[2019] JMSC Civ 164

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2017 HCV 01842

BETWEEN	**TREVOR LAWRENCE**	**1ST CLAIMANT**
	JANET LAWRENCE	**2ND CLAIMANT**
AND	**INTERTRADE FINANCE CORPORATION LIMITED (In Receivership)**	**1ST DEFENDANT**
AND	**JOAN POWELL**	**2ND DEFENDANT**
AND	**CHRISTOPHER MALCOLM**	**3RD DEFENDANT**
AND	**GAVIN CHEN**	**4TH DEFENDANT**
AND	**THE FINACIAL SERVICES COMMISSION**	**5TH DEFENDANT**

IN CHAMBERS

Ms. Camille Wignall-Davis along with MarkPaul Cowan instructed by Nunes, Scholefield, DeLeon & Co for the Applicant/5th Defendant

Bianca Samuels instructed by Knight, Junor and Samuels for the Claimant/Respondent

Heard: July 16, 2019 and July 30, 2019

Application to strike out - Application for summary judgment - Immunity clause - Statutory duty of care - Duty of care - Financial Services Commission - Bad faith

T. HUTCHINSON, J (AG.)

THE APPLICATION

[1] The Fifth Defendant, the Financial Services Commission (FSC) has filed a notice of application seeking court orders that the Claimant's Statement of Case be struck out or in the alternative that summary judgment be entered in their favour with an appropriate cost order.

[2] The Grounds on which the FSC's application is made, are;

1. The Claimants Statement of Case does not disclose any reasonable grounds for bringing the claim as against the Defendant herein.

2. The Claimants do not have a realistic prospect of succeeding on the claim against the 5th Defendant.

3. The Claimants particulars of negligence and breach of statutory duty set out as against the 5th Defendant are deficient in that they are repetitive, prolix and vague.

4. The Claimants case taken at its highest, does not disclose any common law duty owed to the Claimants and/or any actionable breach of a statutory or any common duty owed to the Claimants.

5. The Claimants are not entitled at common law to pursue a cause of action in negligence against the 5th defendant as regulator.

6. In any event the 5th Defendant is shielded from claims of this nature under Section 22 of the Financial Services Commission Act because at all material times it acted in good faith pursuant to its function and in the exercise of its powers as regulator.

[3] There had been a 7th ground filed but Counsel for the Applicant elected not to pursue same.

STRIKING OUT

[4] In asking the Court to strike out the claim brought, the Applicant has placed reliance on the powers outlined at Part 26.3(1) of the rules with specific reference to 26.3(1)(c) and (d) which provide as follows;

> *26.3 (1) 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 -*
>
> *(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 or10.*

SUMMARY JUDGMENT

[5] In the alternative, Counsel for the Applicant has submitted that in the event the Court is not satisfied that the Claimant's case should be struck out, it should move to enter summary judgment in favour of the FSC as the Claimant's case cannot succeed especially in light of the Immunity provision at Section 22 of the FSC Act. /In making this submission, Counsel for the Applicant has sought to rely on the powers of the Court as contained at Rule 15.2(a) which states, that the court may give summary judgment on the claim or on a particular issue if it considers that the claimant has no real prospect of succeeding on the claim or the issue.

BACKGROUND

[6] In 1996 the Claimant and her spouse, who is now deceased, opened a joint account with the 1st Defendant Inter Trade Finance Corporation Ltd (IFCL). Between 1996 and June 2011 additional deposits were made bringing the balance, along with interest accrued, to $109,433,972.39. On the 10th of June 2011 a

request was made for payment the investment having achieved its maturity date but no payment was received.

[7] On the 11th of July 2011, the Claimant received a 'rollover advice' from the IFCL in which it was indicated that instead of paying out the proceeds of the account to them it would be re-invested on their behalf. No payment was received by the Claimants and the IFCL was subsequently placed into receivership. On the 9th of June 2017, the Claimants filed suit against the IFCL as well as three of its Directors. The FSC was added as a 5th Defendant on the basis that the Claimants had relied on the fact that they had granted the 1st Defendant a license to operate and had them listed on their website as licensed to offer financial services in the jurisdiction. The Claimants said that they acted on this as an indication that IFCL were a fit and proper body with which they could do business.

[8] The Claimants also took issue with the fact that the FSC failed to make the public aware of the non-compliance of the IFCL, specifically that their licence had been suspended and they had been served with a cease and desist order. The Claim particularises that had this been made known to the public, the Claimant would not have made additional deposits which were placed with the IFCL within the time of the intervention by the FSC.

[9] Mr. Everton McFarlane, the Executive Director of the FSC, provided an affidavit in support of the application in which he indicated the efforts made by the FSC to regulate IFCL. He also observed that licensing by the Securities Commission was not a guarantee that the 1st Defendant would thereafter conduct itself with propriety for the duration of the licence

[10] It was outlined in the affidavit that pursuant to their duty to regulate the IFCL, the FSC made a decision to suspend their securities dealers licence due to their late and inadequate audited statements. According to Mr. McFarlene, IFCL was informed of this by letter dated March 17th, 2010. On the 14th of July 2010 the Company was given an opportunity to be heard and on the 6th of October 2010

directions were given for the production of a number of documents but this was not complied with. As a result of the further non-compliance the FSC conducted an on-site examination between October 12th and 14th 2010. The licence was suspended for non-compliance by letter dated November 18th, 2010 and directions given to IFCL by letter on December 20th, 2010 that they should cease accepting money from existing or prospective clients. A Cease and Desist Order was subsequently served on them on May 20th, 2011. Copies of the letters sent to IFCL were attached to the affidavit as exhibits.

APPLICANT'S SUBMISSIONS

[11] In putting forward her submissions on behalf of the Applicant, Mrs Wignall-Davis indicated that they are relying on grounds 4, 5 and 6 as outlined in the notice. She observed that in respect of the specific orders being sought against the Applicant in the Claim Form, the loss arose from the fraudulent conduct of the other Defendants and the thrust of the Claim is directed at them.

[12] In respect of the Claimant's position that the FSC was negligent in the performance of its functions as regulator and the licence granted was a negligent misstatement, Counsel submits that at its highest if proven, the allegations amount to negligence but there has been nothing alleged which could be said to amount to bad faith or malice on the part of the FSC. On this point reference was made to Section 22 of the Financial Services Act which provides immunity to the Commission as well as to officers of the Commission in the performance of their duties pursuant to this Act provided there is no proof of willful and reckless misconduct.

[13] Counsel submitted that the offshoot of this provision is all bonafide or good faith acts are covered by this grant of immunity, she argued that this factor serves to further weaken the Claimant's case, as she would have to show willful or reckless misconduct by the FSC in order to remove them from the protection of this section and there is no evidence of this.

[14] The Court was also referred to a number of cases, the first of which was ***Barb Troisin etal v Scotia McLeod etal 2005 ABCA 410*** which was a consolidated appeal. This was a matter in which a claim had been brought by investors against the Alberta Securities Commission (ASC). The ASC made an application seeking summary judgment on the basis that the Claimants had no reasonable prospect of success. The matter was appealed by them having failed before the lower Court.

[15] At paragraph 11 of the Judgment which outlined the argument of the appellants that there was no duty of care owed to the respondents, the Court stated that they didn't find it necessary to consider this question as the evidence presented at the summary judgment application did not show an absence of good faith and was therefore insufficient to displace the immunity provided by Section 193 of the Alberta Securities Act S.A. 1981

[16] At paragraph 14 on the question whether negligence was sufficient to vest liability, the Court stated;

> *"Although lack of good faith may be demonstrated through negligence only the most obvious cases of negligence qualify"*

At paragraph 16, the Court added;

> *There is no evidence of the type necessary to meet the high degree of malfeasance required to displace the immunity provided by s.193.*

[17] Counsel submitted that this authority makes it clear that in order for negligence to be shown to vest FSC with liability, the evidence must show some act on the part of the entity that was malicious or done in bad faith. She pointed out that while the Claimant makes reference to various acts of bad faith, malice and dishonesty on the part of the other defendants the particulars of claim remain silent as to this in respect of the 5th Defendant and for the cause of action to be made out or the claim to succeed, this must be pleaded.

[18] It was submitted that 26.3(c) makes it clear that where the cause of action discloses no reasonable grounds for bringing the claim the Court should act to

have the matter struck out. In this regard, reliance was placed on ***Sebol Ltd etal v Ken Tomlinson etal SCCA 115/2007*** with specific reference to the dicta of Dukharan J at page 13 paragraph 28 where he said:

> *"The focus of the new rules is to deal with the matters expeditiously and to save costs and time, if there are no reasonable grounds for bringing an action, then the Court ought to strike it out."*

[19] In seeking to persuade the Court to strike out the claim as disclosing no reasonable grounds for bringing the action, Counsel also referred to and relied on the decision of ***Dennis Atkinson v Development Bank of Jamaica Ltd etal [2016] JMCC COMM 37*** where Laing J stated as follows at paragraphs 8 and 9;

> *The first limb of the application to strike out the claim, relying on CRR 26.3(1)(c), is that it discloses no reasonable ground for bringing or defending the claim. Batts, J examining that provision in* ***City Properties Limited v New Era Finance Limited 2013 JMSC Civil 23*** *opined, in my view accurately, as follows:*
>
> *"On the issue of the applicable law, the section is clear and means exactly what it says. There must be reasonable grounds for bringing or defending a claim. These reasonable grounds must it seems to me to be evident on a reading of the statement of case. It is well established and a matter for which no authority need be cited, that upon an application to strike out pleading, no affidavit evidence need be filed, the issue is determined by reference to the pleadings.*
>
> *Therefore, it seems to me that when the rule refers to "reasonable grounds" for bringing a claim, it means nothing more or less than that the claimant has disclosed in the pleadings that he has a reasonable cause of action against the Defendant".*

[20] It has also been submitted that even if the claim could be pursued it could not succeed as the Claimant would still be barred by the Immunity provision and this is a factor that the Court should also consider. Mrs Wignall-Davis submitted that in seeking to assert that a duty of care was owed to the Claimant by the Applicant, the case law has made it clear that the Claimant would have to establish a duty of care specific to them and in this regard reliance is placed on ***Yuen Kun-Yeu etal v Attorney General of Hong King [1987] 2 All ER 705.***

[21] Counsel submitted that the question for consideration here was considered by that Court at page 709 paragraph F as follows;

> *The foremost question of principle is whether in the present case the commissioner owed to members of the public who might be minded to deposit their money with deposit-taking companies in Hong Kong a duty, in the discharge of his supervisory powers under the ordinance, to exercise reasonable care to see that such members of the public did not suffer loss through the affairs of such companies being carried on by their managers in a fraudulent or improvident fashion. That question is one of law, which is capable of being answered on the averments, assumed to be true, contained in the appellants' pleadings. If it is answered in the negative, the appellants have no reasonable cause of action, and their statement of claim was rightly struck out.*

[22] It is Counsel's position that the answer to this question was provided in the passages found between pages 710 and 711 of the Judgment where the Court made it clear that for a duty of care to exist it was a twofold test.

[23] The first limb of same being the foreseeability of injury to the individual by the action or omission of the tortfeasor and the second being a close and direct relationship of proximity in which that duty would be owed specifically to the individual. Since the two requirements were not satisfied by the Claimants, the statement of case was struck out.

[24] In concluding her submissions on the point that there was no duty of care owed, Counsel also made reference to the decision of ***Robert William John Davis etal v Percy Radcliffe etal [1990] 1 WLR 823.*** The Claimants brought an action for breach of statutory and common law duty of care. In that matter, the Court also struck out the statement of case on the basis that no duty of care was owed and the Regulator could not be held responsible for the loss suffered by the Claimant.

[25] The Alternate Submission which has been made on behalf of the Applicant is to the effect that even if the Court is of the view that there are reasonable grounds for this action being brought, the Claimant has no realistic prospect of success

based on her inability to show any actions on the part of the Applicant which resulted in her loss, neither is she able to show any bad faith or actions amounting to willful or reckless misconduct. It is submitted that in the absence of any such evidence the claim cannot succeed and as such the Court should enter Summary Judgment in favour of the Applicant.

RESPONDENT'S SUBMISSIONS

[26] In making her submissions, Ms. Samuels has taken issue with the applicability of Section 22 of the FSC Act. She has highlighted the fact that while the Act makes reference to acts of the FSC or its Officers it is silent as to its omissions. Counsel submitted that this isn't a mere coincidence as if the intention of Parliament had been to cover the omissions or failure to act by the FSC the section would have expressly said so. In this regard she compared the relevant section with section 160 of the Registration of Titles Act which says;

> *"The Registrar shall not, nor shall the Referee or any person acting under the authority of either of them, be liable to any action, suit or proceeding, for or in respect of any act or matter born fide done or omitted to be done in the exercise or supposed exercise of the powers of this Act."*

[27] Ms. Samuels noted that the claim is for multiple failures to act and submitted that the immunity provision should be strictly construed. On this point she relied on the dicta of the Privy Council in paragraph 53 of ***Gulf Insurance Ltd v The Central Bank of Trinidad and Tobago [2005] UKPC 10*** which states:

> *"That leaves the question of whether TCB is entitled to damages at all. Prima facie, the unlawful disposal of its assets by the Central Bank was a conversion. But the question is whether the Central Bank is, as the judge and the Court of Appeal thought, immunised from liability by s 44H. That section applies to acts done in the performance, or in connection with the performance of functions conferred on the Bank under this Part". The Board considers that the judge and the Court of Appeal gave it too wide a construction in applying it also to acts which purported to be in performance of functions conferred by the Act but which were in fact outside the powers which it conferred. This is particularly true when the acts in question deprived TCB of its property. The Board considers that provisions of this nature should be restrictively construed. They should not be treated as a*

licence for unlawful expropriation without compensation, provided only that the acts are done in good faith and without negligence."

[28] In support of the position that there is a duty of care owed to the Claimant, Counsel made reference to Section 6(1) and 6(2) of the Act which provides in part as follows;

6.(1) For the purpose of protecting customers of financial services, the Commission shall-

(a) supervise and regulate prescribed financial institutions;

(b) promote the adoption of procedures designed to control and manage risk, for use by the management, boards of directors and trustees of such institutions;

(c) promote stability and public confidence in the operations of such institutions;

(d) promote public understanding of the operation of prescribed financial institutions;

(e) promote the modernization of financial services with a view to the adoption and maintenance of international standards of competence, efficiency and competitiveness.

(2) For the purpose of the discharge of its duty under subsection (l), the Commission shall-

(a) take such steps as are necessary to ensure that appropriate standards of conduct and performance are maintained in prescribed financial institutions in accordance with this Act, any rules or regulations made hereunder or any relevant Act;

(b) at such times as it may determine but at least once in each year-

I. examine, in such manner as it thinks fit, the affairs or business of every prescribed financial institution carrying on business in Jamaica or elsewhere for the purpose of being satisfied that the provisions of this and any relevant Act are being complied with and that the institution is in a sound financial condition; and

II. within ninety days after the completion of the examination report to the Minister the results of every such examination and any such report many contain such recommendations as the Commission

considers necessary or desirable to correct any malpractices or deficiencies discovered in the examination;

[29] Particular emphasis has been placed on 6(2)(b)(i) which requires checks being made on each financial institution once per year to ensure it is in sound financial condition. Ms. Samuel submits that had the Applicant been doing so they would have discovered what the Temporary Manager for IFCL discovered, which was that incoming funds were being used to meet interest and other payments for previous transactions. It is in this regard that Counsel submitted that the FSC failed to do what they had been mandated to and it was as a result of this failure the Claimants suffered loss.

[30] Counsel concluded her submissions by stating that it was the numerous failures outlined in the Particulars of Claim that led to the heavy loss suffered by the Claimant and this failure was conduct which was not covered by Section 22 of the FSC Act.

APPLICANT'S ADDITIONAL SUBMISSIONS

[31] Mrs Wignall-Davis sought to provide a short response to the submissions of Ms. Samuels in which she noted that it would make a mockery of the provision for immunity if inaction or omission were not to be covered.

[32] In respect of Section 6(2)(b) she submitted that the powers of the Commission which were referred to therein do not extend to the level of management that Counsel for the Claimant has submitted.

ANALYSIS/DISCUSSION

[33] The issues which arise for consideration in coming to a decision on this application are two-fold. The first is whether the FSC owed a statutory and common law duty of care to the Claimant which is actionable by her. The second is even if such a duty were to be said to exist by virtue of Section 6 (1) and (2) could the action stand in light of Section 22 of the Financial Services Act.

Did the FSC owe a duty of care to the Claimants

[34] It is the Claimant's position that Section 6(1) and (2) of the FSC Act creates a statutory duty of care by the language used, as it serves to vest the FSC with the responsibility of doing acts geared towards the protection of customers of financial institutions. The Claimant also contends that the fact that they have suffered a financial loss can be directly traced to their reliance on the fact that IFCL was listed by the FSC as a fit and proper body with which they could do business and at no time was the public informed that this was no longer the case. It is said that because of their failure to make the checks as required to do, the Directors of the IFCL were able to engage in practices which were adverse to their customers and the FSC's failure to prevent this conduct created the environment for this loss to occur.

[35] The Court accepts that the language used in the section would appear to create a statutory obligation on the part of the FSC to carry out its functions in such a manner that depositors in these institutions can be protected. The question for the Court however was whether the obligation of the FSC went as far as Counsel for the Claimant has contended. The decision of ***Yuen Kun-Yeu v Attorney General of Hong Kong*** provides useful guidance on this issue. In terms of its facts it is essentially on all fours with the instant matter. Additionally, the statutory provision which existed in the preamble of that act closely mirrors our Section 6(1).

[36] In that decision, on an action brought against the Attorney General as representative for the Commissioner, it was the position of the Claimants that they had relied on the fact that the financial institution in question had been listed as a fit and proper body with which to do business. They also asserted that they had acted on the listing as being indicative that the Commissioner, true to his responsibilities, had conducted his due diligence into the Company before having them listed. The action was brought to recover damages for negligence.

[37] In coming to its decision, the Court reviewed the line of authorities on negligence and duty of care in order to determine the relevant test that should be applied. Having conducted this review, Lord Keith of Kinkel then stated;

> *"The primary and all-important matter for consideration, then, is whether in all the circumstances of this case there existed between the commissioner and would-be depositors with the company such close and direct relations as to place the commissioner, in the exercise of his functions under the ordinance, under a duty of care towards would-be depositors. Among the circumstances of the case to be taken into account is that one of the purposes of the ordinance (though not the only one) was to make provision for the protection of persons who deposit money. The restrictions and obligations placed on registered deposit-taking companies, fenced by criminal sanctions, in themselves went a long way to secure that object. But the discretion given to the commissioner to register or deregister such companies, so as effectively to confer or remove the right to do business, was also an important part of the protection afforded. No doubt it was reasonably foreseeable by the commissioner that, if an uncreditworthy company were placed on or allowed to remain on the register, persons who might in the future deposit money with it would be at risk of losing that money. But mere foreseeability of harm does not create a duty, and future would-be depositors cannot be regarded as the only persons whom the commissioner should properly have in contemplation' (emphasis supplied).*

Having stated thus, the Learned Judge continued;

> *In considering the question of removal from the register, the immediate and probably disastrous effect on existing depositors would be a very relevant factor. It might be a very delicate choice whether the best course was to deregister a company forthwith or to allow it to continue in business with some hope that, after appropriate measures by the management, its financial position would improve. It must not be overlooked that the power to refuse registration, and to revoke or suspend it, is quasi-judicial in character, as is demonstrated by the right of appeal to the Governor in Council conferred on companies by s 34 of the ordinance, and the right to be heard by the commissioner conferred by s 47. The commissioner did not have any power to control the day-to-day management of any company, and such a task would require immense resources. His power was limited to putting it out of business or allowing it to continue. No doubt recognition by the company that the commissioner had power to put it out of business would be a powerful incentive impelling the company to carry on its affairs in a responsible manner, but if those in charge were*

> *determined on fraud it is doubtful if any supervision could be close enough to prevent it in time to forestall loss to depositors. In these circumstances their Lordships are unable to discern any intention on the part of the legislature that in considering whether to register or deregister a company the commissioner should owe any statutory duty to potential depositors. It would be strange that a common law duty of care should be superimposed on such a statutory framework."*

[38] This was not a situation in which the Claimant had gone into the offices of the FSC and received direct financial advice on the IFCL on which they acted to their detriment. If that had been the situation, there would have been no challenge brought to the appropriateness of this action as the foreseeability and proximity required would have been established.

[39] From the affidavit of Mr. McFarlene, it is evident that the FSC having granted the licence to the IFCL had thereafter sought to carry out their responsibilities as a regulator. In 2010 when the IFCL were found to have engaged in the submission of late and inadequate financial statements the decision was taken to suspend their licence. They were given a chance to be heard and on their continued failure to comply with directions from the FSC an on-site examination was conducted of their records following which their license was suspended. It is clear that the steps taken by the FSC were in keeping with their duties and powers as outlined at Sections 6(1) and (2) of the Act.

[40] In respect of the submission that by keeping the IFCL on the list during the time of these 'investigations' the FSC enabled them to carry out the fraud alleged against their clients, I note that the FSC would have had no authority under this provision of the act to make the public aware of these enquiries. Had they sought to do so they would have been acting outside of the general powers and duties given to them by statute. Additionally, had the IFCL been able to regularize the situation, by making this information public, the FSC could have placed themselves at risk of being sued for any loss suffered by the institution or by its clients. As acknowledged by Lord Kinkel, the possibility does exist that by such an institution remaining on the list, a situation could be created in which persons might deposit

and lose their money, but mere foreseeability of harm does not create a duty and future depositors cannot be regarded as the only persons whom the FSC should properly have in contemplation. Its mandate was to exercise its functions bearing in mind the public at large and not just the Claimants.

[41] In relation to the Claimants' contention that the negligence alleged against the FSC is well founded in light of the findings of the Temporary Manager. It is evident from the provisions of Section 6(1) and (2) that the responsibilities of the FSC would be markedly different from those of an individual appointed as Temporary Manager in Receivership. His responsibility would be to review the day to day operations of the institution in order to fulfill his remit. The role of the FSC on the other hand is not as 'hands on'. In fact, the wording of Section 6(2)(b)(i) makes it clear that the FSC was to examine the affairs and business of every prescribed financial institution at least once per year but there is no requirement for it to be involved in the daily affairs of that entity. These responsibilities were not very different from that of the Commissioner in the ***Yuen Kun Yeu*** case where it was noted by the Court that in carrying out his functions the Commissioner did not have any power to control the day to day management of any company and I find that the situation would be no different in the instant case.

[42] In respect of the assertion of a statutory duty the decision of ***Robert William John Davis etal v Percy Radcliffe etal*** is instructive. This matter involved a claim which was brought in a similar set of circumstances for damages for negligence and/or breach of statutory duty. On the question whether there was a statutory duty of care owed by the Regulator to depositors, Lord Goff of Chieveden stated as follows;

> But it must have been the statutory intention that the licensing system should be operated in the interests of the public as a whole; and when those charged with its operation are faced with making decisions with regard, for example, to refusing to renew licences or to revoking licences, such decisions can well involve the exercise of judgment of a delicate nature affecting the whole future of the relevant bank in the Isle of Man, and the impact of any consequent cessation of the bank's business in the

> Isle of Man, not merely upon the customers and creditors of the bank, but indeed upon the future of financial services in the island. In circumstances such as these, competing considerations have to be carefully weighed and balanced in the public interest, and, in some circumstances, as Mr. Kentridge observed, it may for example be more in the public interest to attempt to nurse an ailing bank back to health than to hasten its collapse. The making of decisions such as these is a characteristic task of modern regulatory agencies; and the very nature of the task, with its emphasis on the broader public interest, is one which militates strongly against the imposition of a duty of care being imposed upon such an agency in favour of any particular section of the public (emphasis supplied).

[43] The Court continued;

> *A further consideration which militates against the imposition of a duty of care upon persons in the position of the defendants in the present case is that it is being sought to make them liable in negligence for damage caused to the plaintiffs by the default of a third party, S.I.B.*

[44] The remarks of the Learned Judge specifically addresses the very claim which has been brought, as in bringing this action the Claimants seem to be seeking to hold the FSC responsible for the fraud committed against them by the IFCL, something which the FSC had no control over. In carrying out its role and discharging its numerous functions, the FSC was seeking to acquit its duties not only to Claimant but the wider public. To hold them liable for a judgment call made in the exercise of their functions would be to create a statutory duty of care where the case law makes it clear none existed.

Could the action brought survive the application of Section 22

[45] In respect of this issue, the provision of Section 22 makes it clear that anything that could be considered willful or reckless misconduct would remove the shield of immunity in respect of the FSC. The failings which have been identified by the Claimant do not fit within the parameters of these terms as willful would require intentional or deliberate conduct and reckless speaks to acts or omissions conducted heedless of danger or the consequences of those actions. The use of these words make it clear that the type of conduct required would have been

analogous to the FSC providing advice to the Claimants to invest in the entity while being fully aware of their non-compliance.

[46] In considering this provision, I am in agreement with Counsel for the Applicant that it would make a mockery of the clause if the immunity extended to acts but not omissions which may occur when the FSC made a judgment call in the execution of its duties. Although section 160 of the Registration of Titles Act makes specific reference to omissions, it cannot be taken to mean that the absence of the word from the FSC Act would mean that this would not be covered. In respect of the decision of **Gulf Insurance Ltd v The Central Bank of Trinidad and Tobago** while it makes clear that immunity provisions should be restrictively construed the Court went on to add that they should not be treated as a licence for unlawful expropriation without compensation, provided only that the acts are done in good faith and without negligence. Those remarks need to be considered in their context as the Central Bank had in fact engaged in acts that it had no statutory authority to.

[47] In order to defeat the application of Section 22, just as in the ***Barb Troisin*** case, the Claimant would be required to show acts or specific omissions that were deliberately done in bad faith heedless of the consequences. I have examined the 'failings' which have been outlined in the Particulars of Claim and I note that they all seem to amount to assertions that the FSC had failed to carry out the provisions of Section 6 of the Act without any evidence to support this. This 'evidence' falls far short of the statutory requirement and in those circumstances the action could not survive the application of this provision.

Should the Claim be struck out?

[49] Having arrived at the conclusions above, it remains for the Court to consider whether there is an appropriate basis to grant the relief sought by the Applicant. In light of the guidance provided in the decision of ***Sebol Limited etal v Ken***

Tomlinson etal, the Court is unable to find that there are reasonable grounds for bringing this claim. As stated by Sykes J, as he then was,

> The rule focuses on the grounds for bringing the claim and not on just whether the pleadings disclose a reasonable cause of action.

[50] The position of the Court Appeal makes it clear that where there are no reasonable grounds for bringing an action then the Court ought to strike it out.

[51] This is clearly a matter in which the activities of the 1st, 2nd, 3rd and 4th Defendants resulted in an overwhelming loss to the Claimant. It was their fraudulent activity that created the environment in which the loss occurred and not the 5th Defendant. In seeking to hold the 5th Defendant responsible for the actions of third parties whose conduct they could not control, the Claimant has sought to invoke a duty of care to them where one does not exist. In any event Section 22 of the Act would provide immunity from any such action. In these circumstances, I am satisfied on a balance of probabilities that the matter should be struck out as there are no reasonable grounds for bringing same against the FSC.

[52] The order of the Court on this application is as follows;

1. The Claim against the 5th Defendant is struck out;
2. Costs to the Applicant/5th Defendant to be taxed if not agreed;
3. Applicant's Attorney to prepare, file and serve order herein.

[52] It should be noted that prior to the hearing of the Application brought by the 5th Defendant, the second Claimant had sought an order from the Court having her continue the Claim as Personal Representative for the First Claimant, that order was granted.