

[2] The Summons seeks to strikeout the Plaintiff's Writ of Summons and Statement of Claim on the following grounds:-

- (i) It discloses no reasonable cause of action in that the agreement upon which the Plaintiff relies does not provide for joint and several liability and;
- (ii) It is otherwise an abuse of the process of the Court in that the agreement upon which the Plaintiff relies specifically provides that it is governed by the Laws of Barbados and that the place of jurisdiction of all proceeding in connection with the said agreement shall be Barbados.

FACTUAL MATRIX:

[3] A written agreement (Commission Agreement) was entered into with the First Defendant by the Plaintiff wherein the First Defendant appointed the Plaintiff as its non-exclusive agent to promote and market insurance products and services to the public. It is the further agreement of the Defendants that the Plaintiff relies on the commission agreement for its meaning and effect.

[4] It was also a term of the commission agreement that the First Defendant would pay the Plaintiff commissions pursuant to the commission agreement, once the Plaintiff would have solicited clients and introduce them to the First Defendant.

[5] The Plaintiff alleges that the Third Defendant was a vehicle through which the group of Defendants or the First Defendant was the insurer of the clients

introduced pursuant to the commission agreement. The Plaintiff therefore alleges that the Defendants have breached the terms of the commission agreement by failing to supply the Plaintiff with statements of commissions on referrals.

ALLEGATIONS OF THE DEFENDANTS:

- 2. “The said Statement of Claim does not properly identify the parties. Indeed, the Statement of Claim does not state whether the First Defendant which is described as Cotswold Group Limited also known as Cotswold Group Holdings Limited which is also known as Cotswold Group Holdings Limited. The heading of a suit is not a pleading and as such the Claimant was obliged to properly identify the claim. The Claimant was also obliged to state in its Statement of Claim whether the First Defendant was registered in this jurisdiction or in any other jurisdiction. The naming of a Defendant in the heading of an action is not a proper plea as to the identity of the Defendant. In the event that the companies named in the heading of the suit the Plaintiff was obliged to go further and make a specific plea in this regard. Unfortunately, the information in the Corporate Registry would not support such a plea. Further, the Statement of Claim does not state whether the Second and Third Defendants are companies or other legal entities registered in the jurisdiction and carries on business in the jurisdiction.**

- 3. Subsequent to the filing of the said Writ of Summons, the Claimant disclosed to the First Defendant the Commission Agreement which is mentioned in paragraph 1 of the Statement of Claim. The said agreement is exhibited to the Affidavit of Engrid Bodie filed herein on October 16, 2018 and forms part of the Statement of Claim.**

**dismissed or judgment to be entered accordingly,
as the case may be.”**

- (2) No evidence shall be admissible on an application under paragraph (1) (a).**
- (3) This rule shall, so far as applicable, applying to an Originating Summons and a petition as if the Summons or Petition, as the case may be, were a pleading.”**

[8] The first Defendant in this regard relies in the first instance on the case of **WILLIAM and HUMBERTS LTD V WARD H TRADE MARKS (JERSEY) LTD [1986] AC 368, HL** from which emanates the principle that the power to strike out a pleading is to be exercised only in “plain and obvious” cases. In this case LORD TEMPLEMAN said:-

“Two courses are open to a defendant who wishes to raise the question whether, assuming a statement of claim to be proved, it entitles the plaintiff to relief. One method is to raise the question of law as directed by Ord. xxv. R. 2; the other is to apply to strike out the statement of claim under Ord. xxv, r. 4. The first method is appropriate to cases requiring argument and careful consideration. The second and more summary procedure is only appropriate to cases which are plain and obvious, so that any master or judge can say at once that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to what he asks.”

The observations of Lindley M.R. directed to striking out a statement of claim apply equally to applications to strike out a defence or part of a defence.

There has been recently a difference of judicial approach to the construction of Ord. 18, r. 19. In McKay v. Essex Area Health Authority (1982) Q.B. 1166, the majority of the Court of Appeal (Stephenson and Ackner L. JJ.) cited with approval the observations of Sir Gordon Wilmer in Drummond-Jackson v. British Medical Association [1970] 1 W.L.R. 688, 700 where he said;

“The question whether a point is plain and obvious does not depend upon the length of time it takes to argue. Rather the question is whether, when the point has been argued, it has become plain and obvious that there can be but one result.”

On the other hand, Griffiths L.J. dissented on the point in McKay v. Essex Area Health Authority [1982] Q.B. 1166 and said, at p. 1191;

“If on an application to strike out as disclosing no cause of action a judge realises that he cannot brush aside the argument, and can only decide the question after a prolonged and serious legal argument, he should refuse to embark upon that argument and should dismiss the application unless there is a real benefit to the parties in determining the point at that stage. For example, where striking out the cause of action will put an end to the litigation a judge may well be disposed to embark on a substantial hearing because of the possibility of finally disposing of the action. But even in such a case the judge must be on his guard that the facts as they emerge at the trial may not make it easier to resolve the legal question.

If an application to strike out involves a prolonged and serious argument the judge should, as a general rule, decline to proceed.”

- [9] It is trite law that a cause of action is defined as simply a factual state of affairs, the existence of which entitles one person to obtain a remedy (ies) from a Court against another person. (See **LETANG V COOPER [1961] EWCA CIV J0615-2**). A cause of action ought to have some chance of success when one looks at the allegations in the pleadings alone.
- [10] The First Defendant says that the Writ of Summons and the Statement of Claim disclose no cause of action against the First Defendant in that the First Defendant has not been properly identified in the Statement of Claim. The First Defendant says;

No reasonable cause of action:

“10. The First Defendant submits that the Writ of Summons and Statement of Claim disclose no cause of action against it for the First Defendant has not been properly identified in the Statement of Claim. In order to found a cause of action it is first necessary to properly identify the parties seeking the relief and the party against whom the relief is being sought. See paragraph 8 hereof. The Statement of Claim does not state whether the First Defendant is a legal entity which carries on business in the Bahamas. The names attributed to the First Defendant suggests that the Plaintiff is referring to companies, but the pleading falls short in this regard. The pleading cannot be supplemented by Affidavit evidence. See Order 18 Rule 19

(2) as set out in paragraph 5 above. Further, the Statement of Claim and the Commission Agreement which is referred to in the said Statement of Claim speaks of Cotswold Group Holdings Limited and subsidiaries. The Agreement does not state that Cotswold Group Limited and Cotswold Group Holdings Limited are one in the same. In addition, the Agreement does not identify the subsidiaries or whether the liability of Cotswold Group Holdings Limited or subsidiaries is joint and several. Accordingly, the Claimant has not established a cause of action against the First Defendant in that the First Defendant has not been properly identified in the pleading or the contract. The Court is invited to note that the pleading speaks of a written agreement but the Commission Agreement which the Plaintiff disclosed as the agreement mentioned in paragraph 1 of the Statement of Claim was not signed by the First Defendant. There can be no cause of action relative to a written agreement which has not been signed. It is possible that a cause of action based on conduct can be established on an unsigned agreement but no such cause of action has been pleaded.

ABUSE OF THE PROCESS OF THE COURT:

- 11. The First Defendant submits that the commencement of these proceedings is an abuse of the process of the Court and as such should be struck out.**
- 12. The Agreement which is referred to in paragraph 1 of the Statement of Claim and which has been disclosed to the First Defendant clearly states that the place of jurisdiction shall be Barbados. In the circumstances, it is an abuse of the process of the Court to found an action on an agreement which**

specifically provides that the place of jurisdiction is not in the Bahamas.

- 13. In respect of the exclusive jurisdiction and choice of jurisdiction by the parties, the approach of the Court is to exercise its discretion to secure compliance with whatever contractual terms the parties agree in respect of forum and choice of law.”**

CASE OF THE SECOND DEFENDANT:

- 15. “By an application filed on October 10, 2018 the Second Defendant seeks an Order that the Writ of Summons and Statement of Claim be struck out in that they disclose no cause of action and/or is an abuse of the process of the Court.**

NO REASONABLE CAUSE OF ACTION:

- 16. The Second Defendant repeats the principles of law as set out in paragraphs 6 to 9 hereof.**
- 17. The Second Defendant submits that the pleadings disclose no reasonable cause of action against it for it is not a party to the contract pleaded at paragraph 1 of the Statement of Claim. The Second Defendant further states that it has not been properly identified as a company or other legal entity which has the capacity to enter into a contract. The Second Defendant further submits that in the event any obligation was placed upon it in the said agreement then it would not be bound to discharge the said obligation for it is not a party to the contract.**
- 18. The Second Defendant further submits that the primary allegation made against it in the Statement of Claim is contained in paragraph 4 of the Statement of Claim. In *the event that these***

***allegations were true*, they are insufficient for the Plaintiff to obtain a remedy against it. The allegations do not speak of a contract or breach of any contract to which the Second Defendant is a party.**

- 19. In summary, the Plaintiff has not pleaded the existence of a contract between itself and the Second Defendant and as such cannot claim any remedy under a contract which it has not pleaded.**

ABUSE OF PROCESS:

- 20. The Second Defendant submits that the commencement of these proceedings is an abuse of the process of the Court and as such should be struck out.**
- 21. The Agreement which is referred to in paragraph 1 of the Statement of Claim and which has been disclosed to the Second Defendant clearly states that the place of jurisdiction shall be Barbados. In the circumstances, it is an abuse of the process of the Court to found an action in this jurisdiction on an agreement which specifically provides that the place of jurisdiction is not in the Bahamas.**
- 22. In respect of the exclusive jurisdiction and choice of jurisdiction by the parties, the approach of the Court is to exercise its discretion to secure compliance with whatever contractual terms the parties agree in respect of forum and choice of law.**
- 23. Lord Bingham of Cornhill in the case of Donohue v Armco Ltd 92001] UKHL64 [2002] 1 ALL ER 749 at para 24 set out the principles of law as follows:**

“If contracting parties agree to give a particular Court exclusive jurisdiction to rule on claims between those parties, and a claim falling within the scope of the agreement is made in proceedings in a forum other than that which the parties have agreed, the English Court will ordinarily exercise its discretion.. to secure compliance with the contractual bargain, unless the party suing in the non-contractual bargain, unless the party suing in the non-contractual forum (the burden being on him) can show reasons for suing in that forum. I use the word ‘ordinarily’ to recognize that where an exercise of discretion is called for there can be no absolute or inflexible rule governing that exercise, and also that a party may lose his claim to equitable dilatoriness or other unconscionable conduct. But the general rule is clear; where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation in the absence of strong reasons, sufficient to displace the other’s party’s prima facie entitlement to enforce the contractual bargain, will depend on all the facts and circumstances of the particular case.”

CASE FOR THE THIRD DEFENDANT:

- 25. The Third Defendant repeats the principles of law as set out in paragraphs 6 to 9 hereof.**
- 26. The Third Defendant submits that the Writ of Summons and Statement of Claim disclose no cause of action against it for the**

Third Defendant has not been properly identified in the Statement of Claim. In order to found a cause of action it is first necessary to properly identify the parties seeking the relief and the party against whom the relief is being sought. See paragraph 8 hereof. The Statement of Claim does not state whether the Third Defendant is a legal entity which carries on business in the Bahamas. The name of the Third Defendant suggests that the Plaintiff is referring to a company which is registered in Barbados but the pleading falls short in this regard. The pleading cannot be supplemented by Affidavit evidence. See Order 18 Rule 19 (2) as set out in paragraph 5 above. Further, the Statement of Claim and the Commission Agreement which is referred to in the said Statement of Claim does not identify the Third Defendant as a party to the said Commission Agreement and as such no claim for breach of that Agreement by the Third Defendant can arise.

- 27. The Third Defendant further submits that the only reference made of it is contained in paragraph 5 of the Statement of Claim and this plea is insufficient to found the cause of action of breach of contract or to obtain a relief as claimed in the Statement of Claim.**
- 28. Accordingly, the Claimant has not established a cause of action against the Third Defendant.**

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ABUSE OF PROCESS:

- 29. The Third Defendant submits that the commencement of these proceedings is an abuse of the process of the Court and as such should be struck out.**
- 30. The Agreement which is referred to in paragraph 1 of the Statement of Claim and which has been disclosed to the Third Defendant clearly states that the place of jurisdiction shall be Barbados. In the circumstances, it is an abuse of the process of the Court to found an action in this jurisdiction on an agreement which specifically provides that the place of jurisdiction is not in the Bahamas.**
- 31. In respect of the exclusive jurisdiction and choice of jurisdiction by the parties, the approach of the Court is to exercise its discretion to secure compliance with whatever contractual terms the parties agree in respect of forum and choice of law."**

ARGUMENTS ON BEHALF OF THE PLAINTIFF:

- [11] The Plaintiff's position is that she is seeking to recover monies owed pursuant to the commission agreement and that none of the defendants deny this proposition i.e. monies owed.**
- [12] The Plaintiff says that the Defendants make "heavy weather" of the law on "striking out". Further, the Plaintiff says that the First Defendant cannot rely on the "jurisdictional clause" if the (First Defendant) did not sign the commission agreement. I hasten to point out that the Plaintiff also never signed the commission agreement. The intended parties were Cotswold Group Holdings Limited and Subsidiaries.**

[13] The Plaintiff says that it doesn't matter whether the commission agreement provides or does not provide for joint and several liability if in any event it wasn't agreed. Secondly, the Plaintiff says that the First Defendant cannot rely upon a jurisdictional clause in an agreement which it denies entering into.

[14] Further, the Plaintiff says that even if the First Defendant did not sign the commission agreement it is estopped from denying the commission agreement because both parties acted upon the terms contained therein over several years. The Plaintiff says even if there was no written commission agreement, the Plaintiff's claim would be based upon a quantum meruit and still be a good claim.

THE LAW:

STRIKING OUT:

[15] It is trite law that it is only in the most "plain and obvious" cases that the Court should strike out a Statement of Claim for disclosing no reasonable cause of action.

[16] Order 18 rule 19 (1), (2) and (3) of the RSC provide.

19 (1) "The Court may at any stage of the proceedings order to be struck out or amended any pleadings or the endorsement of any WRIT in the action, or anything in any pleading or in the endorsement on the ground that –

(a) It discloses no reasonable cause of action or defense, as the case may be; or

- (b) It is scandalous, frivolous or vexatious; or
 - (c) It may be prejudice, embarrass or delay the fair trial of the action or;
 - (d) it is otherwise an abuse of the process of the court and may order the action to be stayed or dismissed or judgement to be entered accordingly, as the case may be and may order the action to be stayed or dismissed or judgement to be entered accordingly, as the case may be.”
- (2) No evidence shall be admissible on an application under paragraph (1), (a).
- (3) This rule shall, so far as applicable, applying to an Originating Summons and a petition as if the summons and petition, as the case may be, were a pleading.”

Order 18 Rule 7 (1) provides:-

“Subject to the provisions of this rule, and rules 7A, 10, 11 and 12, every pleading must contain and contain only a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement must be as brief as the nature of the case admits.”

17. It is clear from Order 18 Rule 7 (1) that a Statement of Claim need only to contain material facts in summary which the Plaintiff intends to rely on to put his claim. This is the reason for Order 18 Rule 19 (2).

18. In the case of **STANLEY LITHGOW DRUMMOND JACKSON (Plaintiff/Respondent) v THE BRITISH MEDICAL ASSOCIATION et.al. [1970] 1 W.L.R. 688 LORD PEARSON** stated;

“Over a long period of years it has been firmly established by many authorities that the power to strike out a statement of claim as disclosing no reasonable cause of action is a summary power which should be exercised only in plain and obvious cases. The authorities are collected in the Annual Practice under the heading “Exercise of Power under this Rule” in the notes under Order 18 rule 19. One which might be added is Nagle v. Feildenz (1966) 2 W.B. 633 at pages 648 and 651. Reference has been made to four recent cases – Rondel v. Worsley (1969) 1 A. C. 191; Wiseman v. Borneman (1969) 3 W.L.R. 706; Roy v. Prior (1969) 3 W.L.R. 653; and Schmidt v. Home Office (1969) 2 Ch. 149. In each of these cases there was an important question of principle involved, and the hearing of the application under Order 18 rule 19 was much longer and more elaborate than is usual, but the final decision was that the alleged cause of action was clearly unsustainable, and so the statement of claim disclosed no reasonable cause of action and was ordered to be struck out. There was no departure from the principle that the order for striking out should only be made if it becomes plain and obvious that the claim or defence cannot succeed, but the procedural method was unusual in that there was a relatively long and elaborate instead of a short and summary hearing. It must be within the discretion of the Courts to adopt this unusual procedural method in special cases where it is seen to be advantageous. But I do not think that there has been or should be any general change in the practice with regard to applications under the Rule.

In my opinion the traditional and hitherto accepted view that the power should only be used in plain and obvious cases – is correct according to the evident intention of the Rule’ for several reasons. First, there is in paragraph (1) (a) of the Rule the expression “reasonable cause of action”, to which Lord Justice Lindley called attention in Hubbuck v. Wilkinson (1899) 1 Q.B. 86 at pages 90-91. No exact paraphrase can be given, but I think “reasonable cause of action” means a cause of action with some chance of success, when (as required by paragraph (2) of the Rule) only the allegations in the pleading are considered. If when those allegations are examined it is found that the alleged cause of action is certain to fail, the statement of claim should be struck out. In Nagle v. Feilden (supra) Lord Justice Danckwerts said at page 648 – “The summary remedy which has been applied to this action is one which is only to be applied in plain and obvious cases when the action is one which cannot succeed or is in some way an abuse of the process of the Court. Lord Justice Salmon said at page 651 – “It is well settled that a statement of claim should not be struck out and the plaintiff driven from the Judgment seat unless the case is unarguable.” Secondly, sub-paragraph (a) in paragraph (1) of the Rule takes some colour from its context in sub-paragraph (b) – “scandalous, frivolous or vexatious” sub-paragraph (c) “prejudice, embarrass or delay the fair trial of the action” – and sub-paragraph (d) “otherwise an abuse of the process of the Court.” The defect referred to in sub-paragraph (a) is a radical defect ranking with those referred to in the other sub-paragraphs. Thirdly, an application for the statement of claim to be struck out under this Rule is made at a very early stage of the action when there is only the statement of claim without any other pleadings and without any evidence at all. The plaintiff should not be “driven from the Judgment seat” at this very early stage unless it is quite plain that his alleged cause of action has no chance of success. The fourth reason is that the procedure, which

is (if the action is in the Queen’s Bench Division) by application to the Master and on appeal to the Judge in chambers, with no further appeal as of right of the Court of Appeal, is not appropriate for other than plain and obvious cases. In Dyson v. Attorney-General (1911) 1 K.B. at pages 418-9, 1- Lord Justice Fletcher-Moulton said – “Differences of law just as differences of fact are normally to be decided by trial after hearing in Court, and not to be refused a hearing in Court by an order of the Judge in chambers. Nothing more clearly indicates this to be the intention of the rule than the fact that the plaintiff has no appeal as of right from the decision of the judge in chambers in the case of such an order as this. So far as the rules are concerned, an action may be stopped by this procedure without the question of its justifiability ever being brought before a Court.”

[19] I take the liberty to set out the Statement of Claim at this juncture.

STATEMENT OF CLAIM:

- “1. By a written agreement made on the 1st April, 2014 (hereinafter referred to as the “Commission Agreement”) the First Defendant appointed the Plaintiff as its non-exclusive agent without limitation as to territory to promote and market its insurance products and services to the public upon the terms and subject to conditions therein contained. At the trial of this action the Plaintiff will rely upon the Commission Agreement for its precise terms meaning and effect.**
- 2. It was an express term of the Commission Agreement that the First Defendant (hereinafter referred to as the “Contractor”) would pay the Plaintiff (hereinafter referred to as the “intermediary”) a commission**

calculated in accordance with Clause 3 of the Commission Agreement and the subjoined scheduled thereto at the rates and in accordance with the formula therein provided and as is mentioned infra.

- 3. It was further an express term of the Commission Agreement or a term necessarily to be implied at law that the Contractor would be required to account to the Intermediary at regular intervals in respect of client referrals accepted by the Contractor and thereupon to Immediately settle any such commission as would be agreed by the parties as due and owing by the First Defendant to the Plaintiff.**
- 4. At all times material to this action the Second Defendant provided a plethora of services and without limitation due diligence, compliance or know your customer (KYC) functions and until locked out of her office as hereinafter described the Plaintiff worked side by side in adjacent offices with Directors of the Second Defendant. Mr. Todd Callendar and Mr. Ian Towell. All of the clients solicited by the Plaintiff and introduced to the First Defendant for the purpose of marketing and sales of the First Defendant's insurance products were "on boarded" through the back office and support systems provided by the Second Defendant.**
- 5. The Third Defendant is and has at all times relevant to these proceedings as the vehicle deployed by the Defendant Group or First Defendant as the issuer of the relevant insurance policies to the clients introduced by the Plaintiff known as Welfare Disability and Long-term Care policies. The Third Defendant a Barbados incorporated company was used for reasons of fiscal efficiency and to take advantage of double taxation treaties in the global market.**
- 6. In Breach of Contract the Defendants:-**
 - (i) Have failed to act dutifully to the Plaintiff in accordance with Paragraph 3 hereof and the Commission Agreement**

and in particular have failed to supply The Intermediary/Plaintiff with statements of commission in respect of client referrals periodically or at all during the currency of the Commission Agreement save as is next hereinafter mentioned;

- (ii) On the 20th April, 2017 Mr. Kirk Seymour as Attorney for the First Defendant in response to a claim for commission submitted by the Plaintiff attempted impermissibly to diminish the Plaintiff's entitlement by accusing the Plaintiff of including clients introduced by other intermediaries. No reasons or evidence were assigned in support of that assertion either at the time or at any time subsequently;**
- (iii) Have failed to pay the intermediary/Plaintiff commission on referrals accepted for insurance business underwritten by the First Defendant for the period 2014 – 2018 or at all;**
- (iv) Have failed to pay the Intermediary/Plaintiff commission earned on the renewal of the insurance business referred to in (iii) supra.**

- 7. The Plaintiff has met all of her obligations under the Commission Agreement.**
- 8. It was an implied term of the Commission Agreement that the First Defendant would do all things necessary to perform the Commission Agreement and would not do anything to prevent or disable the Plaintiff from earning her commission.**
- 9. It was an implied term or term necessary to be implied to lend business efficiency and good faith to the Commission**

Agreement that there existed between the Intermediary and the Contractor a relationship of trust and confidence.

- 10. Impressed with that duty the Plaintiff met all of her obligations under the Commission Agreement but notwithstanding and in fundamental breach of contract the First Defendant contumaciously destroyed such trust and confidence as existed between the parties when the First Defendant and/or Second Defendant locked her out of her personal office on the 3rd November 2016 at the offices of the First Defendant and Second Defendant Goodman's Bay Corporate Centre, West Bay Street, Nassau and deactivated her email access.**
- 11. In the premises the Intermediary is entitled to an account of all business referrals introduced and accepted for insurance business by the Contractor from the inception of the Commission Agreement to the date of the Writ herein and payment of the sums found due on the taking of the account together with interest and damages under the equitable jurisdiction of the court alternatively statutory damages.**
- 12. Further or alternatively the Plaintiff has suffered loss and damage by reason of the First Defendant's Breaches of the Commission Agreement.**

PARTICULARS

(These are the best particulars the Plaintiff can provide of loss of commission until after the taking of the account herein.)

Year	Commission Date
2011 – 2016	\$ 548,232.00
2017	\$ 541,329.00
2018	\$ 395,820.00
Total	\$1,485,390.00

AND THE PLAINTIFF Claims:

- 1. An account of all referrals of clients for insurance business to the First Defendant and Second Defendant by and through the agency of the Plaintiff underwritten by the First Defendant from inception of the Commission Agreement to the date of the Writ herein (including renewal commissions) and regardless of whether or not such insurance products or business is held in the name Cotswold Insurance (Barbados) Limited the Third Defendant or any emanation or nominee or custodian entity for the benefit of such clients.**
- 2. An Order that the First Defendant and/or Second Defendant do pay the Plaintiff all sums found due to her on taking of the said account;**
- 3. Damages or Equitable compensation under the Equitable Jurisdiction of the Court;**
- 4. All necessary tracing orders;**
- 5. Alternatively, Interest (including interest on Damages) pursuant to the Civil Procedure (Award of Interest) Act Chapter 80;**
- 6. Damages for Breach of Contract;**

- 7. All further and necessary accounts directions and inquiries;**
- 8. Costs;**
- 9. Such further and other relief to the court may seem just.**

Dated 11th September, 2018.”

[20] I am of the opinion that the Statement of Claim shows a reasonable cause of action as against all of the Defendants for the following reasons;

[21] It has not been denied that a contracted employment relationship existed between the plaintiff and at least one of the parties.

[22] The commission agreement was intended to be between the Plaintiff and Cotswold Holdings Limited and Subsidiaries. When taken at its plain and simple meaning, the intention was that the agreement was intended to be as between the Plaintiff and the Holding Company of Cotswold along with its subsidiaries. That is plain and unambiguous.

[23] The First, Second and Third Defendants entered APPEARANCES in the instant matter. In the case of SOMPORTEX LTD. V. PHILADELPHIA chewing gum corporation [1968] 3 ALL E.R. 26 the facts of which were;

“In May 1967 an English Company obtained leave to serve on an American Company notice of a Writ claiming damages for breach of contract. On 9 August 1967, the American Company acting on the

advice of an American firm of attorneys and an English firm of solicitors, entered a conditional appearance under RSC, Order 12 r. 7, in the action. The appearance was entered, according to an affidavit of one of the partners in the firm of attorneys, ‘on a tentative basis solely to preserve [his] client’s right to contest the jurisdiction of the court in England if [his] firm deemed such action desirable.’ On 18 August a summons was taken out by the American Company, to set aside the Writ. This summons was heard on November 13 and dismissed, time being allowed to the American company to apply for leave to withdraw their appearance under RSC 1965 Order 21, rule 1. On appeal from an order of the judge granting leave.”

HELD: The conditional appearance was entered after competent legal advice and not by mistake, and the American company should not be allowed to resile from the election so made, as the plaintiffs had continued the English action on the basis of the entry of appearance, accordingly leave to withdraw appearance would be refused, and the conditional appearance would stand as unconditional subject to any appeal from the order dismissing the application to set aside the Writ (Appeal Allowed).”

[24] LORD DENNING M.R. said, at paragraphs 28 and 29;

28. “The alternatives then open to the American company were these: first, they need not have entered an appearance at all. If so, judgment might go against them in England, but if the English company sought to enforce that judgment in the courts

of Pennsylvania (where the American company was incorporated) it could not be enforced there, because the American company would not have submitted to the jurisdiction of the English courts. The second alternative was to enter a conditional appearance to this writ and contend that the English courts had no jurisdiction in the matter and apply to set aside the writ. That was the course they took. On 9 August 1967, their lawyers, Clifford-Turner & Co. entered a conditional appearance here for the Philadelphia Chewing Gum Corporation without prejudice to an application to set aside the writ. The memorandum of conditional appearance was stamped with the usual formula;

“This appearance is to stand as unconditional unless the defendant applies within fourteen days to set aside the writ and serve thereof and obtains an order to that effect.”

29. **“It is indeed a difficult point. No doubt in a proper case this court can give leave to withdraw an appearance. It would do so, for instance, if a solicitor entered an appearance without proper authority, or if some mistake had been made which rendered it just to allow the appearance to be withdrawn. It was submitted to us that this was a case of mistake – a mistake by the Pennsylvania lawyers advising the American company – because they did not understand the effect of a conditional appearance in England.”**

[25] The First, Second and Third Defendants by entering an UNCONDITIONAL Appearance have all subjected themselves to the jurisdiction of the court and as

such are parties. It therefore goes without saying that the Defendants herein have subjected themselves to the jurisdiction of the court.

[26] **CAN AN UNSIGNED AGREEMENT STILL BIND THE PARTIES?**

[28] In the case of REVILLE INDEPENDENT LLC V. ANOTECH INTERNATIONAL (UK) LTD [2015] EWHC 726 (Comm) the facts of which were;

- "1. This dispute is mainly about whether a binding contract came into existence in the world where TV shows about cooking meet the manufacture of cookware. The Claimant, Reveille Independent LLC, a US television company, brings this claim against the Defendant, Anotech International (UK) Limited, a distributor of cookware, for debt and damages for breach of contract, qualified at US\$1,710,000, together with interest and costs.**
- 2. The claim arises from the Claimant's alleged agreement to licence to the Defendant US intellectual property rights (the "MasterChef US" BRAND) in the United States and Canada for a five year period and to permit the integration and promotion of the Defendant's home cookware and bakeware products into three episodes of the television series "MasterChef US", broadcast on the FOX Network in the USA in late July and early August, 2011.**
- 3. The Claimant contends that in March 2011 it entered into a binding agreement with the Defendant for the licensing and integration on the terms set out in a Deal Memorandum signed**

by the parties (“the Deal Memo”), and that, having fully performed its obligations, it is entitled to payment of;

- an advance of US\$52,500, payable upon signing.
- US\$300,000 for the integration of the Defendant’s products into Series 2 of “MasterChef US”.
- US\$157,500, us\$250,000 on 1st May 2011, 1st March 2012 and 1st May 2013.

4. These sums, totaling US\$1,010,000, are claimed as a debt, alternatively as damages. The Claimant also claims damages of a further US\$700,000, representing the sums of US\$350,000 that would have been payable under the Deal Memo on 1at March 2014 and 1st March 2015, had the Claimant not accepted the Defendant’s repudiation and terminated the contract on 24th July 2013.

5. Alternatively, the Claimant contends that, having granted the relevant licences to the Defendant ad integrated the Defendant’s products into its television shows, it is entitled to reasonable consideration for doing so, valued at US\$1,710,000. This is advanced as an unjust enrichment claim.

6. The Defendant says that no contract was reached between the parties and therefore the claim fails. It says that the Deal Memo executed by the Defendant on 28 February 2011 was not, as the Claimant alleges, signed by Mr. Friedman of the Claimant on 2 March 2011. The Defendant claims that there was never a binding contract between the parties, either on the terms of the Deal Memo or otherwise, that even if there was such a contract, it was subject to a condition precedent which was never fulfilled (“the Brands Conflict Term issue”). If that be wrong the Defendant says that the Claimant failed to perform its

obligations under any contract, a claim that has rather fallen away.”

[29] JUSTICE MACKIE Q.C. held that the Deal Memorandum was binding. Although the claimant had not established that it had signed the Deal Memorandum, it was clear that the contract had been ACCEPTED BY CONDUCT and was not subject to a condition precedent. JUSTICE MACKIE Q.C. stated at paragraphs 19 -33;

“19. The main points requiring decision are first whether the Claimant signed THE Deal Memo after it had been returned by the Defendant, secondly whether the Claimant’s conduct amounted to acceptance of the Deal Memo, thirdly what the Brands Conflict Term means and fourthly what if any sums the Defendant should pay to the Claimant.

Was the Agreement signed by the Claimant in March 2011?

20. The Deal Memorandum stated that it was not to be binding on Reveille until signed by both parties. It was signed by the Defendant but there is dispute about when it was signed by the Claimant. The burden of proof lies on the Claimant to prove that it was signed in March 2011, Mr. Friedman recalled that he had read the document when received, signed it and then placed it in a folder on his desk. I accept that Mr. Friedman was an entirely frank and honest witness but I am not convinced that his memory of a minor administrative task carried out four years ago is accurate. On this issue the absence of evidence from Mr. Stevens is irrelevant. The contemporaneous documents indicate one very short message from Mr. Friedman to the effect that it was signed but a longer and more explicit one recording that it was not. Of course these documents have to be seen in

the context of people receiving numerous emails every day about what may have been many deals. But on balance the contemporaneous documents conflict with Mr. Friedman's recollection. What about the commercial probabilities? The Claimant had a reason not to sign it when it was received by Mr. Friedman. The deal could not go ahead without the agreement of Fox. Further the terms of the short relevant email on 7 March 2011 confirm that this seems to have been a formality. Another reason not to sign the Agreement was that it had been received in an incomplete state and with the new handwritten Brands Conflict Term. Mr. Friedman later sought to persuade Mr. Stevens to sign a new copy, on the face of it an indication that the previous document was unsatisfactory in some way. Unfortunately at a later stage the circumstances of the signing of the Agreement became very confused as Mr. Cook's detailed written analysis makes clear. While I agree that the ins and outs of that are irrelevant the fact is that the Claimant lost the original document and never sent a signed copy to the Defendant. The Claimant cannot produce it. Further the Claimant's message on this subject in June 2012 was regrettably not a candid presentation of what had happened thus causing further uncertainty about what happened. For these reasons I do not consider that the Claimant has shown that the Agreement was signed by Mr. Friedman in March 2011.

Was there communication of acceptance?

21. The Defendant says alternatively that even if Mr. Friedman signed the Deal Memo there was no binding contract because the Claimant did not notify the Defendant that it had signed the Deal Memo or provide it with an executed copy – see Chitty at

para 2 – 045, “The general rule is that an acceptance has no legal effect until it is communicated to the offeror. Accordingly, there is no contract where a person writes an acceptance on a piece of paper which he simply keeps ... The main reason for the rule is that it could cause hardship to the offeror to be bound without knowing that his offer had been accepted.”

- 22. There is no suggestion that the Claimant did communicate acceptance – except arguably by conduct – so there will only be a contract if the Deal Memo was accepted by conduct.**
- 23. The signature of the parties to a written contract is not a precondition to the existence of contractual relations, as a contract can equally be accepted by conduct – see for a recent statement of the law MSM Consulting Ltd v. United Republic of Tanzania [2009] EWHC 121 (QB) at [119] per Christopher Clarke J.**
- 24. The Claimant also argues that the signature provision within the Deal Memo was for its benefit alone so that it could waive it. The rules relating to prescribed modes of acceptance are based on the assumptions that (i) the offer was drawn up by the offeror, and (ii) the stipulations as to the mode of acceptance were made by him for his benefit. However, it is also possible for the terms of an offer to be drawn up by the offeree, which is what happened here, when Mr. Stevens amended the Claimant’s draft Deal Memo. In such a case, the stipulations as to the mode of acceptance are to be treated as being for the benefit and protection of the offeree, and not the offeror. Ordinarily in such circumstances an acceptance by a method other than that prescribed will be effective unless it can be shown that the failure to use the stipulated mode has prejudiced the offeror (and no such prejudice is pleaded in this case). The Claimant’s**

position is that, if the mode of acceptance was for its benefit only, the requirement to return a copy of the executed Deal Memo did not constitute a pre-condition to contractual relations.

- 25. The Defendant accepts that where a provision in a contract is for the benefit of a party that party is entitled to waive it. In the present case, the requirement in the Deal Memo that it would only be binding on the Claimant when signed by the Claimant. The Defendant also accepts that this could be waived by the Claimant. However, it is still necessary for the Claimant to show that it did in fact waive it. The fact that the stipulation is for the benefit of the Claimant does not mean that the Claimant can simply decide, after the event, to ignore it.**

- 26. These points are rightly described by Mr. Stone as 'formalistic'. The substance is that the Defendant would not be bound by the Deal Memo until the Claimant's acceptance of it was communicated – not a mere formality given that it contained the Defendant's hand written formulation of the Brands Conflict Term. The Claimant did not communicate acceptance by signing and returning the document designed for the purpose. There is force in the submission that one reason for having such a requirement is to remove the uncertainty which otherwise might arise and has done so in this case. As I see it those factors may make it more difficult to show that acceptance has been validly communicated by conduct but they do not affect the principle. The evidence must be clear and, when considered as a whole and in context, unequivocal.**

**Was acceptance communicated to the Defendant by conduct? -
The facts.**

27. In order to decide whether there was acceptance by conduct I have to consider what the Claimant actually did, mainly as regards carrying out the alleged contract with the Defendant. So I look first at the tasks envisaged by the Deal Memo mainly integration and licensing.
28. Integration. The Claimant says that it did everything that it was required to do to integrate the products supplied by the Defendant citing in particular the evidence of Mr. Bennett. This sets out his direct knowledge of the integrations in impressive detail from paragraphs 27 to 140 of his witness statement and is fully supported by the documents he exhibits – such as records of weekly telephone meetings. Some aspects are set out in the chronology above.
29. The Defendant's main evidence on this point was four paragraphs in the statement of Mr. Helskens. It is not to the point that he personally did not approve the talking points submitted on the Defendant's behalf or that the branding shown in a programme was unsatisfactory to him when these matters do not seem to have occurred to his subordinates at the time. In evidence however Mr. Helskens said of the integration services "*they were given to us, yes*" and that his complaint that promotional credits were not given properly was not accurate. Mr. Helskens also on reflection accepted that the Claimant was not at fault for naming "The Cookware Company" in the promotional credit, since that is what Mr. Stevens had told the Claimant to do.
30. The lengthy and well documented evidence of the Claimant makes the position extremely clear. There is nothing in the complaints now made. They were not made at the time and are unsupported by the documents. In September 2011 Mr.

Stevens, the Defendant's managing director, acknowledged both externally and internally that his company was liable to pay for the integrations. If the Claimant had failed in its commitments, or was alleged to do so, the Defendant would have said something about it by then.

- 31. Licensing. The Claimant says, correctly, that the Defendant was both given the right to use, and did and/or attempted to use the Claimant's intellectual property. In internal communications the Defendant acknowledged that it had a licence to use the Claimant's intellectual property – for example Mr. Lambertz' email of 10 March 2011 albeit that he worked for GreenPan. Similar acknowledgements were made in communications with the Claimant listing Master Chef US as one of its licences on a proposal form. The Defendant marketed cookware bearing the Claimant' intellectual property, samples of which were displayed at the Chicago Show and provided to US retailers.**
- 32. The Defendant used the Claimant's intellectual property in promoting itself at the Chicago Show. The Defendant's sale representatives used the MasterChef name in their email footers, when corresponding with third party retailers. GreenPan's sales representatives informed US retailers that they had *"bought the licence to MasterChef"* and *"have a licence agreement for MasterChef"*. The Defendant's sales literature and press releases referred to the fact that the Defendant had the licence for MasterChef US. The Defendant was brought into round-table monthly conference calls with other licensees. In the accompanying emails which it saw, the Defendant was referred to as a licensee. The picture that emerges from the documents was supported and amplified by the witness evidence of Ms. Heiss who, as I have said, was an**

obviously reliable witness. Mr. Helskens was and is in a senior position above the day to day dealings which were left mainly to Mr. Stevens and his team. He attributed apparent admissions to the hyperbole of sales people *“promising the sky, you know how it works with salespeople”*. He accepted that the Defendant used MasterChef-branded product in the USA for marketing purposes and that only a US licence conferred by the Deal Memo could have permitted that. In reality there was no evidence from a witness for the Defendant who could contradict the picture presented by the Claimant’s witnesses and confirmed by the documents.

33. It is overwhelmingly clear that the work envisaged by the Deal Memo was carried out by the parties. That does not of itself mean that there was acceptance by conduct but it goes a long way”.

[29] If the court accepts the principle emanating from the REVEILLE case, which it does then that does not completely resolve the issue as it leaves the jurisdictional issue. The question here is; “can a court imply a term into a contract for good business efficacy? Or does the court have the power to declare a term void or unconscionable in the circumstances.

DOCTRINE OF FORUM NON CONVENIENS:

[30] The doctrine of forum non conveniens is an English Doctrine which was defined by LORD GOFF in the case of SPILIADA MARITIME CORPORATION V. CANSULEX Ltd. 91987) AC 460 at page 476 where it was HELD that:

“a national court may decline to exercise jurisdiction on the ground that a court in another state, which also has jurisdiction, would objectively be a more appropriate forum for the trial of the action, that is to say, a forum in which the case may be tried more suitably for the interest of all the parties and the ends of justice.”

[31] In cases where a contract specifies which country’s laws will govern the contract and any disputes arising out of the contract, the case of **THE EL AMRIA [1981] 2 LLOYDS Rep. 119 (C.A.)** provides some guidance in this regard. In that case, LORD BRANDON, following an earlier decision in the case of **THE ELEFThERIA [1969] 1 LLOYDS REP. 237** at pg. 242 sets out a number of principles by which the question of FORUM NON CONVENIENS should be decided in cases where the plaintiff sues in England in breach of an exclusive foreign jurisdiction clause. His criteria laid down in that case have now been accepted as the basic statement on the question, reiterated by the House of Lords in the case of **DONOHUE V. ARMCO INC [2002] 1 LLOYD’S REP. 425** at pp. 432 – 433 (as per LORD BINGHAM). LORD BRANDON’S principles are as follows:-

- “(1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English Court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but HAS DISCRETION (my emphasis) whether to do so or not.**
- (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown.**
- (3) The burden of proving such strong cause is on the plaintiffs.**

- (4) In exercising its discretion the Court should take into account all of the circumstances of the particular case.**
- (5) In particular, but without prejudice to (4) the following matters, where they arise, may properly be regarded:**
- (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial between the English and foreign courts.**
 - (b) Whether the law of the foreign Court applies and if so, whether it differs from English Law in any material respects.**
 - (c) With what country either party is connected, and how closely.**
 - (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.**
 - (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would;**
 - (i) be deprived of security for their claim;**
 - (ii) be unable to enforce any judgement obtained;**
 - (iii) be faced with a time-bar not applicable in England;**
or
 - (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.”**

[32] Also in the case of **BRITISH AEROSPACE V. DEE HOWARD** [1993] 1 LLOYDS REP. 368, the Court held that;

“where a contract contained an exclusive jurisdiction clause providing for a case to be tried in the UK, it was relevant that the circumstances which might now suggest a trial elsewhere were perfectly foreseeable at the time of the contract.”

[33] It was further held in the **AEROSPACE** case (supra) that;

“the new circumstances had to point to some factor which could not have been foreseen on which they can rely for displacing the bargain which they made i.e. that they would not object to the jurisdiction of the English court.”

[34] In the case of **U and J JVU; UVJ (No. 2) (Domicile)** [2017] EWHC 449 (Fam). The Honourable Mr. Justice Cobb said at page 16 paras 69 – 71;

“Forum Non Conveniens:

69. **“Given that jurisdiction is founded on the basis of the Petitioner’s domicile, I must now consider whether England is the *forum non conveniens*. I am first to consider the principles of law.**

70. The Respondent’s case is brought under para. 9 (1), (2) of schedule 1 to the DMPA 1973 or at common law. The English Court has power

to order a stay of proceedings on the basis that England is an inappropriate forum (*forum non conveniens*) if the respondent can show that there is another court with competent jurisdiction which is clearly or distinctly more appropriate than England for the trial of the action, and it is not unjust that the Petitioner be deprived of the right to trial in England. This is the well-established principle illustrated by *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 (“*Spiliada*”). The essential principles of *Spiliada* are set out in the leading speech of Lord Goff of Chieveley, at 476C-478E. He explained the elements of the test to be applied in a *forum conveniens* case in this way ((a)-(f)):

- i) (a) The basic principle is that a stay will only be granted on the ground of *forum non conveniens* where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice.**
- ii) (b) In general the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay. It is however of importance to remember that each party will seek to establish the existence of certain matters which will assist him in persuading the court to exercise its discretion in his favour, and that in respect of any such matter the evidential burden will rest on the party who asserts its existence. Furthermore, if the court is satisfied that there is another**

available forum which is prima facie the appropriate forum for the trial of the action, the burden will then shift to the plaintiff to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in this country (see (f), below).

- iii) (c) The question being whether there is some other forum which is the appropriate forum for the trial of the action, it is pertinent to ask whether the fact that the plaintiff has, *ex hypothesi*, founded jurisdiction as of right in accordance with the law of this country, of itself gives the plaintiff an advantage in the sense that the English court will not lightly disturb jurisdiction so established. Such indeed appears to be the law in the United States...
- iv) There are cases where no particular forum can be described as the natural forum for the trial of the action. I can see no reason why the English court should not refuse to grant a stay in such a case, where jurisdiction has been founded as of right. It is significant that, in all the leading English cases where a stay has been granted, there has been another clearly more appropriate forum. In my opinion, the burden resting on the defendant is not just to show that England is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum.

In this way, proper regard is paid to the fact that jurisdiction has been founded in England as of right (see *MacShannon's* case [1978] A.C. 795, per Lord Salmon).

- v.(d) Since the question is whether there exists some other forum which is clearly more appropriate for the trial of the action, the court will look first to see what factors there are which point in the direction of another forum. These are the factors which Lord Diplock describes, in *MacShannon's* case [1978] A.C. 795, 812, as indicating that justice can be done in the other forum at “substantially less inconvenience or expense.” Or adopting the language of Lord Keith of Kinkel, in the *Abidin Daver* [1984] A.C. 398, 415, when he referred to the “natural forum” as being “that with which the action had the most real and substantial connection.” So it is for connecting factors in this sense that the court must first look; and these will include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction and the places where the parties respectively reside or carry on business.
- vi) (e) If the court concludes at that stage that there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay.
- vii) If, however, the court concludes at that stage that there is some other available forum which prima

facie is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this enquiry, the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions. One such factor can be the fact, if established objectively by cogent evidence, that the plaintiff will not obtain justice in the foreign jurisdiction; see *The Abidin Daver* [1984] 1 A.C. 398, 411, per Lord Diplock, a passage which now makes plain that, on this enquiry, the burden of proof shifts to the plaintiff.

71. In this case, I have determined that jurisdiction founds with the Petitioner's domicile in England. It is for the Respondent to demonstrate (see [70] (ii) above) that the divorce and ancillary matters may be tried more suitably for the interests of all the parties and the ends of justice in the Municipal Court of Sarajevo."

[35] Therefore, after careful consideration of the legal arguments and in all the circumstance I deny the application to strike out the Plaintiff's Statement of Claim. Also, for the reasons stated above I find that in all the circumstances the exclusive jurisdiction clause falls within the confines of "foreign non-conveniens." Both parties are present in the jurisdiction where everything as it relates to documents, evidence, witnesses and operations exist. Therefore the jurisdiction is transferred to the jurisdiction of the Commonwealth of The Bahamas where it is plain and obvious that the trial ought to be heard.

[36] Costs are awarded to the Plaintiff to be taxed if not agreed.

[37] I wish however to offer a word of caution to parties entering into contracts which contain exclusive jurisdictional clauses. Governing law in contracts is not to be taken lightly. Parties are best advised to focus their minds to jurisdictional matters before the contract is entered into.

Dated this 26 day of May A.D., 2020.



Keith H. Thompson
Justice