ltd and others v Associated Newspapers Ltd****, [1970] 2 All ER 754 at pages 757-8; Lord Denning MR (as he then was) cautioned that fraud should not be pleaded unless there was "clear and sufficient evidence to support it". ~~Similarly~~Similarly, in* ***Donovan Crawford and Others v Financial Institutions Services Ltd*** *[2005] UKPC 40, the Privy Council emphasized the standard in respect of the issue of fraud in civil litigation. The Court adumbrated at paragraph 13 of its judgment that "It is well settled that actual fraud must be precisely alleged and strictly proved."" """"*

[126] Mr. Hylton argued that the evidence in support of such an allegation must be strong. Reference was made to the following paragraph in ***Beverly Lewis v Cleveland Hartley*** (supra):

> *"[28] Although an allegation of fraud in civil proceedings must be proved on the balance of probabilities, the authorities have established that the evidence in support of it must be proportionate*

State for the Home Department v Rehman (Consolidated Appeals) [2003] 1 AC 153 per Lord Hoffman at paragraph 55.

> *with the seriousness of the allegation made. In this case the allegation made essentially involves the ascription of the charge of a criminal offence. For all intents and purposes the more serious the allegation of fraud before the court for determination, the more arduous it will be for the party who bears the burden of proving the truth of that allegation to persuade the court of the probability of its truth."*

[127] Ms Allen has alleged that GLL and Mr Hosin acted fraudulently by inappropriately releasing GLL's reserves in order to inflate profits. While the act of releasing reserves is not in and of itself fraudulent, the rationale must be considered. The resolution of the issue of whether the acts complained of amount to fraud would generally fall to be determined by a tribunal of fact.

[128] I am however of the view that even if the release of GLL's reserves is sufficient to ground the allegation of fraud, that issue is first and foremost a matter for the FSC, which is tasked with the regulation of the industry. Section 147(c) the **Act** makes it an offence for a person *"in purported compliance with a requirement under any provision of [the] Act to supply information or provide an explanation or make a statement"* he knows to be false or is reckless in respect to its veracity. Under the **Act**, the FSC is empowered to, among many other things, suspend and revoke licences[15].

[129] Injudiciously releasing reserves may jeopardise a company's ability to meet its obligations and if the release is not reflected in public financial records it may paint an inaccurate view of what is happening with the company to stakeholders. Where, as has been alleged in this case, there are questions about the propriety of what has been done, it is not Ms Allen's personal fight. Her remit would be to report the matter to the FSC for the appropriate action to be taken. That body is empowered to deal with the alleged wrongful conduct on the part of GLL and/or Mr Hosin as part of its statutory mandate.

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[15] See section 147 (5) of the Insurance Act. See also section 6 of the Financial Services Commission Act.

[130] The court has not been asked to make any declaration that the actions of GLL and/or Mr Hosin was fraudulent. The remedy sought by Ms Allen seems to be an order that Mr Hosin account to the FSC. With respect, that remedy should be sought by the FSC if it desires to do so.

[131] In her particulars of fraud, Ms Allen also mentions the employment of Eckler under the guise of a peer review and the usurpation of her role as appointed actuary. Where allegations of fraud have been made, there may be compelling reasons to proceed to trial as a tribunal of fact is better suited to assess the evidence presented. I do, however, bear in mind, that allegations of fraud are not an absolute bar to obtaining summary judgment.[16] Part 15 of the **CPR** does not say so. In some cases, even if fraud is proved, it will not affect a claimant's entitlement to relief.[17]

[132] Having assessed the pleadings and the affidavits in this matter, I find that the claim that GLL acted fraudulently does not have a realistic prospect of success. In my judgment, the matters complained of may be more suitably subsumed under the issues of wrongful termination and the breach of mutual trust and confidence.

[133] I am therefore of the view that the claim that GLL acted fraudulently has no realistic prospect of success.

Breach of mutual trust and confidence

[134] The relationship between an employer and employee is one which is based on mutual trust and confidence. In ***Woods v WM Car Services Petersborough Limited*** [1981] ICR 666, the Employment Appeal Tribunal stated:

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[16] See ***Wrexham Association Football Club Ltd v Crucialmove Ltd*** [2006] EWCA Civ 237 at paragraph 51.

[17] See ***Sagicor Bank Jamaica Limited v Taylor-Wright*** (supra).

> *"…it is clearly established that there is implied in a contract of employment a term that employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence or trust between employee (sic) and ~~employee :~~employee: Courtaulds Northern Textiles Ltd. v. Andrew [1979] I.R.L.R. 84. To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract: the tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect. (sic) judged reasonably and sensibly, is such that the employee cannot be expected to put up with it: see* British Aircraft Corporation Ltd. v. Austin *[1978] I.R.L.R. 332 and* Post Office v. Roberts *[1980] I.R.L.R. 347. The conduct of the parties has to be looked at as a whole and its cumulative impact assessed:* Post Office v. Roberts*."*[18]

[135] That principle was embraced in ***Johnson v Unisys Ltd*** [2001] UKHL 13 and ***Malik v Bank of Credit and Commerce International SA*** [1997] 3 All ER 1. Its operation has also been considered by the Court of Appeal in ***Wayne Reid v Jentech Consultants Ltd and anor*** and ***Curtis Reid v Cable and Wireless Jamaica and others*** [2020] JMCA Civ 26[19] and ***United General Insurance Company Limited v Marilyn Hamilton*** [2020] JMCA Civ 29.

[136] The purpose of the implication of this term into a contract of employment is to facilitate the proper functioning of the contract. In ***Malik v Bank of Credit and Commerce International SA*** Lord Nicholls of Birkenhead stated:

> *"The starting point is to note that the purpose of the trust and confidence implied term is to facilitate the proper functioning of the contract. If the employer commits a breach of the term, and in consequence the contract comes to an end prematurely, the employee loses the benefits he should have received had the contract run its course until it expired or was duly terminated. In addition to financial benefits such as salary and commission and*

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[18] Pages 670-671
[19] See paragraphs [168] and [197] – [201.

pension rights, the losses caused by the premature termination of the contract (the premature termination losses) may include other promised benefits, for instance, a course of training, or publicity for an actor or pop star…

CONTINUING FINANCIAL LOSSES

Exceptionally, however, the losses suffered by an employee as a result of a breach of the trust and confidence term may not consist of, or be confined to, loss of pay and other premature termination losses. Leaving aside injured feelings and anxiety, which are not the basis of the claim in the present case, an employee may find himself worse off financially than when he entered into the contract. The most obvious example is conduct, in breach of the trust and confidence term, which prejudicially affects an employee's future employment prospects. The conduct may diminish the employee's attractiveness to future employers…

Employers may be under no common law obligation, through the medium of an implied contractual term of general application, to take steps to improve their employees' future job prospects. But failure to improve is one thing, positively to damage is another. Employment, and job prospects, are matters of vital concern to most people. Jobs of all descriptions are less secure than formerly, people change jobs more frequently, and the job market is not always buoyant. Everyone knows this. An employment contract creates a close personal relationship, where there is often a disparity of power between the parties. Frequently the employee is vulnerable. ***Although the underlying purpose of the trust and confidence term is to protect the employment relationship, there can be nothing unfairly onerous or unreasonable in requiring an employer who breaches the trust and confidence term to be liable if he thereby causes continuing financial loss of a nature that was reasonably foreseeable****.* ***Employers must take care not to damage their employees' future employment prospects, by harsh and oppressive behaviour or by any other form of conduct which is unacceptable today as falling below***

> ***the standards set by the implied trust and confidence term**."*[20] [My emphasis]

[137] The facts of the case are instructive and have been accurately summarised in the headnote. The applicants were employees of a bank in respect of which, provisional liquidators were appointed in July 1991. Shortly thereafter, it became widely known that the regulatory authorities considered that the bank's business had for a number of years been carried on fraudulently. In October 1991, the provisional liquidators terminated the employment of both applicants on grounds of redundancy. Neither applicant was thereafter able to obtain employment in the financial services industry, allegedly because of the stigma attached to them as former employees of the bank, although there was no allegation of any wrongdoing against them. Their claims for compensation were rejected at first instance and the matter travelled all the way to the House of Lords.

[138] Lord Nicholls said at page 5:

> *"…the bank was under an implied obligation to its employees not to conduct a dishonest or corrupt business. This implied obligation is no more than one particular aspect of the portmanteau,* ***general obligation not to engage in conduct likely to undermine the trust and confidence required if the employment relationship is to continue in the manner the employment contract implicitly envisages****."* [My emphasis]

[139] Importantly, he continued:

> *"Second, I do not accept the liquidators' submission that the conduct of which complaint is made must be targeted in some way at the employee or a group of employees. No doubt that will often be the position, perhaps usually so. But there is no reason in principle why this must always be so.* ***The trust and confidence required in the employment relationship can be undermined by an employer, or indeed an employee, in many different ways****. I can see no justification for the law giving the employee a remedy if*

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[20] Pages 6-8.

> *the unjustified trust-destroying conduct occurs in some ways but refusing a remedy if it occurs in others.* ***The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. That requires one to look at all the circumstances****."* [My emphasis]

[140] Lord Steyn said that he regarded the emergence of the implied obligation of mutual trust and confidence as a sound development.

[141] He said, at page 47:

> *"The implied obligation extends to any conduct by the employer likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. It may well be, as the Court of Appeal observes, that the decided cases involved instances of conduct which might be described "as conduct involving rather more direct treatment of employees:" [1996] I.C.R. 406, 412. So be it. But Morritt L.J. held, at p. 411, that the obligation:*
>
> > *"may be broken not only by an act directed at a particular employee but also by conduct which, when viewed objectively, is likely seriously to damage the relationship of employer and employee."*
>
> *That is the correct approach. The motives of the employer cannot be determinative, or even relevant, in judging the employees' claims for damages for breach of the implied obligation. If conduct objectively considered is likely to cause serious damage to the relationship between employer and employee a breach of the implied obligation may arise."*

[142] The effect of the decisions in ***Johnson v Unisys Ltd*** (supra) and ***Malik v Bank of Credit and Commerce International SA*** (supra) was examined in great detail by Brooks JA in ***United General Insurance Company v Marilyn Hamilton*** (supra), who stated as follows:

*"[64] **Malik**, in this context, establishes two important principles. The first principle is that courts are entitled to imply that the contract of employment contains a term that the parties will not conduct themselves in such a way as to destroy or seriously damage their mutual relationship of trust and confidence. The second principle is that an employee, in principle, could be awarded damages for loss of reputation caused by a breach of the implied term of mutual trust and confidence. **Gabbidon v Sagicor Bank**, therefore, accepts that the implied term of trust and confidence applies in this jurisdiction.*

*[65] **Gabbidon v Sagicor Bank** considered **Johnson v Unisys** and also found that it applied in this jurisdiction. The applicability arose from the finding that the LRIDA had the same effect on this jurisdiction that the equivalent English legislation had on employment law in that country. That is, it prevented the court from extending the common law in respect of wrongful dismissal.*

*[66] **Johnson v Unisys** establishes that breaches of the implied term of mutual trust and confidence, which result in a dismissal, are not actionable at common law. The impact of **Johnson v Unisys** is explained in **Edwards v Chesterfield Royal Hospital NHS Foundation Trust; Botham v Ministry of Defence** [2011] UKSC 58; [2012] 2 All ER 278 (**Edwards v Chesterfield Royal Hospital**). Lord Dyson SCJ, at paragraph [24] of his judgment in **Edwards v Chesterfield Royal Hospital**, stated:*

> *'…The ratio of Johnson's case is that the implied term of trust and confidence cannot be extended to allow an employee to recover damages for loss arising from the manner of his dismissal….'*

*Lord Kerr SCJ, who dissented in part in **Edwards v Chesterfield Royal Hospital**, accurately distilled the ratio in **Johnson v Unisys**. He said, at paragraph [145] of his judgment, that there were two aspects to the decision in **Johnson v Unisys**:*

> *'I would prefer to express the ratio [in **Johnson v Unisys**] in terms that more clearly recognise the two separate aspects of the decision. In the first place, **the House of Lords rejected the notion that the implied term of mutual trust***

> ***and confidence had any role in determining the nature of the employer's obligations at the time of the dismissal of the employee. Secondly, it concluded that compensation for loss flowing from the manner in which an employee is dismissed must be sought within the statutory scheme devised by Parliament*** *in the 1971 Act and continued in successor enactments. It seems to me that it is the latter of these two which is the more relevant to the issues that arise on this appeal.' (Emphasis supplied)*

[67] Lord Nicholls of Birkenhead in ***Eastwood and another v Magnox Electric plc; McCabe v Cornwall County Council and others*** *[2004] 3 All ER 991; [2005] 1 AC 503 (****Eastwood v Magnox****) explained the Johnson exclusion area. He said, at paragraph [28] of his judgment:*

> *'In the ordinary course, suspension apart, an employer's failure to act fairly in the steps leading to dismissal does not of itself cause the employee financial loss.* ***The loss arises when the employee is dismissed and it arises by reason of his dismissal. Then the resultant claim for loss falls squarely within the Johnson exclusion area****.' (Emphasis supplied)*

[68] It is for those reasons that the breach of mutual trust and confidence is not justiciable if it occurs at the time of dismissal. The acceptance in ***Gabbidon v Sagicor*** *of the principles in* ***Johnson v Unisys****, and the Johnson exclusion area, may be found at paragraph [80] of the judgment."*

[143] The particulars of breach of mutual trust and confidence are quite extensive. They encompass allegations of conflict of interest arising from the appointment of Eckler, the failure of GLL to consult Ms Allen before accepting Eckler's recommendation to release the reserves, the manner in which the peer review was conducted and the release of the reserves without her approval.

[144] In light of the authorities referred to above, it is fair to say, that in order to succeed in a claim for breach of mutual trust and confidence, an employee needs to

show that the effect of the employer's conduct was likely to destroy or seriously damage trust and confidence between the parties, even if that effect was not intended.

[145] If the employee is able to show that the employer's conduct was in fact calculated or intended to destroy or seriously damage trust and confidence, then, of course, this puts his or her case even higher. If there is reasonable and proper cause for the employer's conduct, there will be no breach.

[146] Ms Allen's allegations of failure to review and check the accuracy of Eckler's recommendations, in my judgment, have no real prospect of succeeding because GLL engaged the services of someone who was, from all indications, qualified to do what he was engaged to do. Similarly, her allegations that GLL (or even Mr Hosin), failed to appreciate the implications of its decision to release the reserves, has no real prospect of success. Those allegations do not properly fall under this head of damage.

[147] Having assessed the particulars, I am of the view that the issues raised at sub-paragraphs (iv) – (vi), (xi), (xii), (xiv) – (xvi) of the particulars of breach of mutual trust and confidence are capable of being subsumed under this head of damage. The other issues raised have no real prospect of success as they do not in my opinion fall to be considered under this head.

[148] In relation to (xv), although I have found that Ms Allen's authorization was not legally required, bearing in mind the judgments of Lord Nicholls and Lord Steyn, it is more than arguable that this allegation can be subsumed under the head of breach of the mutual trust and confidence.

[149] Notably, in ***Malik*** Lord Nicholls stated the following at page 37:

> *"In my view, if it was reasonably foreseeable that a particular type of loss of this character was a serious possibility, and loss of this type is sustained in consequence of a breach, then in principle damages in respect of the loss should be recoverable."*

[150] Lord Steyn said, at page 49:

> *"In order to succeed at trial the applicants will have to establish not only a breach of the obligation, which caused them financial loss, but also that such loss is not too remote."*

[151] I have highlighted the foregoing simply to indicate that it will be Ms Allen's responsibility at the trial to establish a breach and any consequential loss.

[152] An order for summary judgment would therefore be appropriate in respect of the issues raised at paragraphs (i) – (iii), (vii) – (x), (xiii) and (xvi) – (xix) of the particulars of breach of duty of mutual trust and confidence.

*Tortious interference with Ms Allen's statutory duty under the **Act***

[153] The tortious interference complained of is in relation to GLL's release of the reserves without Ms Allen's authorization.[21] I have accepted Mr. Hylton's submission that the issue of Ms Allen's rights and obligations under the **Act** were dealt with by Batts J with whom I agree and that in any event they are *res judicata.*[22] That issue has no real prospect of success.

Mr Hosin's application

[154] Mr Hosin, seeks the following orders:

(i) That automatic referral to mediation be dispensed with;

(ii) Mr Hosin be granted summary judgment on the claim against the claimant [Ms Allen]. Alternatively, that Mr Hosin be granted summary judgment on each of the issues identified in the grounds;

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[21] See paragraph 31 of the particulars of claim.

[22] See paragraphs 108 – 110 of this judgment.

(iii) Alternatively, that the claim against Mr Hosin or the parts of the claim identified in the grounds be struck out pursuant to rules 26.3 (1)(a), (b) and (c) of the **CPR**; and

(iv) [Ms Allen] pays the costs of these proceedings to Mr Hosin on the indemnity basis, with special costs certificate for three counsel.

[155] As regards dispensing with mediation, the grounds stated in the application are as follows:

(a) Rule 74.4 (1) of the **CPR** provides that the court may dispense with mediation for good or sufficient reason.

(b) In the circumstances set out in the following paragraphs this matter cannot be resolved through mediation and the paragraphs provide good or sufficient reason to dispense with mediation.

[156] In seeking summary judgment, Mr Hosin relies on the following grounds:

(a) Rule 15.2(a) of the **CPR** provides that the court may give summary judgment on a claim if it considers that the claimant has no real prospect of succeeding on the claim. The rule also provides that the court may give summary judgment on an issue if it considers that the claimant has no real prospect of succeeding on the issue.

(b) Ms Allen has no real prospect of succeeding on the claim, or alternatively, on the issues against him.

(c) By employment contract dated 14 September 2004 Ms Allen was employed by GLL as an actuary and on 1 November 2006 Ms Allen was appointed as GLL's actuary for the purposes of the **Act**.

(d) On 15 August 2018 GLL terminated Ms Allen’s employment by reason of redundancy.

(e) The particulars of claim purportedly gave particulars of the causes of action against him, including for relief under section 213A of the **Companies Act**, for breach of Ms Allen's contract of employment, fraud and defamation.

(f) Mr Hosin did not employ Ms Allen and is not party to her contract of employment.

(g) Mr Hosin denies being party to the fraud alleged by Ms Allen and the facts alleged in Ms Allen's statements of case do not and cannot support a claim that Mr Hosin was guilty of fraud or was party to any conspiracy.

(h) The facts alleged are incapable of amounting to a claim against Mr Hosin for defamation or to entitle [Ms Allen] to the declarations or any relief under section 213A of the **Companies Act**.

(i) The claims relating to Ms Allen's alleged status and rights pursuant to the **Act** have already been determined by this Honourable Court in a judgment delivered on 21 September 2018.

[157] As regards striking out the claim, Mr Hosin outlined the following grounds:

(a) Rule 26.3(1)(a) of the **CPR** provides that the court may strike out a statement of case or part of a statement of case if it appears to the court that there has been a failure to comply with a rule.

(b) Among the relief sought by Ms Allen against Mr Hosin is "damages for slander and defamation of character".

(c) Rule 69.2 of the **CPR** provides that the particulars of claim in a defamation suit must give sufficient particulars of the publications in respect of which the claim is brought to enable them to be identified.

(d) In breach of rule 69.2 of the **CPR**, the particulars of claim do not give any or any sufficient particulars.

(e) Rule 26.3(1)(b) of the **CPR** provides that the court may strike out a statement of case or part of a statement of case if it appears to the court that the statement of case is an abuse of the process of the court.

(f) The claim against Mr Hosin is an abuse of the court's proceedings because:

(1) it seeks to rely on issues that the court has already considered and ruled on and which are therefore *res judicata* as between Ms Allen and Mr Hosin;

(2) it alleges fraud which is not properly particularized and in circumstances where the facts relied on do not support an allegation of fraud against Mr Hosin;

(3) Ms Allen seeks relief for claims against Mr Hosin which are not causes of action; and

(4) Ms Allen seeks relief against Mr Hosin to which she has no entitlement due to lack of locus standi.

(g) Rule 26.3(1)(c) of the **CPR** provides that the court may strike out a statement of case if it appears to the court that the statement of case discloses no reasonable grounds for defending the claim.

(h) Ms Allen’s particulars of claim disclose no reasonable grounds for bringing a claim against Mr Hosin.

[158] In relation to the order for costs, the grounds put forward are as follows:

(a) Rule 64.6 of the **CPR** provides that the general rule is that the court must order the unsuccessful party to pay the costs of the successful party. If this application succeeds there would be no basis to depart from the general rule.

(b) Rules 65.17 (1) and (3) of the **CPR** provide that where the court has a discretion as to the amount of costs to be awarded to a party it should allow

the amount the court deems reasonable, and in determining what is reasonable, the court must take into account all the circumstances, including the conduct of the parties.

(c) In determining what is reasonable the court has a discretion as to whether costs should be awarded on the indemnity basis.

(d) The grounds on which the court can and should award costs on the indemnity basis are where the paying party has acted in a highly unreasonable manner or where it has made a claim which is irreconcilable with the contemporaneous documents.

(e) In alleging in these proceedings that Mr Hosin was party to a fraudulent conspiracy or had committed a breach of contract, Ms Allen acted in a highly unreasonable manner and made claims which are completely irreconcilable with the contemporaneous documents.

(f) Rule 64.12 of the **CPR** provides that when making an order as to the costs of an application in chambers the court may grant a special costs certificate and may direct that the costs of more than one Attorney-at-Law be allowed.

(g) In view of the numerous claims and the nature of the allegations made against Mr Hosin, it was reasonable for him to retain three counsel and it would be appropriate for the court to direct that the costs of three counsel be allowed.

The second affidavit of Eric Hosin

[159] Mr Hosin relied on his second affidavit sworn to on 5 December 2018 and filed on 6 December 2018.

[160] He stated that he is the President of GLL. Mr Hosin also stated that at all material times, Ms Allen was employed to GLL. The terms of her employment he said, were contained in a letter agreement between herself and GLL dated 14 September 2004.

[161] He stated that in his capacity as President of GLL, he attended a meeting of its board of directors on 15 August 2018 when the Board decided to outsource the position of appointed actuary and to make the position occupied by Ms Allen redundant with immediate effect. He signed the letter terminating her employment with GLL.

[162] He further stated that at no time did he personally employ Ms Allen or have any contractual relationship with her. He denied being party to any fraud, conspiracy or misrepresentation as alleged by Ms Allen or at all.

Ms Allen's affidavit

[163] Ms Allen relied on her affidavit sworn to on 5 March 2019 and filed on 7 March 2019 as well as other affidavits sworn by her and filed in this matter.

[164] She stated that the claim before the court is one made under section 213A of the **Companies Act**, 2004 and that Mr Hosin who is also an officer of GLL, which is held wholly by the 4th Interested Party, has:

a. performed such actions while being an officer of the said company;

b. conducted the business and affairs of the companies; and

c. exercised their powers as officer/directors of the company

in such a manner that is oppressive and unfairly prejudicial to her, being a former officer of GLL.

[165] She stated that her employment was terminated at minutes to 9 am on the morning of 15 August 2018, before another meeting she was scheduled to attend. She further stated that she was therefore unsure of when a board meeting would have been held, in light of her knowledge that such meetings were usually held in the afternoon.

[166] Ms Allen stated that her cause of action against Mr Hosin is based on tortious acts against her committed by him, in his personal capacity while he was [employed] in the capacity of president of GLL.

[167] She stated that while she does not profess to have any control over when any company may terminate an employee, it is an extremely uncommon and highly suspicious practice, in her experience as a senior management employee, to effect a termination by redundancy on the same day it is decided.

[168] She further stated that the termination of an Appointed Actuary/ Vice President of GLL would have required the ratification of the Board and could not have been done unilaterally by Mr Hosin. Further, she indicated that outsourcing of the Appointed Actuary is not an industry practice in Jamaica and in any event, even if it was a normal procedure, she was not given an opportunity to apply for said outsourced position.

[169] She stated that her claim against Mr Hosin can proceed against him as an individual, as it has arisen from acts done in the usurpation of her role at GLL as well as against her personal and/or professional reputation. She asserted that the basis of this claim is fraud, misrepresentation, conspiracy and defamation and/or slander amongst other torts. She stated that most of the "malicious acts" were done outside of the scope of Mr Hosin's role as President of GLL and as such, he was on a frolic of his own.

[170] She averred that Mr Hosin through his "malicious and/or reckless" actions as an individual, whether or not GLL is vicariously liable has rendered her open to significant professional backlash particularly, being prevented from performing actuarial duties in the Jamaican insurance industry.

[171] The affidavit continues in terms quite similar to those previously outlined in paragraphs [47]-[50] of this judgment.

Submissions

For Mr Hosin

[172] Mr. Powell in his submissions, also outlined the principles pertaining to applications for summary judgment which have been well traversed in these courts. It was submitted that, in this instance, the issues to be determined are primarily issues of law. He stated that there are no real disputes of fact. Therefore, the application can be

determined on a consideration of the contemporaneous documents that are already before the court and the law.

[173] Mr Powell stated that based on the statements of case, the issue for determination in this application is whether Ms Allen has a real prospect of succeeding against Mr Hosin on any of the following claims:

a. the claim for breach of Ms Allen's contract of employment;

b. the claims pursuant to the **Insurance Act** and for relief under section 213A of the **Companies Act**;

c. the claim for slander; and

d. the claim for fraudulent misrepresentation.

[174] It was submitted that on all these issues, the court should find that Ms Allen's claim against Mr Hosin has no real prospect of success.

[175] In respect of the breach of the employment contract, Mr Powell reminded the court that the claim against Mr Hosin is that he breached "...*the implied term of [Ms Allen's] contract of employment of mutual trust and confidence*." It was submitted that the claim has no real prospect of succeeding against Mr Hosin for the simple reason that he was not a party to Ms Allen's contract of employment. Consequently, he cannot be liable for any breach, if proved.

[176] It was submitted that Ms Allen was employed to GLL and was terminated by that entity and Mr Hosin signed the termination letter in his capacity as an officer of GLL and not in his personal capacity.

[177] It was also pointed out that Ms Allen has since conceded that she does not and never had any contractual relationship with Mr Hosin.

[178] In respect of the claim based on the **Act** and section 213A of the **Companies Act**, Mr Powell submitted that the substantive basis of these claims is that GLL released

some of its reserves without Ms Allen's authorization or consent in her capacity as its statutorily appointed actuary.

[179] It was argued that there are two insurmountable hurdles which she faces in resisting a charge that these claims have no real prospect of succeeding against GLL:

> (i) First, on a substantive basis, even ignoring that the release of the reserves could not have been done by Mr Hosin in his personal capacity, the relevant statutory and regulatory regime created by the **Act** and the **Regulations** do not support the basis on which the claims are being made.

[180] It was contended that section 44 of the **Act** provides for the appointment of an actuary for an insurance company and sets out the duties and responsibilities of the appointed actuary. It does not include a power to compel a company to hold or release reserves. Instead, where a company does not comply with any action required by the appointed actuary, the appointed actuary "shall notify the company's directors and the [Financial Services Commission] accordingly". The FSC is the body charged with responsibility for the general administration of that Act.

[181] It was submitted that neither the **Act** nor the **Regulations** require Ms ~~Allen's approval~~Allen's approval for the release of the reserves by GLL. Her authority or permission was, therefore, never required for the release of the reserves. There is consequently, no basis in law, on which this claim could succeed.

[182] Counsel argued that the release of the reserves without Ms Allen's consent or authorization could not be conduct subject to section 213A of the **Companies Act** because the statutory and regulatory regime did not require her consent or authorization for their release. Ms Allen, therefore, does not have a real prospect of succeeding on her claim for relief under section 213A against Mr Hosin.

[183] It was contended, that this is even before one considers that no loss, prejudice or oppression was suffered by Ms Allen as a result of the release of the reserves.

(ii) Second, the court has already decided in these proceedings that there is "no provision which compels a company to comply, or act in accordance, with the advice of the actuary". Ms Allen did not appeal that decision and the issue is now *res judicata*. It would also be an abuse of process for Ms Allen to try to argue that issue again.

[184] Reference was made to ***Virgin Atlantic Airways Limited v Zodiac Seats Limited*** [2013] 4 All ER 715 in support of this submission. In that case Lord Sumption stated:

> *"[17] Res judicata is a portmanteau term which is used to describe a number of different legal principles with different juridical origins. As with other such expressions, the label tends to distract attention from the contents of the bottle. The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is 'cause of action estoppel'. It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings. Secondly, there is the principle, which is not easily described as a species of estoppel, that where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover further damages: see* ***Conquer v Boot*** *[1928] 2 KB 336, [1928] All ER Rep 120..."*

Mr Powell submitted that in the circumstances, that aspect of the claim should be dismissed.

[185] It was also submitted that contrary to Ms Allen's understanding, the court has already decided that she has no cause of action in her capacity as the statutorily appointed actuary for GLL. He stated that if that is not so, he was inviting the court to make that determination. Reference was made to paragraph [16] of the judgment of Batts J in ***Catherine Allen v Guardian Life Limited and others*** (supra).

[186] Counsel also stated that Batts J at paragraph [15] of his judgment also determined that there was no infringement of section 213A of the **Companies Act**.

[187] Mr Powell submitted that the fact that the court made this decision in the current proceedings does not take this case outside of the operation of the legal principle. He cited the case of ***Sagicor Bank Jamaica Limited v YP Seaton and others*** [2018] JMCA Civ. 23 in support of this submission. In that case, the Court of Appeal he stated, agreed that where a determination was made in an interlocutory application, the issue was *res judicata*. [23]

[188] It was argued that in all the circumstances, Ms Allen should not to be allowed to pursue the claims for relief under section 213A of the **Companies Act** and/or based on her authorization being required for the release of GLL's actuarial reserves.

[189] In respect of the claim for defamation, Mr Powell stated that although it has been alleged at paragraph 30 of Ms Allen's particulars of claim, that the "*action of the defendants have (sic) therefore effectively slandered her reputation and character, causing her permanent loss and damage,*" no other details are provided in relation to the alleged slander.

[190] It was submitted that the particulars of claim do not give sufficient (or any) particulars of the publication of the alleged defamatory statements and as such do not comply with part 69 of the **CPR**, particularly rule 69.2(a). He stated that the particulars of claim do not identify which words "effectively slandered [Ms Allen's] reputation", who spoke them, when they were spoken and to whom they were published. He also stated that her affidavit in response to the application does not take the matter further. In fact, that evidence confirms that this claim should be struck out as Ms Allen asserts that " *...the pleadings as they currently are, are sufficient to support my claims against [Mr Hosin]* ... "[24]

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[23] Paragraph 39.
[24] 6th affidavit of Catherine Allen at paragraph 12.

[191] Mr Powell pointed out that the **CPR** provides that the court may strike out a part of a statement of case if it appears to the court that there has been a failure to comply with a rule. He submitted that Ms Allen has plainly failed to comply with rule 69.2(a).

[192] With respect to the claim for fraudulent misrepresentation, counsel pointed out that Ms Allen has alleged that Mr Hosin "...*fraudulently misrepresented [her] to the [Financial Services Commission] as having sanctioned and agreed to the release of these reserves*" and further that [she] approved the release of the reserves to smooth the profits of GLL.

[193] Mr Powell argued that even if Ms Allen was able to prove all the allegations pleaded under the "particulars of fraud", they would be incapable of sustaining a claim for fraudulent misrepresentation against Mr Hosin. On the evidence before this court, Mr Hosin did not do any of the actions alleged under the "Particulars of Fraud Committed by GLL and [Mr Hosin]".

[194] He submitted that in any event, a claim for fraudulent misrepresentation arises where a party claims to have been induced into entering a contract by reason of false representation of facts. Reference was made to **Halsbury's Laws of England**, volume 76 (2013) at paragraph 701 where the learned authors state:

> *"a misrepresentation is a positive statement of fact, which is made or adopted by a party to a contract and is untrue. It may be made fraudulently, carelessly or innocently. Where one person ('the representor") makes a misrepresentation to another ('the misrepresentee') which has the object and result of inducing the representee to enter into a contract or other binding transaction with him, the representee may generally elect to regard the contract as rescinded…".*

[195] Mr Powell contended that there is no pleading, suggestion or evidence that Ms Allen entered into a contract or agreement as a result of the alleged misrepresentation. She has also failed to plead or provide any evidence to show that she suffered any loss or damage as a result of the alleged misrepresentations.

[196] Counsel adopted the submissions made by Mr Hylton in respect of the strict nature of allegations of fraud.

[197] Based on the foregoing, Mr Powell expressed the view that it would be an appropriate exercise of the court's powers to enter summary judgment in favour of Mr Hosin.

For Ms Allen

[198] Mr Beswick stated that the case of ***Derry v Peek*** (1889) 14 App Cas 337 established a three (3) part test for fraudulent misrepresentation. He then outlined the test as follows:

(1) the defendant knows the statement to be false; or

(2) the defendant does not believe in the statement; or

(3) is reckless as to its truth.

[199] He stated that Ms Allen is alleging that there are several statements which could fall within the ambit of fraudulent misrepresentation:

(a) that she agreed to smoothing of profits;

(b) that she agreed to bring up year-end review for that purpose if any at all; and

(c) that the table was created by her but not with the explanation she used but with a false explanation.

[200] Mr Beswick contended that Ms Allen is not only relying on the report but on the sequence of events and communications before and after that report attached to the email to ground her claim for fraudulent misrepresentation. The defendants, he said, are relying on the report in isolation.

[201] In respect of the defamation claim, Mr Beswick directed the court’s attention to rules 15.3 (d) (iii) (summary judgment) and 26.3 (1) (striking out) of the **CPR**. The

former rule exempts claims for defamation from being determined by way of summary judgment. It was highlighted that rule 26.3 (1) states that a party's statement of case may be stuck out if it is prolix or does not comply with the requirements of parts 8 and 10 of the **CPR**. It was submitted that part 69 which deals with defamation is therefore not necessarily covered by rule 26.3 (1).

[202] It was also submitted that the power to strike out a party's statement of case is a draconian one which should be exercised with caution. Reference was made to ***Peerless Limited v Gambling Regulatory Authority and others*** [2015] UKPC 29 in support of that submission. Mr Beswick stated that based on that case, where any deficiencies can be remedied that should be the preferred course. Specific reference was made to the following paragraphs of the judgment:

> ***"****[22] In* ***R v Bromsgrove District Court, ex parte Kennedy*** *[1992] COD 129, which involved an application to set aside leave on the basis of material non-disclosure, Popplewell J stated that the matter had to be looked at both as to whether there had been material non-disclosure and also as to what the prospects of success were in any event. If the court took the view that at the end of the day the substantive application must fail, then it should say so. By the same token if the prospects of success are good, to terminate the Applicant's proceedings by refusal of leave may well deprive the Applicant of a remedy for unlawful actions by the Respondent.*
>
> *[23] The considerations which arise in relation to inter partes leave hearings may differ somewhat from those that come into play in ex parte applications. In* ***R v Wirral Metropolitan Borough Council, ex parte Bell*** *(1994) 27 HLR 234 Harrison J had to consider how he should approach a case of material non-disclosure in a judicial review inter partes leave application. In that case the judge found that there had been a serious non-disclosure of a relevant report that should have been put before the court by the Applicant. The court, however, considered that no advantage had been obtained by the Applicant and in the end there was no prejudice to the Respondents. In those circumstances he considered that he should not dismiss the application on the ground of non-disclosure on its own but he considered that in coming to a conclusion as to whether*

leave should be granted he should bear in mind the non-disclosure when exercising his discretion taking into account the merits of the case. In that case the judge decided that there were insufficient grounds upon which leave should be granted to apply for judicial review. He concluded his judgment stating at p 242:

> *'If I were to have any doubt about my conclusions on either of the two grounds put forward by the Applicant, I would, nevertheless have been influenced in deciding whether or not to exercise my discretion in this case by the non-disclosure of documents which occurred in the manner which I have described. Whilst, as I said, that is not a matter which would have made me dismiss the application out of hand without considering the merits of the application, it is a matter which I would have taken into account upon the general question of the exercise of my discretion.'*

[24] A refusal to grant leave to apply for judicial review is a final and terminating decision which precludes a party from having the merits of his case considered at a substantive hearing. The power to terminate proceedings without any hearing on the merits is one which should be exercised with considerable caution and in a proportionate way. In its armoury of powers the court has other less draconian ways of marking its disapproval of the conduct of a party and its legal advisers. It can, for example, make a wasted costs order against the legal advisers, it may disallow costs or it may award the costs of the proceedings for the leave application to the Respondent even if leave is granted. As noted by Harrison J, it can have regard to the lack of candour when exercising its overall discretion in relation to the question of whether leave should be granted on the merits of the case. Mr Cox accepted that a question of proportionality does arise in such a case and that the lower court did not explore the alternatives to the outright dismissal of the application even before the merits of the case were considered."

[203] It was also submitted, that once a defence has been filed and the matter defended on its merits, it was too late to raise the issue of abuse of process. Reference was made to ***Brown v Rodney and another*** [2017] JMSC Civ 32 in support of that submission.

Discussion and analysis

[204] The reliefs claimed against Mr Hosin are contained in paragraphs 5, 10, 11, 17 and 18 of the Amended Fixed Date Claim Form. Paragraph 5 deals with the allegation that the revocation of Ms Allen's appointment as the appointed actuary was done unilaterally; paragraph 10 that he account to the FSC in relation to the release of the reserves; paragraph 11 seeks damages for wrongful termination of employment and loss of advantage on the labour market; paragraph 17 seeks damages for defamation of character arising from her termination of employment; and paragraph 18 seeks damages for stigmatization on the employment market for actuaries. Paragraph 11 of the particulars of claim raise the issue of fraudulent misrepresentation.

[205] Ms Allen indicated in the grounds on which she has sought the orders, that the claim is being made by her as a complainant under section 213A of the **Companies Act**, 2004 and has asserted that Mr Hosin who is an officer and the President of GLL has, as was stated in paragraph [164] of this judgment:

> a. performed such actions while being an officer of GLL;
>
> b. conducted the business and affairs of GLL; and
>
> c. exercised his powers as an officer of GLL.
>
> in such a manner that is oppressive and unfairly prejudicial to her and that Ms Allen requires the court to make such orders to rectify the situation.

[206] Having regard to the foregoing, the issue for determination in this application is whether Ms Allen has a real prospect of succeeding against Mr. Hosin on any of the following claims:

(a) the claim for breach of contract;

(b) the claims pursuant to the **Act** and for relief under section 213A of the **Companies Act**; and

(c) the claim for fraudulent misrepresentation/fraud.

Claim for breach of contract – implied term of mutual trust and confidence

[207] The law in relation to the implied term of mutual trust and confidence has already been dealt with in paragraphs [133-144] of this judgment. In so far as there are claims for breach of contract against Mr Hosin, it is my view, that they have no reasonable prospect of success. Mr Hosin cannot be held liable for breaching the implied term of mutual trust and confidence because the term is implied by law in contracts of employment and concerns the employer-employee relationship. The proper defendant in such instances is either an employee or an employer. In the case of Mr. Hosin, it is clear from the documentary evidence that he was not Ms Allen's employer. The letter of termination was signed in his capacity as president of GLL.

Claim made pursuant to the Insurance Act

[208] I have already concluded that Ms Allen's position that her authorization was required for the release of the reserves has no real prospect of success.

Claim made pursuant to section 213 A of the ***Companies Act***

[209] Section 213A of the **Companies Act** states:

> *"(1) A complainant may apply to the Court for an oppression order under this section.*
>
> *(2) If upon an application under subsection (1), the Court is satisfied that in respect of a company or of any of its affiliates-*
>
> *(a) any act or omission of the company or any of its affiliates effects a result;*
>
> *(b) the business or affairs of the company or any of its affiliates are or have been carried on or conducted in a manner; or*
>
> *(c) the powers of the directors of the company or any of its affiliates are or have been exercised in a manner,*

> *that is oppressive or unfairly prejudicial to or unfairly disregards the interest of, any shareholder or debenture holder, creditor, director or officer of the company, the Court may make an order to rectify the matters complained of."*

[210] The alleged oppressive action concerns the release of the reserves and the employment of an external actuary without Ms Allen's consent. Ms Allen stated in her claim form:

> *"15. The Court is being asked to intervene to correct the oppressive actions of the Defendants and to rectify the accounts of the company to protect the interests of' the policyholders and further to ensure that the Defendants comply with the Insurance Act. Additionally, the Courts must send a clear message that the management of Insurance Companies cannot seek to circumvent the role of their Appointed Actuary, whenever there is a disagreement, by employing the services of an external actuary…"*

[211] In relation to the claim made pursuant to section 213A, I have found the cases of ***Sally Ann Fulton v Chas E Ramson Limited*** [2016] JMSC Comm 14 and ***Ivan Smith (Administrator of Estate Kathleen Elfreda Chambers Smith) v CDF Scaffolding & Building Equipment Ltd*** [2016] JMCC Comm 3, helpful.

[212] In ***Sally Ann Fulton*** Sykes J (as he then was) distinguished between sections 212 and 213A of the **Companies Act**. The learned judge relied on the Court of Appeal of Ontario's decision in the case of ***Rea v Wildeboer*** 37 BLR (5th) 101. In that case, Blair JA said:

> *"18 The derivative action was designed to counteract the impact of **Foss v. Harbottle** by providing a "complainant" - broadly defined to include more than minority shareholders - with the right to apply to the court for leave to bring an action "in the name of or on behalf of a corporation ... for the purpose of prosecuting, defending or discontinuing the action on behalf of the body corporate": Business Corporations Act, R.S.O. 1990, c. B.16, s. 246 ("OBCA"). It is an action for "corporate" relief, in the sense that the goal is to recover for wrongs done to the company itself. As Professor Welling has colourfully put it in his text, Corporate Law in Canada: The*

> *Governing Principles, 3rd ed. (Mudgeeraba: Scribblers Publishing, 2006), at p. 509, "[a] statutory representative action is the minority shareholder's sword to the majority's twin shields of corporate personality and majority rule."*
>
> *19 The oppression remedy, on the other hand, is designed to counteract the impact of Foss v. Harbottle by providing a "complainant" - the same definition - with the right to apply to the court, without obtaining leave, in order to recover for wrongs done to the individual complainant by the company or as a result of the affairs of the company being conducted in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of the complainant. The oppression remedy is a personal claim:* ***Ford Motor Co. of Canada v. Ontario (Municipal Employees Retirement Board)*** *(2006), 79 O.R. (3d) 81 (Ont. C.A.), at para. 112, leave to appeal refused, [2006] S.C.C.A. No. 77 (S.C.C.);* ***Hoet v. Vogel****, [1995] B.C.J. No. 621 (B.C. S.C.), at paras. 18-19.*
>
> *20 These two forms of redress frequently intersect, as might be expected. A wrongful act may be harmful to both the corporation and the personal interests of a complainant and, as a result, there has been considerable debate in the authorities and amongst legal commentators about the nature and utility of the distinction between the two. In the words of one commentator, "the distinction between derivative actions and oppression remedy claims remains murky": Markus Koehnen, Oppression and Related Remedies (Toronto: Thomson Canada Limited, 2004), at p. 443.*
>
> *21 Yet the statutory distinctions remain in effect."*

[213] Sykes J went on to say:

> *"10. From this passage, it is the case that the derivative action is designed for wrongs done to the company and not to the individual shareholder.* ***The oppression remedy is directed at wrongs done to the individual. It is a personal claim.*** *However, the passage recognises that in some instances the remedies overlap because the same conduct action may give rise to both actions."* [My emphasis]

[214] Section 212 of the **Companies Act** concerns derivative actions and sections 213 and 213 A concern the oppression remedy.

[215] In ***Ivan Smith*** (supra) Batts J said:

> *"25. Section 213A allows the court to grant certain relief if satisfied that there has been oppression or unfair prejudice to any "shareholder, debenture holder, creditor, director or officer of the company" as a result of:*
>
> *a. Any act or omission of the company or any of its affiliates,*
>
> *b. The manner in which the business or affairs of the company or any of its affiliates are or have been carried on or conducted*
>
> *c. The manner in which the power of the directors of the company or any of its affiliates are, or have been exercised,*
>
> ***The oppression or unfair prejudice, be it noted, must be toward the complainant. This section does not enable a claim for losses or breach of duty or damage to the company. The remedies in Section 213A (3) are granted with a view to putting right the harm suffered by the complainant as a result of the oppression or unfair prejudice. Some claims by the Claimant related to alleged breaches of fiduciary duty and/or fraud on the 1st Defendant****."*[25] [My emphasis]

[216]As both Sykes J and Batts J have concluded, the oppression remedy is directed at wrongs done to the individual. It is a personal claim. In this instance, as stated before, it is my understanding that Ms Allen's claim is grounded in the release of the reserves and the employment of an external actuary. So what seems absent from the pleadings for the application of section 213 A is a causal relationship between Mr Hosin's conduct and any harm suffered by Ms Allen as a result of the "oppressive" conduct. In other words, Ms Allen seems to have done exactly what Batts J, in the highlighted portion of his judgment, says is incongruous. The employment of an external actuary, to my mind,

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[25] See also paragraph 15.

could not have been done by Mr Hosin in his personal capacity. That would be a matter for GLL.

[217] In any event, as the release of the reserves did not require her consent this aspect of the claim also has no real prospect of success. In addition, Batts J at paragraph [15] of his judgment found that there was no oppression or unfair prejudice caused to Ms Allen as a result of GLL's decision to release the reserves (see paragraph [105] above). Mr Beswick has submitted, that based on ***Brown v Rodney and another***, it was too late to raise the issue of whether the claim is an abuse of the court's process. In that case, K Anderson J stated at paragraph [22]:

> *"[22] This court cannot though, at this stage of these proceedings, strike out the claimant's claim as being an abuse of process. That is so because, as stated by the authors, in the text – Blackstone's Civil Practice, 2014, at paragraph 33.12 – 'Applications to strike out for abuse of process should be made shortly after service.'*

[218] I have noted that in that case, the matter had passed the stage of pre-trial review. As such, substantial costs would have been incurred in order to comply with the case management and pre-trial review orders in readiness for trial. That is not the case in this matter. In the circumstances, I do not agree with Mr Beswick that it is too late for court to exercise its discretion to strike out the claim under section 213 A. That issue is also *res judicata* and its pursuit by Ms Allen an abuse of the court's process.

Fraudulent Misrepresentation

[219] The claim against Mr Hosin with respect to fraudulent misrepresentation has no real prospect of succeeding for the same reason its prospects against GLL are at best, slim. Essential ingredients of this cause of action are missing and in my judgment, it is not one that is available to Ms Allen on the facts pleaded against Mr Hosin.

Fraud

[220] As it relates to GLL, I did find that the claim had no real prospect of success in relation to the alleged fraud. However, I must assess the allegations afresh in respect of Mr Hosin.

[221] Having examined the particulars of fraud and those aspects of the pleadings which have alleged fraudulent conduct by Mr Hosin, I am not convinced that the claim has a realistic prospect of success.

[222] It is clear, that Mr Hosin, in his personal capacity, did not employ Ms Allen nor did he employ Mr Goulet of Eckler. He did so as an officer of GLL. There is nothing in the pleadings which support anything to the contrary. The complaints which relate to the alleged inflation of profits and misrepresentation to the FSC that Ms Allen agreed to the release of the reserves and that she did so in order to *"smooth profits"* in my view, appear to be matters for the FSC.

[223] In the circumstances, I am of the opinion that this aspect of the claim has no real prospect of success against Mr Hosin.

Defamation of character

[224] Mr Beswick in his submissions directed the court's attention to rule 15.3 of the **CPR** which states that summary judgment is not available in proceedings for defamation.

[225] It is my understanding that Mr Powell has not asked for summary judgment in respect of the defamation claim, what he has asked is that the court strike out the claim on the basis of non-compliance with the rules.[26]

[226] Rule 69.2 of the **CPR** provides as follows:

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[26]See paragraphs 13 to 17 of Mr Hosin's notice of application; I have noted paragraph 14 of the second defendant's written submissions.

> *"The particulars of claim (or counterclaim) in a defamation claim must, in addition to the matters set out in Part 8 -*
>
> *(a) give sufficient particulars of the publications in respect of which the claim is brought to enable them to be identified; and*
>
> *(b) where the claimant alleges that the words or matters complained of were used in a defamatory sense other than their ordinary meaning, give particulars of the facts and matters relied on in support of such sense; and*
>
> *(c) where the claimant alleges that the defendant maliciously published the words or matters, give particulars in support of the allegation."*

[227] In the 20th edition of **Clerk and Lindsell on Torts**, the learned ~~editors~~editor's note, on page 1410:

> *"The publication of defamatory matter with reference to the claimant will give rise to a cause of action in defamation. The claimant must in his statement of case be able to set out with reasonable certainty the alleged defamatory words, their alleged meaning and, if necessary, factors relied upon as identifying the claimant as the subject of the allegations."*

[228] They continue on page 1411:

> *"**Defamatory meaning** On the question of whether the words complained of have a defamatory meaning, liability is based on an objective test: "What would the words reasonably be understood to mean in the light of the surrounding circumstances as known to the person to whom they were published?" A defendant may be liable for words innocent on the face of them which are in fact defamatory of another person by reason of facts unknown to the author or publisher but known to the person to whom they are published. ~~Similarly~~Similarly, a defendant may be liable for a defamatory statement that can reasonably be taken as referring to the claimant by persons with special knowledge, even though the defendant neither had nor could have had knowledge of the facts that caused those persons with special knowledge to connect the claimant with*

> *the statement. This is commonly referred to as an "innuendo" meaning."*

[229] The editors go on to note that the claimant must prove that he is referred to and that the question of whether the defamatory words refer to the claimant is determined by an objective test.

[230] On pages 1414 and 1415, the test is discussed in great detail. It is stated as follows:

> *"3. WHAT IS DEFAMATORY?*
>
> *(a) The test*
>
> *…A statement may be defamatory in relation to the claimant's personal character, office or vocation. In the former case the test usually applied was whether the matter complained of was calculated to hold the claimant up to "hatred, contempt or ridicule". This "ancient formula" was, however, insufficient in all cases, for a person's business reputation may be damages(sic) in ways which nobody would connect with "hatred, ridicule or contempt", as, for instance, the imputation of a clever fraud which however much to be condemned morally and legally might yet not excite what a member of the jury might understand as hatred or contempt. Lord Atkin in Sim v Stretch (1936) 52 T.L.R 669 applied the test, "would the words tend to lower the claimant in the estimation of right-thinking members of society generally." Or in the words of Neill L.J in Gillick v BBC [1996] E.M.L.R. 267 would the words be "likely to affect a person adversely in the estimation of reasonable people generally". The alternative "or which would cause him to be shunned or avoided" must be added to cover such cases as an imputation of insanity."*

[231] It was stated that in considering whether a statement is capable of a defamatory meaning, the court should give to the material in question, its "natural and ordinary meaning."[27]

[232] On page 1421, the following appears:

> *"**Defamation of someone in their profession or employment** Statements may be defamatory of a person with reference to his profession or employment on the grounds that they disparage him in that capacity. Statements may be defamatory, though they are not necessarily so, if they tend to injure the claimant in his calling or office, even though they are not provocative of "hatred, ridicule or contempt". To be defamatory, however, the words must involve a reflection on the personal character, or on the official, professional or trading reputation of the claimant. It is not sufficient to show only that they injure him in his trade or business…"*

[233] On pages 1424 to 1430, the editors discuss the construction of the language used. In addressing language not defamatory on the face of it, they note:

> *"The approach of the law has been to define what is actionable language on the assumption that the meaning conveyed by that language is clear and undoubted. This, however, is by no means always the case, and where the words do not speak for themselves, the claimant must be prepared to put and prove the necessary gloss or innuendo upon them…The true legal innuendo is where the claimant alleges a special defamatory meaning of the words arising by virtue of extrinsic facts known to the recipients. It is such an innuendo which creates a separate cause of action distinct from the cause of action arising from any defamatory imputation of the words in their ordinary and natural meaning and it requires particulars under CPR PD 53. However, even in the case where it is only contended that the words are defamatory in their*

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[27] Page 1415 paragraphs 22-24.

> *ordinary and natural meaning it is necessary to plead the distinct meanings alleged by the claimant to arise from the words."*[28]

[234] The **Civil Procedure**, 2016, Volume 1, (the White Book) is also of assistance. On page 1777, the learned authors state:

> *"In a claim for slander the precise words used and the names of the persons to whom they were spoke and when must, so far as possible, be set out in the particulars of claim, if not already contained in the claim form."*

[235] Mr Powell's submissions in respect of the legal principles is correct. With respect to the defamation claim, it is my understanding that the order to strike out the particulars is being sought pursuant to rule 26.3 (1) (a) of the **CPR**, which indicates that the court may strike out a statement of case or part of a statement of case if it appears to the court that there has been a failure to comply with a rule.

[236] However, before taking such drastic action it must be considered whether the defect may be cured by an amendment and, if so, the court may, in its discretion, refrain from striking it out without first giving the party concerned an opportunity to amend.

[237] In ***Soo Kim v Young*** [2011] EWHC 1781 (QB), it was stated as follows:

> *"40. However, where the court holds that there is a defect in a pleading, it is normal for the court to refrain from striking out that pleading unless the court has given the party concerned an opportunity of putting right the defect, provided that there is reason to believe that he will be in a position to put the defect right…."*

[238] Given that the fact that defamation claims may not be dealt with by way of summary judgment, I need not engage in any analysis as regards Ms Allen's prospect of success.

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[28] Page 1424.

[239] Mr. Powell has submitted that the pleadings are insufficient to ground a claim for defamation against Mr Hosin. Ms Allen, as pointed out by Mr. Powell has indicated that in her view the pleadings are sufficient to support her claims against Mr Hosin. Having perused paragraph 30 of the particulars of claim and in the context of the particulars as a whole, I do not agree that that the claim does not comply with part 69. It is a matter of evidence whether the acts complained of defamed Ms Allen's character and can be laid at the feet of Mr Hosin. However, some amendment of the pleadings may be required in respect of how his actions allegedly defamed Ms Allen. As such, I will refuse the application to strike out this aspect of the claim.

Eckler's application

[240] By way of Notice of Application for court orders, filed 27 December 2018, Eckler, has sought the following orders:

> (i) That [Ms Allen's] statements of case be struck out as against [Eckler];
>
> (ii) Judgment issue for [Eckler] on [Ms Allen's] claim (summarily or following a striking out) for costs to be taxed if not agreed;
>
> And, alternatively to 1 and 2 above, that:
>
> (iii) Mediation between [Ms Allen] and [Eckler] be dispensed with.

[241] The grounds/issues on which Eckler has relied are as follows:

> (a) [Ms Allen] has no real prospect of succeeding in her claim against it;
>
> (b) [Ms Allen's] particulars of claim disclose no reasonable grounds for bringing her claim against Eckler;
>
> (c) [Ms Allen] has no contractual or other relevant relationship with Eckler. She has suffered no personal loss arising from anything done or not done by

Eckler and, therefore, has no *locus standi* for bringing her claim for damages for permanent loss and damage against it.

(d) [Ms Allen's] claim against Eckler is for professional misconduct. Eckler considers mediation inappropriate in this case because [Ms Allen] has no *locus standi* to bring this claim against it. It has no contractual or other relationship with [Ms Allen] and [Ms Allen] has not alleged that she has suffered any loss as a result of anything done or not done by GLL.

Eckler's affidavit

[242] Eckler has relied on the affidavit of Jill Wagman sworn on 21 December 2018. Ms Wagman deposed that she is the Managing Principal of that company. She stated that Ms Allen has no contractual or other relevant relationship with Eckler capable of being the object of her claim against it for professional misconduct.

[243] She pointed out that the contract dated 23 April 2018, mentioned in paragraph 10 of the particulars of claim is between GLL and Eckler only.

[244] Ms Wagman further deposed that Eckler has received no complaint from GLL of a breach of the Code of Professional Conduct, in relation to the referenced engagement it had with GLL. She also pointed out that Ms Allen has not alleged in her claim form or particulars of claim, that any such complaint by GLL exists.

[245] Ms Wagman stated that on 22 May 2018, Ms Allen confirmed to Eckler that the account which gave her the ability to participate in, and observe all activity within, the special purpose workspace created by Eckler for the peer review exercise, was working. Eckler's peer review activity, she said, was conducted within that workspace and Ms Allen was able to observe, comment on, and participate in it until the close of business on 15 August 2018.

[246] She stated that Eckler completed its work in relation to its peer review on 16 August 2018. Accordingly, it did not have an opportunity to discuss its completed review with Ms Allen before her departure from GLL.

[247] She indicated that Eckler is an international consulting and actuarial firm that provides actuarial and peer review services within several countries and industries for more than one client at any given time, including for competing organizations. Eckler, she stated, does not consider the provision of such services, by itself, as giving rise to an actual or potential conflict of interest.

[248] She stated that Eckler believes that mediation of this claim is inappropriate for the reasons stated above.

Ms Allen's affidavit

[249] Ms Allen, in her affidavit in opposition to the application sworn to on 5 March 2019 and filed on 7 March 2019, stated that she has not alleged or pleaded any contractual relationship with Eckler, and as such, the remedies sought are not for breach of contract. She stated further, that her complaint and/or cause of action against Eckler is also not based on any complaint between that company and GLL.

[250] She then addressed the issue of the peer review and her understanding of its scope.[29] Ms Allen deposed, that she was never consulted concerning the terms of reference or the appointment of the agent and/or servant and/or principal of Eckler, who was tasked with conducting the "peer review" of her work.

[251] She indicated that she had cooperated fully with the peer review process and had updated documentation and information to the Eckler's Web Portal as requested by Mr. Goulet, who was the agent and/or servant and/or principal of Eckler. She opined, that the questions that were asked "appeared to be more form than substance and did not give the impression that a wholesome review of the calculations was being done". In addition, the questions, she said, did not address any of the issues which could result in an increase of the amount of the reserves to be released or impact that release.

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[29] See paragraphs 8 and 9 of her affidavit.

[252] Ms Allen stated that she established a team to work with Mr Goulet and that she and her staff, cooperated with the staff of Eckler, by answering all questions asked of them and providing data and analysis regarding general actuarial assumptions, methods and calculations. She stated further, that from the outset, they provided all the excel files, spreadsheets and projections to Mr Goulet, but no discussions were had with her, as the actuary being reviewed, regarding the findings.

[253] She stated that a draft report was posted in the Web Portal, but remained blank throughout the said "review". Ms Allen stated further, that a partial initial result of the peer review was disclosed to her by way of a copy of an email dated 23 June 2018, sent by Mr Goulet to Mr Hosin, entitled 'Guardian Life Limited - Progress in Peer Review' wherein Mr Goulet indicated that a release of JM$1 billion from the reserves of GLL would be feasible as of 30 June 2018.

[254] Ms Allen deposed, that that initial result was arrived at without any consultation or discussion with her and was not in keeping with the Code of Professional Conduct. She indicated that such consultation would have been expected before generating a report or making a finding.

[255] She stated that she was reliably advised and verily believed that Mr Goulet, submitted his report the day after her services were terminated. The said report was duly uploaded to the Web Portal, without it having been reviewed or discussed with her in accordance with the practice within the industry.

[256] Ms Allen stated that she believes that the intention from the beginning, was to exclude her from the process and to derail her role as Appointed Actuary and it was never the intention of Mr Goulet, to adhere to the Code of Professional Conduct and the peer review.

[257] She stated further, that her claim was formulated on the basis that Eckler, through its agents and/or servants, in its contract with GLL, did other acts which resulted in the usurpation of and interference with her role as Appointed Actuary and her contract of employment with GLL. In the circumstances, the relief being sought is for

tortious interference with commercial business relations. She asserted, that her claim against Eckler is bolstered by the fact that after her termination on 15 August 2018, Mr Goulet replaced her as GLL's Appointed Actuary.

Submissions

For Eckler

[258] Mrs Minott Philips QC, indicated that Eckler is seeking an order for summary judgment or that the claim against it be struck out. She stated that Eckler was relying on various provisions of the **CPR** including rules 15.2 (a), 26.3 (1), and 26.5 (7).

[259] Alternatively, Eckler seeks to dispense with mediation pursuant to rule 74.4 (1) of the **CPR**. In this regard, it was submitted that mediation is generally inappropriate in circumstances where, allegations of professional misconduct are made.

[260] An examination of Ms Allen's particulars of claim was undertaken. It was submitted that of the 31 paragraphs in the particulars of claim, only paragraphs 5, 12, 13, 14, 15, 17 and 18 relate to Eckler. None of those, it was submitted, contains an actionable cause of action by Ms Allen against Eckler. She also observed that the particulars of claim appear to be prolix as it is comprised of over twenty pages with thirty-one paragraphs.

[261] She pointed out that paragraph 12 raised the issue of whether Eckler's appointment was a conflict of interest, in light of the fact that it was also Sagicor's Appointed Actuary. Mrs Minott-Phillips stated that even if the allegations are assumed to be true, they would not, without more, establish the existence of a conflict of interest. She contended that there is nothing remarkable about an actuary (or any other professional for that matter) providing services for multiple clients who compete with each other.

[262] She also pointed out, that there is no allegation that Eckler had a personal interest contingent upon the outcome of its Peer Review for GLL or its work for any other client.

[263] It was further pointed out, that although Ms Allen in paragraphs 16 and 17 of her affidavit, identified her complaint against Eckler as interference with her contract of employment with GLL, there is no corresponding pleading in the particulars of claim.

[264] Learned Queen's Counsel indicated that Eckler provides no professional services to Ms Allen. She argued that even if there was a complaint of professional misconduct by its client, GLL, (which there is not), the consequences of it could not result in personal loss or injury to Ms Allen. She argued that Ms Allen's statutory duty was to advise GLL and report to the FSC. In the absence of a contractual relationship with Eckler, her action against it would have to be grounded in tort (i.e. negligence, etc.). Mrs Minott-Phillips stated, that no claim in tort has been raised in the particulars of claim as there is no express allegation of negligence or any other civil wrong committed by Eckler which affects Ms Allen.

[265] It was submitted, that paragraph 13 of the particulars of claim only refers to the fact that Eckler's agent sent an email to Ms Allen informing her of the peer review and that is a professional courtesy and can form no basis for a complaint.

[266] Learned Queen's Counsel stated that paragraph 14, which alleges professional misconduct by Eckler, is of no moment, as Ms Allen has no contractual relationship with Eckler. In any event, it was submitted that, no personal loss or injury occasioned by Eckler has been pleaded.

[267] Mrs Minott-Phillips indicated, that paragraph 15 of the particulars of claim speaks to Eckler's statutory duty and its discharge of that duty and as such, cannot be the basis of a complaint by Ms Allen. It was also submitted that paragraph 17 does not state any fact that can constitute a cause for complaint against Eckler. Paragraph 18 which indicates that Ms Allen was made aware that Eckler had been appointed as GLL's actuary does not raise any allegation of wrongdoing on its part.

[268] It was submitted that the "Particulars of Breach of Code of Professional Conduct by [Eckler]", not being anchored to any alleged tort committed by Eckler are meaningless.

[269] It was also submitted that unlike lawyers, actuaries are not officers of the court and as such, the court possesses no inherent supervisory jurisdiction over them. Mrs Minott-Phillips stated that the forum with original jurisdiction in respect of disciplinary complaints against actuaries is the appropriate regulatory body governing their profession, which is not the Supreme Court. She submitted that, it is only if the actions complained of are capable of being actionable breaches of contract or tortious wrongs which, if proved, result in loss to Ms Allen, that they can come within the purview of this court as triable causes of action. She stated that none of Ms Allen's complaints set out in her particulars of claim as referenced above, satisfy those requirements.

[270] Counsel directed the court's attention to rule 8.9A of the **CPR** which states:

> *"The claimant may not rely on any allegation or factual argument which is not set out in the Particulars of Claim, but which could have been set out there, unless the court gives permission."*

[271] She submitted that a court was unlikely to grant permission for Ms Allen to rely on a tort that was not identified in the particulars of claim. She argued that a trial in such circumstances would be a waste of time as no relief has been claimed against Eckler. For these reasons, it was submitted, that this is an appropriate case for the court to grant an order for summary judgment in favour of Eckler.

For Ms Allen

[272] Mr Beswick submitted that the pleadings are sufficient to ground the causes of action of tortious interference/interference with commercial relations, as they do not require the existence of any contract between Ms Allen and Eckler. He stated that if proved by evidence at the trial, she will be entitled to the relief sought and as such, the matter is not one which should be determined summarily. Counsel also indicated that Ms Allen is a member of the Society of Actuaries which has certain codes of conduct.

[273] In addressing the issue of tortious interference, Mr Beswick relied on ***OBG Limited and others (Appellants) v Allan and others (Respondents); Douglas and another and others (Appellants) v Hello! Limited and others (Respondents);***

Mainstream Properties Limited (Appellants) v Young and others and another (Respondents) [2007] UKHL 21.

[274] He stated that based on the above case, the relevant criteria required to establish liability for the tort of inducing or procuring a breach of contract are:

(1) The existence of a contract;

(2) The breach of that contract by the third party;

(3) The breach must have been procured or induced by the defendant's conduct;

(4) The defendant knew of the breach and turned a blind eye to it;

(5) The defendant knew that its conduct would have resulted in a breach or was reckless as to whether it could have that effect; and

(6) The defendant intended to procure or persuade the third party to breach its contract with the claimant.

[275] He also outlined the relevant criteria required to establish liability for the tort of unlawful interference as being:

(1) The defendant's use of unlawful means against the claimant;

(2) The use of those means to interfere with the ability of the claimant to deal with a third party;

(3) The intention of the defendant to damage the claimant; and

(4) Damage to the claimant.

[276] It was submitted that paragraphs 12, 13, 14, 15, 16, 17 and 18 of the particulars of claim and the 'Particulars of Breach of Code of Professional Conduct of [Eckler]' meet those requirements.

[277] It was further submitted, that the incorrect heading "Particulars of Breach of Code of Professional Conduct of [Eckler]" should not be construed so as to defeat the whole pleading, as the pleadings including those for breaches of professional conduct, as well as the effects of the said breaches, are in fact, the pleadings for tortious interference although not explicitly stated as such.

[278] Mr Beswick stated that in light of the fact that amendments can be made to the particulars of claim, it is unreasonable for it to be asserted that any defects cannot be cured.

Discussion and analysis

[279] A cause of action based on the tort of 'tortious interference' with commercial relations exists where the damage allegedly suffered by the claimant was caused by ~~the intentional~~the intentional use of unlawful means by the defendant. The intention to inflict harm is an essential ingredient. So too, is the use of unlawful means. The scope of this tort was extensively discussed in ***OBG Ltd v Allan*** [2008] AC 1. The House of Lords, in that case, sought to give greater clarity to the boundaries of economic torts. It dealt with, among other things: the tort of inducing a breach of contract (referred to in the case as the **Lumley v Gye** tort) and the tort of causing loss by unlawful means. Lord Nicholls of Birkenhead stated:

> *"137…The first appeal,* ***OBG Ltd v Allan*** *[2005] QB 762, concerns a claim by a company in liquidation for damages in respect of losses sustained by the company through acts done by administrative receivers whose appointment was later held to be invalid. The causes of action relied upon are conversion and wrongful interference with contractual relations.*
>
> *138 The second appeal,* ***Douglas v Hello! Ltd*** *(No 3) [2006] QB 125, concerns the publication of photographs taken surreptitiously at a celebrity wedding held in private. The causes of action relied upon are breach of confidence and unlawful interference with economic interests. In the third appeal,* ***Mainstream Properties Ltd v Young*** *[2005] IRLR 964, the cause of action is wrongful*

interference with contractual relations. The context is breaches by directors of their obligations to their company."

139 Counsel's submissions were wide-ranging. ***In ~~particular~~particular, the House is called upon to consider the ingredients of the tort of interference with a business by unlawful means and the tort of inducing breach of contract.*** *These are much vexed subjects. Nearly 350 reported decisions and academic writings were placed before the House. There are many areas of uncertainty. Judicial observations are not always consistent, and academic consensus is noticeably absent. In the words of one commentator, the law is in a "terrible mess". So the House faces a daunting task."*

[280] He continued:

"140 I shall consider first the ingredients of the relevant economic torts.

Interference with the claimant's business by unlawful means

141 I start with the tort comprising interference with a trade or business by unlawful means or, more shortly, the tort of unlawful interference. ***The gist of this tort is intentionally damaging another's business by unlawful means. Intention is an essential ingredient. The tort is not one of strict liability for harm inflicted on another's business, nor is it a tort based on negligence****. The defendant must have intended to inflict the harm of which complaint is made****. That is the starting point."*** [My emphasis]

[281] Lord Nicholls then said:

"142 ***But intent to harm is not enough. Intentional harm of another's business is not of itself tortious****. Competition between businesses regularly involves each business taking steps to promote itself at the expense of the other. One retail business may reduce its prices to customers with a view to diverting trade to itself and away from a competitor shop. Far from prohibiting such conduct, the common law seeks to encourage and protect it. The*

> *common law recognises the economic advantages of competition."* [My emphasis]

[282] In addressing the requirement for the use of "unlawful means", his Lordship stated that, intentionally causing damage without using unlawful means is not of itself actionable.[30] He preferred a wide interpretation of the term 'unlawful means' and said that "unlawful means" embraces all acts a defendant is not permitted to do, whether by the civil law or the criminal law.[31]

[283] Lord Nicholls then addressed the intent to injure, which he said, was the other key ingredient of the tort. He stated that:

> *"166… A high degree of blameworthiness is called for, because intention serves as the factor which justifies imposing liability on the defendant for loss caused by a wrong otherwise not actionable by the claimant against the defendant.* ***The defendant's conduct in relation to the loss must be deliberate****. In particular, a defendant's foresight that his unlawful conduct may or will probably damage the claimant cannot be equated with intention for this purpose. The defendant must intend to injure the claimant. This intent must be a cause of the defendant's conduct…"* [My emphasis]

[284] The learned judge then proceeded to discuss the tort of inducing a breach of contract. In outlining the distinction between the torts he said:

> *"172…the rationale and the ingredients of the "inducement" tort differ from those of the "unlawful interference" tort. With the inducement tort the defendant is responsible for the third party's breach of contract which he procured. In that circumstance this tort provides a claimant with an additional cause of action. The third party who breached his contract is liable for breach of contract. The person who persuaded him to break his contract is also liable, in his case in tort. Hence this tort is an example of civil liability which is*

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[30] Paragraph 145
[31] Paragraph 162

> *secondary in the sense that it is secondary, or supplemental, to that of the third party who committed a breach of his contract. It is a form of accessory liability.*
>
> *173 This form of liability is to be contrasted with the tort of unlawful interference. This is a "stand-alone" tort of wide scope, imposing primary liability on a defendant for his own conduct, irrespective of whether on the facts anyone else may also be liable, either in contract or in tort."*

[285] Under the heading, "**Preventing performance of a contract: "interfering with contractual relations**", Lord Nicholls, stated at paragraph 178:

> *"…There is a crucial difference between cases where the defendant induces a contracting party not to perform his contractual obligations and cases where the defendant prevents a contracting party from carrying out his contractual obligations. In inducement cases the very act of joining with the contracting party and inducing him to break his contract is sufficient to found liability as an accessory. In prevention cases the defendant does not join with the contracting party in a wrong (breach of contract) committed by the latter. There is no question of accessory liability. In prevention cases the defendant acts independently of the contracting party. The defendant's liability is a "stand-alone" liability. Consistently with this, tortious liability does not arise in prevention cases unless…the preventative means used were independently unlawful."*

[286] He noted:

> *"180 Given this difference between prevention and inducement, it is confusing and misleading to treat prevention cases as part and parcel of the same tort as inducement cases. The rationale is not the same, nor are the ingredients. But the rationale and ingredients of liability in prevention cases are the same as those of the tort of interference with a business by unlawful means. Prevention cases should be recognised for what they are: straightforward examples of the latter tort, rather than as exemplifying a wider version of* ***Lumley v Gye*** *labelled "interference with contractual relations"."*

[287] At paragraph 189 he stated:

> *"I feel bound to say therefore that the ambit of the* ***Lumley v Gye*** *tort should properly be confined to inducing a breach of contract. The unlawful interference tort requires intentional harm effected by unlawful means,* ***and there is no in-between hybrid tort of "interfering with contractual relations".*** *In so far as authorities suggest or decide otherwise they should not now be followed."* [My emphasis]

[288] Lord Nicholls made it clear, therefore, that the two torts are the tort of inducing a breach of contract and the unlawful interference tort.

[289] Lord Nicholls used the terms 'the tort of unlawful interference' or 'the unlawful interference tort' but Lord Hoffman, in his judgment, used the phrase 'causing loss by unlawful means'. After discussing the tort of inducing breach of contract: the elements of the ***Lumley v Gye*** tort at paragraphs 39 to 44, Lord Hoffman directed his attention to the components of the tort. He stated thus:

> *"**Causing loss by unlawful means: elements of the tort***
>
> *45 The most important question concerning this tort is what should count as unlawful means.*
>
> *….*
>
> *47 The essence of the tort therefore appears to be (a) a wrongful interference with the actions of a third party in which the claimant has an economic interest and (b) an intention thereby to cause loss to the claimant…*

[290] He then said:

> *"51 Unlawful means therefore consists of acts intended to cause loss to the claimant by interfering with the freedom of a third party in a way which is unlawful as against that third party and which is intended to cause loss to the claimant. It does not in my opinion include acts which may be unlawful against a third party but which do not affect his freedom to deal with the claimant."*

[291] It can be seen that, unlike Lord Nicholls, Lord Hoffman preferred a narrower interpretation of 'unlawful means'. In so far as the learned judges disagreed, the judgment of Lord Hoffman was endorsed by the other members of the panel.

[292] In the 22nd edition of **Clerk and Lindsell on Torts**, the following appears on page 1724:

> *"This tort is based on the deliberate use of unlawful means…The need for the claimant to establish that the defendant used unlawful means is central to ensuring that this economic tort liability is consistent with the fundamental principle established in Allen v Flood…"*

[293] In her submissions, Mrs Minott-Phillips stated that:

> *"In the absence of a contractual relationship with the third defendant, the claimant's action against it [Eckler Ltd] would have to be grounded in tort (i.e. negligence, etc.). It is not."*

[294] Notably, Ms Allen has admitted that she has not alleged or pleaded any contractual relationship with Eckler. She pointed out that the remedies sought are not for breach of contract.[32]

[295] Ms Allen, in her affidavit stated as follows:

> *"16. My claim is formulated on the basis that as an actuary, that [Eckler], through its agents and/or servants, in its contract with the 1st Defendant did other actions which resulted in usurpation and interference with of my role as Appointed Actuary and my contract of employment with [GLL]. My relief is for tortuous (sic) interference with commercial business relations…*
>
> *22. I reiterate that my cause of action is tortuous (sic) in nature against [Eckler]."*

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[32] See paragraph 6 of her affidavit.

[296] Of course, as relevant as her affidavit is, I must examine her statement of case. In her claim form, Ms Allen asks for:

> *"19. A declaration that the actions and conduct of Mr. Sylvain Goulet being the Principal and/or agent and/or servant of [Eckler] (sic) did interfere with the business relations of [Ms Allen] and her employer being [GLL] and further said actions amounted to tortious interference with [Ms Allen's] statutory duty under the Insurance Act thereby exposing [Ms Allen] to breaches and/or sanctions and/or other enquiry by the [Financial Services Commission] being the Regulator of Insurance entities;*
>
> *20. Damages against [Eckler][33] for interference with business relations;*
>
> *21. Damages against [Eckler] for tortious interference with [Ms Allen's] statutory duty as Appointed Actuary under the Insurance Act."*

[297] Paragraph 5 of the particulars of claim deals with the appointment of Eckler to review the Appointed Actuary's report for 2017 and "investigate further opportunities of reserves reduction and/or required surplus to eliminate or reduce any double-counting of conservatism", among other tasks.

[298] In paragraph 12, it was averred that the appointment of Eckler, which was also the Appointed Actuary of Sagicor Financial Corporation Limited, breached precept 7 of the Code of Professional Conduct. Paragraph 13 dealt with the requirement for consultation between the reviewer and the reviewee. Ms Allen in paragraph 14, indicated that Eckler failed to consult with her before making its findings. In paragraph 15, Ms Allen indicated that Mr Goulet had contacted her seeking her response to the revocation of her appointment as GLL's Appointed Actuary and whether there was any reason why he should not accept the appointment. In paragraph 17, Ms Allen spoke to

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[33] In the Amended Fixed Date Claim Form Guardian Holdings Ltd was initially listed as the third defendant and Eckler Limited as the fourth defendant. Guardian Holdings Ltd was subsequently made the fourth Interested Party.

her right to indicate to the FSC the basis on which she thought her appointment was terminated and paragraph 18 speaks to the appointment of Mr Goulet. The particulars of Eckler's breach of the Code of Professional Conduct are also stated. They are:

> *"a) failure to disclose conflict of interest to his employer, Sagicor Financial Corp. Limited, where their agent is the Appointed Actuary;*
>
> *b) failure to obtain express agreement by Sagicor Financial Corp. Limited and [GLL] to his performance of the contract at [GLL].*
>
> *c) Failure to consider and/or reckless/careless/negligent as to the ability to perform impartially and fairly to both [GLL] and Sagicor Financial Corp. Limited;*
>
> *d) Wilfully misleading [Ms Allen] into believing he was conducting a 'peer review' of her work;*
>
> *e) Failing to consult [Ms Allen], being the appointed actuary of [GLL], prior to coming to a finding;*
>
> *f) Failure to consult [Ms Allen] prior to confirm the validity of the 3rd Defendant's assumptions and methods, including calculations and recommended changes based on its findings;*
>
> *e) Usurping the role and function of [Ms Allen] as appointed actuary;*
>
> *f) Failure to consult and/or discuss [Ms Allen] prior to sending email dated June 23, 2018 entitled 'Guardian Life Limited — Progress in Peer Review';*
>
> *g) Failure to consult and/or discuss with [Ms Allen] prior to sending email dated June 28, 2018 in which [Eckler] increased the available reserve release to JM$1.9 billion dollars as at June 30, 2018.*
>
> *h) Knowingly putting [GLL] at risk by engaging [Eckler] who would be privy to [GLL's] finances and that of a competing company's finances*
>
> *k) Failing to appreciate the significant implications of releasing the reserves in such magnitude at once, namely possible oppression to*

insured persons as it threatens [GLL's] ability to pay its claims as this should be the first call upon the reserves.

i) Failing to ensure that [Ms Allen] was satisfied with the basis upon which the recommendations were made prior to disclosing them

j) Failure to obtain approval of [Ms Allen] regarding the release of the reserves;

k) Failure to appreciate [Ms Allen's] familiarity with the rules and regulations of the FSC, her knowledge of the insurance business in general in Jamaica and particularly with [GLL], where she has worked for more than a decade.

l) Excluding [Ms Allen] from the review process

m) Failure to afford [Ms Allen] the opportunity ~~to :~~to:

i. check the accuracy of any of the calculations;

ii. review the methodology and assumptions underpinning the work;

iii. review the reasonableness of the results;

iv. review the extent to which the work has been carried out in accordance with the Actuaries' Code, Actuarial Profession Standards, the FRC's Technical Actuarial Standards (if/where applicable) and other applicable regulatory and/or legislative requirements;

v. assist with professional or ethical considerations (including scoping of a piece of work, identifying or managing conflicts of interest). The Guide for Actuaries on Conflicts of Interests highlights the potential value of peer review in assisting a member in evaluating and resolving conflicts of interest;

vi. review of the clarity and/or quality of communication associated with the piece of work; and/or

> *vii. review of the extent to which the work is suitable for the needs and reasonable expectations of the user of the work or of the user of the outputs to which it gives rise."*

[299] At paragraph 31, Ms Allen averred as follows:

> *"31. Further, the said actions amounted to tortuous (sic) interference with [Ms Allen's] statutory duty under the Insurance Act thereby exposing [Ms Allen] to breaches and/or sanctions and/or other enquiry by the [Financial Services Commission] being the Regulator of Insurance entities."*

[300] Eckler, in its defence denied that there was a conflict of interest in its appointment to conduct the peer review. It also denied that it had breached the Code of Professional Conduct.

[301] In assessing whether summary judgment ought to be granted, I am cognisant that it is not my role to engage in a mini-trial. This principle was discussed, in ***Fletcher & Company Limited v Billy Craig Investments Ltd and Anor*** [2012] JMSC Civ 128, McDonald-Bishop J (as she then was) stated the following: -

> *"22. In considering whether summary judgment ought to be granted on the claim, the court has to bear in mind that there must be a "real", as opposed to, a "fanciful", prospect of success of the claimant's case for the claim to stand. The test is not one of certainty and so the court is not required to form a view that the claim is bound to be dismissed at trial. The test requires that the court's attention is directed to the need to do an assessment of the claimant's case to determine its probable ultimate success or failure.*
>
> *23. In assessing whether the claim has a real prospect of success, it is, therefore, legitimate for me to form a provisional view of the outcome of the claim. However, I am not required, nor am I expected, to conduct a mini-trial on disputed facts which have not been tested and investigated on the merits. I am mindful that the object of the rule is not to permit a mini-trial of the issues but to enable cases which have no real prospect of success to be disposed of summarily. I have to look down the road, so to speak,*

> *to see what will happen at the trial and if the case is so weak that it has no real prospect of success, it should be stopped. It saves time and cost and would, in the end, prevent the court's resources being used up unnecessarily in the trial of weak cases that have no real prospect of success. This would go a far way in promoting the overriding objective."*

[302] In ***Gordon Stewart, Andrew Reid and Bay Roc Limited v. Merrick (Herman) Samuels***, (unreported), Court of Appeal, Jamaica, SCCA No 2/2005 judgment delivered 18 November 2005, Harrison J.A. stated at paragraph 19 as follows:

> *"The prime test being "no real prospect of success" requires that the learned trial judge do an assessment of each party's case to determine its probable ultimate success or failure… The judge's focus is therefore in effect directed to the ultimate result of the action as distinct from the initial contention of each party…."*

[303] Therefore, according to the case law it is permissible for me to form a provisional view of the outcome of the claim. This is also supported by the conclusion of the Board in the ***Taylor-Wright*** case.

[304] Paragraph 19 of the amended fixed date claim form seeks a declaration that the actions and conduct of Mr. Goulet interfered with the business relations between Ms Allen and GLL as those actions amounted to tortious interference with her statutory duty under the **Act** and exposed her to liability. Having perused the pleadings, Ms Allen, in my view, is seeking to claim damages for unlawful interference with commercial relations. However, the elements required to ground the tort are absent from the pleadings. One of the elements of tortious interference is that actions of the alleged tortfeasor must have been intended to cause loss to the claimant (in this case, Ms Allen), by interfering with the freedom of a third party (in this case, GLL) in a way which is unlawful as against that third party.

[305] The basis of Ms Allen's issue with Eckler, appears to be her belief that GLL was obliged to obtain her consent for the release of the reserves. No allegation has been made that Eckler acted unlawfully. Even if, an intention to harm may be inferred from

the statement in the pleadings that Eckler has been engaged as GLL's Appointed Actuary, there is no allegation that Eckler did any unlawful acts as contemplated by Lord Hoffman in ***OBG Ltd v Allan***.

[306] Counsel for Ms Allen also argued that Eckler breached the Code of Professional Conduct. In respect of this issue, Mrs Minott-Phillips submitted as follows:

> *"…unlike lawyers, actuaries are not officers of the court. The court possesses no inherent supervisory jurisdiction over them. The forum with original jurisdiction over disciplinary complaints against actuaries is the appropriate regulatory body governing them. That is not the Supreme Court. It is only if the actions complained of are capable of being actionable breaches of contract or tortious wrongs which, if proved, result in loss to the claimant, that they can come within the purview of this court as triable causes of action."*

[307] I agree with that submission. The averments made in the particulars of claim in my view, largely speak to matters which would fall within jurisdiction of the regulator and not the court.

[308] Having regard to the foregoing, it is my view, that Ms Allen does not have a real prospect of succeeding in her claim against Eckler. I also agree with Mrs Minott-Phillips that no amount of amendment can transform the present claim into one for unlawful interference.

Conflict of interest

[309] Allegations of a conflict of interest feature quite heavily in the particulars of claim. I have noted however, that the Code of Professional Conduct which was attached to Ms Allen's affidavit in support of her Fixed Date Claim Form, states, in precept 7, as follows:

> *"An Actuary shall not knowingly perform Actuarial Services involving an actual or potential conflict of interest unless:*
>
> - *the Actuary's ability to act fairly is unimpaired;*

- *there has been disclosure of the conflict to all present and known prospective Principals whose interests would be affected by the conflict; and*

- *all such Principals have expressly agreed to the performance of the Actuarial Services by the Actuary."*

[310] The Consulting Services Agreement made between Eckler and GLL, which was also exhibited to Ms Allen's affidavit in support of her Fixed Date Claim Form, states:

> *"10.* ***CONFLICT OF INTEREST AND WAIVER****. ECKLER has disclosed to GUARDIAN that the Senior Principal at ECKLER who is expected to perform some or all of the SERVICES for GUARDIAN, Mr. Sylvain Goulet is the Appointed Actuary of Sagicor Financial Corp Limited. The CEO of GUARDIAN, Mr. Eric Hosin, has acknowledged this fact and has indicated his acceptance of the situation."*

[311] It seems to me, based on precept 7 of the Code of Professional Conduct, Eckler, has on the face of it, complied with precept 7. I have noted, that Ms Allen stated in one of her affidavits, that Mr. Goulet is now the Appointed Actuary for GLL. I have inferred that that assertion was made in order to set the stage for the argument that a conflict of interest arose on the basis that Eckler wished to secure GLL's account by displacing Ms Allen. Mrs Minott-Philips submitted that in order for the claim to succeed the allegations would have to be of greater substance. For example, that Eckler had a personal interest contingent upon the outcome of the Peer Review for GLL or its work for any other client. I agree that more would be needed to support any allegation of a conflict of interest.

[312] In light of the findings of this court in relation to her rights and responsibilities under the **Act**, I am of the view that the issue of Eckler's alleged interference with Ms Allen's statutory duties has no real prospect of success. The statements made in the particulars of claim, relating to Eckler are insufficient to ground a claim for tortious interference with commercial relations.

Costs

For GLL

[313] In GLL's Notice of Application, it has requested that:

> *"3.The costs of this application and in relation to those claims and paragraphs be awarded to [GLL], to be taxed immediately, and on the indemnity basis with special costs certificate for three counsel."*[34]

[314] Mr Hylton submitted that the general rule is that an unsuccessful party will be ordered to pay the costs of a successful party. He stated that according to rule 64.6(1) of the **CPR**:

> *"If the Court decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party."*

[315] It was submitted that there is no reason to depart from the general rule and costs should be awarded in GLL's favour.

[316] In respect of immediate taxation, Mr Hylton stated that rule 65.15 of the **CPR** provides that the general rule is that costs are not to be taxed until the conclusion of the proceedings, but the court may order them to be taxed immediately.

[317] He contended that if the defendants' application succeeds some claims and issues would be finally disposed of and it would be appropriate to order that the costs relating to those claims and issues be taxed immediately.

[318] In addressing the issue of whether costs on an indemnity basis ought to be awarded, learned Queen's Counsel stated that rules 65.17 (1) and (3) of the **CPR** provide that where the court has a discretion as to the amount of costs to be awarded to a party it should allow the amount the court deems reasonable, and in determining what is reasonable, the court must take all the circumstances into account.

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[34] The grounds were previously outlined in this judgment.

[319] Mr Hylton contended that in determining what is reasonable, the court has a discretion as to whether costs should be awarded on the indemnity basis.

[320] He stated that the bases on which the court can and should award costs on the indemnity basis include where the paying party has acted in a highly unreasonable manner or where it has pursued an application which was very weak or was irreconcilable with the contemporaneous documentary evidence.

[321] He pointed out that a comprehensive review of the cases on this issue may be found in the judgment of Sykes J (as he then was) in ***RBTT Bank Limited v YP Seaton*** [2014] JMSC Civ 139. In considering an application for costs to be awarded on an indemnity basis the learned judge said, at paragraph 55:

> *"This court, in agreement with Coulson J* ***Noorani v Calver*** *[2009] EWHC 592, concludes that if 'indemnity costs are sought, the court must decide whether there is something in the conduct of the action or the circumstances of the case in question which takes it out of the norm in a way which justifies an order for indemnity costs'…."*

[322] Mr Hylton pointed out, that after reviewing the relevant rules and authorities, Sykes J cited with approval, the following principles identified by Tomlinson J, in **Three Rivers District Council v The Governor and Company of the Bank of England (No 6) [2006] 5 Costs LR 714**, at paragraph 25:

> *"…The following circumstances take the case out of the norm and justify an order for indemnity costs…:*
>
> *(e) Where the claimant pursues a claim, which is, to put it most charitably, thin and in some respects, far-fetched;*
>
> *(f) Where the claimant pursues a claim which is irreconcilable with the contemporaneous documents ...."*[35]

[35] See paragraph 47 (8) of **RBTT Bank Limited ~~v. YP~~v. YP Seaton** [2014] JMSC Civ 139.

[323] Mr Hylton further pointed out that on 31 July 2018, the Court of Appeal in ***Sagicor Bank Jamaica Ltd v YP Seaton and others*** [2018] JMCA Civ 23, partially allowed an appeal against Sykes J's judgment but dismissed the appeal against his award of indemnity costs. F. Williams, JA (who delivered the leading judgment) said, at paragraph 90:

> *"…the learned judge below conducted a detailed assessment of the principles pertaining to an award of indemnity costs and arrived at a fair, reasonable and reasoned position."*

[324] Learned Queen's Counsel stated that the learned Judge of Appeal in his explanations of why an award of indemnity costs was justified in that case stated: "*I find that the bank's case which was before the court below ... might fairly be characterized as weak, by virtue of the inability to substantiate its claims*." He also pointed out that another relevant factor was the fact that the bank made allegations at the trial against Mr Seaton that "*suggest[ed] dishonesty and impropriety.*"[36]

[325] Mr Hylton also referred to ***Winston Finzi v Jamaica Redevelopment Foundation Inc. and others*** [2017] JMCC COMM 20, where Laing J, in deciding to award indemnity costs, pointed to the fact that the claimant had made a very serious though unproven allegation against the defendant's Attorneys-at-Law that they had breached a professional undertaking.[37]

[326] Mr Hylton argued, that all those factors and more, are present in the instant case. In this regard, he submitted that Ms Allen continues to pursue issues that have already been litigated and determined in these very proceedings. She has accused GLL of fraudulently misleading its regulator, and has sought to rely on a document which on its face does not justify the allegation of fraud. In these circumstances, it was submitted that an award of costs on an indemnity basis would be appropriate.

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[36] At paragraph 92.

[37] At paragraph 118.

[327] In addressing the number of counsel, Mr Hylton submitted that GLL decided to retain three counsel in the proceedings and for this application. It was submitted that its decision to do so is justified by the seriousness of the allegations and the large number of issues and documents involved.

[328] Mr Hylton contended that Ms Allen was not in a position to take issue with GLL's application, since at all times she has also been represented by three counsel.

[329] For all the foregoing reasons and authorities, it was submitted that GLL's application for costs for three counsel on an indemnity basis should be granted.

For Mr Hosin

[330] Mr Hosin in his Notice of Application, has requested an order that:

> *"4. [Ms Allen] pay the costs of these proceedings to [Mr Hosin] on the indemnity basis, with special costs certificate for three counsel."*

[331] Mr Powell submitted, that that based on the circumstances of this case, the costs of this application and the proceedings against Mr Hosin should be awarded to him on an indemnity basis with special costs certificate for three attorneys.

[332] It was submitted further, that the court should apply the general rule in relation to costs and if Mr Hosin is successful, he should be awarded costs. This, it was contended, is consistent with rule 64.6 (1) of the **CPR**.

[333] Mr. Powell's submissions to some extent, mirrored those made by Mr Hylton in relation to GLL. In addressing the issue of whether costs should be awarded on an indemnity basis, counsel referred to the case of ***Port Kaiser Oil Terminal S.A. v Rusal Alpart Jamaica (A partnership)*** [2016] JMCC Comm 10. Batts J, in considering whether an order for an award of costs on an indemnity basis should be made, stated at paragraph 29:

> *"…The Defendant was therefore unnecessarily put to expense and the costs were therefore unreasonably incurred. In such*

> *circumstances, it is appropriate for the party, who has been unreasonably required to incur those costs, to be compensated on a full indemnity basis. Although not using the words "full indemnity" the rules contemplate that it may be reasonable to award the amount actually paid having regard to the conduct of a party before and during the proceedings. I therefore direct that at taxation the Registrar assess the costs as on an indemnity basis."*

[334] Mr Powell submitted that in pursuing this claim against Mr Hosin, Ms Allen acted in a manner that was "unreasonable and completely irreconcilable with the contemporaneous documentary evidence". He argued that her claims against Mr Hosin were hopeless, both on a substantive and on a procedural basis.

[335] It was contended that it is obvious on the face of the documents, and on any appreciation of the factual circumstances, that Mr Hosin could never be liable for a claim for breach of Ms Allen's employment contract as he was not acting in his personal capacity.

[336] Mr Powell also submitted, that on a plain and ordinary interpretation of the statutory and regulatory provisions, Ms Allen's authorisation or consent was not required for the release of GLL's reserves.

[337] He stated that she was also aware from as early as 21 September 2018 (the date when the judgment of Batts J was delivered), that her claims on these grounds had no prospect of succeeding but persisted in continuing them against Mr Hosin.

[338] Mr Powell stated that in these circumstances, by pursing the claim against Mr Hosin, Ms Allen was maintaining a claim which she knew or ought to have known was "doomed to fail on the facts and on the law" and an award of costs on an indemnity basis against her is merited.

[339] In addressing the special costs certificate, counsel relied on rule 64.12 of the **CPR**.

[340] He stated that according to rule 64.12(2), when considering whether to grant a special costs certificate, the court must take into account whether the application was contested or reasonably expected to be contested, the complexity of the legal issues involved in the application and whether the application reasonably required the citation of authorities and skeleton arguments.

[341] He pointed out that rule 64.12(3) provides that the court, having regard to the matters set out in rule 65.17(3), may allow the costs of the attendance of more than one attorney-at-law on the hearing of an application.

[342] It was submitted that when all the factors outlined in rule 64.12(2) and the circumstances outlined in rule 65.17(3), are considered in the present case, the court should exercise its discretion to allow Mr Hosin a special costs certificate for three attorneys-at-law. Mr. Powell stated that this is an application for summary judgment, which if successful, would result in the entry of judgment against Ms Allen, thereby bringing the claims against Mr Hosin to an end. Such an application, he stated, is usually, if not always contested.

[343] He contended that more importantly, Ms Allen clearly has every intention of proceeding to a trial on its merits. Therefore, not only was the application contested, it was reasonable to expect that it would have been opposed.

[344] Counsel stated that it is evident that both the claim and this application are of extreme importance to Ms Allen. He indicated that she is seeking substantial damages and if Mr Hosin's application is successful, her claim would come to an end. It was however, argued, that the application and the claim itself, are arguably even more important to Mr Hosin as he is the President and an officer of GLL, an insurance company. Mr Hosin's appointment and employment to GLL or any other insurance company, it was said, are subject to him being a fit and proper person and Ms Allen has accused him of fraud and made other serious allegations against him.

[345] Counsel stated that significant time was required to review the extensive documents on which Ms Allen relies, research and review the authorities on the different

issues and properly prepare for the legal arguments made and expected to have been made. He stated that given the extensive legal arguments, there is no doubt that the application required the preparation of written submissions and the citation of authorities.

[346] Mr Powell argued that, in the circumstances, Mr Hosin required three attorneys-at-law to efficiently prepare for the application and he was entirely justified in retaining them. He indicated that the court should also be aware that Ms Allen has been consistently represented by no less than three attorneys (even where she applied for ex parte for orders).

[347] He pointed out that Ms Allen has suggested that Mr Hosin should not recover his costs separately from any costs that are awarded to GLL. Mr Powell argued that that suggestion, ignores the fact that on Ms Allen's case, Mr Hosin has also been sued in his personal capacity and not solely as an officer of GLL.

[348] Counsel also stated that Ms Allen has made allegations of impropriety, including fraud, against Mr Hosin which put him at risk of being personally sanctioned. He stated further, that Mr Hosin's application was made on different bases and deals differently with the causes of action against him when compared with GLL's application.

[349] Mr Powell contended that if successful, Mr Hosin's application disposes of the entire claim against him. He would, therefore, be entitled to immediately tax his costs without any further order of the court. GLL's application, if successful, would not dispose of the claim against it and as such, it would not be entitled, without further order of the court, to tax its costs immediately.

[350] Mr Powell contended that it would be unfair and contrary to the overriding objective to require Mr Hosin to have to abide by the order for costs in favour of GLL.

[351] He argued that in the circumstances, it would be reasonable for Mr Hosin to be awarded his costs separately from any costs that would be awarded to GLL. He stated

that any issues as to the reasonableness of the amounts to be recovered would be determined by the taxing master and do not arise on this application.

[352] In all these circumstances, it was submitted that costs should be awarded to Mr Hosin, with a special costs certificate for three attorneys.

For Eckler

[353] Eckler applied for an order that:

> *"2. Judgment issue for [Eckler] on [Ms Allen's] claim (summarily or following a striking out) for costs to be taxed if not agreed."*

[354] Mrs. Minott-Phillips submitted, that Eckler having succeeded in its application, is entitled to costs with a special costs certificate for two (2) attorneys. In this regard, it was argued, that based on the voluminous nature of the pleadings an order in those terms would be reasonable.

For Ms Allen

[355] In her affidavit filed in opposition to the application[38], Ms Allen addressed the issue of costs. Paragraphs 24 to 26 are relevant; she stated:

> *"24. [Mr Hosin] is being represented by the same attorneys-at-law as the 1st Defendant. The claim against the 1st and 2nd Defendant[s] is for a variety of relief under section 213A of the Companies Act as well as tort and breach of contract. There is nothing novel or unusually complex about the matter beyond the actuarial subject matter, and therefore nothing necessitating costs for 3 different attorneys-at-law with separate costs for the 1st and*

[38] Sworn to on 5 March 2019 and filed 7 March 2019.

> *2nd Defendant[s] when it is the same three attorneys instructed by the same firm on their own Notices of Application. I am reliably informed and verily believe to be true that although costs follow the event, I ought not to be liable for any excessive costs and in relation to this application, for the costs of three attorneys, on their own motion, to prepare and present two similar applications and affidavits with minor variations, especially in circumstances where the application is improper, meritless and has no reasonable prospect of success.*
>
> *25. Further, my claim has thus far been well substantiated with contemporaneous documents as well as much sequential evidence as I could give at the time of drafting in order to properly plead my case.*
>
> *26. I am reliably informed and verily believe to be true that this is not a matter in which indemnity costs ought to be awarded as there is no conduct which takes the case out of the norm or further is unreasonable to any degree. Conversely, it is honest belief that the significant costs which I am made to bear in answering this application, I should be entitled to indemnity costs as I believe this application to be vexatious and intended to frustrate my claim."*

[356] It was submitted on behalf of Ms Allen, that the matter was not so complex to warrant a special costs certificate for three counsel in the case of the first and second defendants.

Discussion

[357] Costs follow the event.[39] Rules 64.6(3) and (4) of the **CPR** state:

> *"(3) In deciding who should be liable to pay costs the court must have regard to all the circumstances.*
>
> *(4) In particular it must have regard to-*

[39] Rule 64.6 (1) of the **CPR.**

(a) the conduct of the parties both before and during the proceedings;

(b) whether a party has succeeded on particular issues, even if that party has not been successful in the whole of the proceedings;

(c)…..

(d) whether it was reasonable for a party-

(i) to pursue a particular allegation; and/or

(ii) to raise a particular issue;

(e) the manner in which a party has pursued-

(i) that party's case;

(ii) a particular allegation; or

(iii) a particular issue

(f) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his or her claim; and

(g)…."

[358] There is therefore no dispute that the defendants, having succeeded in their applications, are entitled to their costs. The dispute where GLL's and Mr Hosin's costs are concerned, is centred around the basis on which the costs are to be awarded and whether it should be a portion of the costs or the full amount. In respect of all three defendants, Ms Allen has taken issue with the request for a special costs certificate.

Whether costs should be awarded to the first and second defendants on an indemnity basis

[359] All three defendants have submitted that they are entitled to costs on an indemnity basis on the ground that the aspects of the claim on which they have succeeded should never have been pursued by Ms Allen. The general rule is that costs are to be awarded on a standard basis (see ***Amoco*** (***UK) Exploration Company v***

British American Offshore Limited [2002] BLR 135). The factors to be considered in making an award of costs on an indemnity basis against standard costs were discussed by Sykes J, in ***RBTT Bank Jamaica Limited v YP Seaton et al*** [2014] JMSC Civ 139 at paragraphs [41] to [46]. He stated:

> *"[41] Before answering the question posed, it is important to speak briefly about parts 64 and 65 which speak to costs. Part 64 deals with entitlement to costs along with other general principles while part 65 deals with quantification of costs. Part 64 establishes the fundamental loser pays principle (rule 64.6 (1)). However, rule 64.6 (2) permits the court to order the winner to pay costs.* ***When the court is deciding who should pay costs the court must have regard to a number of factors listed in rule 65.6 (4). These include the conduct of the parties before and during the proceedings; whether there has been success on all or some of the issues; whether there were payments into court or offers to settle; whether a party behaved reasonably in terms of how he or she pursued an allegation or issue and the manner in which the allegation, issue or the case was pursued; whether the successful claimant exaggerated his claim in whole or in part and whether the claimant gave reasonable notice of intention to issue a claim****.*
>
> *….*
>
> *[43] ... After the part 64 examination is completed, the next stage is quantification. Neither parts 64 or 65 use the words standard basis or indemnity basis of assessment of costs. These labels are a carryover from the previous costs regime that existed in Jamaica. The labels are retained in England and Wales and actually used in the English CPR. Although the labels do not appear in the Jamaican CPR, they are used in Jamaica by both bench and bar before and since the introduction of the CPR.*
>
> *…*
>
> *[45] What is the practical difference between indemnity costs and costs on a standard basis? When costs are assessed on a standard basis, then it is for the receiving party to make the case that any costs he is asking for are reasonable in amount and*

reasonably incurred. On an indemnity basis assessment, it is for the paying part (sic) to make the case that costs claimed are not reasonable in amount and not reasonably incurred…

*[46] What, then, leads a court to make either a standard or an indemnity assessment? It is this court's view that the case of (**Mayor and Burgesses of the London Borough of Southwark v IBM UK Ltd** [2011] EWHC 653 captures the principle quite well. Akenhead J held the following at paragraphs 3 and 4: [3] The principles to be applied are derived from CPR Pt 44.4 which provides that the court will assess costs on a standard or indemnity basis and Pt 44.3 which provides that the court, in deciding what order to make about the costs, should have regard to the conduct of the parties (both before and during the proceedings), success, any admissible offer to settle, whether it was reasonable for a party to raise or pursue particular claims and the manner in which the party has pursued its case or particular allegations or issues. [4] The following are unexceptionable propositions: (a) an award of costs on an indemnity basis is not intended to be penal and regard must be had to what in the circumstances is fair and reasonable: **Reid Minty v Taylor** [2002] 1 WLR 2800, paragraph 20. (b) indemnity costs are not limited to cases in which the court wishes to express disapproval of the way in which litigation has been conducted. An order for indemnity costs can be made even when the conduct could not properly be regarded as lacking in moral probity or deserving of moral condemnation: Reid Minty, paragraph 28. (c) the court's discretion is wide and generous but there must be some conduct or some circumstance which takes the case out of the norm**: Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hammer Aspden & Johnson (A Firm)** [2002] Cr App Rep 67, paragraphs 12, 19 & 32 (d) the conduct must be unreasonable to a high degree. 'Unreasonable' in this context does not mean merely wrong or misguided in hindsight: **Kiam v MGN Ltd (No 2)** [2002] 1 WLR 2810, para 12. (e) the pursuit of a weak claim will not usually, on its own, justify an order for indemnity costs, but the pursuit of a hopeless claim, or a claim which the party pursuing it should have realised was hopeless, may well lead to such an order: '[T]o maintain a claim that you know, or ought to know, is doomed to fail on the facts and on the law, is conduct that is so unreasonable as to justify an order for indemnity costs': **Wates***

> ***Construction Ltd v HGP Greentree Allchurch Evans Ltd*** *[2006] BLR 45, paragraph 27 and* ***Noorani v Calver*** *[2009] EWHC 592 (QB), paragraph 9. (f) there is no injustice to a claimant in denying it the benefit of an assessment on a proportionate basis when the claimant showed no interest in proportionality in casting its claim disproportionately widely and requiring the Defendant to meet such a claim:* ***Digicel (St Lucia) Ltd v Cable & Wireless plc*** *[2010] 5 Costs LR 709, paragraph 68. (g) if one party has made a real effort to find a reasonable solution to the proceedings and the other party has resisted that sensible approach, then the latter puts himself at risk that the order for costs may be on an indemnity basis: Reid Minty, paragraph 37. (h) rejection of a reasonable offer to settle will not of itself automatically result in an order for indemnity costs but where the successful party has behaved reasonably and the losing party has behaved unreasonably the rejection of an offer may result in such an order: Noorani, paragraph 12. (i) rejection of 2 reasonable offers can of itself justify an order for indemnity costs:* ***Franks v Sinclair (Costs)*** *[2006] EWHC 3656.*

[360] Sykes J at paragraph [47] referred to **The Three Rivers District Council v The Governor and Company of the Bank of England (No 6)** [2006] 5 Costs LR 714, where Tomlinson LJ at paragraph 25 dealt with the applicable principles. Tomlinson LJ stated:

> *"(1) The court should have regard to all the circumstances of the case and the discretion to award indemnity costs is extremely wide.*
>
> *(2) The critical requirement before an indemnity order can be made in the successful defendant's favour is that there must be some conduct or some circumstance which takes the case out of the norm.*
>
> *(3) Insofar as the conduct of the unsuccessful claimant is relied on as a ground for ordering indemnity costs, the test is not conduct attracting moral condemnation, which is an a fortiori ground, but rather unreasonableness.*
>
> *(4) The court can and should have regard to the conduct of an unsuccessful claimant during the proceedings, both before and during the trial, as well as whether it was reasonable for the*

claimant to raise and pursue particular allegations and the manner in which the claimant pursued its case and its allegations."

[361] In ***Suez Fortune Investments Ltd and Another v Talbot Underwriting Ltd and Others*** [2019] Costs LR 2019, Teare J said[40]:

> *"2. The court's power to order costs on the indemnity basis stems from CPR Part 44.3 which provides that costs may be assessed on the standard basis or on the indemnity basis. Whereas costs on the standard basis must be proportionate and any doubt as to whether the costs were reasonably and proportionately incurred must be resolved in favour of the paying party, costs on the indemnity basis are not subject to the requirement of proportionality and any doubt as to whether costs were reasonably incurred must be resolved in favour of the receiving party. In deciding what order to make about costs the court will have regard to all the circumstances of the case including the conduct of the parties; see CPR Part 44.2(4) and (5) which provide as follows:*
>
> > *"(4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –*
> >
> > *(a) the conduct of all the parties ….*
> >
> > *(5) The conduct of the parties includes –*
> >
> > *(a) conduct before, as well as during, the proceedings …*
> >
> > *(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue:*
> >
> > *(c) the manner in which a party has pursued or defended its case or a particular allegation or issue …"*

---

[40] See also '**Cook on Costs 2010**' by Michael J Cook pages 155 to 160 paragraphs 11.53 to 11.57.

…

4. Although the requirement that there be some conduct or some circumstance which takes the case out of the norm is not stated in the CPR, that requirement is a necessary consequence of the scheme of the CPR. Costs on the standard basis are the norm and so, in order to justify costs on the indemnity basis there must be something which takes the case out of the norm.

5. Very recently, on 3 October 2019, Excelsior *was described by Sir Bernard Rix as "the leading modern authority" and that litigants were discouraged from citation of authority on what is "a well-travelled road"; see* ***Ford v Bennett*** *[2019] Costs LR 1473 at paras 26–29.*

6. Notwithstanding that discouragement the court was presented with 16 pages of submissions on the law relating to indemnity costs and with no less than 31 authorities. There appeared to be a dispute as to the manner in which the court's discretion should be exercised. The oral submissions of counsel for the Underwriters suggested that the dispute concerned a number of matters but, in reality, the dispute concerned one question, namely, whether, when conduct is relied upon to justify an order for indemnity costs, the conduct had to be unreasonable to a high degree.

7. There is a long line of authority that where it is said that a party's conduct was unreasonable it must be unreasonable to a high degree to justify an order for indemnity costs. That requirement was first stated in ***Kiam v MGN Ltd (No. 2)*** *[2002] 1 WLR 2810 by Simon Brown LJ and has been repeatedly stated since; see* ***Euroption Strategic Fund Ltd v Skandinaviska Enskilda Banken AB*** *[2012] EWHC 749 (Comm) at para 14 per Gloster J,* ***Elvanite Full Circle Ltd v AMEC Earth & Environmental (UK) Ltd*** *[2013] 4 Costs LR 612 at para 16(a) per Coulson J,* ***ICI v Merit Merrell*** *[2017] 5 Costs LR 631 at para 12 per Fraser J and* ***Hislop v Perde*** *[2019] 1 WLR 201 at paras 35–36 per Coulson LJ.*

[362] He continued:

8. It was suggested that the requirement that conduct must be unreasonable to a high degree was not stated in the CPR and that

this gloss on the CPR was therefore wrong in principle. However, the requirement is, I think, a necessary corollary of the scheme of the CPR. Having regard to the importance ascribed to the principle of proportionality in the CPR, where unreasonable conduct is relied upon as justifying costs on the indemnity basis, and hence removing the need for the costs to be proportionate, the conduct must be unreasonable to a high degree. Otherwise due regard would not be had to the importance of proportionality in the scheme of the CPR. This was explained by Morgan J in ***Digicel (St Lucia) Ltd and Others v Cable & Wireless plc and Others*** *[2010] 5 Costs LR 709 at para 19:*

> *"Finally, I have found it useful, when asking myself whether the conduct of the paying party was at a sufficiently high level of unreasonableness or inappropriateness to make it appropriate to order indemnity costs, to remind myself of why precisely I am asking that question. The purpose behind the question is whether the relevant conduct makes it just as between the parties to remove from the paying party the two-fold benefit of an order on the standard basis, as compared with an order on the indemnity basis, that is to say, to enable the receiving party to recover its costs, reasonably incurred and reasonable in amount, with the benefit of the doubt being given to the receiving party and without the receiving party having to address (and persuade the court upon) the subject of proportionality. In this regard, I need to give proper weight to the significance which the CPR attach to this question of proportionality. The policy considerations behind the requirement of proportionality and the weight to be attached to the requirement are emphasised in* ***Lownds v Home Office*** *[2012] 1 WLR 2450, in particular, at [8]–[10]. The matters which will be relevant to any dispute about proportionality include those set out at CPR rule 44.5(3), which I have set out above, and also the similar provisions in rule 1.1(2)(c)."*

9. Counsel for the Bank referred to the summary of the relevant principles by Coulson LJ in ***Hislop v Perde*** *[2019] 1 WLR 201 at paras 35–36 which is in these terms:*

> *‘(a) Indemnity costs are appropriate only where the conduct of a paying party is unreasonable 'to a high degree'. 'Unreasonable' in this context does not mean merely wrong or misguided in hindsight.*
>
> *(b) The court must therefore decide whether there is something in the conduct of the action, or the circumstances of the case in general, which takes it out of the norm in a way which justifies an order for indemnity costs.’*

*10. The issue in **Hislop v Perde** did not in fact concern indemnity costs pursuant to CPR Part 44 but the fixed costs regime in CPR Part 45 for low value road traffic accident cases and employers' liability/public liability claims where there was a late acceptance of a claimant's Part 36 offer. It does not appear that there was any debate as to the circumstances in which it was appropriate to order indemnity costs pursuant to CPR Part 44. Although the summary could be taken as supporting the proposition that indemnity costs are only appropriate where there is unreasonable conduct to a high degree, such a proposition would not only be contrary to CPR Part 44 which enjoins the court to have regard to "all the circumstances" of the case but would also be contrary to **Excelsior**, the effect of which is stated in para (b) of Coulson LJ's summary. Coulson LJ's summary of the principles should, as it seems to me, be read as saying that where conduct is relied upon as justifying an order for indemnity costs it must be unreasonable to a high degree. I did not understand counsel for the Bank to disagree with that approach.*

[363] Teare J then said:

*11. In the light of the wide nature of the discretion to order costs on the indemnity basis I accept the submission made by counsel for the Underwriters that there may be an "aggregation of factors" which justify an order for costs on the indemnity basis, one of which may be unreasonable conduct though not to a high degree. What matters is whether, looking at all the circumstances of the case as a whole, the case is out of the norm in such a way as to make it just to order costs on the indemnity basis. That is the approach in **Excelsior;** see also **ABCI v Banque Franco-Tunisienne** [2003] EWCA Civ 205 at para 70 per Mance LJ.*

12. The wide nature of the discretion has been expressed by Christopher Clarke J in ***Balmoral v Borealis*** *[2006] EWHC 2531 at para 1 in these terms:*

> *"The discretion is a wide one to be determined in the light of all the circumstances of the case. To award costs against an unsuccessful party on an indemnity scale is a departure from the norm. There must, therefore, be something – whether it be the conduct of the claimant or the circumstances of the case – which takes the case outside the norm. It is not necessary that the claimant should be guilty of dishonesty or moral blame. Unreasonableness in the conduct of the proceedings and the raising of particular allegations, or in the manner of raising them may suffice. So may the pursuit of a speculative claim involving a high risk of failure or the making of allegations of dishonesty that turn out to be misconceived, or the conduct of an extensive publicity campaign designed to drive the other party to settlement. The marking of a grossly exaggerated claim may also be a ground for indemnity costs.""*

[364] In ***Lejonvarn v Burgess and another*** [2020] EWCA Civ 114, the following passages appear in the judgment of Coulson LJ:

"4.3 'Speculative, Weak, Opportunistic or Thin' Claims

[44] There is a separate strand of authority concerned with speculative, weak, opportunistic or thin claims. It has long been the position that a defendant's eventual defeat of such claims can give rise to an order for indemnity costs. In ***Three Rivers DC v Governor and Co of the Bank of England*** *[2006] EWHC 816 (Comm), [2006] 5 Costs LR 714 (at para [25]), Tomlinson J (as he then was) summarised the position:*

> *'(5) where a claim is speculative, weak, opportunistic or thin, a claimant who chooses to pursue it is taking a high risk and can expect to pay indemnity costs if it fails.'*

[45] There are a number of cases where costs have been awarded on an indemnity basis because of the weakness of the claimant's underlying claims: see by way of example ***Wates***

> ***Construction Ltd v HGP Greentree Allchurch Evans Ltd*** *[2005] EWHC 2174 (TCC), (2005) 105 ConLR 47, [2006] BLR 45…"*

[365] In ***Excelsior Commercial and Industrial Holdings Ltd v Salisbury Hamer Aspden and Johnson (a Firm)*** [2002] EWCA Civ 879, the court's power to order costs on the indemnity basis was considered. Lord Woolf MR emphasised that the court had "*a wide and generous discretion in making orders as to costs*"[41] but that there must be "*some conduct or (I add) some circumstance which takes the case out of the norm*"[42]. Lord Woolf said that "*an indemnity order may be justified not only because of the conduct of the parties, but also because of other particular circumstances of the litigation*"[43]. Finally he said that "*there is an infinite variety of situations which can come before the courts*" and that it would be "*dangerous for the court to try and add to the requirements of the CPR which are not spelt out in the relevant parts of the CPR.*"[44]

[366] In the case of ***Norman Washington Manley Bowen v Shahine Robinson*** [2015] JMCA Civ 57, it was noted as follows:

> *"[53] The Judicature (Supreme Court) Act provides in section 47(1) that "[i]n the absence of express provision to the contrary the costs of ~~and~~an incident to every proceeding in the Supreme Court shall be in the discretion of the Court..." Parts 64 and 65 of the CPR contain the general provisions in relation to the ordering and quantification of costs in civil proceedings in the Supreme Court and any appeal relating to any such order….*
>
> *[64]…~~In the~~In the United Kingdom, costs are assessed on the standard or indemnity basis. Our CPR, however, does not speak specifically to standard and indemnity costs and has not adopted the English approach to expressly differentiate between the two bases."*

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[41] See paragraph 12.
[42] See paragraph 19.
[43] See paragraph 31.
[44] See paragraph 32.

[367] Bearing the foregoing in mind, I consider the case of ***RBTT Bank Jamaica Limited v YP Seaton et al***, instructive as regards the position in Jamaica. In that case Sykes J, dealt extensively with the considerations concerning awarding costs on an indemnity basis. The relevant passages in his judgment are referred to at paragraphs [358] to [359] of this judgment. Therefore, in so far as the very recent UK authorities differ from the position in ***RBTT Bank Jamaica Limited v YP Seaton et al*** (supra) I will be guided by the latter.[45]

[368] In the case at bar, GLL and Mr Hosin have not been successful *in toto* in their respective applications. However, in my judgment, some of the claims which Ms Allen pursued against them can properly be described as 'thin' claims, for example, that for fraudulent misrepresentation. Aspects of her claim were also the subject of adjudication in ***Catherine Allen v Guardian Life and ors***. In this regard, I refer to the claims concerning authorisation for the release of reserves and relief pursuant to section 213A of the ***Companies Act***. Based on the extensive nature of the pleadings, considerable time and resources would have been spent in the preparation of these applications.

[369] It is therefore, my view, based on the principles in ***RBTT Bank Jamaica Limited v YP Seaton et al*** (supra), that costs should be awarded on an indemnity basis to GLL and Mr Hosin.

Whether a special costs certificate should be granted

[370] Rule 64.12 of the **CPR** states:

> *"(1) When making an order as to the costs of an application in chambers the court may grant a "special costs certificate".*
>
> *(2) In considering whether to grant a special costs certificate the court must take into account –*

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[45] See also ***Port Kaiser Oil Terminal S.A v Rusal Alpart Jamaica (A Partnership)*** (supra)

(a) whether the application was or was reasonably expected to be contested;

(b) the complexity of the legal issues involved in the application; and

(c) whether the application reasonably required the citation of authorities and skeleton arguments.

(3) The court having regard to the matters set out in rule 65.17(3), may direct that the costs of the attendance of more than-

(a) one attorney-at-law at the hearing of the application; or

(b) two attorneys-at-law at the trial,

be allowed."

[371] Rule 65.17(3) states:

"In deciding what would be reasonable the court must take into account all the circumstances, including-

(a) any orders that have already been made;

(b) the conduct of the parties before as well as during the proceedings;

(c) the importance of the matter to the parties;

(d) the time reasonably spent on the matter;

(e) whether the cause or matter or the particular item is appropriate for a senior attorney-at-law or an attorney-at-law of specialised knowledge;

(f) the degree of responsibility accepted by the attorney-at-law;

(g) the case, speed and economy with which the matter was prepared;

(h) the novelty, weight and complexity of the matter; and

> *(i) in the case of costs charged by an attorney-at-law to his or her client-*
>
> > *(i) subject to section 21 of the Legal Profession Act, any agreement that may have been made as to the basis of charging;*
> >
> > *(ii) any agreement about the seniority of attorney-at-law who should carry out the work;*
> >
> > *(iii) whether the attorney-at-law advised the client and took the client's instructions before taking any unusual step or one which was unusually expensive having regard to the nature of the matter."*

[372] In her affidavits Ms Allen asserted that:

> *"There is nothing novel or unusually complex about the matter beyond the actuarial subject matter of which the 2nd Defendant is not an actuary, and therefore nothing necessitating costs for 3 different attorneys-at-law with separate costs for the 1st and 2nd Defendant when it is the same three attorneys instructed by the same firm on their own Notices of Application."*

[373] I disagree. It is an understatement to describe the pleadings as extensive. I appreciate that significant time was required to review the documents on which Ms Allen relies, conduct the research and review the authorities on many issues raised in her statement of case and to properly prepare for the legal arguments made.

[374] Where Mr Hosin is concerned, I also accept Mr Powell's submissions that it is important to bear in mind that claims have been brought against him in his personal capacity. In the circumstances, I agree that it would not be unreasonable for Mr Hosin to be awarded his costs separately from any costs to which GLL may be entitled. The interests of the first and second defendant are, in my view, not the same and as such would not be subject to rule 64.7 of the **CPR** which gives the court the discretion to disallow the costs of a party who has chosen to be separately represented although his or her interest is the same as another party.

[375] Based on the above, it is my view that a special costs certificate for three counsel should be granted to GLL and Mr Hosin. However, in light of the fact GLL's and Mr Hosin's applications were partially successful, I am of the view that they should be awarded 80% of their costs.

[376] With respect to Eckler, I have no difficulty, based on the above, in granting a special costs certificate for two counsel. Eckler is entitled to its full costs having entirely succeeded in its application.

Orders

[377] In light of the foregoing the following orders are made:

GLL's application

(1) Summary judgment is granted in respect of:

(i) The issues based on [Ms Allen's] rights and obligations under the **Insurance Act** and in relation to GLL's reserves.

(ii) Paragraph 10 of the particulars of claim, save and except the allegation that GLL breached the implied duty of mutual trust and confidence and the particulars of breach of duty of mutual trust and confidence at sub-paragraphs (iv), (v), (vi), (xi), (xii), (xiv) and (xv);

(iii) The Particulars of fraud in paragraph 11 (i), (iii), (v) and (vi);

(iv) Paragraph 31 of the particulars of claim (tortuous interference with the Claimant's statutory duty under the Insurance Act; and

(v) Paragraph 11(fraudulent misrepresentation) and particulars of fraud (ii) and (iv).

(2) GLL is awarded 80% of its costs on an indemnity basis to be taxed or agreed.

(3) Special costs certificate is granted for two attorneys-at-law

(4) The application for immediate taxation is refused.

(5) Leave to appeal is granted. The time within which Ms Allen is permitted to file her Notice of Appeal is extended to 4 September 2020.

Mr Hosin's application

(1) Summary judgment is granted in respect of the claims made pursuant to the **Insurance Act**, section 213A of the **Companies Act** (authorization to release reserves and the 'oppression' action), breach of contract, fraud and fraudulent misrepresentation.

(2) The automatic referral to mediation is dispensed with.

(3) Mr Hosin is awarded 80% of its costs on an indemnity basis to be taxed or agreed.

(4) Special costs certificate is granted for two attorneys-at-law.

(5) The application for immediate taxation is refused.

(6) Leave to appeal is refused.

The third defendant's application

(1) The application for summary judgment is granted.

(2) Costs are awarded to the third defendant against Ms Allen to be agreed or taxed.

(3) Special costs certificate is granted for two attorneys-at-law.

(4) Leave to appeal is refused.