IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

Cause No.: FSD 204 of 2016 (IMJ)

BETWEEN

STEVEN GOODMAN

Plaintiff

AND

DAWN CUMMINGS
(Discontinued on 18 January 2019)

1st Defendant

DMS GOVERNANCE LIMITED

2nd Defendant

IN CHAMBERS

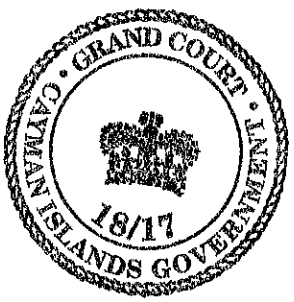
Before: **The Hon. Justice Ingrid Mangatal**

Appearances: **Mr. Hefin Rees QC instruction by Mr. Paul Smith, Mr. Ben Hobden and Mr. Jordan McErlean of Conyers Dill & Pearman on behalf of the Plaintiff**
Mr. Ben Valentin QC instructed by Mr. Mark Goodman and Ms. Kirsten Houghton of Campbells on behalf of the Defendants

Heard: **17 and 18 January 2019**

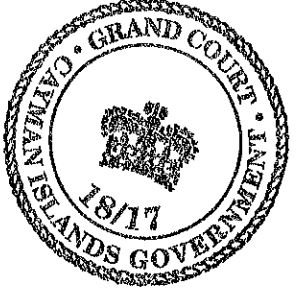
Draft Judgment Circulated: **25 June 2019**

Judgment Delivered: **2 July 2019**



HEADNOTE

Civil Procedure - Application for Summary Judgment, Order 14, Rule 12 of the Grand Court Rules - Application to Strike Out, Order 18, Rule 19 - Vicarious Liability - "Wilful Neglect or Default"- pleading



JUDGMENT

Introduction

1. In December 2016 the Plaintiff Mr. Steven Goodman (**"Mr. Goodman"**) brought proceedings against (i) the first-named Defendant Ms. Dawn Cummings (**"Ms. Cummings"**) for breach of common law director duties and/or breach of fiduciary duties; and (ii) the second-named Defendant DMS Governance Limited (previously DMS Offshore Investment Services Limited) (**"DMS"**) as being vicariously liable for the acts of Ms. Cummings and/or for breach of contract. Mr. Goodman brought the proceedings by way of assignment to him of certain causes of action of Tangerine Investment Management Limited (In Official Liquidation) (**"Tangerine"**).

2. The assignment took place pursuant to a Deed of Assignment dated 18 March 2014 (**"the Deed"**). Mr. Goodman's claim was brought against the Defendants after the Deed was sanctioned by the Grand Court, Foster J, in May 2015.

3. Mr. Goodman asserted that Ms. Cummings was a director of Tangerine, whose principal business was to act as Investment Manager to funds established by Axiom for the purpose of providing loans to English law firms, from 19 December 2011 until her resignation on 17 October 2012. In broad summary, it is alleged that, during that time, she: (i) caused Tangerine to enter into panel law firm agreements with unsuitable firms, without due diligence and outside the agreed investment criteria; (ii) caused Tangerine to pay out, or failed to challenge the payment of approximately £15 million of Tangerine's money to entities owned or controlled by Timothy Schools (**"Mr. Schools"**), the sole owner and a director of Tangerine; and (iii) failed to take any or any adequate steps to scrutinize Mr. Schools.

4. The allegation of vicarious liability against DMS is made on the basis that the acts and omissions of Ms. Cummings were carried out in the course of Ms. Cummings' employment and/or agency. It is further alleged that DMS breached its contract with Tangerine by failing to ensure that Tangerine met its obligations pursuant to the relevant investment management agreement and by failing to monitor Ms. Cummings' performance.

5. It is further alleged that these breaches on the part of Ms. Cummings and /or DMS caused the termination of the investment management agreement. The loss in facilitation fees to Tangerine have been alleged to be in the region of £55 million over a four year period.

6. Ms. Cummings, in a Defence filed 30 March 2017, denied the allegations made by Mr. Goodman and denied that her conduct caused the alleged loss or any loss or damage. She also contended that she is entitled to rely on the terms of various indemnity provisions in Tangerine's Articles of Association ("**the Articles**"), which she averred, provide her with defences to Mr. Goodman's claims, and to rights of action against Tangerine.

7. DMS, in its Defence, denies that it is vicariously liable to Mr. Goodman as alleged in the Statement of Claim or at all. It also denies that it is liable pursuant to any contract alleged to have been entered into between DMS and Tangerine or that it is otherwise liable to account or pay compensation to Mr. Goodman.

8. At paragraph 4 of the Defence, it is pleaded as follows:-

> "4. *This Defence is advanced without prejudice to the Second Defendant's contention that the Claim should be summarily dismissed pursuant to GCR Order 14 rule 12 and/or GCR Order 18 rules 12 and/or 19 and/or in the exercise of the inherent jurisdiction of this Honourable Court on the grounds that the essential allegations that (i) the Second Defendant is vicariously liable in respect of the acts or omissions of the First Defendant and (ii) the Second Defendant assumed any contractual obligations to Tangerine, and consequently the claim advanced in the Statement of Claim:*
>
> *4.1 has no prospect of success at trial, and/or*
>
> *4.2 does not contain the necessary particulars of the allegations of vicarious liability and/or breach of contract; and/or*

4.3 *discloses no reasonable cause of action against the Second Defendant; and/or*

4.4 *is frivolous and vexatious; and/or*

4.5 *is otherwise an abuse of the process of the Court."*

9. Pursuant to the Grand Court Rules 1995 (Revised Edition) (**"the GCR"**), GCR Order 16 Rule 1, and an order of the Court dated 28 June 2017, Ms. Cummings filed a Third Party Notice against Tangerine. By that Third Party Notice, Ms. Cummings claimed against Tangerine as follows:

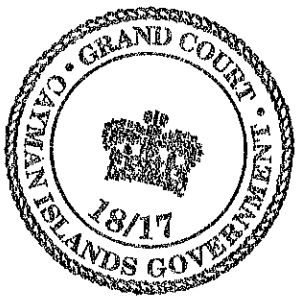
"(1) A declaration that [Tangerine] *is obliged to indemnify* [Ms. Cummings], *out of its assets, in respect of all liabilities, loss, damage, cost or expense (including but not limited to liabilities under tort, and statute) and all reasonable legal and other costs and expenses on a full indemnity basis properly payable incurred by or on her behalf in providing assistance to* [Tangerine] *and to its liquidators in the course of the liquidation of* [Tangerine], *and in defending the Main Action and in respect of any actions relating thereto.*

(2) An order that [Tangerine] *pays to* [Ms. Cummings] *amounts representing such legal fees, costs and expenses, in advance of the final disposition of the Main Action,* [Ms. Cummings] *having undertaken to repay such amount if it is ultimately determined that* [Ms. Cummings] *is not entitled to be indemnified by* [Tangerine].

(3) Alternatively, damages for breach of [Tangerine's] *obligation to indemnify* [Ms. Cummings], *such damages to be assessed.*

(4) Interest pursuant to s. 34 of the Judicature Law (2013 Revision) on such amount (s) which [Tangerine] *is ordered to pay to* [Ms. Cummings], *from the date the relevant liability was incurred until*

the date of payment, at such rate as the Court shall deem appropriate.



(5) An order that [Tangerine] shall indemnify [Ms. Cummings] in respect of the legal fees, costs and expenses she has incurred in defending the Main Action and in respect of any actions relating thereto, save insofar as [Mr. Goodman] *has paid those costs, and in respect of the costs of her claim against* [Tangerine] *by this Third Party Notice.*

(6) A declaration that all amounts payable by the Company to [Ms. Cummings] *pursuant to the indemnity are liquidation expenses in the liquidation of* [Tangerine].

...."

10. Mr. Goodman, on behalf of and as assignee of Tangerine, filed a Defence to the Third Party Notice on 1 September 2017.

11. Tangerine's Liquidator also on 1 September 2017 filed a Defence to the Third Party Notice. This Defence adopted the Defence filed by Mr. Goodman. The Liquidator in addition pleaded that if it is ultimately determined that Ms. Cummings is entitled to any of the substantive relief sought in the Third Party Notice, such that the Indemnity Provisions are deemed to be enforceable as against Tangerine, Tangerine sought a declaration that it should be indemnified by Mr. Goodman in respect of any liability incurred as a result of an Order made by the Court, and in respect of all and any liability incurred.

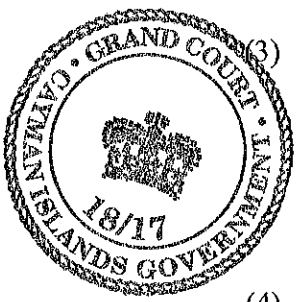
12. Replies were filed on behalf of Ms. Cummings to the Third Party Defences on 15 September 2017.

The Preliminary Issues Trial

13. In November 2017, I heard and tried four preliminary issues. My written Judgment determining those issues was delivered on 13 September 2018. Those preliminary issues were as follows:

(1) Whether the Articles were incorporated into the terms of Ms. Cummings' appointment as a director.

(2) Whether the provisions of the Articles extend to former directors.



(3) Whether Ms. Cummings is entitled to rely on Article 154 of the Articles in circumstances where she seeks to rely on indemnification pursuant to an implied contract as opposed to indemnification pursuant to the Articles as per the wording of Article 154.

(4) Whether Ms. Cummings is entitled to rely on Article 154 of the Articles as against the Third Party in respect of the expenses incurred in defending this action.

14. I determined all of those preliminary issues in the affirmative, as advanced on behalf of Ms. Cummings.

15. On 5 November 2018, following written submissions, I issued a consequential ruling, entering judgment in the Third Party claim against Tangerine making costs orders against Mr. Goodman and granting a number of declarations in favour of Ms. Cummings.

The Applications Before the Court in January 2019

16. In January 2019, four inter-related applications were before the Court. These were:

(a) The Defendants' Summons, dated 1 September 2017, seeking the dismissal of the claims against both Defendants (the "**Strike Out Application**"). This application seeks either the entry of summary judgment pursuant to Order 14 Rule 12 of the GCR or the striking out of Mr. Goodman's Statement of Claim, pursuant to Order 18 Rule 19, and /or in the exercise of the Court's inherent jurisdiction. Although this application mainly is concerned with legal arguments, evidence was filed in

support of the application, by Ms. Cummings, (Cummings 3, dated 26 November 2018), and Anne Storie, CEO of DMS (Storie 1, dated 26 November 2018). Mr. Goodman has filed evidence in opposition (Goodman 3, dated 17 December 2018).

(b) Preliminary Issue 5 ("**Issue 5**"), which was adjourned, at Mr Goodman's request, during the November 2017 trial.

(c) Mr. Goodman's application, by Summons dated 17 December 2018, for leave to discontinue his claim against Ms. Cummings on the basis of an order for standard basic costs (the "**The Application to Discontinue**").

(d) Mr. Goodman's application, by the same Summons, for leave to amend the Statement of Claim in a number of ways, against DMS.

17. On the 18th January 2019, I made an *ex tempore* Ruling, in which I ruled on Issue 5, in the context of The Application to Discontinue. The discontinuance was ultimately consented to by Ms. Cummings, and the sole remaining question was whether leave to discontinue should be granted on the terms of a standard costs order, or whether it should be on the contractual indemnity basis to be considered in Issue 5.

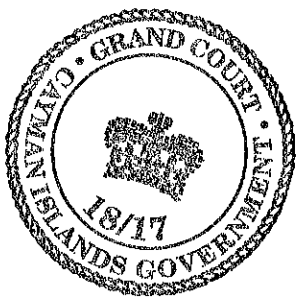
18. I determined Issue 5 in favour of Ms. Cummings, and granted leave to Mr. Goodman to discontinue, on terms, including that Mr. Goodman pays to Ms. Cummings her costs of and occasioned by her defence of this action, including the Third Party Proceedings and the trial of the Preliminary Issues determined by judgment filed 13 November 2018. These costs were to be calculated on the indemnity basis provided for in Articles 149-154 of the Articles of Association of Tangerine Investment Management Limited, with such costs to be taxed on the indemnity basis if not agreed, and with credit to be given to Mr. Goodman to the extent of costs already paid.

19. The applications remaining before me are inter-related applications as follows:

a. The Strike Out Application, now solely on behalf of DMS.

b. Mr. Goodman's application to amend.

20. Mr. Valentin QC, who appears for DMS, filed a written Skeleton Argument ("**SKA**"), in which he submits that the claim against DMS should be summarily dismissed or struck out on the grounds that:



(a) since the claim against Ms. Cummings has/had no prospect of success, and was bound to fail, the claim that DMS is vicariously liable for any breach of duty on the part of Ms. Cummings is also necessarily bound to fail.

(b) The claim that DMS is vicariously liable for any breach of duty on the part of Ms. Cummings as a Director, is in any event, bad in law, and

(c) To the extent that Mr. Goodman advances freestanding claims against DMS in contract and in tort, those claims are makeweights, which are bad in law and/or embarrassing as pleaded, and have no prospect of success and/or are bound to fail.

21. It was also submitted that Mr. Goodman's application to amend the Statement of Claim should also be dismissed because the proposed amendments to the vicarious liability claim against DMS do not resolve the fundamental defects in that claim.

22. It was also submitted on behalf of DMS that overall, Mr. Goodman's (paragraph 5 of SKA), "*sustained and continuing attempts to ignore, circumvent and/or manoeuvre around the application and the effect of the indemnity provisions in the Articles is an abuse of process, having regard, in particular, to the basis on which* (Mr. Goodman) *actively persuaded the Court to sanction the assignment of the claims to him by Tangerine in May 2015.*"

23. Mr. Valentin, in my view, correctly identifies that the claim against DMS is put forward on two or (possibly) three separate grounds, as follows:

(a) Vicarious liability for Ms. Cummings' acts carried out in the course of her employment and/or agency.

(b) Breach of a contract formed between DMS and Tangerine in late 2011.

(c) A relationship akin to a contractual one/assumption of responsibility such as to give rise to a duty of care.

Vicarious Liability

24. It was submitted that the effect of the indemnity provisions in Tangerine's Articles is not only to indemnify Ms. Cummings (absent wilful neglect or default), but also, as per Article 153, to "*waive any claim or right of action...* [Tangerine] *may have...against any Indemnified Person on account of any act or omission of such Indemnified Person in the performance of his duties for* [Tangerine]*; provided that such waiver shall not apply to any claims or rights of action arising out of the wilful neglect or default of such Indemnified Person...*"

25. Further, that it is settled law in England, and in the Cayman Islands, that vicarious liability is a form of secondary liability for a wrong committed by an employee in the course of his/her employment, with the primary liability being that of the employee. Reference was made to ***Majrowski v Guy's and St Thomas' NHS Trust*** [2007] 1 A.C.224, per Lord Nicholls, at [7]-[8].

26. Accordingly, that if the employee is not liable, for whatever reason, then the employer cannot be liable. Learned Counsel submitted that this was clearly established in cases such as ***Stavely Iron & Chemical Co. Ltd. v Jones*** [1956] AC 627. That case concerned the negligent operation of a crane. Reference was made to page 639 where Lord Morton stated:

> *"My Lords, what the court has to decide in the present case is: Was the crane driver negligent? If the answer is "yes", the employer is liable vicariously for the negligence of the servant. If the answer is "No", the employer is surely under no liability at all... where the liability of the*

employer is not personal but vicarious...if the servant is "immune", so is the employer."

27. Reference was also made to page 643 where Lord Reid opined: *"My Lords, if this means that the appellants could be held liable even if it were held that the crane driver was not herself guilty of negligence, then I cannot accept that view."*

28. It was submitted that it is further settled law that, whilst the employer may be vicariously liable for the torts of the employee that are committed in the course of the employee's employment, it is not sufficient to make the employer liable if the acts of the employee for which he is responsible do not themselves amount to an actionable tort, but only amount to a tort, for example, when linked to other acts which were not performed in the course of the employee's employment. In other words, all of the features of the wrongful conduct necessary to make the employee liable, have to occur in the course of his/her employment. Reference was made to ***Credit Lyonnais Nederland NV v ECGD*** [2000] 1 A.C. 486 and to ***Mohamud v Wm Morrison Supermarkets plc*** [2016] AC 677, per Lord Toulson, at [45].

29. DMS goes on to submit that, DMS is in any event, not liable, vicariously or directly, to Tangerine, or to Mr. Goodman as Tangerine's assignee, for alleged negligence or breach of duty on the part of Ms. Cummings, since, (even if, which DMS denies, she had been an employee of DMS), she did not act in that capacity when discharging her duties as a director, and therefore agent, of Tangerine. Some of the cases relied upon for this proposition are ***Kuwait Asia Bank E.C. v National Mutual Life Nominees Ltd*** [1991] 1 A.C. 187 (a decision of the Judicial Committee of the Privy Council), ***Paget-Brown & Co. Ltd. v Omni Securities Ltd*** [1999] CILR 184 (a decision of the Cayman Islands Court of Appeal).

30. It was asserted that there is no contrary authority that supports the proposition that the acts or omissions of a director, which are alleged to have occurred in the course of the performance of her duties as a director, can give rise, in addition to or separate from, any

liability she may have to the company which has appointed her as director, to vicarious liability on the part of another, different, employer.

31. DMS' SKA continues by saying (paragraph 44) that these earlier submissions make it unnecessary for the Court to consider or resolve the separate issue of whether Ms. Cummings was, in fact, an employee of DMS, as to which *"it may be said by* [Mr. Goodman] *(in light of the matters set out in Goodman 3[3/15]) that there is scope for some factual dispute."* DMS asserts that there is no lack of clarity in respect of the relationship between Ms. Cummings and DMS and that the position is clearly set out in Cummings 3 and Storie 1. It was, DMS aver, clear that at no stage during her appointment as a Director of Tangerine, was Ms. Cummings employed by DMS.

Breach of Contract and the Relationship akin to contract/assumption of responsibility

32. Reference was made by DMS to Mr. Goodman's other way (in addition to vicarious liability) of establishing liability against DMS by alleging that a contract was formed between DMS and Tangerine in late 2011, pursuant to which "*DMS agreed to provide services to Tangerine in consideration for a fee (which was paid)*", and which had certain *"express terms"*- paragraph 29 of the Statement of Claim. It is also further alleged by Mr. Goodman that DMS breached this alleged contract in various ways, including "*by failing to monitor and scrutinize Ms. Cummings' performance"*- Statement of Claim, para. [227]-[228].

33. Mr. Valentin asserts that there is a complete lack of particularity in the contract claim, in so far as no particulars are given as to the following:

(a) whether the contract was written or oral;
(b) by whom, when, where, the contract was made;
(c) whether it is said to be evidenced in writing;
(d) the alleged fee, or
(e) the basis on which the alleged terms are said to be "*express terms*".

34. Additionally, says learned Counsel, despite these points being made in DMS' Defence (at paragraph [25]), Mr. Goodman has offered no further particularization in his Reply, or in either of the two proposed amendments to the Statement of Claim.

35. DMS has denied that any contractual relationship existed between it and Tangerine. At paragraph 12 of Storie 1, Ms. Storie, who is CEO of DMS, confirms, on affidavit, that *"there was never any contractual relationship, in writing or otherwise, between Tangerine and* [DMS] *in relation to the management, administration, governance or supervision of Tangerine."* DMS makes the point that there is no evidence to contradict that evidence, and asserts further that there is otherwise no evidence to support the existence of any contractual relationship. Mr. Valentin argues that it is striking that there is no reference to the existence of any such contractual relationship in any of the Offering Memoranda issued in respect of the Axiom Fund to investors during its lifetime. Nor in any of the sections dealing with the "*Investment Manager*" or "*Fees and Expenses*" is there any reference either to a contractual relationship with DMS or to any fee paid or payable by Tangerine to DMS.

36. In these circumstances, it was submitted that the alleged contract between DMS and Tangerine is a fiction invented by Mr. Goodman, which has no prospect of success at trial, and should be summarily dismissed.

37. At paragraph 15 of the Reply to DMS' Defence, Mr. Goodman asserts that, even if there was no contractual relationship between DMS and Tangerine, *"there was still a relationship akin to a contractual one"* and *"an assumption of responsibility such as to give rise to a duty of care."*

38. In regard to this claim, DMS says that, in any event, since there is no accompanying pleaded allegation that DMS breached the alleged *"relationship akin to a contractual one"*, or the alleged *"duty of care"*, nor is there any loss alleged to have been suffered by Tangerine as a result of any such breaches, the allegation does not disclose a reasonable cause of action and ought to be struck out or summarily dismissed on that basis alone.

39. Mr. Valentin also referred to the decision expressly relied upon, in paragraph 15 of the Reply, by Mr. Goodman on this issue, i.e. ***Lejonvarn v Burgess*** [2017] EWCA Civ 254. It was submitted that the facts in that case are plainly distinguishable from the facts in the instant case. Further, that by invoking this case, Mr. Goodman is in effect (correctly, says DMS), acknowledged that he has no proper basis for alleging, or at the very least further substantiating, the alleged "*express terms*" contract pleaded in the Statement of Claim.

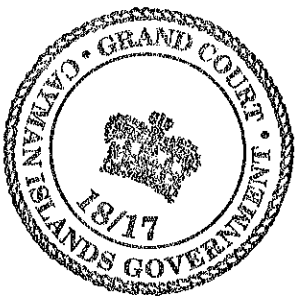
40. Learned Counsel submitted that there is no authority, in England or the Cayman Islands, that supports the existence of a duty of care in a case such as the present one. On the contrary, it was submitted, it is settled law in the Cayman Islands, that, absent fraud or bad faith (which is not here alleged by Mr. Goodman), a management company offering services such as the appointment of one of its employees as a Director of a company owes no duty of care to that company. In that regard, reference was made to ***Paget-Brown*** per Zacca P, at 193. Accordingly, the argument continues, even if Ms. Cummings had been employed to DMS (which is denied), DMS would not have owed any duty to Tangerine to monitor her conduct as a Director of Tangerine. Mr. Valentin makes the more broad submission also that, if the Court were to find that DMS had owed a duty of care to Tangerine to prevent it suffering economic loss, that would run counter to the narrow limitations imposed on negligence claims seeking the recovery of economic loss following the decision of the House of Lords in ***Caparo Industries v Dickman*** [1990] 2 A.C. 605.

41. It was also submitted that if such liability or responsibility had been assumed by DMS in tort for (in effect) negligently causing economic loss, it would also run counter to the indemnities given to Ms. Cummings in the Articles, since they precluded any liability in respect of her conduct as a Director of Tangerine, save in respect of losses caused by her deliberate misconduct (i.e. breaches in wilful neglect or default of duty). Mr. Valentin argues that it would be wrong in principle for the Court to impose such a potentially wide-ranging and novel liability for economic loss, unless DMS had undertaken it by contract.

42. In the circumstances, it was asserted that the claim advanced at paragraph 15 of the Reply to the DMS Defence also stands no prospect of succeeding at trial and, absent allegations of fraud or dishonesty on the part of DMS and of loss caused by any alleged breach of duty of care, discloses no reasonable cause of action, and should like the other claims, be struck out.

The Proposed Amendments to the Statement of Claim

43. DMS submitted that the proposed amendments, which relate only to the claim that DMS is vicariously liable for the alleged breaches of duty on the part of Ms. Cummings, should be refused for reasons, including the following:



(a) On the assumption that the essential allegation of wilful neglect or default falls to be dismissed/struck out, there is nothing in the proposed amendments which cures the fundamental defects with respect to the vicarious liability claim.

(b) It was submitted that unless the fundamental defect in the vicarious liability claim is cured, no purpose is to be served by permitting the other proposed amendments to the Statement of Claim.

The arguments advanced on behalf of Mr. Goodman

44. Mr. Goodman strongly opposed the application for summary judgment/strike out.

45. Reference was made to Order 14, Rule 12 of the GCR. Mr. Rees QC correctly submits, that although that Rule appears to impose a different threshold than the equivalent English Civil Procedure Rule (Rule 24.2), the authorities make clear that the relevant question for the purpose of a summary judgment application in the Cayman Islands is whether there is a real, as opposed to a fanciful prospect of success - ***Swain v Hillman*** [2001] 1 All E.R. 91. Reference was made to the well-known House of Lords decision in ***Three Rivers No. 3*** [2001] UKHL 16, and to Cayman authorities; ***Southdown Regency Dev Ltd v Cayman National Bank Ltd*** [2007] CILR Note 4, ***In Re Sterling Macro Fund*** (Unreported 6 April 2017) at [12], and ***Montpelier Pension Trustees Ltd et al v Crown Acquisitions Worldwide Ltd*** (Unreported 8 November 2016) at [41]-[42].

46. Mr. Rees submitted that summary judgment is typically reserved for straight-forward cases or short points of law or construction. Further, that the more complex the legal and factual matrices of a case, the less appropriate it is to dispose of the case in a summary judgment application.

47. It was submitted that DMS does not have the benefit of the indemnity and/or waiver of liability provisions in Tangerine's Articles of Association. It was stated that, as has always been Mr. Goodman's position, for example, in paragraph 16(6) of his Reply, Mr. Goodman does not therefore have to establish that Ms. Cummings' conduct amounted to wilful neglect or default in order to obtain judgment against DMS for vicarious liability; a breach of common law director duties and/or a breach of fiduciary duties will be sufficient.

48. Learned Counsel submitted that DMS does not fall within the definition of an "*Indemnified Person*" in the Articles of Association and it does not therefore have the benefit of the exculpation provisions. Further, that DMS is not a party to the Articles of Association and there is no Director Service Agreement or similar document which incorporates the indemnity contained in the Articles of Association.

49. It was further submitted that the indemnity in Article 149 does not purport to exempt Ms. Cummings from liability, and that rather, it simply indemnifies her in respect of it. Further, that the waiver in Article 152 similarly does not purport to exempt her from liability but rather to waive liability once it has been established. The point made here was that Ms. Cummings remains liable for her breach of duties although there is a bar in terms of enforcement against her for any action short of wilful neglect or default.

50. Mr. Rees argued that a mere procedural bar to an action against an employee personally will not prevent a claim to vicarious liability. Reference was made to ***Broom v Morgan*** [1953] 1 Q.B. 597, in which case the facts were that the plaintiff was injured by the negligence of her own husband and succeeded in recovering damages from her husband's employer, despite the fact that, at that time, she could not have sued her husband directly. The English Court of Appeal, at pages 607-608, held that "*...the fact that a wife has no cause of action against her husband in respect of his tortious act, and negligence, does*

not mean that in law that she has no right of action against her husband's employers..." and *"...if the liability of the master is, properly speaking, a vicarious liability only (so that he is only liable if his servant is also liable), then I still think that the employer here is liable... if* [his immunity] *is an immunity from suit and not an immunity from duty or liability. He is liable to his wife, though his liability is not enforceable by action; and he is liable, so also is his employer, but with the difference, that the employer's liability is enforceable by action".*

51. Reference was also made to ***Various Claimants v Barclays Bank*** [2017] EWHC 1929 (QB), where the Defendant bank which had required job applicants to attend a medical examination was found vicariously liable for sexual assaults committed by the doctor during those examinations notwithstanding that the doctor could not have been personally liable because of a time limitation.

The allegation that DMS is vicariously liable for the acts and omissions of Ms. Cummings

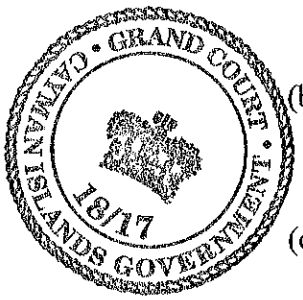
52. Mr. Rees submitted that DMS' position seems to be that it cannot be vicariously liable for the acts and omissions of Ms. Cummings because Ms. Cummings was not employed by or an agent of DMS at the relevant time, but was instead employed by a close affiliate of DMS, DMS Organization Ltd. Reference was made to paragraphs 8 - 9 of Cummings 3, and paragraphs 9 and 11 of Storie 1. Learned Counsel characterised DMS' position as misunderstanding or misrepresenting both the legal principles of vicarious liability as well as the factual matrix of the case.

53. Learned Counsel submitted that, as regards the legal principles of vicarious liability, recent authorities show a clear and unmistakable expansion of its application into the realm of relationships 'akin to employment'.

54. Reference was made to the decision in ***Various Claimants v Catholic Welfare Society*** [2012] EWCA Civ 938. In that case, liability was held to attach to the Institute of the Brothers of the Christian Schools, a religious order, in respect of sexual abuse perpetrated or allegedly perpetrated by teachers at a residential school for boys, even though the

Institute had not managed the school. At paragraph [35], Lord Phillips set out five factors making it fair, just and reasonable to impose vicarious liability:

(a) The employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability;



(b) The tort will have been committed as a result of activity being taken by the employee on behalf of the employer;

(c) The employee's activity is likely to be part of the business activity of the employer;

(d) The employer, by employing the employee to carry on the activity, will have increased the risk of the tort committed by the employee; and

(e) The employee will, to a greater or lesser degree, have been under the control of the employer.

55. Reference was also made to ***Cox v Ministry of Justice*** [2016] UKSC 10, where the English Supreme Court refined and applied the same principles to establish that prisoners working in a prison kitchen were in a relationship akin to employment. Mr. Rees relies upon this case as re-affirming and establishing the following principles:

(a) It has long been recognised that a relationship can give rise to vicarious liability even in the absence of a contract of employment (para 16);

(b) It is possible to impose vicarious liability on a body which did not employ the wrongdoer, even in circumstances where another body did employ the wrongdoer and was also vicariously liable for the same tort (para 18);

(c) It has long been established that the imposition of vicarious liability is justified where the tortfeasor's activity is likely to be an integral part of the business activity of the defendant (para 23);

(d) A relationship other than one of employment is, in principle, capable of giving rise to vicarious liability where harm is wrongfully done by an individual who carries on activities as an integral part of the business activities carried on by a defendant for its benefit (rather than her activities being entirely attributable to the conduct of a recognisably independent business of her own or of a third party), and where the commission of the wrongful act is a risk created by the defendant in assigning those activities to the individual in question (para 24);

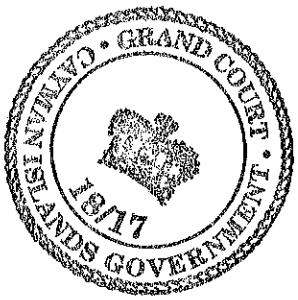
(e) There is no requirement that the individual be carrying on activities of a commercial nature or that the benefit which the defendant derives from the tortfeasor's activities, takes the form of a profit. It is sufficient that there is a defendant which is carrying on activities in furtherance of its own interests (para 30);

(f) Defendants cannot avoid vicarious liability on the basis of technical arguments about the employment status of the individual who committed the tort (para 31), and

(g) The payment of a wage is not essential to establish vicarious liability (para. 37).

56. Reference was also made to ***Mohamud v Wm Morrison Supermarkets*** [2016] UKSC 11, where at paragraphs [1] and [44]-[45], Lord Toulson stated as follows:

> *"[1] Vicarious liability in tort requires, first, a relationship between the defendant and the wrongdoer, and secondly, a connection between that relationship and the wrongdoer's act or default, such as to make it just that the defendant should be held legally responsible to the claimant for the consequences of the wrongdoer's conduct...*
>
> *[44] In the simplest terms, the court has to consider two matters. The first question is what functions or "field of activities" have been entrusted by the employer to the employee, or in everyday language, what was the*

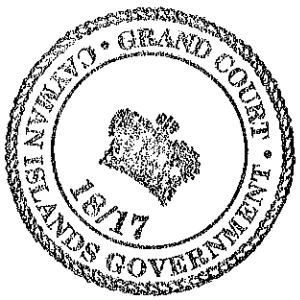


nature of his job. As has been emphasized in several cases, this question must be addressed broadly...

[45] Secondly, the court must decide whether there was sufficient connection between the position in which he was employed and his wrongful conduct to make it right for the employer to be held liable under the principle of social justice..."

57. Learned Counsel also referred to the leading textbook ***Clerk & Lindsell on Torts***, where at paragraphs [6-27] and [6-33] it is stated:

> *"Where the relationship of employer and employee exists, the employer is liable for the torts of the employee that are committed in the course of the employee's employment. The nature of the tort is immaterial and the employer is liable even where liability depends upon a specific state of mind and his own state of mind is innocent.*
>
> ...
>
> *The most recent type of extension of the vicarious liability principle has occurred in cases in which the immediate tortfeasor can be said to be in a relationship with the defendant which is "akin to employment". So, for example, the relationship between a Roman Catholic priest and a bishop is regarded as close enough in character to an employer-employee relationship so as to make it fair and just that the diocese should be held vicariously liable in respect of acts of child abuse perpetrated by the priest (JGE v English Province of Our Lady Charity [2012] EWHC 841). The same is true of the relationship between lay brothers of the Catholic Church and the particular religious unincorporated associations to which they belong (Various Claimants v Catholic Child Welfare Society [2012] EWCA Civ 938). That the work arrangements between prisoners and the prison authorities for whom they perform remunerated tasks can be held to fall within the present extension to the vicarious liability principle was confirmed by the Supreme Court in Cox v Ministry of Justice (supra). Their Lordships confirmed that, although the relationship in issue could*



be distinguished from a true contract of employment on the basis that it was not voluntarily entered into, it was nonetheless sufficiently akin to an employment contract for vicarious liability to be imposed...It was enough, said Lord Reid JSC, that the tortfeasor was engaged in furthering the defendant's interests in a broad sense, regardless of whether those interests are commercial in nature..."

58. Mr. Rees rounded off this aspect of the submissions, by stating that it is clear from this legal framework that DMS would be vicariously liable for Ms. Cummings' acts and omissions even if (i) she was not formally employed by DMS; (ii) she was employed by DMS Organization Ltd and DMS Organization Ltd was in fact also vicariously liable for her, and (iii) she was not paid by DMS. The key question, it was submitted, is whether the relationship between Ms. Cummings and DMS was such that it should give rise to vicarious liability. It was argued that DMS cannot avoid liability by technical arguments about Ms. Cummings' employment status.

59. At paragraph 35 of the SKA, a number of bits of evidence are referred to, which it is argued on behalf of Mr. Goodman, can support his stance that the relationship between Ms. Cummings and DMS was in fact such as to give rise to vicarious liability on the part of DMS.

60. It was submitted that the multitude of factors identified in paragraph 35 also mean that the instant case is distinguishable from the ***Paget-Brown*** case, where the Court of Appeal held that the Claimant in that case had not alleged any facts from which could be inferred an express or implied contractual term obliging the Defendant to monitor the director's performance. In this case, the argument continues, DMS selected Ms. Cummings, installed her as a director of Tangerine and failed to properly control or monitor her activities. In all the circumstances, it cannot reasonably be said that Mr. Goodman's claim for vicarious liability against DMS has no prospect of success.

DMS' Contractual Obligations

61. It is Mr. Goodman's position that there is no merit in DMS' second ground for seeking summary judgment, which is that the essential allegation that DMS assumed any contractual obligation to Tangerine has no prospect of success and/or is not properly particularized.

62. Mr. Rees sought to make clear that Mr. Goodman does not allege that there was a contract between Tangerine and DMS contained in a single written document. Rather, as set out in paragraph 29 of the Statement of Claim, Mr. Goodman's position is that in late 2011, DMS agreed to provide certain services to Tangerine (which, Mr. Goodman says, it did provide, albeit deficiently), in consideration for a fee (which fee was paid). It was submitted that the terms of the contract are to be derived from, amongst other things, the DMS Fund Governance documentation, its Code of Conduct and business model and the offering memoranda. At paragraphs 227 and 228 of the Statement of Claim the manner in which those terms were breached is set out.

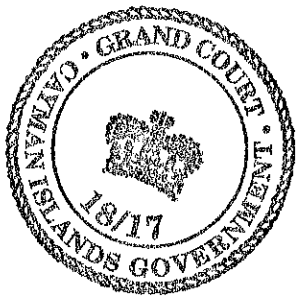
63. It was submitted that this is not a case in which the Court is invited to construe a straightforward clause in a contract. Rather, Mr. Goodman says DMS is disputing the existence and terms of a contract formed in a factually complex matter. It was argued that such questions are precisely the kind that are ill-suited to summary judgment.

The Striking Out Application

64. Reference was made to Order 18, Rule 19(1)(a) (no reasonable cause of action) and to the decision of Smellie J (as he then was) in ***Grupo Torras S.A. v Bank of Butterfield Int'l. (Cayman) Ltd*** [2000 CILR 441] at [445], which was applied by Smellie CJ subsequently in ***Algosaibi Bros v Saad Invs*** [2013 (1) CILR 202], where it was stated as follows:

> *"The rules governing an application to strike out a pleading for disclosing no reasonable cause of action are well settled. They have been invoked and applied in these courts on a number of occasions in the past. The following passage from a leading English case is an appropriate summary. I quote from the well-known passage in in the judgment by*

Stephenson L.J.in McKay v Essex Area Health Authority..([1982] 2 All E.R. at 778):



'The defendants have to show that the case is "obviously unsustainable": see A-G of Duchy of Lancaster v. London and North Western Rly Co...; "obviously and almost incontestable bad": see Dyson v A-G...; "one which cannot succeed", "unarguable": see Nagle v Fielden...; "quite unsustainable": see Schmidt v Secretary of Home Affairs...; "hopeless": see Riches v DPP... This is all summed up in a sentence from the judgment of Lord Pearson in Drummond-Jackson v British Medical Association...which Lawson J followed in this case: "...the order for striking out should only be made if it becomes plain and obvious that the claim or defence cannot succeed."

65. In sum, on behalf of Mr. Goodman it was submitted that the application to strike out Mr. Goodman's Statement of Claim is as misconceived as the application for summary judgment.

The Application to Amend

66. Mr. Rees submitted that the proposed amendments are minor in scope and cannot be said to cause any prejudice to DMS.

67. He indicated in the SKAs that the first set of proposed amendments merely reflect the discontinuance of the claim against Ms. Cummings.

68. The second set of proposed amendments expands the description of the relationship between Ms. Cummings and DMS from 'employee and/or agent' to 'employee and/or akin to employee and/or agent' and clarifies the nature of the vicarious liability. Learned Counsel says that these amendments are required to respond to DMS' current position,

namely that Ms. Cummings was not strictly an employee of DMS. It was submitted that these amendments are central to the determination of the question of vicarious liability. It was submitted that DMS cannot, on the one hand, assert that the Statement of Claim is deficient and, on the other hand, resist the minor amendments required to remedy the perceived deficiency.

69. The remaining proposed amendments, it is said, largely respond to the new evidence produced by DMS and Ms. Cummings and clarify that DMS does not have the benefit of the indemnity and/or waiver of liability provisions in Tangerine's Articles of Association.

Discussion and Analysis

70. As I understand it, whilst there is no express indication in the Rules, in an application under Order 14, Rule 12 by the defendant seeking summary judgment, the burden is on the applicant/defendant to satisfy the preliminary requirements for proceeding - (See Order 14, Rule 13(1)). If those conditions are satisfied, the burden would then shift to the respondent/plaintiff of satisfying the Court that there is a real prospect of success (See Order 14, Rule 14(b)). I have reasoned by analogy in relation to an application by a plaintiff for summary judgment discussed in the 1999 Supreme Court Practice, Order 14/4.

71. In my judgment of September 2018, I held that Ms. Cummings appointment as a Director of Tangerine was made solely pursuant to the Articles and on the basis that the protection afforded by the Articles, including the indemnity provisions (Articles 149-154), would continue to apply to her, in respect of her conduct as a Director, even after she ceased to be a Director.

72. Articles 2, and 149-154, provide as follows:

> *"INTERPRETATION*
>
> ...
>
> *2. In these Articles, the following terms shall have the following meanings unless the context otherwise requires:*

...

*"**Directors**" means the Directors for the time being of the Company;*

...

*"**Indemnified Person**" means any Director, officer or member of a committee duly constituted under these Articles and any liquidator, manager or trustee for the time being acting in relation to the affairs of the Company, and his heirs, executors, administrators, personal representatives or successors or assigns"*

...

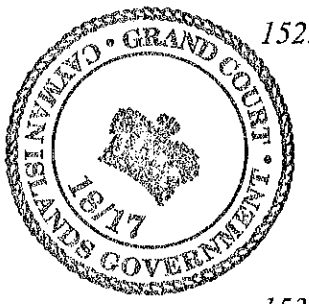
INDEMNITY

149. Every Indemnified Person shall, in the absence of wilful neglect or default, be indemnified and held harmless out of the Assets of the Company against all liabilities, loss, damage, cost or expense (including but not limited to liabilities under contract, tort and statute or any applicable foreign law or regulation and all reasonable legal and other costs and expenses on a full indemnity basis properly payable) incurred or suffered by him or by reason of any act done, conceived in or omitted in the conduct of the Company's business or in the discharge of his duties and the indemnity contained in this Article shall extend to any Indemnified Person acting in any office or trust in the reasonable belief that he has been appointed or elected to such office or trust notwithstanding any defect in such appointment or election.

150. No Indemnified Person shall be liable to the Company for acts, defaults or omissions of any other Indemnified Person.

151. Every Indemnified Person shall be indemnified out of the funds of the Company against all liabilities incurred by him by or by reason of any act done, conceived in or omitted in the conduct of the Company's business or in the discharge of his duties in defending any proceedings, whether civil or criminal, in which judgment is given in his favour, or in which he is acquitted, or in connection

with any application in which relief from liability is granted to him by the court.



152. To the extent that any Indemnified Person is entitled to claim an indemnity pursuant to these Articles in respect of amounts paid and discharged by him, the relative indemnity shall take effect as an obligation of the Company to reimburse the person making such payment or effecting such discharge.

153. Each member and the Company agree to waive any claim or right of action he or it may at any time have, whether individually or by or in the right of the Company, against any Indemnified Person on account of any act or omission of such Indemnified Person in the performance of his duties for the Company; provided however, that such waiver shall not apply to any claims or rights of action arising out of the wilful neglect or default of such Indemnified Person or to recover any gain, personal profit or advantage to which such Indemnified Person is legally entitled.

154. Expenses incurred in defending any civil or criminal action or proceeding for which indemnification is required pursuant to these Articles shall be paid by the Company in advance of the final disposition of such action or proceeding upon receipt of an undertaking by or on behalf of the Indemnified Person to repay such amount if it shall ultimately be determined that the Indemnified Person is not entitled to be indemnified pursuant to these Articles. Each member of the Company shall be deemed to have acknowledged and agreed that the advances of funds may be made by the Company as aforesaid, and when made by the Company under this Article are made to meet expenditures incurred for the purpose of enabling such Indemnified Person to properly perform his or her duties to the Company."

73. The claim by Mr. Goodman arises as a result of assignment of Tangerine's cause of action against Ms. Cummings. A company has no cause of action against a director in respect of a matter against which the company has agreed to indemnify the director. Tangerine therefore only has a cause of action against Ms. Cummings where wilful neglect or default are pleaded or established.

74. In the decision of the Judicial Committee of the Privy Council in ***Viscount of Royal Court v Shelton*** 1 W.L.R 985, their Lordships had for consideration a clause in the Articles of Association of a Company, which (at page 988), Lord Brightman re-stated by separating it into its component parts as follows:

"(1) Every director, officer or servant of the company shall be indemnified out of its funds against all costs, charges, expenses, losses and liabilities incurred by him (a) in the conduct of the company's business, or (b) in the discharge of his duties; and

(2) no director or officer of the company shall be liable (a) for the acts, defaults or omissions of any other director or officer, or (b) by reason of his having joined in any receipt for money not received by him personally, or (c) for any loss on account of defect of title to any property acquired by the company, or (d) on account of the insufficiency of any security in or upon which any moneys of the company shall be invested, or (e) for any loss incurred through any bank, broker or other agent, or (f) for any loss occasioned by any error of judgment or oversight on his part, or (g) for any loss, damage or misfortune whatever which shall happen in the execution of the duties of his office or in relation thereto, unless the same shall happen through his own dishonesty."

75. At page 991D-G, the Board discusses the issue of construction of Article 46, in the following fashion:

".... In the opinion of their Lordships article 46 is worded in a manner which is apt to exonerate a director who has innocently participated in an act which is ultra vires the company, and to excuse him from the obligation which would otherwise have lain upon him to reimburse the company for any loss thereby occasioned. Under article 38 the duty of the directors of the company was to manage its business. The purchase of the property at Stoke-on-Trent, and the trading from that locality, happened in the course of or in relation to the performance by the directors of that duty. The directors, as a matter of construction of article 46, are therefore not liable for the loss which happened to the company. The same answer may also be reached under paragraph (1)(a) of article 46. The directors are prima facie liable to the company for the loss. But that liability was incurred "in the conduct of the company's business". The directors are therefore entitled to be indemnified against such liability. A company has no cause of action against a director in respect of a matter against which the company has agreed to indemnify him.

This result, as a matter of construction, is what one would expect. It is not contested that an article of this sort will exonerate a director against liability for a loss caused to the company by the negligent act of the director. This was decided by Neville J. in In re Brazilian Rubber Plantations and Estates Ltd [1911] 1 Ch. 425, which was followed by Romer J. at first instance in In re City Equitable Fire Insurance Co. Ltd [1925] Ch. 407."

76. Further, by Article 153, Tangerine waived any cause of action against Ms. Cummings, save where arising out of wilful neglect or default. In my judgment, it follows that Tangerine could not have assigned any greater right to Mr. Goodman than it itself had against Ms. Cummings.

Mr. Goodman's claim that DMS is vicariously liable for the acts of Ms. Cummings because DMS is not an indemnified person under the Articles

77. In my view, Mr. Goodman's argument that he does not have to establish that Ms. Cummings' conduct amounted to wilful neglect or default in order to obtain judgment against DMS, and that instead, he need only establish a breach of common law directors' duties and/or a breach of fiduciary duties, must fail. In my view, the cases cited by Mr. Rees QC, such as ***Broom v Morgan*** and ***Various Claimants v Barclays Bank*** are treating with procedural bars, and not substantive bars, such as exist in the instant case. Reference may also be made to ***Clerk & Lindsell on Torts***, paragraph 32-02, cited by Mr. Valentin.

78. It seems to me that the important consideration is that Tangerine could not assign to Mr. Goodman causes of action that it did not have.

79. It is in my view settled substantive law that vicarious liability is a form of secondary liability for a wrong committed by an employee, or a person akin to an employee. Therefore, if the relevant employee is not liable, the employer cannot be vicariously liable for the employee's conduct.

"Wilful Neglect or Default"

80. It is well established that "*wilful neglect or default*" requires Mr. Goodman to plead and prove that Ms. Cummings knew that she was breaching her duties or, at the least appreciated that her conduct might be a breach of duty and she went on notwithstanding to do or omit to do the act complained of, without regard for the consequences. See ***Peterson v Weavering Macro Fixed Income Fund Limited (in liquidation)*** [2015] 1 CILR, 45 per Chadwick P at paragraphs [113] and [117].

81. The requirement to plead facts which properly support and particularize an allegation of wilful default are set out in GCR, Order 18, Rule 12(1). In my judgment, the Statement of Claim fails to properly particularize and plead the essential allegation of wilful neglect or default.

82. Further, the application to amend the Statement of Claim also amounts to an unsatisfactory pleading or basis for establishing a case of wilful neglect or default. In my judgment the facts as pleaded do not take the facts higher than a claim for negligence. What are pleaded are bare assertions.

83. In my view, the claim for *"wilful neglect or default"* falls to be struck out, as was the case in the decision of the Bermuda Court of Appeal in ***Focus Insurance Company Ltd. v Hardy*** (Unreported Civil Appeal No. 15 of 1992).

84. Alternatively, DMS would be entitled to summary judgment on this issue as the claim for *"wilful neglect or default"* has no real prospect of success.

85. In my view, the claim against DMS is bound to fail for a number of reasons. Even if Ms. Cummings was an employee of DMS, which DMS denies, or the relationship between Ms. Cummings and DMS was one akin to employment, the decisions in ***Kuwait Asia*** and ***Paget-Brown*** make it clear DMS is not vicariously or directly liable to Tangerine or to Mr. Goodman as its assignee, for alleged wrongs or breach of duty on the part of Ms. Cummings, since she would not have been acting in that capacity when discharging her duties as a Director (and agent) of Tangerine. In the ***Paget-Brown*** case the Court of Appeal of the Cayman Islands held that the fact that the Company was a management company offering services did not affect the principles as enunciated in the ***Kuwait*** case.

86. I do not accept that, there is, as argued by Mr. Rees on behalf of Mr. Goodman, any distinction to be drawn because in the ***Paget-Brown*** case the claim was based on liability for the director's negligence, whereas in the instant case, it is for vicarious liability for wilful neglect or default (the argument that Mr. Goodman did not need to establish wilful neglect or default having failed).

87. I appreciate that Mr. Goodman argues that Ms. Cummings appointment as a Director came into being because of her relationship with DMS (or affiliates), and that certain of DMS' proprietary technology was used by Ms. Cummings in her work at Tangerine.

88. However, it is plain that Ms. Cummings could not be said to be carrying out her duties as a Director of Tangerine as a direct activity of DMS.

DMS' Alleged Contractual Obligations - Breach of Contract and the "Relationship akin to contract - assumption of responsibility"

89. When one looks at the pleadings, affidavits, and SKAs in their totality, it is quite plain that there is no proper basis upon which it could be said that there are express terms to a contract between DMS and Ms. Cummings.

90. I note that in the ***Paget-Brown*** case, the facts were quite similar to the instant one. The case involved the appellant, a Cayman company offering services to overseas companies, and it entered into a contract with the respondent, a local subsidiary of the Omni group. Under that agreement, it agreed to provide a registered office, to act as company secretary, and to provide a person to act as a company director. Following the Respondent's winding up, its liquidators issued proceedings in respect of transactions which had taken place prior to the director's resignation. There were ultimately two claims made against the appellant (i) for vicarious liability for the director's negligence or breach of fiduciary duty, and/or (ii) for negligence itself in failing to exercise due care and skill in monitoring the performance of the employee's duties. The appellant had filed applications to dismiss the Respondent's claims as disclosing no reasonable cause of action. The Grand Court dismissed the application to strike out, and granted leave to re-amend the Statement of Claim. It was held by the Court of Appeal that both claims disclosed no reasonable cause of action, and this was despite a fee (described by Zacca P as "*nominal*"), paid by the respondent to the appellant for nominating the Director to act.

91. In my judgment, in all of the circumstances, this claim also stands to be struck out as disclosing no reasonable cause of action. Alternatively, there is no real prospect of Mr. Goodman's case succeeding on this aspect of the matter either.

No Real Prospect of Success

92. It is trite that the Court must approach the issue of summary judgment from the point of view of examining whether the claim has a real, as opposed to a fanciful prospect of success.

93. In that regard, I have looked at "*The evolution of the Plaintiff's pleaded case against Ms. Cummings*" as set out in DMS' SKA. I have looked at the case against the backdrop of the twists and turns of Mr. Goodman's case regarding the indemnity provisions in the

Articles, (see my September judgment, at paragraphs 42 and 43, on the same subject matter). I have also had regard to Mr. Goodman's subsequent abandoning of the claim against Ms. Cummings after my decision on the Preliminary Issues concerning the Articles. Taking a realistic and informed approach to this case, it is plain to me that these are claims with no realistic prospect of success.

The Application To Amend

94. In my judgment, the application to Amend also should be dismissed as the amendments sought do not cure the fundamental defects identified above in relation to the claims.

Disposition

95. I am of the view that overall, summary judgment is the more appropriate course than striking out, although on some grounds, aspects of the claim could be struck out as disclosing no reasonable cause of action. I would therefore dismiss the claim by Mr. Goodman and enter judgment for DMS on the whole claim, with costs to be taxed if not agreed.

GRAND COURT · CAYMAN ISLANDS GOVERNMENT · 18/17

THE HON. JUSTICE INGRID MANGATAL
JUDGE OF THE GRAND COURT