**COMMONWEALTH OF THE BAHAMAS**
**IN THE SUPREME COURT**
**Common Law and Equity Side**
**2019/CLE/gen/FP/00224**

**BETWEEN**

**(1) MARVIN DAMES**
**(2) LATALIA DAMES**
**Plaintiffs**

**AND**

**FIRST CARIBBEAN INTERNATIONAL BANK (Bahamas) Ltd**
**AND**
**INSURANCE MANAGEMENT (BAHAMAS) LTD**
**Defendants**

BEFORE: The Honourable Justice Petra M. Hanna-Adderley

APPEARANCES: Mr. Beryn Duncanson for the Plaintiffs

Ms. Michelle Deveaux and Ms. Berchel Wilson for the First Defendants

Ms. Viola Major and Ms. Camille Cleare for the Second Defendants

HEARING DATES: August 14, 20 and 25 and September 17, 2020

**RULING**

**Hanna-Adderley, J**

There are four applications before the Court. The first is an application by the First Defendant to strike out the Plaintiffs Statement of Claim, the second is an application by the First Defendant to strike out portions of the Affidavit evidence, the third is an application by the Plaintiffs for summary judgment and the fourth is an application by the Plaintiffs for declaratory relief and in response the Second Defendant's preliminary objection to declaratory relief.

**Introduction**

1. The first is an application filed by the First Defendant on January 13, 2020 by way of a Summons pursuant to Order 18, Rule 19 of the Rules of the Supreme Court ("RSC") to strike out the Plaintiffs Writ of Summons filed on November 26, 2019 on the grounds that it discloses no reasonable cause of action; it is scandalous; it is frivolous and vexatious and it is an abuse of the court process and alternatively pursuant to Order 15, Rule 6 of the RSC that the Writ of Summons be amended by striking out the First Defendant on the

grounds that the First Defendant has been improperly joined as a party to the action and that the filing of the First Defendant's Defence be stayed pending the determination of the Summons.

2. The second is an application filed by the First Defendant on June 3, 2020 pursuant to Order 41, Rule 6 of the RSC seeking an Order that the Court strike out portions of paragraph 3, 5 and 6 of the Plaintiffs Affidavit filed on February 4, 2020 as those paragraphs contain evidence which are scandalous, irrelevant and/or oppressive and that paragraph 10 of the said Affidavit be struck out pursuant to Section 10 of the Listening Devices Act as it is inadmissible evidence having been obtained contrary to the provisions of Section 4(2) of the Listening Devices Act. The First Defendant's Summons was supported by the Affidavit of Sally Laing filed on June 3, 2020.
3. The third is an application filed by the Plaintiffs on February 4, 2020 by way of a Summons seeking an Order pursuant to Order 14, Rule 3 of the RSC for summary judgment as against both Defendants or either Defendant, an Order directing damages to be assessed before a Judge or Registrar pursuant to Order 37 of the RSC, an Order for further directions pursuant to Order 14, Rule 6 of the RSC and alternatively an Order for an interim payment made payable to the Plaintiffs by both or either Defendant in an amount to be assessed by the Court pursuant to Order 37 of the RSC and an Order for a full accounting to be made to the Plaintiffs by the First Defendant pursuant to Order 43, Rule 2 of the RSC. In support of the Plaintiffs first Summons, they rely on the Joint Affidavit of Latalia and Marvin Dames ("Joint Affidavit") filed on February 4, 2020, Affidavit of Latalia Dames filed on June 24, 2020 and Affidavit of Pamela Hanna filed on June 24, 2020.
4. The fourth is an application filed by the Plaintiffs on August 24, 2020 by way of a Summons ("**the Declaratory Summons**") seeking a declaration that the accord and settlement between the Plaintiffs agreed in correspondence between the parties and verbal notice given by Counsel to the Court on August 14, 2020 is an accord as to withdrawal of the Second Defendant, Insurance Management from this lawsuit and in the usual course of any lawsuit before this Court any payments thereunder ought to be directed to the lawyers for the Plaintiffs and alternatively a declaration that the respective parties were not 'ad idem' on the question of settlement, so therefore no settlement was concluded; an order directing that costs be payable by the Second Defendants to the Plaintiffs on a full indemnity basis in any event; any further relief and/or directions of the Court. The Plaintiffs application is supported by the Second Affidavit of Beryn Duncanson filed August 24, 2020.
5. The First Defendant's application is opposed by the Plaintiffs and they rely on the Joint Affidavit, Affidavit of Latalia Affidavit and Affidavit of Pamela Hanna.
6. The Plaintiffs application (the Declaratory Summons) is opposed by the Second Defendants by way of a preliminary objection.
7. The Plaintiffs application for summary judgment is opposed by the First Defendant and it relies on the said Affidavit of Sally Laing.

**Statement of Facts**

8. The Plaintiffs filed a Specially Indorsed Writ of Summons on November 26, 2019. In their Statement of Claim they claim inter alia:-

> "1. The Plaintiffs were the owners of a Residential Property ("the Subject Property") located at 110 Explorer's way, Hudson Estate East, Freeport, Grand Bahama
>
> 2. The First Defendant is and was the Bank that holds a mortgage over the Subject Property. The First Defendant also at all material times acted de facto as an insurance broker/agent for the Second Defendants.
>
> 3. The Second Defendant carried on business as Insurance Company located in Freeport, Grand Bahama.
>
> 4. The Plaintiffs made monthly payments to the First Defendant at a total amount of [$____] that was inclusive of both the subject property mortgage payment and homeowner's insurance policy payments ("Comprehensive Homeowners Policy").
>
> 5. The Plaintiff's were under the belief and acted on such belief that the subject property was effectively insured.
>
> 6. On or about the 1st and 2nd of September 2019 the subject property sustained significant damages due to Hurricane Dorian estimated at a total loss of $110,000.
>
> 7. The Plaintiffs sought to make a claim against their insurance policy. They were subsequently advised by both the Defendants that no such insurance policy for the subject property had been renewed or effected.
>
> 8. Due to the grievous neglect of the First Defendant to pay insurance premiums the insurance policy over the subject property was cancelled by the Second Defendants, but without notice of any kind to the Plaintiffs from either Defendant.
>
> 9. It was an implied term of the contract that the First Defendant would act with reasonable care and skill acting as brokers/agents and as a fiduciary.
>
> 10. By reason of the breach of contract and/or negligence of the Defendants the Plaintiffs suffered loss and damage.

> Particular of Negligence and/or Breach of Contract of the Defendants
>
> a.The First Defendant failed to pay insurance premiums to the insurers reasonably promptly or at all
>
> b. Both Defendants failed to advise the Plaintiffs that insurance premiums had not been paid promptly to insurers or at all
>
> c. Failed to notify that there was any default and/or expiry of the insurance policy
>
> d. Failed to effect renewal of an adequate insurance homeowners policy or at all for the subject property

e. Failed to take reasonable care and skill to ensure that their client's insurance needs were clearly met.

f. Failed to act with reasonable care and skill of that of a competent broker/agent/insurer and/or fiduciary.

11. The First Defendant has also caused the Plaintiff's considerable emotional distress and inconvenience as a result of their failure to effect an insurance policy over the subject home.

12. The Plaintiffs made clear instructions to the First Defendant to ensure that an adequate homeowners insurance policy was in place. Such instructions were made for the peace of mind of the Plaintiffs, which was ultimately wholly lacking.

PARTICULAR OF DAMAGE

The Claimant's losses are set out in the attached schedule of past and future expenses and losses served with these Particulars of Claim.

13. The Plaintiffs claim:

(a) General Damages;

(b) Damages for Emotional Distress;

(c) In the alternative Aggravated Damages;

(d) Interest at commercial rates;

(e) Costs on the full indemnity basis."

The Schedule of Past and Future Expenses and Losses are:-

"1. GENERAL DAMAGES

| | |
|---|---|
| (a) General Damages | To be assessed |
| (b) Damages for Emotional Distress | $50,000 |
| (c) Aggravated Damages | To be assessed |
| 2. SPECIAL DAMAGES | |
| (a) Travel Expenses | $[ ] |
| (b) Relocation Expenses | $[ ]" |

**The First Defendant's Applications to Strike Out**

**Issues**

9. The issues to be determined before the Court on these applications are whether the Plaintiffs Statement of Claim discloses a reasonable cause of action or raises some question fit to be decided and/or is scandalous, frivolous or vexatious and/or may prejudice, embarrass or delay the fair trial of the action and/or is otherwise an abuse of the process of the Court.
10. Further, the Court must also determine whether the "contentious" portions of the Joint Affidavit and Affidavit of Latalia Dames should be struck for being scandalous, frivolous and oppressive pursuant to Order 41, Rule 6 of the RSC and inadmissible pursuant to Section 10 of the Listening Devices Act.

**Analysis and Conclusion**

**The Law**

11. Order 18, Rule 19 of the RSC states:-

"19. (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that —

(a) it discloses no reasonable cause of action or defence, as the case may be; or
(b) it is scandalous, frivolous or vexatious; or
(c) it may 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 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, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading."

12. The power to strike out is a Draconian remedy which should be employed only in clear and obvious cases where it is possible to say at the interlocutory stage and before full discovery that a particular allegation was incapable of proof (per Allen, J in **Bettas Limited v Hong Kong and Shanghai Banking Corporation Limited and HSBC Bank Plc SCCiv App No. 312 of 2013**).
13. Guidance on how this rule should be applied is set out by **Osadabey, JA** in **Hamby v Hermitage Estates Ltd SCCiv App No. 21 of 2008** and also by **Auld, LJ** in **Electra Private Equity Partners v KPMG Peat Marwick (a firm) & Ors [2001] 1 BCLC 589**. Osadabey, JA states in Hamby:

"It is well settled that the jurisdiction to strike out is to be used sparingly and limited to plain and obvious cases where there is no need for a trial. There is no doubt that the

exercise of that jurisdiction may deprive a party of the examination and cross examination of witnesses which can change the result of a case." At page 613 of **Electra Private Equity Partners**, Auld LJ stated: "It is trite law that the power to strike out a claim under RSC Ord.18, r.19 or in the inherent jurisdiction of the Court should only be exercised in "plain and obvious" cases. That is particularly so where there are issues as to material primary facts and the inferences to be drawn from them, and when there has been no discovery or oral evidence. In such cases, as Mr. Aldous submitted, to succeed in an application to strike out, a defendant must show that there is no realistic possibility of the plaintiff establishing a cause of action consistently with his pleading and the possible facts of the matter when they are known. Certainly, a judge, on a strike-out application where the central issue is one of determination of a legal outcome by reference to as yet undetermined facts, should not attempt to try the case on the affidavits. See **Goodson v Grierson [1908] 1 KB 761, CA**, per Fletcher Moulton LJ at 764-5 and Buckley LJ at 766; **Wenlock v Moloney**, per Sellers LJ at 1242G-1243D and Danckwerts LJ at 1244B ([1965] 1 WLR 1238); and **Torras v Al Sabah & others(unreported) 21 March 1997 CA**, per Saville LJ. There may be more scope for early summary judicial dismissal of a claim where the evidence relied on by the plaintiff can properly be characterised as "shadowy" or where "the story told in the pleadings is a myth . . . and has no substantial foundation"; see eg **Lawrance v Lord Norreys (1890) 15 App Cas 210**, per Lord Herschell at 219-220. However, the court should proceed with great caution in exercising its power of strike-out on such a factual basis when all the facts are not known to it, when they and the legal principle(s) turning on them are complex and the law, as here, is in a state of development. It should only strike out a claim in a clear and obvious case. Thus, in **McDonald's Corporation v Steel [1995] 3 All ER 615, [1995] EMLR 527, CA**, Neill LJ, with whom Steyn and Peter Gibson LJJ agreed, said, at 623e-f of the former report, that the power to strike out was a Draconian remedy which should be employed only in clear and obvious cases where it was possible to say at the interlocutory stage and before full discovery that a particular allegation was incapable of proof."

**Discloses No Reasonable Cause of Action**

14. Counsel for the First Defendant, Ms. Deveaux referred the Court to **Drummond-Jackson v British Medical Association 1 W.L.R. 688** in support of her submission that the Plaintiffs claim fails to disclose a reasonable cause of action. She submits as highlighted by Lord Pearson in **Drummond-Jackson (supra) as found at 18/19/10 Commentary of The Supreme Court Practice 1999 on page 349**, a reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleadings are considered. Moreover as long as the statement of claim or particulars disclose some cause of action or raise some question fit to be decided by a Judge or jury, the mere fact that the case is weak and not likely to succeed is no ground for striking it out (**18/19/10 Commentary of The Supreme Court Practice 1999 on page 349**). She also submits that pursuant to the Court's inherent jurisdiction the Court may receive evidence as to why no reasonable cause of action is disclosed, although under

Rule 19(1)(a) the Court must consider only the allegations on the pleadings. See **Supreme Court Practice White Book 1999 Note 18/19/5**.

15. She submits that the allegations of negligence in the Plaintiffs' Statement of Claim is not made out as there is no pleading of the actual loss sustained by the Plaintiffs and as such an essential ingredient of the tort has not been pleaded. It is her submission that a claim of negligence requires a duty of care which is owed, a breach of that duty and the breach of that duty has caused or resulted in loss or damage to the party claiming. See **Odgers on Civil Court Actions 24th Ed., 1996 p 206, para 10.03; Caparo Industries plc v Dickman (1990) 1 AC 605; Nykredit Mortgage Bank Plc v Edward Erdman Group Ltd [1997] 1 W.L.R. 1627**
16. Ms. Deveaux further submits that the First Defendant did not owe any duty of care in contract or otherwise to the Plaintiffs to keep the collateral property insured nor did the Statement of Claim give any particulars of a particular contractual term of the Restructured Credit Facility or Mortgage which the First Defendant had breached. Additionally, she submits that the post 2017 escrow collection of the insurance premiums by the Bank could not derogate from the Plaintiffs' covenant or duty to keep the Collateral Property insured and that an implied term cannot be inconsistent with or override an express term of an agreement. Further, it is her submission that any accumulation of the insurance proceeds by the Bank was not done as broker or agent for the Plaintiffs but was done on behalf of and as agent for the Insurer pursuant to the arrangement between the Bank and the Insurer.
17. Moreover, she submits that the Plaintiffs have also failed to sufficiently plead the nexus between the alleged breach of duty by the First Defendant and the loss and damage claimed and such breach must be the "effective or dominant cause" of the loss sustained. She referred the Court to the case of **Galoo v Bright Grahame Murphy 1994 1 WLR 1360 at 1370-1374**. It is her submission that in the instant case the alleged breach relied on by the Plaintiffs i.e. a failure to pay over insurance premiums was the not the effective or dominant cause of the Plaintiffs' loss.
18. She also submits that while the Court will not usually strike out the action where an amendment of the pleadings can cure the defect, in the instant case she submits that no amendment by the Plaintiffs can cure the defect in the pleading against the Bank. She further submits that the Plaintiffs are unable to plead a loss attributable to the alleged breach on the part of the Bank and no opportunity can be given to rectify the pleading. See **Republic of Peru v Peruvian Guano Co (1887) 36 Ch. D 489 at 496.**
19. Lastly, she submits that there was no duty on the First Defendant to keep the Collateral Property insured but that in any event the Plaintiffs have suffered no loss as the Collateral property was insured for the loss and damage.
20. Counsel for the Plaintiffs, Mr. Beryn Duncanson submits that the Plaintiffs have made out the basis for a claim and that all of the elements such as duty of care as there is a relationship even as common strangers in a tort scenario but the relationship as banker and fiduciary between the First Defendant and the Plaintiffs. He further submits that the First Defendant was in breach of the said duty and that breach caused the Plaintiffs loss

which he states was the Plaintiffs home being severely damaged in Hurricane Dorian. Therefore, it is his submission that all of the basic elements have been pleaded. He refers the Court to **Kim v Park [2011] EWHC 1781 (QB) ["Kim v Park No. 1"] and Kim v Park [2013] EWHC 3568 (QB) ["Kim v Park No.2]** and **Outlook Asset Management LT v Capstone Corporate Ltdet. al [February 11th, 2019\ BVI, Court of Appeal of the Eastern Caribbean Supreme Court.** Moreover, he submits that the Writ elegantly expresses the existence of a duty of care and moreso the fact of a relationship between the bank as banker to the Plaintiffs and that there was a breach of the duty by the facts complained.

21. He also submits that the Courts give an expressed opportunity and warning to a Plaintiff as to any necessary amendment that may be required before and failing which then a strike out would ensure. Further, he submits that the usual and normal course for an opposing party in these circumstances is to make a request for Further and Better Particulars.
22. I accept Ms. Deveaux's submission that for an application grounded pursuant to Order 18, Rule 19(1)(a) of the RSC the Court's duty is to look at the pleadings and the pleadings alone. Therefore, the Court must determine upon looking at the pleadings whether they disclose a reasonable cause of action with some chance of success or raises some question fit to be decided by this Court.
23. In the instant case I find that the Plaintiffs' pleadings are deficient but that they do raise some questions fit to be decided. While on the face of the Statement of Claim there are allegations of negligence, breach of contract and breach of fiduciary duty as against both Defendants, the Plaintiffs have failed to clearly particularize the loss and/or damage sustained by the Plaintiffs by the First Defendant's failure to pay the insurance premiums or to notify the Plaintiffs of the cancellation of the policy. As submitted by Mr. Duncanson, such a deficiency can be cured by a request for further particulars and/or amendment of the Statement of Claim. As established by **Hamby v Hermitage Estates Ltd**. (supra), **Electra Private Equity Partners** (supra) **and Drummond-Jackson** (supra) and other cases mentioned above this is not a plain and obvious case where there is no need for a trial. Therefore, in the circumstances I accept Counsel for the Plaintiffs submissions but I invite him to consider amending his pleadings to cure the said deficiencies.

**Scandalous, Frivolous or Vexatious**

24. Counsel for the First Defendant submits that the First Defendant's contractual relationship with the Plaintiffs as customers could not reasonably give rise to any duty of care owed by the Bank to the Plaintiffs in respect of provision of insurance on the Collateral Property, for which the Plaintiffs could suffer emotional distress. She further submits that emotional distress is a non-pecuniary damage which is normally a non-recoverable where the cause of action stems from a breach of contract except in limited circumstances. She refers the Court to **Addis v Gramaphone (1909) Ch. 488 and Halsbury Laws of England (2019) Vol. 29, para 509** in support of her submission.

25. Additionally, Ms. Deveaux submits that in an action in negligence a claim for aggravated damages is unsustainable unless the pleadings contain sufficient particularization of conduct which justifies going beyond the compensatory nature of damages and refers the Court to the case of **AB v South West Water Services Ltd. (1993) QB 507** in support of her submission.
26. It is her submission that the claims for emotional distress and aggravated damages raised by the Plaintiffs in their Statement of Claim ought to be struck out as unsustainable as the circumstances giving rise to such claims are insufficiently particularized and in any event such losses are unforeseeable in respect of any alleged breach of duty of care in tort by the Bank and such loss is not compensatable as a consequence of any alleged breach of contract by the Bank.
27. Counsel for the Plaintiffs submit that their claim for emotional distress is applicable to a claim for negligence and that the example provided in **Addis v Grammophone (supra)** whereas a banker not honouring a customer's cheque is similar to the Plaintiffs case as discovering the bank's failure to pay forward their insurance premiums for over seven years meant their home was not covered following the passage of a hurricane is a harsher event in terms of emotional distress.
28. Mr. Duncanson also submits that case law is clear on the position that aggravated damages is within the discretion of the Court to award given the conduct of a defendant in litigation and not just a question of the founding of the claim in tort as opposed to contract. He submits that the claim for breach of fiduciary duty justifies the claim for aggravated damages and the clear misconduct of the defendants in colluding to present a fake insurance policy and their recent behavior exposes the Bank to an award of aggravated damages upon the proof of liability.
29. On this ground the Court must consider whether the matter alleged to be scandalous would be admissible in evidence to show the truth of any allegation in the pleading which is material to the relief prayed (**Commentary at 18/19/15 on page 350 in the Supreme Court Practice 1, 1999**, **per Selborne, L.C. in Christie v Christie (1873) L.R. 8 Ch. App at 503**). Moreover, this is applicable for cases which are obviously frivolous or vexatious, or obviously unsustainable (**Commentary at 18/19/16 on page 350 in the Supreme Court Practice 1, 1999 per Lindley L.J. in Att-Gen of Duchy of Lancaster v L. & N.W. Ry [1892] 3 Ch. 274 at 277**). The pleading must be "so clearly frivolous that to put forward would be an abuse of the process of the Court" (**Commentary at 18/19/16 on page 350 in the Supreme Court Practice 1, 1999 per Jeune P. in Young v Holloway [1895] P. 87 at 90**). The relief sought, i.e. aggravated damages, damages for emotional distress and general damages by the Plaintiffs are not sufficiently pleaded/particularized. Moreover on their claim of misconduct by the Defendants to which the Plaintiffs allege a breach of fiduciary duty, they have failed to particularize the breaches and it is only in their Joint Affidavit that they depose to the crux of the alleged breach. In particular they allege that the bank's "unwillingness to provide them with their loan history", the "refusal" to allow them to pay their mortgage payments by way of a standing order and a query as to the way in which the mortgage

payments are applied to the loan all amounted to such a breach however this was not particularized in their Statement of Claim. These deficiencies though can be cured by amendment.

**Abuse of Process**

30. Counsel for the First Defendant submits that where a claim once viable when instituted has been made doomed to fail by reason of subsequent events a court may strike out the action as an abuse of process of the Court and refers the Court to the **Commentary at 18/19/9 of the Supreme Court Practice 1979**. It is her submission that the Court may also strike out and dismiss this action on the basis that even if the alleged failure to pay insurance premiums established a cause of action for the Plaintiffs, subsequent events by the payment over of those premiums and issuance of the valid effectual insurance policy have made the action unsustainable and doomed to fail.
31. Ms. Deveaux relies on the Affidavit evidence of Sally Laing and Melanie Thompson filed June 22, 2020. The evidence of Sally Laing in part is that she is the Branch Manager of the Freeport Branch of the First Defendant. That the Plaintiffs had the responsibility as Mortgagors to insure and keep insured the Collateral Property as set out at Clause 4.6 of the Mortgage deed and that the Collateral Property was insured by the Second Defendant for the sum of $100,000.00. That during the first loan facility the Plaintiffs bore the sole responsibility of paying the insurance premiums pursuant to the terms of Clause 4.6. of the Mortgage deed however the Plaintiffs and the Bank agreed in the Restructured Loan Facility that in the event of non-payment, the Bank reserved the right to charge the insurance to the mortgage account and reschedule payments over the mortgage period. That at the time of entering into the Personal Loan Facility in 2017 the insurance on the Collateral Property had lapsed and the Bank's Credit Risk Department stipulated that the loan payments towards the Personal Loan Facility include a monthly sum held in escrow towards payment of the annual insurance premium. That since the 2017 Personal Loan the Bank has collected the Escrow Payments made to the Insurer towards the annual premium; that it has always been the obligation of the Plaintiffs as Mortgagors to provide evidence of updated insurance cover annually as expressly provided at Clause 1 of the 7 Covenants at page 2 of 3 of the Restructured Loan Facility. That the Collateral Property has insurance coverage for the loss and damage allegedly caused by Hurricane Dorian and that it was the Plaintiffs failure to satisfy the requirements for making a claim to the Second Defendant and that the Second Defendant has not denied liability under the Policy.
32. The evidence of Melanie Thompson in part is that she is the Assistant Manager of Claims of the Freeport Branch of the Second Defendant. That on October 21, 2005 the Second Defendant effected a home building insurance policy for the Plaintiffs over the subject property and that they received instructions to renew the policy in 2006 however no instructions were received to renew the following year and the policy lapsed on September 29, 2007. That in 2011 the Plaintiffs requested insurance cover from the Second Defendant over the subject property for the insured sum of $110,000.00 and the policy took effect on September 26, 2011. That the Second Defendant did not receive any

instructions to renew the policy and the policy lapsed on September 25, 2012. That although the Plaintiffs' building insurance lapsed in September 2012, as a result of discussions between the First and Second Defendants following the passage of Hurricane Dorian in September 2019, the Second Defendant effected a policy of home building insurance over the subject property to allow the Plaintiffs to make a claim under the policy for building damage which is said to have occurred as a result of Hurricane Dorian. That following receipt of the Writ of Summons, the Second Defendant appointed an adjuster and negotiations commenced between the Second Defendant's adjuster and the Plaintiffs regarding the amount to be paid under the policy and these negotiations are ongoing.

33. Ms. Deveaux submits that the evidence of the Second Defendant has confirmed that a valid and effectual insurance policy over the Collateral Property and on the Plaintiffs own evidence before this Court the Insurer has admitted its liability to pay out the insurance proceeds and that the only dispute which remains is a dispute as to the quantum. Moreover, she submits that it was the Plaintiffs failure to lodge a formal claim with the Second Defendant which has affected the Plaintiffs ability to receive the insurance proceeds. Further, as the Second Defendant has not denied liability to pay the insurance proceeds, there is no loss sustained by the Plaintiffs.
34. Counsel for the Plaintiffs submits that the insurance policy the Defendants claim to be in place is a fake and appears to be fraudulent. Mr. Duncanson submits that the evidence of the Second Defendant as found in the Affidavit of Melanie Thompson is that the last proper home policy was in 2012 and that the Defendants met together after Hurricane Dorian to agree a scheme whereby customers of the First Defendant with hurricane claims could be handled. He makes the further submission that the Plaintiffs claim was only processed by the Second Defendant after they received the Plaintiffs Writ. Additionally, he submits that on the face of the policy it is a fake as when looking at the policy itself as found exhibited to the Affidavit of Latalia Dames it says in big red capital letters "Preview Only" which covers every page however he submits that the same policy is produced in the Affidavit of Sally Laing with the big red letters 'rubbed out' presumably from repeated black and white photocopying and/or scanning.
35. Mr. Duncanson also submits that the purported insurance policy is contrived and that it is a scheme for extracting the First Defendant from a delicate situation after Hurricane Dorian. Therefore, he submits it could not reasonably be inferred that there was any implied term that the agreed settlement payment would have to be made following the kind of procedure employed for a real home policy. It is his submission that the typical procedure is payment by cheque in the joint name of the homeowner and the bank (as Loss Payee), as though it were an insurance payment, however as there is no real insurance contract in place, there could be no real insurance payout. He submits that the Plaintiffs clearly agreed the settlement of the lawsuit against the Second Defendant by the usual settlement of lawsuits, which is by payout to himself as the lawyer for the Plaintiffs.

36. In short, the "subsequent events" upon which the First Defendant relies, which Ms. Deveaux submits make this action unsustainable and doomed to fail, at present, have evolved. Whether the matter is "settled" is now a live issue.
37. This ground confers upon the Court in express terms powers which the Court has hitherto exercise under its inherent jurisdiction where there appears to be "an abuse of the process of the Court." This term connotes that the process of the Court must be used bona fide and properly and must not be abused. The Court will prevent the improper use of its machinery, and will, in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation (**Commentary at 18/19/18 on page 352 of the Supreme Court Practice 1, 1999 Castro v Murrary (1875) 10 Ex. 213**).
38. Having already determined that the pleadings do disclose issues fit to be tried albeit there is a need to further particularize loss and damage, after considering the relevant case law, the evidence before me and the submissions of Counsel, I find that the instant action is not a proper case to strike out the Plaintiffs action as against the First Defendant. The Affidavits filed herein make it crystal clear that this action must be decided on the merits. To do otherwise at this juncture would be tantamount to conducting a mini trial on the Affidavits.

**Application to Strike Out Affidavit Evidence**

39. The First Defendant seeks an Order pursuant to Order 41, Rule 6 of the RSC and the Court's inherent jurisdiction that portions of paragraphs 3, 5, and 6 of the Joint Affidavit be struck out on the ground that the said paragraphs contain evidence which is scandalous, irrelevant and/or oppressive and that paragraph 10 of the Joint Affidavit be struck out pursuant to Section 10 of the Listening Devices Act as it contains inadmissible evidence obtained contrary to Section 4(2) of the Listening Devices Act.

**The Law**

40. Order 41, Rule 6 of the RSC states "The Court may order to be struck out of any affidavit any matter which is scandalous, irrelevant or otherwise oppressive."

**The Issues**

41. The issues before the Court to be determined is whether the alleged paragraphs as found in the Joint Affidavit contain evidence which is scandalous, irrelevant and/or oppressive and as such should be struck out. Whether paragraph 10 of the Joint Affidavit contains inadmissible evidence obtained contrary to Section 4(2) of the Listening Devices Act and as such should also be struck out.

**Analysis & Conclusion**

**Joint Affidavit Evidence**

42. The Court indicated during the hearing that it would make a determination on the admissibility of the alleged offending paragraphs prior to determining the Plaintiffs application for summary judgment. The evidence contained in the Joint Affidavit filed on behalf of the Plaintiffs was in support of the Plaintiffs application for summary judgment.
43. The paragraphs that are the subject of the First Defendant's application is stated below:-

"3. Our House was virtually destroyed by Hurricane Dorian when that storm swept through Grand Bahama about the 1st September 2019. The photographic evidence at the time shows our home was inundated with over 5 feet of seawaters and rainwater. The forces of those winds and waters were so massive as to, not only have completely gutted the interior of the House and rotted and/or compromised all electrical wiring, but also they shifted the whole foundation structure such that there are readily apparent massive structural cracking and breakage in the support columns, readily observable in the corners of the structure, inside and outside of the House. Contractors and engineers have told us that the home is a virtual "write-off" because of all the latent damage to the structure – it is uncertain that the home would survive another major hurricane, and most certain that its life expectancy has been seriously cut down.

5.We sought advice from our attorney who wrote a demand letter before action by email to the Defendants on 1st November, 2019, which went largely unanswered. We were told by our attorney that a certain Ms. Bastian, in-house attorney for the Bank in Nassau did eventually answer him by telephone and email (directing him to speak with Insurance Management), but nothing was forthcoming in answer to our legal claim. On the 11th November 2019 our attorney assisted us in person (Marvin and attorney Duncanson) with our request at the Freeport Branch at the Mall, for our full Loan Statement/Loan History. We were told by the receptionist, a middle-aged woman named Mrs Delancy, that we would have to pay $10.70 a month for a statement, to which Mr Duncanson retorted that would be a ridiculous charge of over $1,200 to a customer for daring to request a Loan History for over 10 years. Mrs. Delancy phoned the branch manager who 'ok'ed us having a printout of our Loan Statement for the past year, but that we would have to write to her requesting anything further back. Our attorney advised us that he did in fact write to the branch manager in those terms on the 12th November 2019 for a full Loan History [see exhibit "MLD-4" described below]. The Bank ignored these written and verbal requests for over 2 months until just last week upon our attorney's complaints the prior week with Bank's attorneys at McKinney, Bancroft & Hughes, citing his intention to refer the judge at the first opportunity specifically to this strange attitude of the Bank to neglect its fiduciary duty as to providing loan statements. It was only following then that this Loan Account was finally released to us just last Monday 27th January 2020. Marvin had got a call from the Bank that prior Friday that a document was available at the branch for pickup. So we did finally receive those documents last Monday 27th January. Having that Loan History, and now with the help and expert assistance of our family accountant Mrs. Pamela Hanna, we have been able to identify a number of serious anomalies in that Loan History Statement. For instance we do not understand how a $30,000 loan that was consolidated with the mortgage in September 2011 wound up in all these additional charges of added

amounts of $33,954.28, $1,540 and $11,584.79 being added to our loan balance. [After that consolidation loan our monthly mortgage payment went up from $686.12 to about $1,027, which with insurance varied upwards to $1,156 per month in recent years.] Those various anomalies are discussed in greater detail in Mrs. Hanna's own affidavit. Additionally, we understand from our attorney that the Statement appears to show a capitalization of payment arrears, which is not something we understood to be taking place, how it worked as in how they are calculated to include missed payments as though forming an additional debt notwithstanding the continued running interest and compound interest on the loan balance, nor something to which we have ever agreed. Now produced and shown to us is our full Loan History statement as recorded by the Bank, attached hereto, and due to its size for paper handling convenience exhibited hereto only at the end of the exhibits train herein as Exhibit "MLD4" [under cover of related emails].

6. Many times over the years Marvin has repeatedly complained with the Bank that because of the timing of his employment pay every two weeks, the most sensible arrangement would be a monthly direct debit being set up on a certain date allowing for 2 or 3 days after that month's end paycheque would have cleared. Otherwise he was required to skip most of a whole day at work just to come into the Bank to physically make the mortgage payment. Marvin tried and pleaded on numerous occasions with the Bank to set up a standing order that would pay 50% of his mortgage to the loan account every 2 weeks as his paycheque is deposited to his account but to no avail. The Bank has always unreasonably refused to allow us that type of direct debit arrangement. This ensured that the Bank was almost always in a position to charge us late fees of $25 every month, which late fees were increased in about October 2011 to $30.81 per month. These unreasonable late fees alone are a substantial charge over the lifetime of a mortgage."

44. Counsel for the First Defendant has highlighted the various portions of the above paragraphs to which she submits should be struck out for being scandalous, irrelevant or oppressive. She submits that these paragraphs purport to give evidence to matters which were not pleaded in the Plaintiffs' Statement of Claim and are irrelevant to the issues in this action. While it is noted that Ms. Deveaux refers to paragraph 3 as the paragraph that the Plaintiffs stated "the sheer shock and stress" to which they experienced on their discussions with the Bank regarding their insurance coverage and whether the premiums were being held in escrow by the insurer or the bank, that portion is contained in paragraph 4. She submits however on this point that there is no recovery for emotional indignation felt by the Plaintiffs and as such is scandalous and irrelevant. Moreover she submits that paragraph 5 contains irrelevant material which speaks to requests made by the Plaintiffs for statements and printouts on their mortgage account from the bank and that paragraph 6 is inaccurate as there was a standing order in place since 2017 and its installment did not rectify the late payments by the Plaintiffs to the Bank. It is her submission that there is no basis on which the Plaintiffs can rely on this evidence in support of their application for Summary Judgment nor does it take the Court anywhere in respect of the dealings between the First Defendant and the Plaintiffs on the central issue of the insurance coverage which is before the Court.

45. Mr. Duncanson in response to the instant application submits that the evidence contained at paragraphs 3, 5 and 6 of the Joint Affidavit is not scandalous, vexatious or oppressive as it constitutes fair comments in giving evidence as to the Plaintiffs' case. Moreover, he submits that at face value these paragraphs are all relevant to the narrative describing the Plaintiffs' complaints in their dealings with the Bank.
46. In considering whether to strike out the various portions of the paragraphs found in the Joint Affidavit in particular paragraphs 3, 5 and 6, the Court must look at whether the evidence rises to being scandalous, irrelevant or oppressive.
47. The evidence contained in the Joint Affidavit and Affidavit of Latalia Dames is in support of the Plaintiffs application for summary judgment. However, the paragraphs to which the First Defendant seeks to be struck out contains evidence to which I find is irrelevant to the instant action. Moreover, the pleaded case before the Court deals with allegations of negligence and breach of contract and/or fiduciary duty as it relates to their claim of the collateral property not being covered by a policy of insurance. Therefore, I find that the evidence contained at paragraphs 5 and 6 of the Joint Affidavit that deals with any allegation of breach of fiduciary duty for failing to provide loan statements, querying of mortgage payments and the application of late fees to the mortgage account is immaterial, that is, not relevant to the pleaded case. In the circumstances the Court accepts the submissions of Counsel for the First Defendant and strikes the relevant paragraphs. Paragraph 4 however does relate to the claim for Emotional Distress and is therefore not struck out.

**Transcript of Recordings Exhibited to Joint Affidavit and Affidavit of Latalia Dames**

48. Ms. Deveaux submits that paragraph 10 of the Joint Affidavit should be struck out pursuant to Section 10 of the Listening Devices Act as it refers to a transcript or record of conversations between an officer of the First Defendant and the Plaintiffs. She refers the Court to Section 4(2) of the Listening Devices Act and relies on the case of **Rolle v Nassau Flight Services Limited (2012) 1 BHS J. No. 21** in support of her submission that subsection 3 of Section 4 of the Listening Devices Act makes exceptions where consent is granted by the other party to the recording being made or for the protection of the lawful interest of that person.
49. She further submits that where no consent has been given Section 10 of the Listening Devices Act makes the evidence of that conversation inadmissible and as such the evidence in paragraph 10 of the Joint Affidavit is inadmissible as it was obtained pursuant to an illegality. She also makes the same submission in respect of the Affidavit of Latalia Dames and relies on the case of **Phillip v Attorney General of Trinidad and Tobago (2009) UKPC 18**. It is her submission that the conversation between the Plaintiffs' and the officer of the First Defendant was made in contravention of Section 4(2) of the Listening Devices Act. Further as evidenced in the Affidavit of Sally Laing, the First Defendant's officer was never informed that she was being recorded and she never consented to such a recording being made. She submits that this evidence is wholly

inadmissible and as such should be struck out and any other reference to any contents of the recording should be struck out.

50. Mr. Duncanson submits in response to the First Defendant's submission that the recorded conversation at paragraph 10 of the Joint Affidavit and in Latalia Dames Affidavit be struck out as being contrary to Section 4(2) of the Listening Devices Act in that one of the Plaintiffs, Mrs. Dames was present at both of the recorded meetings, was central to the conversation and recorded the conversations on her own phone. It is his submission that the restrictions upon evidence under Section 3 and 10 of the Listening Devices Act do not apply to a person who was also a party to the recorded conversation. He refers the Court to Section 3 and 10 of the Listening Devices Act and submits that at common law there is no known general or special prohibition on the admissibility of such evidence. Further he submits that Section 3 of the Listening Devices Act deals with the mere act of recording but it makes an exception if you are a party to the conversation and Section 4 deals with the publication or communication of the recording. Additionally, he submits that Section 4(3) makes exceptions whereby the communication or publication is made with the consent of such a party, in the public interest, and for the protection of the lawful interest of that person. Inasmuch it is his submission that the publishing referenced in the Listening Devices Act is not the same as publishing in Court proceedings and that the purpose for keeping the evidence is that it is in the public interest and for the protection of the lawful interest of that person.
51. In addition to the above, Mr. Duncanson submits that the evidence contained at paragraph 10 of the Joint Affidavit and the Affidavit of Latalia Dames has been corroborated by the evidence in the Affidavit of Pamela Hanna filed June 24, 2020, who was present at both meetings to which the recordings were made.
52. Ms. Deveaux in response to Mr. Duncanson's submissions states that the Plaintiffs by virtue of the evidence contained at paragraph 10 of the Joint Affidavit and the Affidavit of Latalia Dames is seeking to publish that communication by way of the transcript recording and it is unclear as to the accuracy of the recording to the Court in these proceedings. She submits that by putting such information in an Affidavit amounts to publication and as such Section 10 of the Listening Devices Act applies.
53. The relevant provisions of the Listening Devices Act to which the parties rely on are stated below:-

> "3. (1) Subject to the provisions of subsection (2) of this section, any person who uses a listening device to hear, listen to or record a private conversation to which he is not a party shall be guilty of an offence against this Act.
> (2) Subsection (1) of this section shall not apply —
> (a) where the person using the listening device does so in accordance with an authorisation given to him under section 5 of this Act; or
> (b) to the unintentional hearing of a private conversation over a telephone.

(3) The court by which a person is convicted of an offence under this section may order that any listening device used in the commission of the offence shall be forfeited and disposed of as the court may think fit.

4. (1) Subject to the provisions of subsection (3) of this section, any person who communicates or publishes to any other person a private conversation or a report of or the substance, meaning or purport of a private conversation that has come to his knowledge as a result of the use of a listening device used in contravention of section 3 of this Act shall be guilty of an offence against this Act.

(2) Subject to the provisions of subsection (3) of this section, any person who, having been a party to a private conversation and having used a listening device to hear, listen to or record that conversation, subsequently communicates or publishes to any other person any record of the conversation made directly or indirectly by the use of a listening device shall be guilty of an offence against this Act.

(3) Subsection (1) or (2) of this section shall not apply where the communication or publication —

(a) is made to a party to the private conversation or with the consent, express or implied, of such a party; or

(b) is not more than is reasonably necessary —

(i) in the public interest;

(ii) in the performance of a duty of the person making the communication or publication; or

(iii) for the protection of the lawful interests of that person; or

(c) is made to a person who has, or is believed on reasonable grounds by the person making the communication or publication to have, such an interest in the private conversation as to justify the making of the communication or publication under the circumstances under which it is made; or

(d) is made in accordance with an authorisation referred to in paragraph (a) of subsection (2) of section 3 of this Act by a person who used the listening device to hear, listen to or record the private conversation pursuant to the authorisation.

10. (1) Where a private conversation has come to the knowledge of person as a result, direct or indirect, of the use of a listening device used in contravention of section 3 of this Act, evidence of that conversation may not be given by that person in any civil or criminal proceedings.

(2) Subsection (1) of this section shall not render inadmissible the evidence of a private conversation —

(a) that has come to the knowledge of the person giving evidence if a party to the conversation consents to that evidence being given; or
(b) in any prosecution for an offence against this Act."

54. Listening device has been defined by the Listening Devices Act as meaning "any instrument, apparatus, equipment or device capable of being used to hear, listen to or record a private conversation while it is taking place".
55. The evidence before me as found in the Joint Affidavit and Affidavit of Latalia Dames on this application is that following the passage of Hurricane Dorian one of the Plaintiffs attended the First Defendant bank on two occasions; spoke with an officer of the First Defendant and during both meetings made recordings of the same on her cell phone.
56. According to Section 10 of the Listening Devices Act, for the private conversation to be deemed inadmissible in civil and criminal proceedings, the recording of such by way of a listening device must be in contravention of Section 3 of the said Act. Section 3 of the said Act makes it an offense to use a listening device to hear, listen or record a private conversation to which a person is **not a party to**. In the instant case, one of the Plaintiffs was a party to both private conversations and as such I do not find that the Plaintiffs were in contravention of Section 3 of the said Act.
57. As it relates to the transcripts of the recordings I am persuaded by Mr. Duncanson that the inclusion of the transcripts in an Affidavit used in court proceedings does not amount to communicating or publishing the same to another person as required by Section 4 of the Act, but in any event a contravention of Section 4 of the Act does not result in the material being inadmissible.

**Plaintiffs Application for Summary Judgment**

58. By Summons filed February 4, 2020 the Plaintiffs also seek several orders, namely, an Order that summary judgment be entered in favour of the Plaintiffs as against both or either of the Defendants pursuant to Order 14, Rule 3 of the RSC; an order directing that damages be assessed before a Judge or the Registrar pursuant to Order 37 of the RSC; an order for such further directions under Order 14, Rule 6 of the RSC; costs and in the alternative an order for an interim payment (as a portion of overall damages to be assessed) be made payable to the Plaintiffs, by both, or either of the Defendants, in such amount/s as to be assessed by the Court or by the Registrar under Order 37 of the RSC and for an order for a full accounting be made to the Plaintiffs by the First Defendant pursuant to Order 43, Rule 2 of the RSC. In support of the Plaintiffs application, they rely on the Joint Affidavit, Affidavit of Latalia Dames and Affidavit of Pamela Hanna.

**Issue**

59. The issue before the Court to be determined on the Plaintiffs application is whether the Plaintiffs can prove their claim clearly and whether the Defendants are unable to set up a bona fide defence or raise an issue against the claim which ought to be tried.

**Analysis & Conclusion**

**The Law**

60. Order 14, Rule 3 of the RSC provides:-

> "3. (1) Unless on the hearing of an application under rule 1 either the Court dismisses the application or the defendant satisfies the Court with respect to the claim, or the part of a claim, to which the application relates that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim or part, the Court may give such judgment for the plaintiff against that defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed.
> (2) The Court may by order, and subject to such conditions, if any, as may be just, stay execution of any judgment given against a defendant under this rule until after the trial of any counterclaim made or raised by the defendant in the action."

61. It is noted that the purpose of the provisions of Order 14 of the RSC is to allow a Plaintiff to obtain summary judgement without the need of a trial if he can prove his claim clearly and if the defendant is unable to set up a bona fide defence or raise an issue against the claim which ought to be tried ( **Roberts v Plant [1895] 1 Q.B. 597, CA-The White Book Commentary on page 171 at 14/4/2**).
62. Counsel for the Plaintiffs submissions in part is that there was no proper insurance policy in effect which is contrary to the claims made by Ms. Sally Laing in her Affidavit. He relies on the case of **Kirkpatrick v the South Australian Insurance Company (1886) AC 117** in support of his submission. Moreover he submits that the policy exhibited to Ms. Laing's Affidavit has key words worn out and those critical words are seen in the apocryphal policy document exhibited to the Affidavit of Latalia Dames. He also submits that the Affidavit evidence of Melanie Thompson filed on behalf of the Second Defendant contains critical evidence that the first policy was effected in October 2005 and then another one was effected in 2011 but the last one expired at September 25/26th, 2012; that in 2015 the Second Defendants entered into a sub-agency agreement with Sentry Insurance Brokers Limited through which the First Defendant has an interest and that the premiums for these policies are paid to the Second Defendant by the First Defendant and that although the Plaintiffs' building insurance lapsed in September 2012 as a result of discussions between the First and Second Defendant following the passage of Hurricane Dorian in September 2019, the Second Defendant effected a policy of home building insurance over the subject property to allow the Plaintiffs to make a claim under the policy for building damage which is said to have occurred as a result of hurricane Dorian.
63. Mr. Duncanson submits that the critical admissions made by the Affidavit evidence of the Second Defendant and First Defendant shows that there is no proper defence which can be made out for the First Defendant.
64. In response to the Plaintiffs' application, Ms. Deveaux in part submits that forfeiture of a policy on the ground of nonpayment of a premium may be waived by subsequent demand

for or acceptance of the premium in such circumstances as would naturally lead the insured to believe the company intends to treat the policy as subsisting. **See MacGillivray at paragraph 7-057 and Kirkpatrick (supra)**. She also submits that the Plaintiffs cannot approbate and reprobate in that they cannot say that there is a fake insurance policy when they are claiming and have claimed on the said insurance policy. Moreover, it is her submission that the evidence before the Court shows that the admission of liability by the Second Defendant ensures that there is insurance coverage.

65. Additionally, she submits that the Plaintiffs inability to plead (or prove) the loss sustained as a result of the acts or omissions of the First Defendant in their Statement of Claim does not entitle them to summary judgment. Further, she submits that an award of summary judgment cannot be made where the Statement of Claim is defective or omits material averments and the defects cannot be supplemented by the Affidavit evidence in support of the application for summary judgment. **See Sheba Gold Mining Co. v Trubshawe (1892) 1 QB 674 and Barclays Bank International Ltd. v Minnis and Minnis unrep. Judgment dated Oct. 17, 1980.**
66. The purpose of Order 14 of the RSC is to enable a plaintiff whose application is properly constituted to obtain summary judgment without trial, if he can prove his claim **clearly**, and if the defendant is unable to **set up a bona fide defence or raise an issue against the claim which ought to be tried**. (**Notes 14/3-4/5 1997 White Book - Roberts v Plant [1895] 1 QB 597 C.A.)** (**emphasis mine**).
67. The granting of summary judgment under Order 14 of the RSC is two-fold, the Plaintiff must be able to prove his claim clearly and the defendant is unable to set up a bona fide defence or raise an issue against the claim which ought to be tried.
68. Taking into consideration the evidence before the Court and the Plaintiffs pleadings, I do not find that the Plaintiffs can prove their claim clearly. As the Statement of Claim is defective in its failure to plead certain essential ingredients to establish their action in negligence and breach of contract and the Plaintiffs changing positions as stated in their Affidavits and submissions by their Counsel i.e. their claim that the insurance policy was a fake, the collusion of the Defendants, the "misconduct" of the First Defendant Bank throughout the course of the proceedings, the Court does not accept that the Plaintiffs can prove their case clearly. I do not accept that the recordings amount to critical admissions as submitted by Counsel for the Plaintiffs. The true import of the transcripts will be determined at trial.
69. Additionally, upon review of the submissions by Counsel for the First Defendant and its Affidavit evidence, I am of the opinion that the First Defendant would have a bona fide defence and is able to raise an issue against the claim which the Plaintiffs seek to be tried. In the circumstances, I accept Counsel for the First Defendant submissions.
70. Moreover, the relief to which the Plaintiffs seek summary judgment, i.e. an order for interim payment and a full accounting are not items of relief sought by way of the Statement of Claim nor have they pleaded the basis on which they are entitled to such relief. To my mind, they cannot now attempt to claim such relief by way of summary

judgment. It is on the basis of the above that the Plaintiffs application for Summary Judgment fails.

**Plaintiffs Summons for Declaratory Relief**

71. The Plaintiffs Declaratory Summons arises from a purported settlement agreement between the Plaintiffs and the Second Defendant in the instant action. Prior to the start of the hearing of the First Defendant's application to strike out the Plaintiffs action against it, Counsel for the Plaintiffs and the Second Defendant advised the Court that both parties had reached a settlement. In particular, the Court refers to the transcript for August 14, 2020 page 1, lines 23-32 and page 2, lines 1-7; 23-26.

> "*Mr. Duncanson : With that opportunity in hand, the Plaintiffs and the Second Defendants have reached a cord [sic], we have reached terms. And I hope that my learned friend I expect, Mrs. Major can confirm that to your Ladyship. Now—*
> *The Court: Yes, so if that is the case and Mrs. Major has just confirmed that, so the matter is settled and she need not continue to appear in this hearing correct?*
> *Mr. Duncanson: Exactly so, my Lady. It's settled in the sense that we expect that the formalities of a closing should take place from hence. So the Court will be getting a formal notice of withdrawal at that time. But really for all intent and purposes, yes it's resolved between the Plaintiffs and the Second Defendants.*
> *Ms. Major: As indicated by Mr. Duncanson, we will send something to the Court formally so the Court has it in writing, the discontinuance against the Defendant."*

72. The Plaintiffs' Summons for declaratory relief is two-fold, firstly, they ask for a declaration that the accord and settlement agreed between themselves and the Second Defendant by way of correspondence and notice given to the Court on August 14, 2020 amounted to the Second Defendant's withdrawal from the instant action and as such any payments ought to be directed to Counsel for the Plaintiffs. Secondly, the Plaintiffs ask in the alternative for a declaration that the parties (the Plaintiffs and the Second Defendant) were not 'ad idem' i.e. there was no meeting of the minds as it related to the question of settlement therefore no settlement was concluded.
73. While the Declaratory Summons does not provide the provision of the RSC to which the Plaintiffs make their application, Mr. Duncanson during his submissions referred the Court to Order 15, Rule 17 of the RSC which states "No action or other proceedings shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding a declaration of right whether or not any consequential relief is or could be claimed."
74. In opposition to the Plaintiffs application, Counsel for the Second Defendant, Ms. Major made a preliminary objection to the Declaratory Summons being heard on the ground that the relief sought by the Plaintiffs in this Summons raises a fresh cause of action which ought to be addressed in separate proceedings not within the extant proceedings under the Plaintiffs Writ of Summons.
75. Counsel for the Second Defendant submits in part that the Summons is a construction summons and is a freestanding claim which can stand on its own as it seeks primarily a

declaration that a settlement agreement exists and a declaration as to its terms. Ms. Major submits that the Summons' failure to fall under any Order of the Rules of the Supreme Court indicates that the relief it seeks is not interlocutory and as such if successful it will finally determine the dispute between the parties in the instant action and also under a separate contract. She refers the Court to Order 15, Rule 5 of the RSC and submits that the Court ought to give strong consideration to the embarrassment and lack of expediency which would result from allowing the Summons to be considered as part of the instant action.

76. She submits that Counsel for the Plaintiffs are not prohibited from seeking declaratory judgment or that the Court cannot look at the without prejudice correspondence in order to determine whether there is a binding settlement agreement. It is her submission however, that the issue is that the application should not be made before the Judge presiding over the initial action as it would not be appropriate for the Court to consider the merits of the case after having sight of the without prejudice correspondence if it is determined there was no binding settlement agreement. She refers the Court to the case of **Walker v Wilsher [1889] 23 QBD 335** in which she states that it has been accepted that if the terms in a without prejudice letter offering settlement are accepted, a complete contract is established, and relief sought in the usual way in connection with that contract. She also refers the Court to the case of **BGC Brokers LP and others v Tradition (UK) Limited and others [2019] EWCA Civ 1937** and submits that such an application is usually done before the Master and not before the Trial judge which would essentially have the same judge looking at the merits of the case.
77. She further submits that the Court has the discretion to determine whether it can separate what is viewed in the without prejudice correspondence and the merits of the case, however she submits it would be prudent to separate the instant summons from the remainder of the action. It is also her submission that the summons for declaratory judgment can be the basis for a separate action and the instant action can be stayed pending the determination of such. Moreover, she submits that the suggestion that the substantive proceedings could thereafter be transferred to a different Judge is impractical and a significant waste of judicial resources in light of the fact another Defendant is involved in the matter. It is also her submission that the nature of this application can be likened to applications for interim payments whereby such an application is not heard by the same judge which has carriage of the matter and that Order 29, Rule 14 of the RSC prohibits the parties from disclosing to the Court that such an order was made until all questions of liability and the amount of damages have been decided.
78. Counsel for the Plaintiffs, Mr. Duncanson submits in part that the Plaintiffs are entitled at common law to come to the Court to confirm whether there is a binding settlement agreement and what are the usual implied terms of payment in settlement of any writ action. He submits that the Second Defendant's presence before the Court is in anticipation of the Plaintiffs application for summary judgment and not just to answer to the current application. It is also his submission that initiating a summons for declaration pursuant to Order 15, Rule 17 of the RSC changes nothing substantively between the

parties in such that if the Plaintiffs were to withdraw their Summons for declaratory relief the Second Defendants will still have to answer to the summary judgment application.

79. Mr. Duncanson also submits that the basic principles under Order 15, Rule 5 of the RSC which is for joinder is that the Court's usual preference to discourage the multiplicity of proceedings where they share the same transaction and set of facts. Moreover, he submits that the practice is that the same judge that tries the underlying dispute is relied upon to review the without prejudice correspondence and refers the Court to an article previously submitted in his Submissions dated August 25, 2020. He refers the Court to paragraph 14 of **BGC Brokers LP and others (supra)** as instructive as it highlights that the principle that a settlement agreement borne out of without prejudice negotiations is not covered by without prejudice privilege and where the settlement agreement was concluded by the acceptance of a without prejudice offer, the fact that the agreement is not privileged means the without prejudice offer ceases to be protected by the privilege since it forms part of the contract. He also refers to the case of **Walker (supra)** and submits that that case is a red herring and it is undisputed that without prejudice correspondence should not normally be submitted to the Court. He refers the Court to **Howell v Howell [1997] TCI Supreme Court** in support of his submission.
80. In response to Counsel for the Plaintiffs submissions, Ms. Major sought to clarify that the Second Defendant does not dispute that the Court can look at the without prejudice correspondence in determining whether or not it forms the basis of a concluded settlement agreement and that it is in the trial judge's discretion to make the decision whether or not it can be heard before her. Moreover she submits that in the normal course the parties would have a purported settlement agreement and the existing action would be settled and completed and if there was a breach of the agreement or the terms of the agreement needed to be enforced then by necessity the parties would bring a separate action. She submits that once the action has been settled or withdrawn a new action must be commenced and that action would be grounded in breach of contract or seeking declaratory relief. Lastly she submits that it is well within the trial judge's discretion to decide that she has the ability to determine whether she can hear it or not, however she submits where there is a potential for injustice for the same judge to hear it, there is no injustice should another court hear it.
81. Essentially, the Second Defendant has conceded that the Plaintiffs are not prohibited from seeking declaratory relief, nor is the Court prohibited from looking at without prejudice correspondence in order to determine whether there is a binding settlement agreement. It is the Second Defendant's submission, however, that the application should not be made before the Judge presiding over the initial action, as it would not be appropriate for the Court to consider the merits of the case after having sight of the without prejudice correspondence, if it is determined there was no binding settlement agreement. The Second Defendant also accepts that it is within the Court's discretion whether it should hear the Summons or refer it to another Judge. The Second Defendant has produced no case law to support the proposition that this Summons should be heard by another Judge.

82. The issues in this action are not overly complicated. From a reading of the Statement of Claim and the Defence of the Second Defendant there will be no substantial dispute as to the facts in this case. Either the First Defendant collected the insurance premiums and paid them over to the Second Defendant or not; either the Plaintiffs were told that they had insurance coverage or not; either the insurance policy lapsed or not; either the policy was reinstated or not; either the Plaintiffs suffered mental distress or not and either the Plaintiffs suffered loss and damage or not. I do not see how my determination on whether a Settlement Agreement was arrived at by the Plaintiffs and the Second Defendant would prejudice my ability to decide the facts and legal issues involved in this case. I am satisfied that it is appropriate and that I will exercise my discretion and hear the Plaintiffs Summons seeking Declaratory Relief. The extant Summonses as between the Plaintiffs and the Second Defendant are hereby stayed until a determination of the Summons for Declaratory relief.
83. Costs. Neither the First nor Second Defendants have been successful in their respective application. Costs, therefore, shall be in the cause. The Plaintiffs and the First Defendant asked for leave to appeal and cross-appeal as the case may be, the Decisions adverse to them and leave was granted.

Dated the November 2, 2020

**Petra M. Hanna-Adderley**
**Justice**