COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION
2018/CLE/GEN/01042

BETWEEN

ROSALYN BROWN

Plaintiff

AND

COTSWOLD GROUP LIMITED

First Defendant

AND

COTSWOLD CORPORATE SERVICES LIMITED

Second Defendant

AND

COTSWOLD INSURANCE (BARBADOS) LIMITED

Third Defendant

AND

COTSWORLD GROUP HOLDINGS LIMITED

Fourth Defendant

Before:	**The Hon. Madam Justice G. Diane Stewart**
Appearances:	**Mr. Michael Scott K.C. for the Plaintiff** **Mr. Roger Forde Q.C. and Mr. Byron Woodside for the Defendants**
Hearing Date:	**26th April 2022**
Ruling Date:	**25th November 2022**

RULING

1. By Summons filed 12th February 2021, the Plaintiff, Rosalyn Brown **(the "Plaintiff")** seeks inter alia summary judgment against the Defendants, Cotswold Group Holdings Limited **(the "Defendants")** pursuant to Order 14 (1) of the Rules of the Supreme Court **(the "Summary Judgment Application")**. This application was the third application made in the summons. The other two applications were previously determined by this Court.

2. Subsequent to the filing of this summons and before the summary judgment application was heard, the Plaintiff applied to amend her writ to remove Cotswold Group Holdings as the First Defendant and add them as the Fourth Defendant. This application was granted

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3. The Summary Judgment Application is supported by the Second Affidavit of Rosalyn Brown filed 19th February 2021 **(the "Second Affidavit")**. By the Second Affidavit, the Plaintiff avers, *inter alia*, that the Fourth Defendant had no defence to her claim except for the amount of the compensation owed to her. On 15th June 2018, the legitimacy of her claim was acknowledged by Mr. Roger Forde Q.C., a Barbadian legal practitioner in a letter to her former Counsel **(the 15th June 2018 Letter")**.

4. By the 15th June 2018 Letter, he stated at para. 4: -

   > **"I am instructed by my client that Cotswold Group Holdings Limited and its subsidiaries entered into an agreement with your client whereby your client agreed to refer to my client persons or entities who are desirous of entering into a business with my client and in consideration hereof your client would be paid a commission in the even that (a) those persons or entities who she referred to my client thereafter entered into a business relationship with my client and (b) the sole efforts of your client caused those persons or entities to enter into the business relationship with my client. The agreement also provided that the commission would be paid over the period of the business relationship and that in the event persons were referred to my client and entered into a business relationship as a result of the effort of your client and some other person, then the commission would be shred......I am also instructed by my client that it has made payments to your client in pursuance of the terms of the said agreement. I attach hereto a schedule of payments made to your client".**

5. The 15th June 2018 Letter was in response to her pre-action letter dated 8th June 2018. The Plaintiff was advised by the Insurance Commission and was made to believe that there was no legal requirement under the External Insurance Act, No. 15 of 2009 **("The Act")**, for an individual or a natural person to be registered. Section 4 (2) of the said Act restricted licensing to corporate entities.

6. The Plaintiff was mortified by the implied accusation that she was not registered when she was not required to be while they had not admitted to their own negligence for failure to register under the Act. She referred to the sixth paragraph of her affidavit filed 7th December 2020 where she stated that on 22nd July 2020 she made enquiries of the office of the Registrar of External Insurance, who confirmed that she was not required to be licensed and observed that none of the Defendants nor any company in the Cotswold Group of Companies were registered by the Insurance Commission. She submitted that The Cotswold Group of Companies consequently were in breach of the law.

Background Pleadings

7. The Plaintiff's action against the Defendants is by way of its Re-Amended Writ of Summons and Statement of Claim filed 21st January 2022, where she seeks damages for breach of contract and an accounting of all referrals of clients for insurance business

to the First Defendant and the Second Defendant by and through the agency of the Plaintiff. The Plaintiff had agreed with Cotswold Group Insurance Limited through a Commission Agreement dated 1st February 2012 to be their non-exclusive agent to market their insurance products and services to the public and also through a Commission Agreement dated 1st April 2014 with Cotswold Group Holdings Limited **(collectively referred to as the "Commission Agreements")**. It was an express term of the Commission Agreements that the Fourth Defendant and Subsidiaries as Contractor would pay the Plaintiff a commission to be calculated at specific rates and formulae.

8. The Defendants by the Commission Agreements would be required to account to the Plaintiff, at regular intervals, the acceptance of client referrals and settle any commission which stemmed from that acceptance. The Plaintiff also worked with the Second Defendant who assisted with KYC requirements. The Third Defendant, a Barbados incorporated company, was the vehicle deployed as the issuer of the relevant insurance policies and was used for reasons of fiscal efficiency and to take advantage of double taxation treaties in the global market.

9. By their respective defences the First Defendant and Fourth Defendant denied entering into any agreement with the Plaintiff for the payment of commission or at all. They further denied that they had authorized any other entity to do so. However, in the event that they did, the Plaintiff had represented that she was compliant with the Act, she did not introduce the clients as alleged and she did not meet all of her obligations under any purported agreement. They further denied that the Third Defendant was its servant, agent or principal.

SUBMISSIONS

Plaintiff's Submissions

10. The Plaintiff relies on **Order 14 rule 1 of the Rules of the Supreme Court (the "RSC")** which states: -

> **"Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has entered an appearance in the action, the plaintiff may, on the ground that the defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against that defendant."**

11. In **Anglo-Italian Bank v Wells (1878) 38 L.T. 197 p. 201 CA**, Jessel M.R. states: -

> **"When the Judge is satisfied not only that there is no defence but no fairly arguable point to be argued on behalf of the defendant it is his duty to give judgment for the plaintiff**".

12. The existence of a fairly arguable point does not include a desire to investigate alleged obscurities and a hope that something will turn up, when defending an application for summary judgment. In **HRH The Dutchess of Sussex and Associated Newspaper Limited [2021] EWHC 273**, Warby J found that while efficiency of the administration of

justice is not a ground for entering summary judgment without a trial, even if it enables a huge savings of time and costs, equally, at the other end of the spectrum, the court must be astute to a defendant who seeks to make a case look more complicated and difficult than it really is so as to obscure the fact that there is really no defense to the claim.

13. In the First Defendant's Re-Amended Defence and Counterclaim filed 14th December 2020, a series of contradictory denials were provided which the Plaintiff submits do not amount to a defence. In one paragraph it denies entering into an agreement with the Plaintiff for payment of commission nor did it give any authorization to do so. In another paragraph it claims that if it did enter into an agreement with the Plaintiff, the Plaintiff did not uphold her end of the bargain by complying with the Act or by introducing the clients.

14. In its Counterclaim, the First Defendant alleges that if it did enter into an agreement with the Plaintiff, the First Defendant was induced to enter into it by the Plaintiff's representation that she could lawfully perform her duties. The aforesaid assertions do not amount to a bona fide defence to the Plaintiff's claim.

15. It was a fact that the Plaintiff, by an agreement dated 1st April 2014, entered into a commission agreement with Cotswold Group Holdings Limited, the Fourth Defendant. It was irrelevant whether it received authorization from the First Defendant or anyone else to do so. There was no legal requirement under the External Insurance Act for an individual or natural person to be registered. Section 4 (2) expressly restricts licencing to corporate entities. Therefore, the First Defendant's Counterclaim was bound to fail.

16. The First Defendant is disingenuous or confused in its pleading. In its amended defence dated 14th September 2020, it admitted that the Fourth Defendant entered into the agreement by which the Plaintiff carried out the required performance. The only triable issue was in relation to quantum of damages.

17. As directed by the Court, the Plaintiff submits that the use of separate company nomenclatures was ultimately irrelevant as it was plain from the context of the action that all corporate emanations bearing the name "Cotswold" acted as one and the same. Both the 1st February 2012 and the 1st April 2014 agreements expressed that the "Cotswold" contracting party purported to contract on behalf of itself as well as the Cotswold group of companies. Any ambiguity would be construed against the Cotswold Defendants, *contra proferentem*.

18. If further amendment was required the "slip rule" pursuant to Order 2 rule 1 of the RSC could be used to effect any amendment.

19. As for the impact of illegality on the Plaintiff's claim, if any, in **Patel v Mirza [2016] UKSC 42**, the Supreme Court held that the test for illegality as formulated in Tinsley v Milligan [1994] 1 AC 340 should be rejected. In Patel, Mr. Patel placed bets on the price of shares with Mr. Mirza based off of insider information. Using advanced insider information to profit from trading securities was a statutory offence. The insider information was found to be mistaken however, the funds were not returned by Mr. Mirza and Mr. Patel brought a claim based on contract and unjust enrichment for their return.

Mr. Mirza's argument against the claim was that the whole contract was illegal and the claim should be precluded based on the principle of ex turpi causa non oritur action.

20. . A more flexible approach was adopted in respect of policy considerations to arrive at a balanced judgment whilst taking account of the proportionality of the outcome. Mr. Patel's claim was allowed as it would have the effect of returning the parties to their positions prior to entering into the contract.

21. Lord Toulson stated: - **"it is necessary (a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the clam (b) to consider any other relevant public policy on which the denial of the claim may have an impact and (c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts."**

22. The Plaintiff submits that she was advised by the Insurance Commission that there was no requirement for her to register under the Act.

Defendants' Submissions

23. The Fourth Defendant relies on **Order 14 rule 4 of the RSC** which provides: -

> **"4. (1) A defendant may show cause against an application under rule 1 by affidavit or otherwise to the satisfaction of the Court.**
> **(2) Rule 2(2) applies for the purposes of this rule as it applies for the purposes of that rule.**
> **(3) The Court may give a defendant against whom such an application is made leave to defend the action with respect to the claim, or the part of a claim, to which the application relates either unconditionally or on such terms as to giving security or time or mode of trial or otherwise as it thinks fit**
> **(4) On the hearing of such an application the Court may order a defendant showing cause or, where that defendant is a body corporate, any director, manager, secretary or other similar officer thereof, or any person purporting to act in any such capacity —**
> > **(a) to produce any document;**
> > **b) if it appears to the Court that there are special circumstances which make it desirable that he should do so, to attend and be examined on oath."**

24. In the **Supreme Court Practice 1988 Volume 1 (the "Supreme Court Practice") at page134 at 14/1/2** the following condition precedents were necessary for the Plaintiff to invoke the Order 14 jurisdiction.

> **"The Defendant must have given notice of the intention to defend;**
> **The Statement of Claim must have been served on the Defendant; and**
> **The Affidavit in support of the application must comply with the requirements of Rule 2."**

25. By the notes governing the following Order 14 provisions, 14/3-4/3, 14/3-4/13 and 14/3-4/10 respectively, a Defendant serving a Defence would be sufficient to enable the Court

to grant him leave to amend his Defence. A counterclaim precluded the obtaining of a summary judgment and where there were issues to be tried, the Court was precluded from granting a summary judgment.

26. The Fourth Defendant, **("CGHL")** contends that, at the date the Plaintiff filed her original writ of summons along with the Summary Judgment Application, it was a separate and distinct entity from Cotswold Group Limited and not known as an alias. The Plaintiff accepted that she was mistaken and submits that the Court could easily find that CGHL was not a proper party to the action.

27. By paragraph 8 of the Affidavit of Todd Callender filed 10th March 2021, the Writ of Summons nor any document was served on CGHL. This arose based on the confusion of whether the First Defendant was CGHL; the former being served. CGHL was a company registered in Barbados and leave for service out of the jurisdiction would have had to been granted. The Summary Judgment Application seeks in a cavalier fasion to strike out the name of a party in order to correct the fundamental mistake made in the pleading.

28. In response to the Court's direction on the question of illegality, the Defendants rely on Section 32(2) of the External Insurance Act which provides: -

    "No person shall be licensed as an insurance manager or as an external insurance broker under this Act other than a body corporate that is incorporated in and under the laws of The Bahamas."

29. The Court will not enforce a contract which is expressly or impliedly prohibited by statute. **Halsbury's Law of England (5th) Vol 22 para. 243**

30. The plain and ordinary meaning of Section 32 of the External Insurance Act is that only a body corporate incorporated in The Bahamas could carry on the business as an external insurance broker. The section prohibits an individual from being able to possess a licence to carry on external insurance brokerage in The Bahamas.

31. Where a contract is void ab initio and the parties are unable to make any claim under the contract, any claim arising thereof must be made on the basis of quantum meruit which was an equitable relief and must be specifically pleaded. The Plaintiff's case however, was only for breach of contract.

32. Further, the right to proceed with a claim for quantum meruit does not arise out of the original contract nor is there an inference of fact based on acceptance of services on what was thought to be a binding contract. The true basis of the claim is an inference in law where work is done under what purports to be a binding contract but is not so in fact.

33. The Fourth Defendant is a company registered in Barbados under the Exempt Insurance Act, CAP 308A of the Laws of Barbados and is permitted to sell insurance policies for customers outside of Barbados. In the event it was not compliant with the laws of The Bahamas and had no licence, any contract made between the Plaintiff and the Fourth Defendant would be void ab initio. As a consequence, the Fourth Defendant would not

be able to maintain its counterclaim as similarly the Plaintiff would not be able to maintain her claim.

DECISION

34. By the Summary Judgment Application the Plaintiff seeks judgment to be entered in her favor against the Fourth Defendant. As both parties correctly submit, Order 14 of the RSC vests the Court with the jurisdiction to enter judgment against a defendant if the plaintiff can prove that there is no viable defence to a claim. Order 14 of the RSC and the governing principles of summary judgment were considered by the Court of Appeal in **Mark Oscar Gibson Sr. v The Bank of The Bahamas Limited SCCivApp No. 43 of 2020**.

35. Evans JA, delivering the judgment of the Court, opined: -

> **"13. The test which is applicable is well known and was most recently applied by Charles J in the case of Higgs Construction Company v Patrick Devon Roberts and Shenique Esther Rena Roberts 2017/CLE/gen/00801 (unreported) where she observed as follows:**
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> > **"[26] Under O. 14 r 5, the test to be applied by the Court is whether there is any "triable issue or question" or whether "for some other reason there ought to be a trial". If a plaintiff's application is properly constituted and there is no triable issue or question nor any other reason why there ought to be a trial the Court may give summary judgment for the plaintiff.**
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> > **[27] It is a well-established principle of law that the Court ought to be cautious since it is a serious step to give summary judgment. Nonetheless, a plaintiff is entitled to summary judgment if the defendant does not have a good or viable defence to his claim. This is also in keeping with the overriding objective of Order 31A to deal with cases justly by saving unnecessary expense and ensuring timely and expeditious disposal of cases. It is also part of the Court's active case management role to ascertain the issues at an early stage and to decide what issues need full investigation at trial and to dispose summarily of the others."**
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> **14. In AerCap Ireland Ltd and others v Hainan Airlines Holding Co. Ltd [2020] EWHC 2025 (Comm) Cockerill J observed that: "13. The law governing applications for summary judgment is not contentious. In summary: a) The test for summary judgment is that (i) the party against whom the application is made has no real prospect of success on the claim or issue in question, and (ii) there is no other compelling reason why the claim or issue should be disposed of at trial: CPR 24.2. b) A real prospect of success means a 'realistic' as opposed to a 'fanciful' prospect of success": Swain v Hillman [1999] EWCA Civ 3053. 12 c) At the same time, a 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable".**

36. If on the evidence before the Court, it appears as if the claim is an "open and shut" one which has been properly initiated before the Court or there was nothing outstanding to prevent the matter from going to trial, there is no reason to take the parties through the process of a trial or the trial itself.

37. In the instant case, the Plaintiff's claim against the Defendants collectively is for a breach of contract. Therefore, the validity of the contract, the terms of the contract and whether there were any clear breaches of it are to be determined. The question of whether either of the parties met the proper registration requirements, to conduct the activities in the agreements, under the Act must be determined in order to determine whether there was a valid contract.

38. A letter dated 1st December 2020 from the Insurance Commission to the Plaintiff states that; there are no companies with the name "Cotswold" that are presently nor ever were licensed with them under the Act, that only persons holding the position of shareholders, directors, senior managers or resident representatives are required to be approved by the Insurance Commission and explained that an insurance broker or manager was a corporate entity and not an individual per section 32 (2) of the Act.

39. In **Cable Bahamas Limited v. Rubis Bahamas Limited and another [2016] 2 BHS J. No. 8, Bain J,** on hearing an application for summary judgment and considering the suitability of adhering to the same, relied on Sir Nicholas Browne Wilkinson VC's comments in **British and Commonwealth Holdings PLC v Quadrex Holdings Ltd. 1989 3 WLR 723**: -

> **"123 In British and Commonwealth Holdings PLC v Quadrex Holdings Ltd. 1989 3 WLR 723 Sir Nicholas Browne Wilkinson VC commented on the suitability of Order 14 judgments in complicated cases -**
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> > **"Finally, I would say a few words about the suitability of such a case as this for Order 14 and interim payment procedures. The factual issues are complicated: the evidence and exhibits run to well over 2,000 pages. The legal issues are not entirely straight forward and raise at least one important point of law. The plaintiffs' "skeleton" argument before the judge ran to 63 pages; the judgment on Order 14 is some 43 pages; and this judgment is itself unduly long. The argument before us took many days. In another recent appeal from the Commercial Court, *Home and Overseas Insurance Co. Ltd. v Mentor Insurance Co.,* The Times, 26 December 1988 the question at issue was a complicated point of Law. Parker LJ said:**
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> > > **"The purpose of Order 14 is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claim. If the defendant's only suggested defence is a point of law and the court can see at once that the point is misconceived the plaintiff is entitled to judgment."**

40. In this action, the interpretation of the provisions of the Act fall to be determined. The interpretation of these provisions directly impact whether or not there is a valid contract between the parties which would enable the Plaintiff to receive damages for breach of that contract if the Court determines that there was a breach.

41. The Court cannot on a summary judgment application make that determination without considering and testing the evidence and hearing legal submissions on the law surrounding the issue.

42. I am satisfied that the issues must be ventilated at trial and this is not an appropriate application for summary judgment.

43. The Summary Judgment Application is therefore dismissed.

44. The Plaintiff shall pay to the Defendants its costs to be taxed if not agreed.

Dated this 25th day of November 2022

Hon. Madam Justice G. Diane Stewart