**BARBADOS**

**[Unreported]**

**IN THE SUPREME COURT OF JUDICATURE**

**HIGH COURT**

**CIVIL DIVISION**

**No. 0630 of 2014**

**BETWEEN:**

| | |
|---|---|
| **ELOISE JOHNSON** | **CLAIMANT/RESPONDENT** |
| **AND** | |
| **PERMANENT VALUE ASSET MANAGEMENT LIMITED** | **FIRST DEFENDANT/APPLICANT** |
| **JEFF LIPTON** | **SECOND DEFENDANT/APPLICANT** |
| **KATHERINE MACKAY** | **THIRD DEFENDANT/APPLICANT** |

**Before the Honourable Madam Justice Margaret A. Reifer, Judge of the High Court**

**Dates of Hearing: 2016 May 10th, 13th, 20th, 23th, July 18th**

**Appearances:**

**Mr Barry Gale Q.C. and Ms Mawena Brathwaite, Attorneys-at-Law for the Defendants/Applicants**
**Mr. Bryan Weekes, Attorney-at-Law for the Claimant/Respondent**

## DECISION

### Introduction

[1] The development of a vibrant financial services sector across the jurisdictions has resulted in what may previously have been an anomalous situation, but which has now become the new norm.

[2] It has given rise to a scenario which urges the Court to examine the boundaries of the common law to determine the state of the law as it relates to remedies available to litigants constrained by geographical location and contractual limitations. In short, to examine the law as it relates to the assumption of personal and corporate liability.

### Background

[3] The factual matrix within which this action has arisen is as follows:

[4] The Claimant/Respondent is a Canadian citizen resident in Barbados.

[5] Through the legal vehicle of a Company registered in Guernsey Channel Islands, UK (Grange Nominees Ltd) she invested a sum of Canadian dollars in Argyle Funds SPC Inc. (hereinafter Argyle), a mutual fund registered in the Cayman Islands, authorized to issue different classes of shares. Stated differently, the account holder in Argyle is Grange Nominees Ltd, of which the Claimant/Respondent is the beneficial owner.

[6] The Investment Manager of Argyle is Permanent Value Asset Management Ltd (hereinafter PVAM) the First Defendant/Applicant, a company (International Business Company) registered and doing business in Barbados. PVAM manages the fund. PVAM owns 10,000 management shares of Argyle.

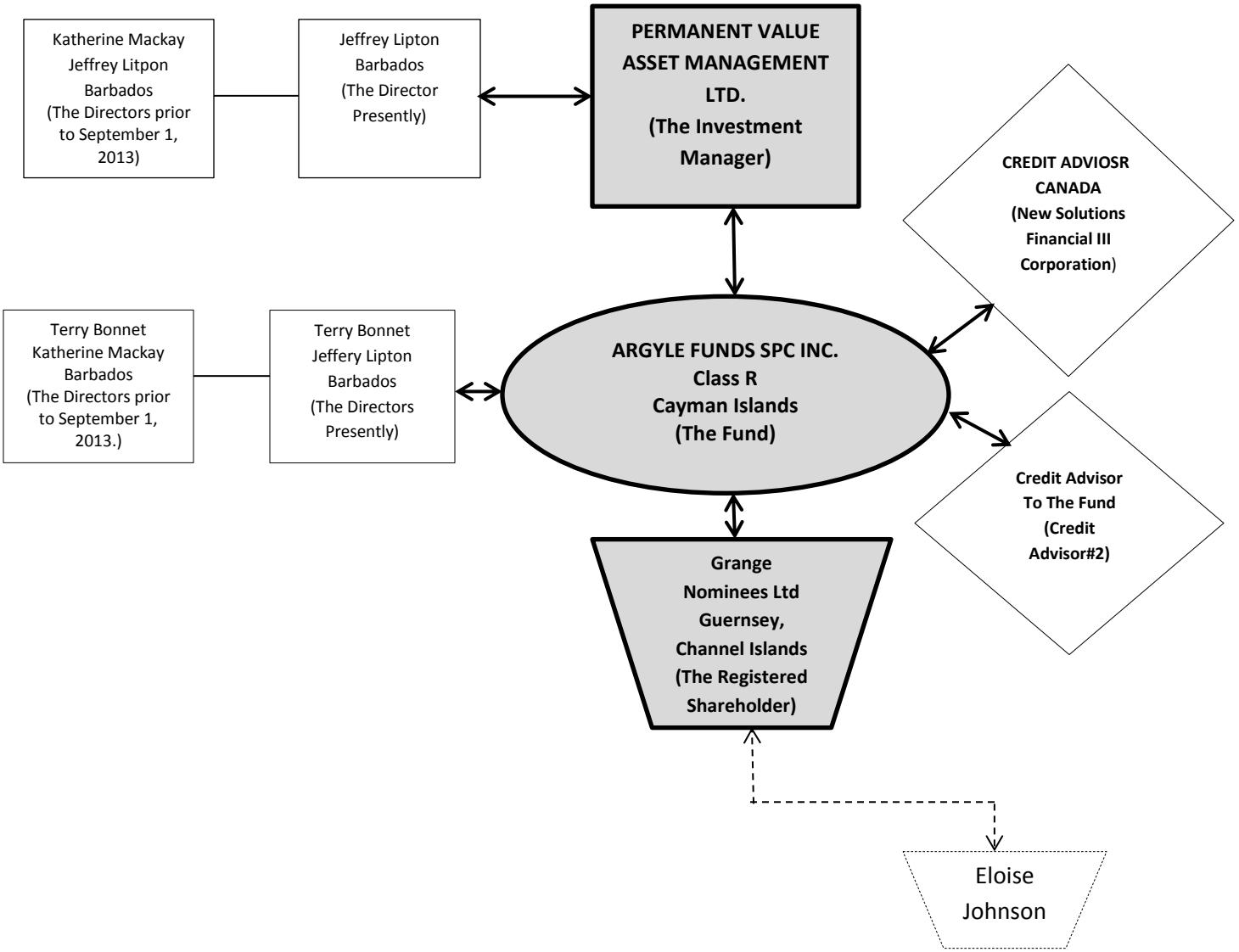
[7] The Second and Third Defendants/Applicants, Jeffrey Lipton and Katherine Mackay respectively, were at all relevant times Directors and employees of PVAM (2006 to present). The Third Defendant/Applicant is currently not a Director having ceased holding that office in August of 2013. The Second Defendant/Applicant remains up to the present time a Director of PVAM.

[8] Counsel for the Defendants/Applicants makes this point: Argyle is incorporated and domiciled in the Cayman Islands, does no business in Barbados and is not a party to these proceedings. Its sub-advisor, New Solutions Financial Corporation is a Canadian Company which also has no connection whatsoever with Barbados. The investments made by Argyle are not made in Barbados. The only entity having a presence in Barbados is PVAM.

[9] PVAM, as the Investment Manager of Argyle launched a Private Offering Memorandum in Barbados. The Claimant/Respondent, Grange Nominees Ltd, completed and submitted both an Application Form and Subscription

Agreement in Barbados, which said document identified Cayman Islands Law as the governing law.

[10] The inter-relationship of the major players herein is best illustrated by the affidavit evidence of the 2nd and 3rd Defendants/Applicants. At paragraph 11 of the Affidavit of Katherine Mackay filed November 18th 2014 the following chart appears:



[11] This claim has arisen because the Claimant/Respondent alleges that one of the fund's credit advisors (New Solutions/Ovenden) has become 'too dependent on asset backed loans rather than receivable financing'. In consequence, the Claimant/Respondent's investment may be, at worst, lost; at best, fatally diminished. Consequentially also, the distribution of dividends and interest to the investors, and the calculation of the net asset value of the fund, was suspended.

**The Application**

[12] The Application of the Defendants/Applicants presently before this Court was filed November 18th 2014 pursuant to **CPR 2008 Part 15.2 (a)(i)** and **(b)** and in the alternative pursuant to **Part 26.3 (3)(b)**. It is supported by the two Affidavits of the 2nd and 3rd Defendants/Applicants, Jeff Lipton and Katherine Mackay of even date.

[13] It seeks an order from this Court dismissing the Claimant/Respondent's Claim Form and Statement of Claim filed herein on April 15th 2014.

[14] This Statement of Claim was answered by Defence filed July 2nd 2014 on behalf of all three Defendants/Applicants.

[15] The Claimant/Respondent's cause of action is best adumbrated at paragraphs 31 and 32 of the said Statement of Claim, and states as follows:

> "31. The Defendants assumed corporate and personal responsibility for the work entailed in managing the funds invested by the Claimant in

Argyle and thereby owed a duty of care to the Claimant to carry out the functions of investment manager in a competent and professional manner.

32. The Defendants have all breached the said duty of care and were negligent in the execution of their responsibilities as investments managers in that:

(a) They failed to request and/or demand sufficiently detailed information from New Solutions/Ovenden in relation to their investment activities otherwise they would have been aware of the deficiencies in the modus operandi and could have taken steps in a timely fashion to remove the funds from New Solutions and/or Ovenden.

(b) Alternatively, if they did receive information about New Solutions/Ovendens' investment activities they failed to take any corrective measures to safeguard the funds invested with that entity by Argyle.

(c) They failed to ensure that New Solutions carried/obtained the requisite insurance coverage to safeguard the funds provided to it for investment whether for the purpose of factoring receivables or otherwise, in clear breach of the express warranty given to the Claimant by Argyle that the funds would be so protected."

[16] Most significantly, the Claimant/Respondent's cause of action is NOT in Contract, but a claim for financial loss arising in Tort. In other words, the Claimant/Respondent is alleging that a duty of care was owed, was negligently breached and as a result it has suffered consequential financial loss.

[17] An alternative claim pegged to S**ection 228 of the Companies Act, Cap. 308** was abandoned at the hearing of the Application.

[18] The main plank of the Defendants/Applicants' Defence can be found at its paragraphs 12 and 13 as follows:

"12. The Defendants deny that they assumed corporate and personal responsibility for the work entailed in managing the funds invested by the Claimant in Argyle as alleged in paragraph 31 of the Statement of Claim or at all and puts the Claimant to strict proof thereof. The defendants

> further deny that they owed a duty of care to the Claimant to carry out the functions of investment manager in a competent and professional manner as alleged in paragraph 31 of the Statement of Claim or at all and puts the Claimant to strict proof thereof.
>
> 13. The Defendants further deny that they are in breach of any duty or were negligent as alleged in paragraph 32 of the Statement of Claim or at all …"

[19] The grounds of the application (purportedly 4 in number) are set out hereunder seriatim:

> "1. The Claimant has failed to set out a cause of action against the Defendants and:
>
> i. Pursuant to CPR 2008 Part 26.3 (3) (b) the insufficiency of the Claimant's claim warrants the Court striking out the Claimant's claim as she has no reasonable grounds of bringing the claim.
> ii. Ultimately, pursuant to CPR 2008 Part 15.2 (a) (i) the Claimant has no real prospect of succeeding on the claim or issue.
> iii. Finally, pursuant to CPR Part 15.2 (b) there is no other reason why the case or issue(s) should be disposed of at trial."

[20] The Claimant/Respondent filed two affidavits in response: her own and that of her Investment Adviser Maurice Fortier, both dated February 6th 2015. Counsel Mr. Gale QC submits that there is nothing in the Affidavits of these two persons to challenge the Affidavits of Messrs. Lipton and Mackay and that there are no disputes of fact. Counsel Mr. Weekes submits to the contrary, that there is a significant dispute of fact.

**The Applicants/Respondents Submissions**

[21] Counsel made six main points in support of the argument that there were no reasonable grounds for bringing the claim and no real prospect of success, in both written and oral submissions as follows:

1. If there is a Duty of Care owed in this scenario (be it in Contract or in Tort), it is a Duty of Care owed by PVAM to Argyle pursuant to the Investment Management Agreement between these two entities which notably the 2nd and 3rd Defendants/Applicants are not parties of/to (seen at Exhibit KM3). Stated differently, the Duty of Care is owed, not to the Claimant/Respondent, but to the fund. In other words, there is no cause of action against the Defendants/Applicants.
2. The Claimant/Respondent has no *locus standi* to bring this action against the Defendants/Applicants. Only the company by its proper organ can bring proceedings for a wrong done to that company. He raises the concept of Reflective Loss-: **Prudential Assurance Co. Ltd v Newman Industries Ltd Argyle (No. 2) [1982] Ch 204** and **Johnson v Gore Wood & Co. [2002] 2 AC 1.** It is Argyle which must sue for that loss: **Foss v Harbottle (1843) 2 Hare 460**.
3. There was no Duty of Care owed but if there was a Duty of Care, it would be to Grange Nominees Ltd, (the SH) neither of whom are parties to this action. Only a shareholder may bring a derivative action on behalf of the Company (the Derivative Action Point) **Medley v Finton [2012] CILR 360; Svanstrom v Jonasson [1997] CILR 192**.
4. There is nothing in the contract documents (Subscription Agreement, Investment Management Agreement etc.) to establish any assumption of personal and/or corporate liability by the 2nd and 3rd Defendants/Applicants. The evidential onus of the Claimant/Respondent has not been discharged. The Court need not conduct a mini trial to conclude that there is not a scintilla of evidence to support an allegation of assumption of personal and corporate responsibility (Reference was made to the affidavits of Johnson and Fortier). Stated differently, there is no evidence to suggest that the Claimant/Respondent has some "prospect of success" against the 2nd and 3rd Defendants/Applicants (and the pleadings lack the necessary specificity for a claim of this nature). This case should not proceed to trial just because there

is a possibility of the evidence arising in the future at discovery. Credible evidence must be placed before the Court and it has not been.

5. This case is based not on facts but on the law of Assumed Responsibility as adumbrated in the case of **Williams V Natural Life Health Foods [1998] 1 WLR 830**. This case shows that, on an Objective Test, the issue of Assumption of Responsibility is key; a tortfeasor must do something personally for there to be an Assumption of Responsibility and the facts herein show the contrary.
6. The Joint Tortfeasor Point:
   The Defendants are sued as joint tortfeasors. If the mere fact that the 2nd and 3rd Defendants were directors was a sufficient argument, it would open the door to a flood of cases against alleged joint tortfeasors. There must be more; there must be a special relationship that permits the consideration of assumed liability on the part of a director. Counsel submits that finding a director liable in negligence as a joint tortfeasor is a very unusual result.

[22] In conclusion, he submits that the case against the Second and Third Defendants/Applicants bears no chance of success and should be struck out as there is no case on the facts that establishes that there was a breach of Personal Responsibility. The Court should apply the Overriding Objective of the CPR to ensure that this case is dealt with expeditiously and fairly, and actively managed by giving judgment on this application.

[23] Counsel submitted further that in a Summary Judgment application one must look at the evidence and not at the pleadings and if one examines the Claimant/Respondent's affidavits in support, there is nothing in them that

speaks to an assumption of Personal Responsibility by the Second and Third Defendants/Respondents.

**The Claimant/Respondent's Rebuttal Arguments in Summary**

[24] Counsel emphasized that this claim was grounded fairly and squarely on the tort of negligence and not contract.

[25] He argued that there is evidence on which the Court can make an assessment as to whether there was an assumption of personal and corporate liability. The basic framework of this claim is that the Claimant/Respondent invested money in an entity (Argyle) which was to be managed by another entity (PVAM) pursuant to an arrangement in contract; if all went well, at the end of it she would recover her principal investment plus interest. The Offering Memorandum of this investment constitutes a direct statement linking the Second and Third Defendants/Applicants to the day to day operations of the Investment Manager (PVAM) the First Defendant/Applicant.

[26] Additionally, he submits that the Defendants/Applicants' Defence amounts to nothing more than a mere denial; it contains no particularity such as, a statement that they did everything that they were supposed to do, undertook a particular course of action or procedure that would have secured the proper handling of the funds by the sub-advisors. He submits that there is a lot of information not before the Court as it is not in the possession of the

Claimant/Respondent and only accessible after disclosure (a submission that counsel for the Defendants/Applicants contend is nothing short of 'fishing', submitting on the authority of **ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725**, that the court should not allow a case to go forward to trial simply because there is a possibility of some further evidence emerging).

[27] He posits that the Defendants/Applicants' affidavits assist the case for the Claimant/Respondent as at the heart of this matter is the relationship or proximity of the parties. The Defendants/Applicants' affidavits show exactly how the Defendants/Applicants fit into the whole structure, and the proximity of the parties, which is the principle which guides this type of case. The current state of the law, he states, is that it is no longer necessary to have an express statement of responsibility when the claim is by a person who has no contractual or quasi-contractual link to the tortfeasor.

[28] There is sufficient proximity or neighbourhood (**Donoghue v Stevenson [1932] AC 562 and the 'neighbour principle')** when one looks at the structure set out by the Defendants/Applicants, the same individuals are involved in the managing of the shares and therefore there is sufficient 'proximity' to establish 'neighbourhood' between the parties, giving rise to a Duty of Care.

[29] The law is not as set out in **Williams v Natural Health Life Foods Ltd.** The issue in **Williams** is not the same and the law on the subject of Joint Tortfeasors was not being argued. The applicable law is as set out in **MCA Records Inc. v Charly Records Ltd [2001] EWCA Civ 1441** and **Body Corporate v Taylor [2008] NZCA 317**.

**CPR Provisions**

**Part 15.2(a)(i) and (b)**

[30] This Application invokes the authority of the Court under **Parts 15** and **26** of the **CPR**.

[31] **Part 15** provides two grounds on which this Court may give summary judgment: firstly, that the Claimant has no real prospect of succeeding on the claim or issue; and secondly, there is no other reason why the case or issue should be disposed of at a trial: **Part 15.2 (a)(i)** and **(b)**.

[32] Summary judgment under this provision is a means of disposing of weak claims at an early stage of the proceedings on the basis of lack of evidence. It enables the Court to determine an issue[s] between parties without a trial.

[33] The test of whether the Claimant has "a real prospect of success" and what that means, has been much rehearsed. The *locus classicus* and oft cited discussion of this test is that of Lord Woolf MR in the case of **Swain v Hillman [2001] 1 All ER 91 CA** where he stated as follows:

> "It is important that judges in appropriate cases should make use of the power contained in CPR Part 24 [to grant summary judgment]. In doing so, they will give effect to the overriding objective… It saves expense, achieves expedition, avoids the court's resources being used up on cases where that serves no purpose and is in the interest of justice. If a claimant has a case which is bound to fail, it is in his interest to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a claimant should know that as soon as possible… Useful though the power is, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial… The proper disposal of an issue under Part 24 does not involve the judge conducting a mini-trial; that is not the object of the provisions; it is to enable cases, where there is no real prospect of success, either way, to be disposed of summarily."

And later:

> "… The words 'no real prospect of succeeding' did not need any amplification as they spoke for themselves. The word 'real' directed the Court to the need to see whether there was a realistic as opposed to fanciful prospect of success. The phrase does not mean 'real and substantial prospect of success'. Nor does it mean that summary judgment will be granted only if the claim or defence is bound to be dismissed at trial."

[34] Some of the principles distilled from the leading case law are as follows:

[35] In **E. D and F Man Liquid Products Ltd v Patel (2003) Times, 18 April, Potter LJ** observed that the case to be analysed must be "something better than merely arguable under the former rules" (this case coincidentally establishes that the same test is applied on an application to set aside default judgments). See discussion of this in **Comodo Holdings Ltd v Renaissance Ventures Limited et al BUIHCMAP 2014/2002**; and BVI Court of Appeal Cases **Citco Global Custody NV v Y2K Finance Inc BVIHCVAP 2008/0022 (delivered 19th October 2009, unreported); Alfa Telecom**

**Turkey Ltd v Cukurova Finance International Ltd et al BVIHCVAP 2009/001 (delivered 16th September 2009, unreported).**

[36] **Three Rivers District Council v Bank of England (No. 3) [2001] UKHL 16** (also considered a *locus classicus* on this principle) establishes that the criterion to be applied in this exercise by the court is not one of probability, it is absence of reality. The Court will consider the merits of the Respondent's case only to the extent necessary to determine whether it has sufficient merit to proceed to trial.

[37] In reaching its conclusion, the Court must not embark on a mini-trial: see **Western United Credit Union Co-operative Society Ltd v Corrine Ammon TT 2010 CA 42; Royal Brompton Hospital NHS Trust v Hammond (No. 5) [2001] EWCA Civ 550**.

[38] Summary judgment is unsuited to complex claims or claims relying on complex facts and issues involving questions of law and fact where the law is not simple: **Swain v Hillman and another [2001] 1 All ER 91; Three Rivers District Council v Bank of England [2001] 2 All ER 513; Hallman Holding Ltd v Webster and another [2016] UKPC 3; Comodo Holdings Ltd v Renaissance Ventures Limited et al BUIHCMAP 2014/2002.**

[39] The Learned author of the text **The Caribbean Civil Court Practice** outlines the approach that should be taken by a Court in an application of this type in the following terms:

> "…the test of 'no real prospect of succeeding' requires the judge to undertake an exercise of judgment; he must decide whether to exercise the power to decide the case without a trial and give summary judgment; it is a discretionary power; he must then carry out the necessary exercise of assessing the prospects of success of the relevant party; the judge is making an assessment not conducting a trial or fact-finding exercise; it is the assessment of the case as a whole which must be looked at; accordingly, 'criterion which the judge has to apply under CPR 24 is not one of probability; it is the absence of reality."

[40] It has also been observed that in reaching a conclusion the Court must take account of not only the evidence placed before it on the application for summary judgment, but also the evidence which can reasonably be expected to be available at trial.

**No Other Reason why the Case/Issue should be disposed of at Trial (15.2(a)(b))**

[41] This ground, while pleaded by the Defendants/Applicants, was not argued by either party.

[42] It speaks to a submission/argument that there is some other reason for a trial which necessitates the Court refusing Summary Judgment.

[43] A non-exhaustive list of reasons for going to trial can be found at **Blackstone's Civil Practice 2011 at 34.46**; and **The Whitebook 2011 Vol. 1 at 24.2.4**.

**Part 26.3(3)(b) Application**

[44] This provision enables the Court to strike out a statement of case at a Case Management Conference if the insufficiency of the Claim warrants striking out because there are no reasonable grounds for bringing it.

[45] My sister **Richards J.** in the case of **Junior Wood Trucking Services Inc. v Butcher BB 2014 HC 24** and more recently in **Seymour DaCosta Cumberbatch v COP, PSC & AG Civil Suit No. 1062 of 2013** addresses the difference between the test for summary judgment under **Part 15.2** and the test for striking out under **Rule 26.3** of the **CPR**. **S**ee also **Auto-Guadeloupe Investment S.A.S v Alvarez et al BB 2013 HC 39; Mottley v The Nation Publishing Co. Ltd. et al BB 2013 BC 63; Sebol Limited & Others v Ken Tomlinson & Others (SCCA No 115/2007 delivered 12th December 2008); S.T. Distributors Ltd. & Anor v CIBC Jamaica Ltd. & Anor (SCCA No 112/2004 delivered 31st July 2007); Stewart v Samuels JM 2005 66.**

[46] The learned author of the text **The Caribbean Civil Court Procedure** made this observation as to how a Court should treat a combined challenge such as this one, when he stated as follows at **Note 23.23**:

> "Where a defendant makes a combined challenge to the claimant's case, the court ought normally to start by considering the first challenge, for which it will not need to consider any evidence; if the claimant's statement of case is found to contain a coherent set of facts which disclose a legally recognizable claim against the defendant, the defendant is then entitled by CPR 24 to try and persuade the court that, notwithstanding that fact, the claimant has no real prospect of success; it is at that stage that the court will normally consider any

> evidence that the parties may adduce: **Chief Constable of Kent V Rixon [ 2000] All ER 476, CA, Brooke LJ**.
> It has been held that the court may treat a defendant's application to strike out as if it were an application for summary judgment: **Taylor V Midland Bank Trust Co Ltd [1999] All ER 831**."

[47] See the guidelines established for application in a striking out action by our Court of Appeal in **Paradise Beach and Paradise 88 Limited v Edghill and Patel Civil Appeal No. 10 of 2011.**

[48] In that case, it was stated (in a judgment delivered by **Moore JA**) that a court should not engage itself in a minute and protracted examination of the documents and facts of the case in order to see whether the respective party has a cause of action sustainable before the Court (stated with reference to **Wenlock v Moloney and Others [1965] 2 All ER 871 and Chan Seek v Alvis Vehicles Ltd [2003] EWHC 1238)**. To do so, is to usurp the position of the trial judge, and produce a trial on written evidence solely, without oral evidence being tested in cross-examination in the ordinary scheme of things. It was held further that it was not appropriate to 'strike' a claim where the central issues are in dispute: **King Telegraph Group Ltd [2003] EWHC 1312 (QB)**. This must be taken in conjunction with a constant mental reminder that for the court to achieve a just result it must bear in mind the Overriding Objective of dealing with cases justly.

[49] **Kodilyne** in the text **Commonwealth Caribbean Civil Procedure, 3rd Ed.** at **page 63** speaks to the interplay between the two sections as follows:

> "…The main distinction between striking out and summary judgment is that the former is aimed at weakness in the manner in which the issues are set out in the statements of case, whereas the latter is used in cases or defences that are weak on the facts and, since summary judgment is defined as "a procedure by which the court may decide a claim or a particular issue without a trial, it is clear also that it applies also to cases or defences based on misconceived points of law."

**Discussion**

[50] What in this Court's opinion was the very positive effect of this Application was the focusing of attention on the very narrow issue in this matter.

[51] It is seen by this Court as the exploration, definition/delimitation of the legal principles surrounding the concept of Assumption of Personal and Corporate Liability, referred to more widely as the **Extended Hedley Byrne Principle**, the Test to be used in the determination of Personal (and corporate) liability. It contemplates this Court's acceptance of the law as outlined by the House of Lords in **Williams and Another v Natural Life Health Foods Ltd [1998] 1 WLR 830** (the Objective Test) as being the relevant law in this jurisdiction and the practical application of that law (the Extended **Hedley Byrne** Principle) to the facts of this case.

[52] Counsel for the Respondents/Applicants summarizes it this way when referencing paragraph [35] of Counsel Mr. Weekes' submissions: that it is dealing with the issue whether professional persons are liable to a third party; in other words/stated differently, whether the Respondents/Applicants Mr. Lipton and Ms. Mackay can be liable to an investor in the Argyle Fund.

[53] Counsel Mr. Weekes usefully outlines the development of the law on this subject starting at paragraph 22 of his Written Submissions of February 9th 2015 where he traces the law relating to duty of care and its scope in relation to the duty to prevent pure economic loss beginning with the iconic House of Lords decision of **Hedley Byrne & Co Ltd v Heller & Partners [1964] AC 465; followed by Anns v Merton London Borough Council [1978] AC 728**. He cites also the Canadian authority of **City of Kamloops v Nielson (1984) 10 DLR 641** (endorsing the House of Lords in **Anns**); **Invercargill CC v Hamlin [1994] 3 NZLR 513 CA** (followed **Anns**). Counsel further follows the modern development of the principle enunciated in **Hedley Byrne** through the following cases: **Caparo Industries v Dickman [1990] 1 AC 605; Murphy v Brentwood DC [1991] 1 AC 398; Smith v Eric S. Bush [1988] QB 743; Henderson v Merrett [1995] AC 145; Merrett v Babb [2001] EWCA Civ 214; Harris v Wyre Forest District Council [1988] QB 835;** and most importantly, **Williams v Natural Life Health Foods Ltd [1998] 1 WLR 830**. These were all cases where the Court of Appeal and House of Lords in the UK found liability in wrongdoers even where there was no direct communication between the parties, but there was an assumption of responsibility in conversations, or in documents, or by virtue of the relationship.

[54] He relies on the New Zealand case **Body Corporate v Taylor [2008] NZCA 317** as outlining the current law on the Assumption of Responsibility. He argues that the dicta in the **Williams Case** are obiter.

**A General Statement of the Law**

[55] Whatever the authority relied on, the law on the assumption of legal responsibility is premised, (in the corporate/business context), on the belief that the law cannot be more favourable to company directors than to employees. It posits generally that a director must be personally liable where his negligent conduct leads to foreseeable damage. The earlier authorities spoke to foreseeable physical damage, the newer authorities examining responsibility for financial loss.

[56] Where the director is liable personally for the commission of a tort, his liability depends on the usual principles and does not derive from his status as director, regardless of the fact that others (such as the company) may be liable for the same tort depending on the circumstances.

[57] Where, as in this case, the damage said to have been caused by the negligence of the employee or director is pure economic loss, personal liability will depend on whether there has been a personal assumption of responsibility. For directors to incur personal liability, however, the court must be satisfied objectively that it was reasonable for the claimant to rely on the director's

assumption of responsibility, so as to create a special relationship between him and the claimant.

[58] See **Williams v Natural Life Health Foods Limited [1998] 1 WLR 830; Sirroco Limited v Atlas Private Trust Limited TC 2001 SC 11; Benjamin v KMPG Bermuda et al BM 2007 SC 25; Frank Houlgate v Investment Company Ltd et al [2011] CSOH 160; BP plc v Aon Limited and another [2006] All ER (D) 171; White and Another v Jones and Another [1995] 1 All ER 691 (where solicitors were found liable to intended beneficiaries).**

[59] See also **The Common Law Library, Charlesworth & Percy on Negligence, 12th ed**.

**The Burden of Proof Point**

[60] The burden of proof (and for that matter the standard of proof) formed a large plank of the Defendants/Applicants' submissions, as it was submitted forcefully that the Claimant/Respondent had failed to discharge the Burden placed on her.

[61] **Blenman JA** in **Comodo Holdings Ltd v Renaissance Ventures Ltd et al** had this to say on the burden of proof in applications such as this:

> "[90] Also, **ED & Man Liquid Products Ltd v Patel** and another recognizes that the test in a summary judgment application is no reasonable prospect of success and the burden of proof falls upon the applicant, that is, the person who is attacking the claim or defence. Because a summary judgment application is not a trial or even a mini trial, it is not necessary to consider which party had the stronger case.

> [91] It is the law that a respondent to a summary judgment application is not required to prove his case to a high standard. It will suffice to show that his case may succeed even though it is improbable. Authority for this proposition is found in **Swain v Hillman and Three Rivers Council v Bank of England**. I agree with Mr. Flynn, QC's complaint that the Comodo's pleaded case could not be said to be fanciful or have no real prospect of success.
>
> [92] …It is the law that before deciding whether or not to grant summary judgment, the judge should take into account the filed witness statements and also consider whether the case is capable of being supplemented by evidence at trial. (**The Royal Brompton Hospital National Health Service Trust V Hammond [2001] EWCA Civ 778)."**

[62] This is the approach taken by the learned authors of **Blackstone's Civil Practice 2011** at **Paragraph 34.11** citing **E D and F Man Liquid Products Ltd v Patel** (above) (who observe that placing the onus of proof on the applicant is a reversal of the traditional position in applications for summary judgment under the old rules), but more directly, as this discussion in **Patel** was found to be obiter, **Director of Asset Recovery Agency v Woodstock [2006] EWCA Civ 741** which to my mind speaks to a "shifting burden".

[63] See also the approach of **Harrison JA** of the Jamaica Court of Appeal in **Steward v Samuels JM 2005 CA 66 and Smikle v Nunes (2007) No 178 of 2002; George - Creque JA in St. Lucia Motor & General Insurance Co Ltd v Peterson Modeste HCVAP 2009/008; Saunders JA in Bank of Bermuda Ltd v Pentium (BVI) Limited et al Civil Appeal No.14 of 2003; Cox v National Housing Corporation (Barbados) No. 519 of 2011 (unreported) and Junior Wood Trucking Services Inc v Butcher BB 2014 HC 24.**

**The Standard of Proof**

[64] The **Whitebook** at **24.2.5** states that the standard of proof required of the respondent is not high: "It suffices merely to rebut the applicant's statement of belief ... When deciding whether the respondent has some real prospect of success the court should not apply the standard which would be applicable at the trial, namely the balance of probabilities on the evidence presented; on an application for summary judgment the court should also consider the evidence that could reasonably be expected to be available at trial." (**Royal Brompton Hospital NHS Trust (No. 5) [2001] EWCA Civ 550, CA"**; see also **Blackstone's Civil Practice 2015** above.

**Conclusion and Disposal**

[65] Had the Claimant/Respondent's action been based in Contract this Court can say that summary judgment would most likely have been granted in favour of the Defendants/Applicants.

[66] The several issues raised above leads this Court to the sure conclusion that these are matters properly determined only after the Court has investigated them further.

[67] There is without doubt a legally recognizable claim (a cause of action known to the law) against these Defendants/Applicants.

[68] There is no absence of reality in this claim. Just a quick look at the cases cited by both counsel in this matter speak to this. In **White v Jones [1995] 1 All ER 691** for example, the Court found that a solicitor who failed to draft a will, not only assumed responsibility to the testator, but to the beneficiaries as well. In **Smith v Bush [1989] 1 AC 831** the House of Lords held a negligent surveyor liable in damages to the borrower, even though the survey was carried out on the instruction of the lender. See also **Merrett v Babb; Harris v Wyre Forest District Counsel and Williams & Another v Natural Life Health Foods Ltd** all cited above.

[69] There are issues of law and fact to be determined by a trial of this action.

[70] This claim cannot be said to be entirely without substance. It evidently has its challenges, but it is not fanciful. It deserves to be assessed after witness statements and discovery and possibly trial. Dismissal of the claim at this early stage would, in my opinion, run counter to the tenets of the Overriding Objective.

[71] In closing, I adopt the following, stated by **Blenman JA** in **Comodo Holdings Ltd**:

> "[95] Similarly complex claims, cases relying on complex facts and issues involving questions of law and fact where the law is not simple, are likely to be inappropriate for summary judgment. It is also recognized that summary disposal is also inappropriate if the case is in a developing field of law**." (Brooks v Commissioner of Police of the Metropolis and others (2005) 1 WLR 1495**."

[72] This view is shared by the author of **The Caribbean Civil Court Practice, David Di Mambro** at **note 23.24** page 231 where the following appears:

> "… on the other hand, a case should not be struck out where the claim is in an area of developing jurisprudence and the facts need to be investigated before conclusions can be drawn about the law: **Farah v British Airways plc and the Home Office (2000) Times, 26th January, CA**. For this reason the court refused to strike out a claim by an acquiring company alleging breach of duty by directors of the company acquired: **Partco Group Ltd v Wragg [2002] EWCA Civ 594**.
> Similarly, in **Equitable Life Assurance Society v Ernst & Young (a firm) [2003] EWCA Civ 1114, the Court of Appeal** decided that the company's claims against its auditors for loss of a chance of a sale of the business should not be struck out: the scope of legal responsibility for the consequences of professional negligence was an area of developing jurisprudence and sensitive to the facts."

[73] **Blackstone's Civil Practice** makes this statement specifically on negligence cases alleging a duty of care:

> "It is unlikely to be appropriate to grant summary judgment to a defendant on the basis there was no duty of care in a novel situation (**Bishara V Sheffield Teaching Hospitals NHS Trust [2007] EWCA Civ 353)**. The question of whether a duty of care is owed often has to be decided in the light of all the facts and evidence (**Caparo Industries plc v Dickman [1990] 2 AC 605; Capital** and **Counties PLC v Hampshire County Council [1997] QB 1004)**."

[74] Accordingly, this Application for summary judgment is dismissed.

[75] A case management date shall be scheduled for the continuation of this matter.

**MARGARET A. REIFER**
Judge of the High Court