COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2022/CLE/GEN/00474

B E T W E E N

ISAAC DANIEL PICCIOTTO KASSIN

Respondent/Claimant

AND

J.P. MORGAN TRUST COMPANY (BAHAMAS) LIMITED

(As Trustee of the Cabo Verde Trust)

Applicant/Defendant

Before:	The Honourable Madam Justice Camille Darville Gomez
Appearances:	Giahna Soles-Hunt, Nastassia Rigby & Dwayne Whylly for the Claimant N. Leroy Smith & Kimberleigh Turnquest for the Defendant
Hearing Date:	28 November 2024
Submissions received:	19 April 2024, 14 June 2024 and 18 June 2024

Civil Procedure — Strike out and Summary Judgment — Automatic Exchange of Financial Account Information Act, 2016 - Common Reporting Standards - Statutory immunity — Act of state doctrine.

RULING

Darville Gomez, J

Introduction

[1.] This action arose out of damages and loss sustained by the Claimant (sometimes referred to as "Mr. Kassin") who is and/or was at all material times a tax resident of the Republic of Colombia and settlor and beneficiary of the certain Bahamian trust called and known as the "Cabo Verde Trust" (the "Trust"), when he was required to pay a normalization tax and an increased wealth tax to the *Direccion de Impuestos y Aduanas Nacionales* (the "DIAN"), the Tax and Customs National Authority in Colombia, due to a discrepancy between the value of the Trust's assets that he reported to the DIAN in his personal tax returns and the value of the Trust's assets reported by the

Bahamas Competent Authority to the DIAN pursuant to the Bahamas' Common Reporting Standard and Anti-Money Laundering regimes.

[2.] The Bahamas Competent Authority obtained the value of the Trust's assets from two reports it received from the Defendant, a Bahamian bank and trust company (sometimes referred to as "JPM Bahamas") duly licensed to carry on trust business and formerly engaged as trustee of the Trust at the material time.

[3.] The Defendant claimed to have submitted the reports in its *bona fide* efforts to comply with its obligations as a Reporting Financial Institution under the aforementioned regimes.

[4.] The Claimant by his Amended Statement of Claim alleged gross negligence and/or breaches of duty and fiduciary duties on the part of the Defendant, its servants and/or agents and sought an award for special damages in the amount of USD$2,588,561.97 (and continuing to accrue); general damages for breach of duty; interest and costs.

[5.] By its Amended Defence, the Defendant denied liability and claimed contributory negligence and failure to mitigate loss and damage.

[6.] The Defendant, as Applicant, applied for an order striking out the Claimant's Writ of Summons and Statement of Claim, pursuant to Parts 26.3(1)(b) and (c) of the Supreme Court Civil Procedure Rules (the "CPR"). Alternatively, the Defendant sought an Order under CPR Part 15 that Summary Judgment be entered in favour of JPM Bahamas and an Order that the Claimant pay JPM Bahamas' costs in and occasioned by this Action, such costs to be assessed if not agreed.

[7.] For the reasons hereinafter set out, I have dismissed the Defendant's Strike Out and Summary Judgment Application and awarded costs to the Claimant to be assessed by this Court on the papers if not agreed between the parties.

Facts and Background

[8.] On 13 July 2016, the Claimant settled the Cabo Verde Trust under the laws of The Commonwealth of the Bahamas by way of a Revocable Trust Agreement made between the Claimant as settlor and beneficiary and the Defendant as the initial trustee.

[9.] The Trust's directly held asset comprised 50% of the issued share capital of a Bahamian company called Rising Fawn Limited. In turn, Rising Fawn Limited held the issued share capital of a BVI company called Hampton Holdings Limited which in turn owned 100% of the shares of various Chilean operating companies.

[10.] As a designated Colombian tax resident at the material time, the Claimant understood that he was required to disclose the assets of the Trust by way of a disclosure program pursuant to Colombian Law 1739 of 2014.

[11.] In accordance with the said disclosure program and the Colombian tax code, in 2017 and 2018, the Claimant declared the value of the Trust's assets to the DIAN at USD$6,182,749.72 for both

years, respectively. The value declared represented the historical acquisition value of the shares in the Chilean operating companies (the "Entities").

[12.] On 1 January 2017, the Automatic Exchange of Financial Account Information Act, 2016 (the "Act") was enacted to facilitate the implementation and enforcement of the Common Reporting Standard ("CRS") in The Bahamas.

[13.] For the purposes of the Act, the Financial Secretary in the Ministry of Finance of the Commonwealth of The Bahamas is designated as the "Competent Authority" for the jurisdiction. Among other things, the Competent Authority is empowered to enforce compliance with the Act's provisions and regulations and receive and exchange information reported under the Act with the competent authorities of other participating jurisdictions.

[14.] It is the Competent Authority who therefore obtains financial information from the Reporting Financial Institutions ("RFI") designated under the Act with respect to all of their accounts which are deemed to be reportable and thereafter automatically exchanges that information with their exchange partners annually.

[15.] Under the Act, all Reporting Financial Institutions have four key obligations which include *inter alia* the:

(i) Identification of Reportable Accounts by applying the due diligence rules and procedures under CRS, the Bahamian anti-money laundering regime or similar requirements to which the RFI is subject; and

(ii) Obtaining and filing Information Returns relating to the Reportable Accounts maintained with them.

[16.] In this instant action, at all material times, the Defendant (outside of its capacity as trustee of the Trust) was a designated Reporting Financial Institution under the Act and from *circa* 2018 Colombia was deemed to be a "Reportable (and therefore a participating) Jurisdiction".

[17.] In purported pursuance of its obligations under the Act, in or around early 2017, the Trust was classified in the Defendant's records as being a Passive Non-Financial Entity ("Passive NFE"). A Passive NFE is an entity that is considered to be reportable for the purposes of the CRS.

[18.] However, in or around early 2018, certain personnel of the Defendant determined that the Trust's classification should be updated in order to reflect it being an Active Non-Financial Entity. For the purposes of the CRS an Active NFE is an entity that is not considered to be reportable.

[19.] Nonetheless, the update to the Trust's classification was not made by the Defendant's CRS team and as a result the Trust continued to be classified on the Defendant's records as being a reportable Passive NFE.

[20.] Consequently, although the Trust was not reportable, the Defendant, in its capacity as a Reporting Financial Institution, reported its determination of the actual value of the Trust to the Competent

Authority on two occasions, viz, in August 2018 and in August 2019. The reports were then subsequently reported to the DIAN by the Competent Authority.

[21.] In August 2018 the value of the Trust reported by the Defendant for the 2017 fiscal year was USD$22,743,037.00 which it derived from the market value of the Trust as stated in the Trust's 2016 valuation. In August 2019 the value of the Trust reported by the Defendant for the 2018 fiscal year was USD$20,813,246.50 which was the actual value of the Trust as stated in the Trust's 2017 valuation.

[22.] Later, on 6 August 2020 the Claimant was invited by the DIAN to participate in its voluntary disclosure program to normalize the amount of taxes he owed to the DIAN based on its finding that he was in possession of an unreported asset. The DIAN's finding was due to the discrepancy between the value of the Trust the Claimant reported to the DIAN in his personal tax returns and the respective values of the Trust the Competent Authority reported to the DIAN under the Bahamas' CRS and AML regimes. The Claimant was given until 25 September, 2020 to remedy the tax obligations he allegedly owed due to the unreported asset before any applicable sanctions would be imposed.

[23.] Without communicating his reservations or challenges of the DIAN's findings to the DIAN, the Claimant voluntarily participated in its disclosure program in his alleged efforts to mitigate his damages. As a result of his participation, he was assessed a penalty tax fee in the amount of USD$2,224,464.00 and an additional wealth tax in the amount of USD$292,610.00 for the fiscal years 2020 and 2021.

[24.] By way of an email dated 27 August 2020, the Claimant informed the Defendant that *inter alia* due to the Defendant mistakenly reporting the Trust's financial information to the Competent Authority without having any legal obligation to do so and against his alleged express instructions not to do so he found the Defendant to be in breach of the Revocable Trust Agreement and responsible for the DIAN's findings. Therefore, he communicated to the Defendant that it was his desire to reach an Agreement with the Defendant for its compensation to him of the penalty payments the DIAN would later determine that he owed.

[25.] The Defendant by way of reply email almost two months later on 12 October, 2020 and past the deadline set by the DIAN for response (viz., 25 September, 2020) informed the Claimant that it disagreed with the allegation the Claimant made that the Defendant was in breach of the Revocable Trust Agreement. The Defendant also informed the Claimant in that same email that the consideration of any sort of agreement at that time was in its view premature as in any event it was the Defendant's intent to withdraw the reports it filed in respect of the Trust from the reporting portal when it reopened in July 2021.

[26.] However, no evidence was produced to show that the filings were removed from the portal by the Defendant as advised. Instead, almost twelve months later, on 2 September 2021 the Defendant submitted a letter of clarification to the Competent Authority informing them that the reports it

filed in respect of the Trust were filed erroneously due to "an inadvertent, isolated administrative mistake" and confirming its position that the Trust rightly classified as an Active NFE was not reportable under the CRS.

[27.] By a specially indorsed Writ of Summons filed on 25 March 2022 the Claimant commenced this action which was later amended and filed on 17 September 2024 (the "Amended Writ"). By the Amended Writ the Claimant sought an award for damages and loss occasioned to him by reason of the alleged gross negligence and/or breaches of duty and fiduciary duties on the part of the Defendant, its servants and/or agents as the former trustee of the Trust (the Defendant having served in that capacity from 13 July 2016 to 6 December 2023).

[28.] The Claimant particularized his damages and loss as follows:

Particulars of Damages and Loss

a. Penalty tax assessment in the amount of USD2,224,464.00;

b. Additional Wealth Tax in the amount of USD292,610.00;
c. Costs associated with the Claimant's representation before the Colombian Tax Authority in the amount of approximately USD40,658.00;
d. Interest on loan in the amount of USD30,829.97 as at January 31, 2022 and continuing to accrue.

[29.] The Defendant in its Amended Defence filed on 7 October 2024 denied *inter alia* that it was grossly negligent or that it breached any of the duties pleaded by the Claimant. The Defendant averred that the Trust sustained no loss and that it could not be held liable for the matters complained of within the Amended Writ as they fell squarely within the ambit of (i) section 14(5) of the Automatic Exchange of Financial Account Information Act, 2016 (the "Act") and/or (ii) the exculpatory and other provisions of the Letter of Direction and/or (iii) the exculpatory and other provisions of the Updated International Fiduciary Services Terms transmitted to the Claimant on 14 July 2017 and subsequently and/or (iv) the exculpatory and other provisions of the Revocable Trust Agreement made between the parties on 13 July 2016. The Defendant made no admission as to the existence of the alleged or any damages and loss sustained by the Claimant personally, or as to the amount thereof and further or alternatively claimed that insofar as the Claimant may establish that he has suffered any alleged damages and loss, the same was caused by the Claimant's own negligent or willful acts and/or omissions and/or the Claimant's failure to mitigate his loss.

[30.] The Defendant particularized the Claimant's contributory negligence and failure to mitigate his loss and damage as follows:

Particulars of Contributory Negligence and Failure to Mitigate Loss and Damage

a. The Claimant failed to make any or any adequate inquiries into his ability to engage with DIAN before voluntarily entering the disclosure program in 2020.

b. The Claimant failed to take any or any sufficient steps to engage with DIAN before entering the voluntary disclosure program or at any point thereafter, including by communicating with DIAN in response to the Tax Notice and explaining why the Tax Notice was erroneous (as alleged by the Claimant) and/ or by taking legal proceedings.

c. The Claimant failed to exercise reasonable care for his own personal tax reporting.

[31.] The Claimant in his Amended Reply to the Amended Defence filed on 21 October 2024, wholly maintained the assertions and claims pleaded in his Amended Writ.

[32.] By Notice of Application filed on 11 April 2024 the Defendant made the following applications:

(i) An order to strike out the Claimant's Writ of Summons and Statement of Claim filed on 25 March 2022 for failing to disclose any reasonable ground for bringing a claim and/or being frivolous, vexatious, scandalous and/or an abuse of the process of the court pursuant to Parts 26.3(1)(b) and (c) of the CPR (hereinafter referred to as the Strike Out Application");

(ii) Further and alternatively, an order that Summary Judgment be entered for the Defendant on the basis that the Claimant has no real prospect of succeeding on the claim set forth in his Specially Indorsed Writ pursuant to Part 15 of the CPR (hereinafter referred to as the Summary Judgment Application"); and

(iii) An Order that the Claimant pay the Defendant's Costs in and occasioned by this Action, such Costs to be assessed if not agreed.

[33.] The Defendant relied upon the following grounds in support of its application:

(i) this Action is debarred by s.14(5) of the Automatic Exchange of Financial Account Information Act, 2016 (the "Act") ("Ground One"), which provides that:

> *"14 -*
>
> *(5) - No action, suit, prosecution or other proceedings shall be brought or instituted against the Competent Authority or a Bahamas Financial Institution, its employees, agents or assigns in respect of any lawful disclosure done bona fide in pursuance, or execution or intended execution, of this Act.";*

(ii) the Governing Agreements (comprised of the respective Trust Agreement, prevailing Service Agreement and its Updated IFS Terms) (i) expressly authorized the disclosures complained of herein, (ii) exculpated the trustee from any liability in relation thereto and (iii) did not create any so called 'duty to warn' and no such duty exists/arises at law or otherwise ("Ground Two");

(iii) the Claimant's pleaded case is also (i) rendered non-justiciable by virtue of the act of state doctrine and/or (ii) contrary to public policy ("Ground Three");

(iv) this action constitutes a thinly-veiled claim based upon (alleged) breaches of confidentiality and as such, it is rendered unsustainable by s.14(1) of the Act ("Ground Four") which states that:

"14-

(1) Any law relating to confidentiality shall not apply to the disclosures of information by a Reporting Financial Institution to the Competent Authority that is required to be contained in an Information Return filed under this Act.";

(v) the Claimant's alleged loss was unforeseeable and/or too remote and is irrecoverable in any event ("Ground Five").

[34.] The Defendant's application is supported by a First Affidavit of Montgomery Moree filed on 11 April 2024 and a Second Affidavit of Montgomery Moree filed on 28 May 2024.

[35.] The Claimant/Respondent objected to the application and filed an Affidavit in Opposition on 24 May 2024.

[36.] The Claimant/Respondent opposed the application on the following bases:

(i) the Claimant's case is not appropriate for a strike-out application or summary judgment and the Court should only decide the case upon a full evidentiary hearing;

(ii) the Claimant is asking for relief from this Court upon the admitted actions and conduct of JPM, not the actions of the executive of the Republic of Colombia;

(iii) in the circumstances of this case, the trust documents do not exonerate the trustee from what they have described as "inadvertent" disclosures. The trust documents specifically exclude acts of gross negligence and willful default; it is for the Court to determine, after hearing the evidence of JPM's conduct and the relationship, whether JPM's acts may be exonerated by the trust documents. The Court will also need to hear expert evidence to determine whether JPM's actions and conduct fell sufficiently below the standard expected of a professional trustee to attribute liability to JPM and to determine whether the Trust documents do in fact exculpate JPM. This determination cannot take place on a strike-out or summary judgment application.

(iv) the impugned actions and conduct of JPM fall outside the scope of the AE Act and are therefore not afforded the protection of the AE Act; and

(v) the tax penalty consequences were a direct result flowing from the Trustee's gross negligence and or willful misconduct. It was further reasonably foreseeable given that the Claimant had informed JPM of the basis of the trust, and had had several meetings to correct the financial statements and to obtain the correct classification of the Claimant's entities. Further, JPM was informed of the imminent penalty and did nothing.

The Claimant's Case

[37.] By way of the Claimant's Amended Writ, Mr. Kassin asserted that due to the Defendant's failure to update its internal records it reported the incorrect value of the Trust's assets to the Competent Authority on two occasions with no prior notice to him and with no instruction or obligation to do so. As a result of this disclosure he says that the DIAN found him to be in possession of an

undisclosed asset valued at USD$20,813,246.50 (being the determined value of the Trust's assets the Defendant reported to the Competent Authority for FY 2018).

Incorrect Value

[38.] As regards the value reported by the Defendant being incorrect, Mr. Kassin in his Amended Writ made reference to a meeting held on 7 June 2017 with his son, his Chilean counsel and the Trust's account representative Ms. Paulamae Dean. He alleged that the purpose of the meeting was to (i) review and finalize the 2016 financial statements of the Companies and (ii) ensure that they contained accurate figures and accounts before they were reported to the Colombian tax administration.

[39.] Mr. Kassin further alleged that in that meeting it was determined and agreed between the Defendant and his accountants that the historical cost of the Entities would be the Trust's represented value. JPM Bahamas in its Amended Defence admitted that the meeting did occur with its trust officer with responsibility for the Trust, Mr. Kassin's son and his Chilean counsel. However, JPM Bahamas did not admit the other aspects of the meeting including that it had incorrectly classified transactions or that the aim of it was to review and finalize the 2016 financial statements.

[40.] Notwithstanding, Counsel for the Claimant reiterated in her oral submissions that it was at that meeting that there was a "meeting of the minds" on the matter and the Defendant was made aware that the Claimant had already reported the historical cost of the Trust's assets as its requisite value for 2016 by way of his personal tax return submitted to the Colombian authorities in or around May 2017.

[41.] Further, by his Amended Writ, the Claimant averred that in any event the historical value of the Trust was the correct value to have been reported by him as in accordance with Decree 624 of 1989 of the Colombian Tax Code it is provided that he was to declare *"the Trust's interest for historical cost (acquisition value) or a commercial appraisal of the Trust's underlying assets (i.e. 50% of the Companies and the underlying companies Chile), which could not be lower than the historical cost."*

[42.] Therefore, relying on the 2016 & 2017 Unaudited Financial Statements he asserted that the Defendant had access to, the Claimant posits that because the cost of the Trust's underlying assets was shown to be lower than the Trust's historical cost in both years, the historical cost of USD$6,182,749.72 that he personally declared to the Colombian tax authority in both 2017 & 2018 was the correct value of the Trust to report and the values reported to the Competent Authority by the Defendant of USD$22,743,037.00 in 2018 and USD$20,813,246.00 in 2019 were not.

No obligation to report and no prior notice to Claimant

[43.] As regards the Claimant's assertion that the Defendant had no obligation to lodge the reports it did, in his Amended Writ the Claimant averred that at the time certain JP Morgan Bahamas personnel made the Defendant aware that the Trust should be classified as an Active NFE, it was also made aware that the Trust was not subject to CRS reporting in the Bahamas. Notwithstanding, the Claimant says that the reports were lodged anyway solely because the Defendant failed to ensure that its records in respect of the Trust were accurately maintained and updated.

[44.] Instead, Counsel submitted that the Claimant was left in the dark regarding the filing of the respective reports until he received a "surprise notice" in 2020 that provided him with very little time to comply with or seek to remedy the outstanding tax obligations alleged against him. As a result, Counsel submitted that the Claimant having no assistance from the Defendant on the matter despite his invitation for the Defendant's help, made and acted on his determination that his best course of action to mitigate his loss would be to pay the USD$2.2M settlement assessment amount required by the DIAN to the DIAN instead of trying to appeal it.

[45.] The Claimant in his Affidavit avers that he took this position as *"there were potentially grave consequences from appealing the assessment"* including *"administrative penalties, economic fines, delay interest"* and *"the imposition of criminal penalties."* The Claimant further averred that proceeding with an appeal would leave him at risk of his financial status being published in the Colombian newspapers making him and his family *"potential targets to be kidnapped or extorted"* nullifying the entire reason he established the Trust in the Bahamas in the first place which was for the protection of his family's interest. In support of the Claimant's position Counsel referred the Court to the case of *Pilkington v Wood [1952 P. 1398] – [1953] Ch. 770* as the authority for the provision that the Claimant's duty to mitigate does not oblige him as the injured party to commence litigation against a third party to protect the alleged wrongdoer from the consequences of his own carelessness.

[46.] Therefore, in the circumstances, the Claimant alleged that by filing the reports in the way that it did the Defendant breached several of the duties it owed to the Claimant in its capacity as a professional trustee.

[47.] The Claimant averred that by its actions the Defendant was in breach of:

(i) its fiduciary duty owed to the Claimant as it failed to adhere to the standard of care expected of a professional trustee;

(ii) its duty to amend and correct its records to show the Trust's assets as not reportable;

(iii) its duty to ensure its records for the Claimant were correct and accurate causing it to report the Trust to the Competent Authority twice;

(iv) its duty to inform the Claimant that it intended to report the incorrect value of the Trust's assets to the Competent Authority prior to doing so;

(v) its duty when it reported the Trust, even though it had designated the Trust as an Active NFE and non-reportable;

(vi) its duty to verify the categorization of the Trust as an Active NFE before reporting it to the Competent Authority, twice;

(vii) its duty when it reported the Trust and did so automatically contrary to the instructions of the Claimant, JPM, the Trust's characterization and the financial information it kept in its records; and

(viii) its duty to verify and ensure the relevant and correct value of the Trust's assets and the breakdown of the financial statements prior to reporting the same to the Competent Authority twice, with no obligation to do so and despite possessing the correct, true and accurate financial information in respect of the Trust's assets;

Gross Negligence and Bad Faith

[49.] However, notwithstanding the aforementioned claims, Counsel for the Claimant clarified during her oral submissions that the crux of the Claimant's case is not the matter of the disclosure itself nor the finding of the DIAN but rather the fact that the Defendant failed to amend or correct its records to reflect the Trust's accurate classification twice despite having sufficient time to correct the records before they became subject to the respective disclosures that occurred.

[50.] Counsel further elucidated this point in her oral submission that this failure by the Defendant even after having met with the Client to review the Trust's records, having been privy to emails where the correct classification of the Trust was confirmed and being aware of the severity and the need to be careful regarding the disclosures or categorizations represents more than just a mere inadvertence. Rather, Counsel submits that it is such a marked departure from the standard of care expected of a professional trustee that it constitutes both an act that is grossly negligent and an act that the *"Court cannot reasonably conclude [...] was demonstrated in good faith"* on the evidence alone without a substantive trial **(Roncarelli v Duplessis [1956] Que QB 447)**. However, this

Court will disregard the claim of bad faith as it was not pleaded in the Claimant's Writ and therefore is inappropriate to be considered any further at this juncture (Three Rivers District Council v Governor and Company of the Bank of England (No. 3) [2001] UKHL 16).

The Defendant's Case

[51.] By way of its Amended Defence, the Defendant denies that it was grossly negligent or that it breached any of the duties it owed to the Claimant while engaged in its capacity as trustee or at all.

[52.] The Defendant submitted that the proceedings are misconceived and legally unsustainable for several reasons and set out the following grounds:

Ground One: This action is debarred by s. 14(5) of the Automatic Exchange of Financial Account Information Act, 2016.

Ground Two: The governing agreements (i) expressly authorized the disclosures complained of herein, (ii) exculpated the trustee from any liability in relation thereto and (iii) did not create any so-called 'duty to warn' and no such duty exists/arises at law or otherwise.

Ground Three: The Claimant's pleaded case is also (i) rendered non-justiciable by virtue of the Act of State Doctrine and/or (ii) contrary to public policy.

Ground Four: This action constitutes a thinly-veiled claim based upon (alleged) breaches of confidentiality as such, it is rendered unsustainable by s. 14(1) of the Automatic Exchange of Financial Account Information Act, 2016.

Ground Five: The Claimant's alleged loss (if any) was unforeseeable and/or too remote.

[53.] Therefore, it is the Defendant's case that the claims set forth by the Claimant are devoid of merit and have no real prospect of succeeding at a trial. As a result, it is the Defendant's position that the Specially Indorsed Writ should be struck out pursuant to Parts 26.3(1)(b) and (c) of the Civil Procedure Rules, 2022 and the Defendant should be awarded Summary Judgment pursuant to Part 15.

Gross Negligence and Bad Faith

[54.] As regards the Claimant's claim that it was grossly negligent for the Defendant to fail to maintain accurate records for the Trust, by way of the First Affidavit of Montgomery Moree it is admitted that through *"inadvertence"* the Defendant did fail to appropriately update its records to reflect the Trust's proper classification as an Active NFE. It is also admitted therein that consequently *"in the course of attempting to comply with and discharge its statutory duties under the Automatic Exchange Act, [the Defendant] reported the Trust directly and exclusively to the Competent Authority on two occasions."*

[55.] However, Counsel for the Defendant submitted that it is to be noted that as regards the records in question the records were not Trust records as purported by the Claimant but rather CRS/ Automatic Exchange records created by the Defendant outside of its capacity as trustee solely for the purpose of giving effect to the Defendant's obligations as a Reporting Financial Institution under the Act.

[56.] Therefore, Counsel submitted that in its failure to update its records and in its action in lodging the two reports the Defendant was at those times acting in its capacity as a Reporting Financial Institution discharging its statutory/regulatory functions and not acting as a professional trustee discharging any function flowing from the Revocable Trust Agreement itself. For that reason, the Defendant says that any allegation of gross negligence or breach of duty made against it in its capacity as trustee only need to be stated to be rejected.

Breach of Duties

[57.] It is undisputed by the Defendant that while acting in its capacity as trustee of the Trust, it had a duty to exercise reasonable skill and care in the management of the Trust's assets, a duty to protect and preserve the trust property and a duty to act in the best interest of the Trust.

[58.] However, Counsel for the Defendant submitted that as regards those duties no allegations have been made out on the facts to show that the Defendant as professional trustee was in breach of any of them particularly as there is no evidence that the Trust sustained any loss or that any loss alleged can be attributed to any failure of the Defendant in its capacity as trustee to keep or create a record.

[59.] Rather, it is the Defendant's position that the claim being brought by the Claimant is being brought in respect of the Claimant's own personal tax obligations occasioned as a result of his failure to mitigate his own risk because instead of challenging the DIAN's alleged *"misconceived conclusions of the characterization of his noncompliance"* he chose to accede to the DIAN's invitation to remit a settlement payment voluntarily.

Exculpatory Provisions & Statutory Immunity

[60.] But on the other hand, Counsel for the Defendant submitted that if the Defendant was found to have breached any of the aforementioned duties, in any event, as a professional trustee it would be inoculated by the relevant exculpatory provisions of the Trust Agreement and as a Reporting Financial Institution it would be inoculated by the statutory immunity afforded to it for any *bona fide* lawful disclosure under ss 14(1) and (5) of the Act. The only exceptions to these protections applying if as Counsel submitted the Defendant's liability arose out of its fraud, willful default or gross negligence which in this instant action the Defendant wholly denies.

[61.] Therefore, Counsel submitted that as the Defendant's disclosures were made *bona fide* they are directly excused by ss 14(1) and (5) of the Act and this protection in turn renders the reasons why or how such mistaken disclosures came to be made, (i.e. a failure to update internal records)

immaterial as he said *"the Bahamian parliament, [in] recognizing the complexity inherent in the classification and identification of evidence has by enacting legislation, provided financial institutions as well as the competent authority itself, with statutory immunity from liability, provided only that their actions are undertaken in good faith"* and as such s 14(5) in particular *"does not leave open, in scope, [to the Claimant] to inquire into or to challenge the events leading up to such disclosure."*

Act of State Doctrine

[62.] Finally, notwithstanding the Claimant's assertion that the crux of his claim is the Defendant's record keeping or its failure thereof, Counsel posited that no matter how it is framed the *gravamen* of the Claimant's claim comes down to the disclosure made by the Defendant which the Claimant encapsulates in paragraphs 34 & 35 of his Amended Writ and evidences in his particularized loss and damages which all directly relate to the tax penalty he alleges the DIAN wrongly levied on him *"as a result of JPM reporting the Trust and the incorrect value of the Trust's assets."*

[63.] Therefore, the Defendant's position as submitted by its Counsel was that because the penalty was imposed on the Claimant by the DIAN, which is the Competent Authority in the Colombian jurisdiction, if the penalty was determined correctly then it would be outrageous for the Claimant to attempt to pursue recovery for his losses here in The Bahamas. However, if the penalty was determined in error, in any event, it is not for this Court to adjudicate but rather for the Claimant to appeal as he remains bound by the determination of the Colombian Competent Authority until it determines otherwise and so does this Court.

[64.] For these reasons, Counsel submits that this action brought by the Claimant is simply not capable of getting off of the ground on any of the Claimant's thinly veiled claims whether considered individually or collectively. As such, the Defendant seeks to strike out the action or obtain summary judgment.

Issues

[65.] The issues the Court must decide are:

a. Whether the Claimant's Writ of Summons and Statement of Claim should be struck out; and
b. Further and alternatively, whether Summary Judgment should be entered for the Defendant;

The Law

Strike Out

[66.] It is undisputed that the Court has the power to strike out a statement of case, in whole or in part pursuant to the provisions of Part 26.3 of the CPR 2022 or under its inherent jurisdiction. In the

instant case, the Defendant/Applicant has sought to rely on rules 26.3(1)(b) and (c) which I now set out below:

> *"26.3(1) –*
>
> *(b) the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim.*
>
> *(c) the statement of case or the part to be struck out is frivolous, vexatious, scandalous, an abuse of the process of the Court or is likely to obstruct the just disposal of the proceedings."*

[67.] The parties referred to several authorities on the issue of the legal principles to be applied on applications for strike out including: **Damianos v Bank of the Bahamas Limited 2018/CLE/gen/01129** (referenced by the Claimant but challenged by the Defendant as having no bearing on this instant application due to the decision on striking out in this case being handed down under the RSC 1978), **Citco Global Custody NV v Y2K Finance Inc [2009] ECSCJ No 165,** (referenced by the Claimant but submitted by the Defendant that this case did not involve a concurrent application for summary judgment), **Blackstone's Civil Practice 2009, Belize Telemedia Limited and another v Magistrate Usher and another (2008) 75 WIR 138** and **Burnford & Ors v Automobile Association Developments Ltd [2022] EWHC 368 (Ch).**

[68.] In **Citco Global Custody NV v Y2K Finance Inc [2009] ECSCJ No 165** Edwards JA at paragraph 12 referencing Blackstone's Civil Practice 2009 at page 431 provides that strike out is appropriate under CPR 26.3(1)(b): *"12. "where the claim sets out no facts indicating what the claim is about or if it is incoherent and makes no sense, or if the facts it states, even if true, do not disclose a legally recognizable claim against the defendant."*

[69.] On the other hand, in **Blackstone's Civil Practice 2009** at paragraph 33.6 on pages 429 – 430 it is provided that a statement of case should not be struck out:

> *" where the argument involves a substantial point of law which does not admit of a plain and obvious answer; or the law is in a state of development; or where the strength of the case may not be clear because it has not been fully investigated. It is also well settled that the jurisdiction to strike out is to be used sparingly since the exercise of the jurisdiction deprives a party of its right to a fair trial, and its ability to strengthen its case through the process of disclosure and other court procedures such as requests for information; and the examination and cross examination of witnesses often change the complexion of a case."*

[70.] Matthews HHJ in **Burnford & Ors v Automobile Association Developments Ltd [2022] EWHC 368 (Ch)** at paragraph 20 on pg. 18 stated that:

"On an application to strike out, the court usually approaches the question on the assumption (but it is only an assumption, for the sake of argument) that the respondent will be able at the trial in due course to prove its factual allegations."

[71.] In **Belize Telemedia Ltd and another v Magistrate Usher and another (2008) 75 WIR 138** at paragraph 15 it is stated by Conteh CJ that:

'15. [..] where a party advances a groundless claim [....] it would be pointless and wasteful to put the particular case through such processes, since the outcome is a foregone conclusion.'

Summary Judgment

[72.] Turning now to summary judgment, the law has long been settled that the Court may order Summary Judgment either on its own initiative or on the successful application of a party pursuant to Part 15 of the CPR where it is determined that:

"15.2 -

(a) [the] Claimant has no real prospect of succeeding on the claim or issue.

[73.] The parties referred to several authorities on the issue of the legal principles to be applied on applications for summary judgment including: **Sagicor Bank Jamaica Ltd v Taylor –Wright [2018] UKPC 12, Pinewood Technologies Asia Pacific Ltd v Pinewood Technologies PLC [2023] EWHC 2506 (TCC), Christina Layne v Wilma Antoine TT 2022 HC 264** (referenced by the Claimant but challenged by the Defendant for being in factual contradistinction with the instant case as regards the defences involved therein of undue influence and unconscionable bargain), **Altimo Holdings and Investment Ltd and others v Kyrgz Mobil Tel Ltd and others [2011] UKPC 7** (referenced by the Claimant but again challenged by the Defendants for having no relevance to the instant case which does not involve any novel or controversial points of law), **Angela Mary Heyes v Sarah Holt [2024] EWHC 779 and HRH The Duchess of Sussex v Associated Newspapers Ltd [2021] EWHC 273 (Ch).**

[74.] In **Pinewood Technologies Asia Pacific Ltd v Pinewood Technologies PLC [2023] EWHC 2506 (TCC)** beginning at paragraph 75 Smith J cited the well-known judgment of Lewison J in ***Easyair Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch)*** at [15] where he discusses how the Court should approach applications for Summary Judgment. He says that:

"75. –

c. The court must consider whether the Claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 1 All ER 91;

(ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at 8.;

(iii) In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman; and

(v) In reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550.

[75.] Finally, the Defendant/Applicant referred to **The Caribbean Civil Court Practice 2011** at Note 23.23 on page 248 which sets out how the Court should approach an application for strike out and summary judgment. Firstly, "where a defendant makes such a combined challenge to the claimant's case, the court ought normally to start by considering the first challenge, for which it will not need to consider any evidence; if the claimant's statement of case is found to contain a coherent set of facts which disclose a legally recognizable claim against the defendant, the defendant is then entitled by CPR Pt 24 to try and persuade the court that, notwithstanding that fact, the claimant has no real prospect of success; it is at that stage that the court will normally consider any evidence that the parties may adduce": **Chief Constable of Kent v Rixon [2000] All ER (D) 476**, CA, Brooke LJ.

Analysis and Disposition

[76.] In this instant action, the Defendant has made a combined application for strike out of the Claimant's Specially Indorsed Writ and further and alternatively, summary judgment. In **The Caribbean Civil Court Practice 2011** (supra), it is stated that where such an application is brought, the Court should *"start by considering the first challenge for which it will not need to consider any evidence."* The first challenge therefore being the matter of whether or not on the pleadings alone an order should be made for strike out **(Three Rivers District Council v Bank of England (No 3) [2003] 2 AC 1)**. It is appropriate to turn to that issue first.

Strike Out

[77.] The Defendant has made its application for strike out pursuant to CPR 26.3(1)(b) and (c) which read as follows:

26.3 Sanctions – striking out statement of case.

(1) In addition to any other power 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 that —

(b) the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim;

(c) the statement of case or the part to be struck out is frivolous, vexatious, scandalous, an abuse of the process of the Court or is likely to obstruct the just disposal of the proceedings;

[78.] Before assessing the provisions of CPR 26.3, it is necessary to recall the principles that govern the Court's exercise of this jurisdiction viz, that it is well-settled that the jurisdiction to strike out is to be exercised sparingly, as it is a draconian remedy which denies a party the opportunity to have its case heard on the merits (**Blackstone's Civil Practice 2009**). Further, when considering such an application the Court must proceed on the assumption that the pleaded facts are true (***Burnford v***

Automobile Association Developments Ltd [2022] EWHC 368 (Ch)*; *Morgan Crucible Co. plc v Hill Samuel & Co. Ltd [1991] Ch 295).

[79.] The Defendant relies on five grounds for its strike-out application, viz: statutory immunity under section 14(5) of the Automatic Exchange of Financial Account Information Act, 2016, contractual exculpation under the Trust Agreement and related documents; the act of state doctrine; the protection afforded by section 14(1) of the Automatic Exchange of Financial Account Information Act, 2016; and the contention that the Claimant's alleged loss was unforeseeable and/or too remote. These grounds must be considered within the framework of CPR 26.3.

Part 26.3(1)(b) – No reasonable ground for bringing the claim

[80.] In **Citco Global Custody NV v Y2K Finance Inc (supra)**, Edwards, J.A. articulated clear circumstances in which it is appropriate to strike out a claim pursuant to CPR 26.3(1)(b) including:

1. Where the claim sets out no facts indicating what the claim is about;
2. Where the claim is incoherent or makes no sense; or
3. Where the facts, even if true, do not disclose a legally recognizable claim.

[81.] He further emphasized as I have stated above that, on hearing an application under this rule, the Court must proceed on the assumption that the pleaded facts are true (**Morgan Crucible Co. plc v Hill Samuel & Co. Ltd [1991] Ch 295**).

Application of the *Citco* Three-Part Test

(i) Does the Claim Set Out Facts Indicating What It Is About?

[82.] The first limb of *Citco* requires that the pleadings disclose sufficient factual material to identify the nature of the claim. Here, the Claimant pleads that the Defendant, acting as trustee, wrongfully filed reports, misclassified the Trust, and reported incorrect valuations, leading to tax penalties abroad. These allegations are particularized with reference to the Trust's classification, valuations, and the Defendant's alleged failures to amend its records. I am satisfied that the Claimant has pleaded sufficient facts to indicate what his claim is about. The first *Citco* ground for strike-out is therefore not satisfied.

(ii) Is the Claim Incoherent or Does It Make No Sense?

[83.] The second limb asks whether the claim is incoherent or unintelligible. In this case, the pleadings disclose a clear dispute of fact: the Claimant alleges negligence and breach of fiduciary duty in the Defendant's trustee capacity, while the Defendant asserts that its actions were undertaken solely as a Reporting Financial Institution. This is a factual dispute, not incoherence. The claim is intelligible, logically structured, and capable of adjudication. Issues of contributory negligence

may arise, but they do not render the claim incoherent. Accordingly, the second *Citco* ground for strike-out is not satisfied.

(iii) Do the Facts, Even If True, Disclose a Legally Recognizable Claim?

[84.] The third limb requires the Court to assume the pleaded facts are true and ask whether they disclose a cause of action known to law. The Claimant pleads gross negligence and breach of fiduciary duty, both of which are legally recognizable claims under Bahamian trust law. The Defendant's insistence that it acted only as a Reporting Financial Institution does not negate the fact that the information reported was obtained in its trustee role. Whether its failure to amend records amounted to negligence or fell below the standard of a trustee is a live issue requiring determination at trial. Further, the Defendant's position that it erroneously filed the reports due to 'an inadvertent, isolated administrative mistake' and that the trust sustained no loss and that it was inoculated and not liable due to section 14(5) of the Act in addition to the exculpatory and other provisions of the various contracts and the Trust is unsuitable for determination summarily. The third *Citco* ground for strike-out is therefore not satisfied.

[85.] Applying the three-part test in *Citco*, I find that the Claimant's case sets out sufficient facts, is coherent, and discloses legally recognizable causes of action. None of the *Citco* grounds for strike-out are satisfied.

Part 26.3(1)(c) - Frivolous, Vexatious, or Abuse of Process

[86.] I next consider whether the Claimant's specially indorsed writ should be struck out as frivolous, vexatious, scandalous, or an abuse of process.

[87.] As Conteh CJ observed in **Belize Telemedia Ltd,** it is wasteful to put a case through trial where it is bound to fail. Such cases are "obviously frivolous, vexatious, or unsustainable" (***Attorney General of the Duchy of Lancaster v London and North Western Railway Company* [1892] 3 Ch 274**).

[88.] Having already found that the claim discloses a legally recognizable cause of action, it follows that it is not frivolous, vexatious, or wholly unsustainable. Nor is it an abuse of process.

[89.] As Bowen LJ stated in **Willis v Earl of Beauchamp (1886) 11 P.59**, the Court has inherent power to prevent abuse of its machinery, but this is not such a case.

Summary Judgment

[90.] Turning to the application for summary judgment, the test is whether the Claimant has a real prospect of success and whether there is any other compelling reason for a trial.

Real Prospect of Success

[91.] In **Easyair Ltd v Opal Telecom Ltd [2009] EWHC 339** (Ch), Lewison J explained that a realistic prospect of success is one that carries conviction and is more than merely arguable. The Court must consider the evidence before it and that reasonably expected at trial, but must not conduct a mini-trial.

[92.] On the pleadings, I am satisfied that the Claimant's case is sustainable. It would be inappropriate at this stage to consider the exculpatory provisions relied upon by the Defendant, as doing so would amount to a mini-trial.

Other Compelling Reason

[93.] As to whether there is any other compelling reason for trial, I accept that the dispute lies in the characterization of facts rather than their existence. However, this does not eliminate the need for a trial. The issues of statutory immunity, trustee duties, and gross negligence require evidentiary resolution.

[94.] I do not accept that this case is frivolous or presents no substantial argument. Nor do I accept that the law on statutory immunity is so settled as to preclude inquiry.

[95.] For these reasons, I find that the Claimant has a real prospect of success and that there is a compelling reason for trial. The Defendant's application for summary judgment is therefore dismissed.

Conclusion

[96.] Accordingly, having considered the pleadings, the affidavits filed in support and in opposition, the oral submissions of Counsel, and the applicable statutory and contractual provisions, I am not satisfied that the Defendant has demonstrated that the Claimant's case discloses no reasonable cause of action or that it is frivolous, vexatious, or an abuse of the process of the Court within the meaning of Part 26.3(1)(b) or (c) of the Civil Procedure Rules, 2022.

[97.] Further, I am not satisfied that the Defendant has shown that the Claimant has no real prospect of succeeding on his claim such as to warrant the entry of summary judgment under Part 15 of the Civil Procedure Rules, 2022.

[98.] The issues raised by the Claimant—including whether the Defendant's disclosures were lawful and bona fide under section 14(5) of the Act, whether the Defendant acted in its capacity as trustee or solely as a Reporting Financial Institution, and whether the conduct alleged amounts to gross negligence—are all matters that require evidentiary resolution and cannot be determined summarily. Further, the issue of whether the act of state of doctrine has been engaged falls to be

maturely considered because the claim is directed at the Defendant's conduct in The Bahamas and does not in my view necessarily require this Court to adjudicate the validity of the Colombian tax authority's acts.

[99.] The Defendant's reliance on section 14(5) of the Automatic Exchange of Financial Account Information Act, 2016 and the exculpatory provisions of the Trust Agreement and related documents raises questions of statutory interpretation and contractual construction that are not suitable for determination at this interlocutory stage. The applicability of the act of state doctrine and public policy considerations also require further analysis in the context of the full factual matrix.

[100.] Accordingly, the Defendant's Notice of Application filed on 11 April 2024 is dismissed.

[101.] I award costs to the Claimant to be assessed in accordance with the Civil Procedure Rules, 2022 on the papers, if not agreed between the parties.

Dated this 18th day of December, 2025

Camille Darville Gomez

Justice