

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **CIVIL DIVISION**

3
4 **Cause No: G 0150/2013**
5

6 **BETWEEN:**

7 **ROCHESTER LIMITED**

8
9 **PLAINTIFF**

10
11 **AND:**



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1. **PATRICIA GLASGOW**
 2. **BODDEN CORPORATE SERVICES LTD.**
 3. **BCSL DIRECTORS LTD.**
 4. **BCSL SECRETARIEES LTD.**

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DEFENDANTS

21 **Appearances:**

22 **Mr. Thomas Lowe Q.C. with Mr. Nicholas**
23 **Dixey and Mr. Colm Flanagan of Nelson &**
24 **Co. for the Plaintiff**

25 **Mr. Paul Keeble and Ms. Su Tummala of**
26 **Hampson & Co. for the 2nd, 3rd and 4th**
27 **Defendants**
28

29 **Before:**

29 **Mr. Justice Robin McMillan¹**

30 **Heard:**

30 **24th November 2015**
31

32 **HEADNOTE**

33 *O.14 – Burden of Proof – Apparent conflict between two sets of alleged facts and circumstances*
34 *- Prolonged and serious argument – Care to be exercised where discovery has not taken place –*
35 *Real prospect of success may be established by a Defendant even where Court considers*
36 *Defendant's ultimate success may be improbable.*
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¹ When this matter was heard on the 24th November 2015 McMillan J sat as an Acting Judge of the Grand Court. McMillan J's fulltime appointment as a Judge of the Grand Court was on the 1st February 2016.

JUDGMENT

1. This is an application by the Plaintiff for summary judgment on the issue of liability to be entered originally against the Second to Fourth Defendants on the whole of the claim against them, pursuant to GCR O.14, as sought by Summons dated 10th August 2015. At the commencement of the hearing, however, counsel for the Plaintiff indicated that summary judgment would be sought only against BCSL Directors Ltd., the Third Defendant.
2. Default Judgment against Patricia Glasgow, the First Defendant, was entered on 15th May 2015.
3. In support of the Plaintiff's present application the Plaintiff relies upon the First Affidavit of Sharon Farrington ("Ms. Farrington") dated 14th May 2015 and upon the Second Affidavit of Ms. Farrington dated 21st August 2015.
4. The Third Defendant relies in opposition upon the Affidavit of Lynn M. Bodden dated 27th October 2015.



SUMMARY OF FACTS

5. At Exhibit "SF1" of Ms. Farrington's Second Affidavit there appears at page 16 a Sentence Ruling of Quin J. dated 25th March 2014 in relation to the First Defendant following her pleading guilty to three counts on Indictment No. 21 of 2013. This Ruling contains a helpful and agreed summary of the relevant facts.

6. The First Defendant was employed at Bodden Corporate Services Ltd, the Second Defendant, as a Corporate Administrator and Assistant Office Manager. Her half-sister Ms. Farrington was a good friend of Ms. Chrissie Ann Hatcher, whom the learned Judge describes as the sole beneficial owner of the company known as Rochester Ltd., - the Plaintiff in this matter before me.

7. Upon Ms. Farrington's recommendation, Ms. Hatcher agreed to have the company's registered office transferred to the Second Defendant in the present proceedings. A trust was also established under Cayman Islands law, requiring two trustees.

8. Ms. Farrington was one trustee and she recommended her sister, the First Defendant, to stand as the second trustee. Accordingly, Ms. Hatcher appointed Ms. Farrington and the First Defendant to serve as the two trustees. Ms. Hatcher's trust is then described as primarily established to provide funds for animal protection and for the assistance of environmental groups.



1 9. The First Defendant's dishonesty in relation to theft, obtaining a money transfer by
2 deception and making documents without authority, came to light as a result of a
3 real estate broker contacting the Second Defendant to inform it that he had a buyer
4 for land owned by Rochester Ltd.

5
6 10. When Ms. Farrington started to make enquiries on behalf of the trust she realized
7 that Ms. Hatcher had in fact earlier passed away on the 25th July 2010.

8
9 11. Ms. Farrington discovered that several requests had been made to Rochester Ltd.'s
10 bankers which were not on the file. These were requests for cheques payable to
11 Rochester Ltd. and deposited into Rochester Ltd. bank accounts. Thereafter, it was
12 discovered that it was the First Defendant who withdrew the funds, a matter to
13 which I shall later return.

14
15 12. It was discovered that the bank withdrawal slips were always signed by the First
16 Defendant and, purportedly, her colleague Ms. Carol Balls ("Ms. Balls"). Ms. Balls
17 was the Second Defendant's office manager and the co-signatory on the Rochester
18 Ltd. account.

19
20 13. 'There were 18 facsimile transmissions purportedly signed by Ms. Balls authorizing
21 the cheques to Rochester Ltd. The police, in the course of their enquiries,
22 discovered that Ms. Balls had not signed any of these documents, and in fact, the
23 First Defendant had cut and pasted Ms. Ball's signature from other documents in
24 order to demonstrate that Ms. Balls, the co-signatory, was in fact co-authorizing the
25 transactions.





1 6. On 6 November 2003 the Third Defendant, acting by the First
2 Defendant and Ms. Lynn Bodden, resolved that the mandate on
3 Rochester's bank account at BOB be changed so that the account could
4 be operated on the signature of any two authorized signatories of the
5 Third Defendant.

6 7. A similar resolution was passed by the Third Defendant in respect of
7 the CNS account on 29 April 2004.

8 8. The First Defendant and Ms. Balls were at all material times
9 authorized signatories of the Third Defendant and, to the extent to
10 which they signed documents on behalf of the Plaintiff in such capacity,
11 were de facto directors of the Plaintiff.

12 9. In her capacity as de facto director and shareholder of the Plaintiff
13 and/or trustee of the Rochester Fund, the First Defendant owed the
14 Plaintiff duties of a fiduciary. In particular, she owed the following
15 duties:

16 9.1. she would act in good faith and in the best interests of the
17 Plaintiff;

18 9.2. she would not use the powers conferred on her for any
19 improper purpose;

20 9.3. she would not use the assets of the company for an improper
21 purpose;

22 9.4. she would avoid a conflict of interest between her own interests
23 and those of the Plaintiff; and

24 9.5. she would not use her position to make a secret-profit.

25 10. Between 8 September 2008 and 24 August 2011, in breach of her
26 fiduciary duties, the First Defendant made unauthorized withdrawals
27 from CNS and BOB totaling some US\$439,300, leaving a few hundred
28 dollars in the savings accounts. The withdrawals from CNS were by
29 way of cheque issued by CNS pursuant to written requests signed by the
30 First Defendant and, purportedly, Ms. Balls. These cheques were then
31 paid into the Plaintiff's savings account with BOB. The withdrawals
32 from BOB were in cash and were made pursuant to written requests
33 signed by the First Defendant and, purportedly, Ms. Balls.

1 14. At page 8 of his Sentence Ruling Quin J. states that the theft started in September
2 2008 and continued until August 2011, and that there were 74 unauthorized
3 transactions over a 3-year period. Earlier at page 3 the learned Judge remarks that
4 the Crown submitted that the total amount of funds misappropriated by the First
5 Defendant was US\$437,300.00.

6
7 **THE AMENDED STATEMENT OF CLAIM**

8
9 15. Paragraphs 1-10 of the Amended Statement of Claim state as follows:

- 10
11 "1. The Plaintiff is a Cayman company and is the sole asset of the
12 Rochester Trust.
- 13 2. The Rochester Trust was established by an irrevocable declaration of
14 trust made on 7 October 2003 by the First Defendant and her half-
15 sister Sharon Farrington, acting as Original Trustees.
- 16 3. As at the date of the declaration of trust the First Defendant was
17 employed by the Second, Third and /or Fourth Defendants as a
18 corporate administrator and assistant office manager.
- 19 4. At all material times the Plaintiff had a securities account at Cayman
20 National Securities ("CNS") and a savings account as well as mutual
21 fund investments at Bank of Butterfield ("BOB"). The CNS account
22 had a balance of US\$233,492.32 as at 30 June 2008 whilst the BOB
23 savings account had a balance of US\$30,366.45 as at 8 September
24 2008 and BOB held a further US\$242,454.90 in mutual funds as at 30
25 September 2008.
- 26 5. Between 22 October 2003 and 23 July 2012, the Second to Fourth
27 Defendants provided for reward directors, officers and the registered
28 office of the Plaintiff. A yet further related entity, BCSL Nominees
29 Limited, held the entire issued share capital in Rochester before
30 transferring it to the Original Trustees on about 22 October 2003.
- 31
32



- 1 11. *Ms. Balls did not know anything about these withdrawals as her*
2 *signature had, in every case, been forged by the First Defendant.*
3 12. *By making the cash withdrawals from BOB the First Defendant*
4 *fraudulently asserted permanent dominion over that cash which was*
5 *inconsistent with the Plaintiff's rights and thereby committed the tort of*
6 *conversion."*
7

8 In addition, paragraphs 16 and 17 are as follows:

- 9 "16. *Further or in the alternative, the Second to Fourth Defendants owed*
10 *the Plaintiff an implied duty to provide their services with reasonable*
11 *care and skill and/or a common law duty to the same effect.*
12 17. *In breach of these In breach of these duties, the Second, Third and/or*
13 *Fourth Defendants failed to provide their services with reasonable care*
14 *and skill."*
15

16 Particulars of breach then follow, and finally at paragraph 18.1 the following
17 particulars of loss and damage are, inter alia, set out:

- 18
19 "18.1 *The Plaintiff's primary case is that, with proper systems in place, the*
20 *Plaintiff would have suffered no loss with the result that its claim is for*
21 *the full amount of US\$349,665.86."*
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1 **THE DEFENCE OF THE SECOND, THIRD AND FOURTH DEFENDANTS**

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3 16. Paragraphs 1-13 of the Defence submissions state as follows:
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- 5 "1. The 2nd, 3rd and 4th Defendants will be referred to individually or as the
6 context may require as "these Defendants". These Defendants deny
7 that they or any of them are indebted to the Plaintiff as alleged or at
8 all. Save as may be expressly admitted or not admitted each and every
9 allegation in the Statement of Claim is denied.
- 10 2. Paragraph 2 of the Statement of Claim is admitted. The Rochester
11 Trust is referred to hereafter as "the trust". These Defendants will
12 refer to the full terms of the Declaration of Trust at the trial of this
13 matter. The Plaintiff was the main or sole asset of the trust. The
14 Rochester Trust was established on the instructions of the Protector
15 one Christi Ann Hatcher ("Hatcher"), herself a beneficiary of the trust,
16 and now deceased. The trustees of the trust were at all material times
17 Sharon Farrington ("Farrington") and her half-sister, the 1st
18 Defendant (the "trustees").
- 19 3. The Plaintiff and its monies were treated by the trustees as assets of the
20 trust. The Plaintiff was treated and intended to be treated by the
21 trustees of the trust, by its directors and shareholders as a receptacle
22 for monies and company formalities were not followed. When monies
23 were required for a beneficiary of the trust they were taken out at the
24 behest of the trustees without observance of company requirements.
- 25 4. Hatcher was in the habit of visiting the Cayman Islands twice a year.
26 During these visits to Cayman she would instruct the trustees to
27 withdraw sums in cash from the Plaintiff, in the region of \$10,000.00
28 which she would take back to Tampa or New York with her. After her
29 instructions were carried out, the transaction would be reflected by
30 minuted Directors; Resolution of the 3rd Defendant reflecting the
31 suggested "dividend" paid to the sole shareholder of the Plaintiff being
32 the trustees. On some occasions Hatcher would attend at the 3rd
33 Defendant's offices, sometimes with Farrington, and would meet with



1 the 1st Defendant when the exchange of cash would take place at that
2 time. On other occasions Farrington would give instructions to draw
3 cash and travel to Tampa taking the cash to Hatcher. On another
4 occasion the 1st Defendant herself took \$18,000.00 in cash to Hatcher.
5 These Defendants had no direct involvement in these cash withdrawal
6 and drop-off arrangements, which were matters between Hatcher, the
7 trust and its trustees.

8 5. By the Declaration of Trust the 1st Defendant as trustee had power to
9 deal with the trust property which in light of the way in which the
10 Plaintiff company was operated included monies in the Plaintiff's bank
11 accounts. The trustees were entitled to self-deal and have interests
12 conflicted with those of the trust without being accountable to the trust.

13 6. At the same time and on the same day as the Declaration of Trust and
14 as part of the setting up of the trust, instructions were given by Hatcher
15 to the 2nd Defendant as to the siting of the registered office, the
16 provision of nominee directors and the person authorized to give
17 instructions in respect of the Plaintiff. In answer to questions in the
18 contract between Hatcher and the 2nd Defendant, Hatcher confirmed
19 that she required the 2nd Defendant to provide a "nominee Director",
20 the provision of which was expressly subject to an indemnity. As it was
21 clearly to be Hatcher and the trustees who made decisions in respect of
22 the Plaintiff, Hatcher gave to these Defendant an indemnity in the
23 following terms ("this company" being a reference to the Plaintiff):-

24 INDEMNITY – IMPORTANT – PLEASE READ BEFORE SIGNING

25 In consideration for BCSL undertaking to accept the transfer of the
26 registered office of this company the customer hereby undertakes and
27 agrees to indemnify BCSL or any shareholder, director, officer or
28 employee of BCSL and to hold them harmless and to keep them
29 indemnified and held harmless for all actions, suits, proceedings,
30 claims demands, costs and expenses whatsoever which may be taken or
31 made against BCSL or any shareholder, director, officer or employee
32 of BCSL or which may be incurred or become payable by BCSL or any
33 shareholder, director, officer or employees in respect of or arising out
34 of or in consequence of any decision or act made by BDSL in relation



1 to the incorporation, maintenance, and/or administration of the
2 company.

3 "Christi Ann Hatcher"

4 Signature of each Director and/or beneficial owner

5 Date: Oct 7, 03

- 6 7. In the circumstances the reality of the situation was that the trustees
7 were to have control of the funds of the Plaintiff and the position of the
8 3rd Defendant as director of the Plaintiff was merely cosmetic. The 2nd
9 Defendant was only to provide "nominee" directors.
- 10 8. In the circumstances, when the 1st Defendant drew monies out of the
11 Plaintiff (whether properly or wrongly and for her own benefit) she
12 was acting as trustee of the trust and not on behalf of or as employee of
13 any of these Defendants.
- 14 9. As to paragraph 3 of the Statement of Claim, the 1st Defendant was
15 employed by the Second Defendant as Corporate Administrator and
16 Assistant Office Manager.
- 17 10. Paragraph 4 is admitted. As to paragraph 5, the 3rd Defendant was a
18 nominee director only whose position as to the assets of the Plaintiff
19 were (for the reasons and in the circumstances set out above) purely
20 formal with decisions being made by the trustees and Hatcher. It is
21 admitted that at all material times the trustees held the entire issued
22 share capital in the Plaintiff.
- 23 11. As to paragraph 6 and 7 the resolutions were passed on the directions
24 and instructions of the trustees.
- 25 12. As to paragraph 8 it is admitted that the 1st Defendant and Ms. Balls
26 were authorized signatories of the 3^d Defendant. However when they
27 signed documents or authorizations they acted at the behest of and on
28 the instructions of the trustees.
- 29 13. As to paragraph 9 the only relevant capacity of the 1st Defendant was
30 as trustee of the trust. Paragraphs 9.1, 9.2 and 9.3 are admitted.
31 Paragraphs 9.4 and 9.5 are denied and are in conflict with the express
32 terms of the Declaration of Trust."
33



1 17. Counsel for the Third Defendant also refers to a Draft Amended Defence which
2 appears to amplify the basis upon which the Second Defendant and Third
3 Defendant accepted instructions to act in relation to the Plaintiff.
4

5 18. Ms. Lynn Bodden explains at paragraphs 5 and 8 of her Affidavit, that on the 19th
6 October 2015, upon a further investigation, it was possible to locate some archived
7 and previously overlooked electronic records. In that context, as I understand it, the
8 Draft Amended Defence is intended to illustrate the receipt and alleged impact of
9 the additional information and it is brought to the Court's attention simply as an
10 illustrative aspect of the Third Defendant's submitted argument itself.
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THE O.14 APPLICATION

19. The Plaintiff contends that it is entitled to summary judgment unless the Court dismisses the application or the Defendant satisfies the Court that there is an issue or question in dispute which ought to be tried.

20. In this case, the preliminary requirements for proceedings under O.14 having been satisfied, the Plaintiff has therefore established a prima facie case, and

*"the burden, as it were, then shifts to the Defendant to satisfy the Court why Judgment should not be given against him"*²

21. Furthermore, in *Grant Thornton (a firm) v. Telecayman Limited*³, I stated:

"33. In this context the Court reminds itself of the very pertinent comment of Smellie CJ in *ABC International Molson Coors Brewing Company v. ABC International*, where the learned Chief Justice emphasizes at paragraph 44 that the Court must be "very careful" in granting relief by way of summary judgment to satisfy itself that the defendant is unable to establish a bona fide case.

34. Furthermore, adopting the language of Vos J.A. in *Merren v. Cayman National Bank*, the issue is whether the Defendant has shown a fair and reasonable probability that it has a real, or bona fide, defence."

22. In *David Morrison v. Solomon Harris*⁴, Quin J. elaborates upon this general principle at paragraph 135:

"135. It is common ground between both leading counsel that the approach to Summary Judgment is set out in the English Court of Appeal case of *Swain v. Hillman and Another* [2001] 1 All E.R. 91 which has been followed by the Grand Court in *Rankine v. Scott, Martin and Ebanks* [2008] CILR Note 9. The approach can be summarized as follows:

- i. In an appropriate case the Court will grant summary judgment to a Plaintiff;
- ii. The issue on such an application is whether the Defendant has no real, as opposed to fanciful, prospect of success;

² (See the Supreme Court Practice 1999, Volume I, Note 14/4/1)

³ Cause No. G276 of 2014

⁴ Cause G395 of 2015



- iii. *The Court has to test that by reference to what would happen if the matter were allowed to go forward to a trial;*
- iv. *The Court should generally not grant summary judgment when there are disputed issues of fact or where there should be a trial for some other reason;*
- v. *Where there is a dispute of fact the Court should only grant summary judgment where it can see with confidence that the issue would be determined in favour of the applicant."*

23. Finally, in *Three Rivers District Council v. The Governor of the Bank of England*⁵ Lord Steyn emphasizes the judgment of *Wenlock v. Maloney*⁶ when Danckwerts L.J. said of the inherent power of the court to strike out:

*"...this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the Plaintiff really has a cause of action. To do that is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power."*⁷

24. This passage is of some relevance in the context of the present application, as Lord Steyn further adds at paragraph 97 that he would also pay careful regard to what the Court of Appeal in *Wenlock* regarded as objectionable.

25. Moreover, it is clearly recognized that if an application to strike out involves a prolonged and serious argument the judge should, as a general rule, decline to proceed with the argument unless he not only harbours doubts about the soundness of the pleadings but, in addition, is satisfied that striking out will obviate the necessity for a trial or will substantially reduce the burden of preparing for the trial or the burden of the trial itself.

⁵ (No. 3) [2001] 2 All E.R. 513

⁶ [1965] 1 WLR 1238 at paragraph 97

⁷ (See [1965] 2 All E. R. 871 at page 1244)

1 26. Although *Three Rivers* addressed the issue of summary judgment against a
2 Plaintiff, nonetheless, it provides ample illustration of the learned Chief Justice's
3 precept that the Court must be "*very careful*" in granting relief by way of summary
4 judgment to satisfy itself that the defendant is unable to establish a *bona fide* case.

5
6 27. It is in light of these broad legal principles that the respective evidence and the legal
7 submissions of the Plaintiff and the Third Defendant must now be considered.

8
9 ***THE EVIDENCE OF MS. SHARON FARRINGTON***

10
11 28. Ms. Farrington is the sole trustee of the Rochester Trust. In Ms. Farrington's First
12 Affidavit sworn in support of an injunction application she states at paragraph 6 that
13 the sole asset of the Rochester Trust – of which the First Defendant and Ms.
14 Farrington were co-trustees – was a Cayman company called Rochester Ltd. This
15 company owned a number of assets including land in Grand Cayman, Cayman Brac
16 and mutual fund investments. The company had a securities account at Cayman
17 National Securities ("CNS") and a savings account and mutual fund investments at
18 Bank of Butterfield ("BOB").

19
20 29. Ms. Farrington also describes in paragraphs 13-15 how the co-trustees had come to
21 be appointed and stipulated that at no time was the First Defendant ever a
22 beneficiary of the trust.

23
24 30. Ms. Farrington's Second Affidavit was sworn in support of the Plaintiff's
25 application for summary judgment, claiming, in effect, that the Third Defendant has
26 no *bona fide* defence to the claim.

27
28 31. Ms. Farrington states at paragraphs 9-17:



- 1 “9. *The sole asset of the Trust is the Plaintiff Company which has owned a*
2 *number of assets including land in Grand Cayman, Cayman Brac and*
3 *mutual fund investments. The Plaintiff Company had a securities*
4 *account, at Cayman National Securities (CNS”) and a savings account*
5 *and mutual fund investments at Bank of Butterfield (“BOB”).*
- 6 10. *Between 22 October 2003 and 23 July 2012, Bodden Corporate*
7 *Services Ltd., BCSL Directors Ltd and BCSL Secretaries Ltd. (together*
8 *“the Bodden Defendants”) provided directors, officers and the*
9 *registered office to the Plaintiff Company.*
- 10 11. *During this period the First Defendant was an employee of the Second*
11 *Defendant. She was employed as a Corporate Administrator and*
12 *Assistant Office Manager.*
- 13 12. *In the course of her employment, the First Defendant was appointed as*
14 *a signatory of the Third Defendant and as a representative of the*
15 *Fourth Defendant (both subsidiaries of the Second Defendant).*
- 16 13. *On 6 November 2003 and 29 April 2004 respectively, the Second*
17 *Defendant, as directors of the Plaintiff Company, resolved that the*
18 *BOB account and the CNS account be solely operated on the signature*
19 *of any two authorized signatories of the Second Defendant, of which*
20 *the First Defendant was one.*
- 21 14. *As at 30 June 2008, the CNS account had a balance of US\$233,492.32,*
22 *the BOB savings account a balance of US\$30,366.45 as at 8 September*
23 *2008 together with US\$242,454.90 in mutual funds at the BOB as at 30*
24 *September 2008.*
- 25 15. *Between September 2008 and August 2011 there were a series of*
26 *withdrawals and transfers made from the mutual fund accounts at BOB*
27 *and from the CNS account into the BOB savings account. Cash*
28 *withdrawals which were not authorized by the Plaintiff Company,*
29 *totaled a sum in excess of US\$437,300.00 (“the Funds”). There is now*
30 *only a balance of several hundred dollars remaining on each account*
31 *and all of the mutual fund investments have been redeemed.*
- 32 16. *The various unauthorized withdrawals were made by the First*
33 *Defendant in the purported exercise of her employment duties as an*
34 *authorized signatory and representative of the Bodden Defendants.*



1 17. *As a result, the Plaintiff Company and accordingly the Trust suffered*
2 *significant loss."*
3

4 32. Ms. Farrington's Second Affidavit exhibits a paginated bundle of documents
5 marked as Exhibit "SF1." These include police statements taken from Mr. Norman
6 Bodden, Ms. Carol Balls and Ms. Lynn Bodden. They contain, *inter alia*, certain
7 details of the First Defendant's responsibilities which in themselves do not appear
8 to be controversial or contested. For example, Mr. Bodden states that the First
9 Defendant was appointed as a signatory of the Third Defendant, a nominee director
10 company and subsidiary of the Second Defendant. She was also appointed as a
11 signatory on the Plaintiff's bank accounts. He also states at page 1:

12
13 *"Where BCSL Directors were the sole directors of the Company, BCSL*
14 *Directors could always be appointed as the sole signatory on the Company's*
15 *Bank Account, unless otherwise instructed. BCSL directors act in a fiduciary*
16 *capacity for the clients."*
17

18 33. Ms. Lynn Bodden likewise states at page 10 that the First Defendant was appointed
19 as a signatory of the Third Defendant, a nominee director company and subsidiary
20 of the Second Defendant. The Third Defendant was the sole director of the Plaintiff.
21 Ms. Bodden adds:

22 *"Two signatures are always required for any transaction by BCSL Directors. It*
23 *was required that P G always sign a request to a bank with another authorized*
24 *signatory of BCSL Directors Ltd."*
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1 34. I accept, for the purpose of this hearing, the submission of counsel for the Third
2 Defendant that these police statements were given in the context of a criminal
3 investigation only and they were not framed in such a way as to be responsive to or
4 determinative of any wider enquiry.

5
6 35. Ms. Farrington also exhibits at page 16 of Exhibit "SF1" the Sentence Ruling of
7 Quin J. to which I have referred in part.

8
9 36. Written Resolutions of the Directors of the Plaintiff Company are exhibited,
10 whereby the accounts of the Plaintiff at Bank of Butterfield International (Cayman)
11 Ltd. and Cayman National Securities Ltd. henceforth "*be operated on the signature*
12 *of any two authorities signatories of BCSL Directors Ltd.*".

13
14 37. In the Bank of Butterfield International (Cayman) Ltd. and Cayman National
15 Securities Ltd., Resolutions – copies of which appear at pages 46 and 47,
16 respectively of exhibit "SF1" – Lynn Bodden and Patricia Glasgow are described as
17 the undersigned, "*being the Directors of the Company*", meaning, I assume, the
18 Plaintiff Company itself.

19
20 38. This is some indication of how the First Defendant functioned in several different
21 and contemporaneous roles, even if not officially so. The respective Resolutions
22 are dated 6 November 2003 and 29 April 2004.



1 **THE EVIDENCE OF MS. LYNN M. BODDEN**

2
3 39. Ms. Lynn M. Bodden is a partner within the law firm of Bodden & Bodden and a
4 Director of the Second, Third and Fourth Defendants in these proceedings.

5
6 40. Ms. Bodden explains at paragraph 7 of her Affidavit that a number of agreements
7 were entered into with Ms. Christi Hatcher in 2003 which formed the basis upon
8 which the Second and Third Defendants were to carry out services for the Plaintiff.

9
10 41. Ms. Bodden further explains at paragraph 8 of her Affidavit that following
11 Hurricane Ivan, in 2004, many office files were lost. However, it occurred to Ms.
12 Bodden that some of the documents in this matter might well have been preserved
13 in electronic form. Copies of documents signed by Ms. Hatcher came to light on the
14 19th October 2015, and they are now referred to in the draft Amended Defence to
15 which I have earlier alluded.

16
17 42. I shall now set out in full detail Ms. Bodden's evidence from paragraphs 14-22 of
18 her Affidavit:

19 "12. *Farrington was a very close friend of Hatcher and handled her matters*
20 *and those of the Plaintiff while she was employed with Hunter &*
21 *Hunter. Farrington was planning to retire from Hunter & Hunter and*
22 *sometime before her retirement from the firm introduced Hatcher to us*
23 *as a client, with a view to the 2nd Defendant providing registered office*
24 *services to Hatcher's company, the Plaintiff, going forward. I had*
25 *meetings with Hatcher, the first of these likely being on 7 August 2003*
26 *attended by both Farrington and Hatcher. It was the case that the*
27 *shares in the Plaintiff had been held by Huntlaw on a bare trust as*
28 *nominee for Hatcher. Hatcher indicated that she wanted a Cayman*
29 *Islands trust. She was very concerned with privacy and confidentiality.*
30 *I advised that she should have a professional trustee. However Hatcher*
31 *rejected this advice and insisted that she wanted to have her close*



1 friend Farrington as trustee, since she wanted to keep all matters very
2 private and confidential. When I pointed out that two trustees were
3 necessary under Cayman Islands law Hatcher suggested that Glasgow,
4 Farrington's half-sister, whom she knew well and who was by then
5 employed by the 2nd Defendant would be ideal as trustee.

6 13. Accordingly the personality of the trustees, the individuals who were to
7 run the Plaintiff and in particular Glasgow was very much a matter
8 decided upon by Hatcher. She knew them and trusted them to carry out
9 her wishes, and could as she expressed control them. From the outset it
10 was clear in our discussions that by reason of the relationship between
11 Glasgow and Farrington and because Glasgow was expressly to be a
12 trustee and was an employee of the 2nd Defendant, Glasgow would be
13 speaking for Hatcher, Farrington and the Plaintiff so that the 2nd
14 Defendant could safely take their instructions from her. Naturally it
15 was accepted and understood that she would be liaising with
16 Farrington and receiving instructions from her and/or Hatcher.

17 14. This was in fact the way in which the relationship worked; Farrington
18 would telephone Glasgow, or Hatcher would telephone Glasgow
19 directly, and have her withdraw funds in advance of Hatcher's visits to
20 the Cayman Islands. There would be an exchange of cash at the 2nd
21 Defendant's offices or in some cases Glasgow took cash up to Tampa,
22 Florida to delivery to Hatcher. In many cases these Defendants had no
23 knowledge of the instructions passing between
24 Hatcher/Farrington/Glasgow nor what arrangement they had made as
25 to the exchange of funds, save that I was aware that Glasgow was
26 providing Farrington with copies of the bank statements on the
27 Plaintiff's bank accounts on a monthly basis. It can be seen that this
28 was totally different from the sort of arms' length relationship that
29 Farrington portrays in her 2nd Affidavit. Although Glasgow worked for
30 the 2nd Defendant, her duties were limited to administrative matters.
31 The authority that she had to take monies out of the Plaintiff and to act
32 for the Plaintiff in the way that she was (properly) supposed to do
33 came, and came only, from her position as trustee, and – as the name
34 suggests – a person trusted by Hatcher and Farrington. I believe



1 Glasgow was remunerated by Hatcher for her services as trustee; I
2 recall her saying that Hatcher paid for her trip or trips to Tampa.
3 Obviously acting as a trustee paid or unpaid was not part of Glasgow's
4 employment or duties with the 2nd Defendant, and derived purely from
5 her appointment by Hatcher as trustee.

6 15. As far as I can recollect there were certainly at least two meetings
7 between me and Hatcher, on 7 August 2003 and 7 October 2003, the
8 first of these meetings certainly attended by Farrington who introduced
9 us. There may well have been more meetings. At these meetings we
10 discussed what the 2nd Defendant would be able to do for Hatcher. She
11 wanted the 2nd Defendant to provide administrative facilities for the
12 Plaintiff and a nominee director. Exhibited to my affidavit [13] are
13 copies of the Register of Members, the Register of Directors, and the
14 Register of Officers of the Plaintiff. It appears that for one day BCSL
15 Nominees Ltd., a subsidiary of the 2nd Defendant, was the shareholder
16 of the Plaintiff and thereafter the shares were transferred to Farrington
17 and Glasgow. Although I cannot remember precise details this was
18 clearly at the request of Hatcher and part of the arrangement whereby
19 Farrington and Glasgow were to control the Plaintiff with the 2nd
20 Defendant merely providing registered office services, administration
21 and company formalities. Hatcher expressly wanted "nominee
22 directors" for reason of confidentiality, but at the same time wanted to
23 control the trust through these trustees she trusted and appointed.

24 16. It is the case that very small fees were agreed with Hatcher for the
25 provision of services for the Plaintiff. These are set out in the Amended
26 Defence. I made it absolutely clear to Hatcher who agreed and
27 understood that the services of the 2nd and 3rd Defendant respectively as
28 registered office and nominee director would be provided on the basis
29 that there would be absolutely no liability save in the case of actual
30 fraud. (I cannot remember actually mentioning fraud although this
31 would have been understood). Hatcher was handed a number of
32 documents which made it absolutely clear that these Defendants were
33 accepting no liability whatsoever and if any claim was made upon them
34 Hatcher would be fully liable to indemnify them. The position of a



1 “nominee director”, who was effectively a cipher, would also have
2 been made plain to Hatcher. This was perfectly reasonable bearing in
3 mind that the people charged with administering and dealing with the
4 Plaintiff were her own people, Farrington and her sister, Glasgow. It
5 was also perfectly reasonable and only to be expected in the light of the
6 very small, indeed nominal, fees that were to be paid.

7 17. On this basis Hatcher was provided with a number of documents
8 including those set out at paragraphs 7 and 12 of the Amended
9 Defence. Hatcher took these documents away, brought them back and
10 signed them and dated them October 7, 2003. I list and exhibit to my
11 affidavit below the relevant documents (those listed at (a) – (c) being
12 documents which we located in electronic archives on 19 October
13 2015):

- 14 a) Letter to the 2nd Defendant dated 7 October 2003 signed by
15 Hatcher on behalf of the Plaintiff requesting provision of
16 corporate administration services [14, 15];
17 b) Deed of Indemnity dated 7 October 2013 and signed by
18 Hatcher [16];
19 c) Standard Terms and Conditions for Corporate Services signed
20 by Hatcher [17-19];
21 d) Change of Registered Office Questionnaire dated 7 October
22 2003 and signed by Hatcher [20-22];
23 e) Letter to Huntlaw dated 7 October 2003 signed by Hatcher
24 requesting the transfer of the registered office of the Plaintiff
25 [23];

26 18. It was on the basis of the foregoing contractual documents, and on this
27 basis only that services were provided by these Defendants to the
28 Plaintiff.

29 19. On the same day Glasgow and Farrington executed the Declaration of
30 Trust a copy of which dated 7 October 2003 is exhibited to my affidavit
31 [24-41] and which gives wide powers and complete control to the
32 trustees. Hatcher also executed and provided on 7 October 2003 a
33 Letter of Wishes [42, 43] addressed to Farrington and Glasgow as
34 trustees of the Rochester Trust reflecting their authority. Hatcher later



1 proved the 2nd Defendant with an updated Letter of Wishes dated 4 July
2 2007 [44-45] which similarly was addressed to Farrington and
3 Glasgow as trustees of the Rochester Trust.

4 20. Without actually saying so the Statement of Claim assumes that the
5 Plaintiff was a contracting party. It makes no reference to any contract
6 for the simple reason that there was no contract. Accordingly the
7 Plaintiff has no right to sue – only the contracting party – Hatcher or
8 her personal representatives (who I believe include Farrington) would
9 be entitled to sue and then they would be met with the indemnities
10 contained in the contractual documents which I have referred to and
11 have exhibited above.

12 21. However (and this is an argument of law) if the true position is that
13 Hatcher was acting as agent for the Plaintiff it is quite clear that the
14 waivers and the absolute rejection of any liability which were part of
15 the agreement entered into with Hatcher would apply to any contract
16 with the Plaintiff. In the circumstances, again, it is absolutely clear that
17 there can be no liability on these Defendants.

18 22. It was in these circumstances that the Plaintiff was operated. The
19 circumstances differ completely from an arms' length company
20 administration such as that portrayed by Farrington in her affidavit. It
21 was an intensely personal matter and a personal relationship, where
22 despite the existence of the trust the company and its assets were
23 treated as being available for Hatcher with her two close friends,
24 Farrington and Glasgow, as trustees with Glasgow as assistant office
25 manager and joint signatory (together with Carol Ann Balls) on the
26 Plaintiff's bank account. Transactions such as the sale and purchase of
27 assets, quite apart from monies handed to Hatcher, were carried out at
28 the behest of Farrington and Glasgow. This was as far removed from
29 the sort of arms' length company relationship which is suggested in the
30 Statement of Claim as can be imagined".



1 43. As I understand Ms. Bodden's evidence, she states explicitly that Ms. Farrington
2 and Ms. Glasgow were to control the Plaintiff with the Second Defendant merely
3 providing registered office services, administration company formalities.
4 Furthermore, it is said that although Ms. Hatcher wanted "nominee directors" at
5 the same time she wanted to control the underlying trust through these trustees she
6 trusted and appointed.

7
8 44. In this regard Ms. Bodden also states at paragraphs 31-33 of her Affidavit:

9
10 "31. *It was never the case that the Plaintiff company was to be run as a*
11 *normal company in any way. It was simply a vehicle for the transfer of*
12 *funds to Hatcher and was to be controlled by the trustees who were of*
13 *course only shareholders and not the board of directors. Farrington*
14 *does not seek to explain (if this was a normal company operation –*
15 *which it was not) on what possible basis the trustees could simply*
16 *comply (as they were intended to do and as they did) with requests by*
17 *Hatcher for funds.*

18 32. *The disingenuous nature of Farrington's present assertion that the*
19 *Plaintiff was run as a company in the normal way is illustrated by*
20 *paragraph 16 of her own first affidavit sworn 14 May 2013 in which*
21 *she expressly acknowledged that as trustee she was instructing the 2nd*
22 *Defendant to withdraw funds from the Plaintiff's bank accounts:*

23 16. *Christi would request funds from the Company two or three*
24 *times a year and I would give instructions to BCSL to make the*
25 *necessary withdrawals.*

26
27 33. *The foregoing sworn statement by Farrington in her first affidavit*
28 *supports entirely the pleading at paragraph 3 of the original Defence,*
29 *i.e. that the Plaintiff was treated by the trustees of the trust, as a*
30 *receptacle for monies and when monies were required they were taken*
31 *out at the behest of the trustees without observance of company*
32 *requirements."*

1 45. Ms. Bodden's Affidavit exhibits a paginated bundle of documents marked as
2 Exhibit "LMB1". It includes at page 13, a copy of the Register of Members of
3 Rochester Ltd., showing Sharon Farrington and Patricia Glasgow holding all shares
4 in the company as trustees of Rochester Trust, beginning on the 22nd October 2003.
5 There is also at page 13 a copy of a Register of Directors, showing BCSL Directors
6 Ltd. as sole director from the 22nd October 2003. Again at page 13 there is also a
7 copy of the Register of Officers, showing BCSL Secretaries Ltd. as Secretary of the
8 Plaintiff from 22 October 2003. Then, at page 14 is a copy of a letter dated 7
9 October 2003, signed by Christi Ann Hatcher ostensibly on behalf of Rochester
10 Ltd. I set out the contents of the letter which are as follows:

11 "BODDEN CORPORATE SERVICES

12 PO Box 10335 APO

13 Grand Cayman

14 Cayman Islands

15 Dear Sirs

16 ROCHESTER LTD.

17 I/We, the undersigned, have requested Bodden Corporate Services Ltd.
18 ("BCSL") to provide or procure the provision of the services specified
19 below (the Services) in respect of the above-named Company. I/We
20 understand and hereby acknowledge that they have agreed to provide
21 or procure the provision of the Services subject to and upon the terms
22 of this letter and the attached indemnity.

23 Notwithstanding the terms of any other agreement or course of dealing
24 between BCSL and me/us, I am / we are hereby requested and
25 authorized, but not obliged, to rely upon and act in accordance with
26 any instruction which may from time to time be, or purport to be, given
27 by telephone, telefax or otherwise by me/us or on my/our behalf by any
28 authorized person without enquiry on BCSL part as to the authority or
29 identify of the person given or purporting to give such instruction and
30 regardless of the circumstances prevailing at the time. For this purpose
31



1 an authorized person shall be someone designated as such either (i) in
2 the company incorporation application form signed by me/us or by
3 legal counsel on my/our behalf; or (ii) by subsequent notice in writing
4 signed by me/us.

5 BCSL shall be entitled to treat any such instruction as fully authorized
6 by and binding upon me/us and BCSL shall be entitled (but not bound)
7 to take such steps in connection with or in reliance upon such
8 instruction as they may in good faith consider appropriate whether
9 such instruction includes directions to pay money or otherwise to debit
10 or credit any account or relates to the disposition of any money,
11 securities or documents, or purports to bind me/us to any agreement or
12 other arrangements with them or any other person or to commit me/us
13 to any other type of transaction or arrangement whatsoever, regardless
14 of the nature of the transaction or arrangements or the amount of
15 money involved and notwithstanding any error or misunderstanding or
16 lack of clarity in the terms of such instructions.



17 I/We are aware that a written form of indemnity is required in relation
18 to the provision of the services contemplated hereby. The requisite form
19 of indemnity is therefore attached which has been duly signed by me/us
20 in the presence of a notary public. The attached indemnity is in
21 addition and without prejudice to all other indemnities and remedies
22 that may be available to BCSL and/or any connected person or entity.



23 I/We hereby confirm that the provision of this letter shall extend to
24 each subsidiary, affiliated and associated company of BCSL and to
25 each Director, officer and employee of any of the foregoing
26 (whosoever situated) who may provide any of the services or perform
27 any of the functions herein contemplated.

28 Neither BCSL or any subsidiary, affiliated or associated company nor
29 any Director, officer or employee of any of the foregoing shall be
30 obliged to provide any service herein contemplated in a manner which
31 might (in the opinion of the service provider) contravene any
32 applicable law or which might otherwise involve a breach of duty
33 (fiduciary or otherwise) or be contrary to the policies for the time being
34 of BCSL and for the avoidance of doubt and without prejudice to the

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terms of the attached indemnity, none of the foregoing shall be liable for any failure or delay to carry out any instructions herein provided or for any errors in carrying out such instructions other than in the case of actual fraud on the part of the person concerned.

I/We confirm also that I/we have been advised by BCSL to seek legal and tax advice with regard to the above-named Company and the beneficial ownership thereof in such other jurisdiction(s) as may affect such Company and/or the beneficial owner(s) thereof. I/We hereby further confirm that neither BCSL nor any affiliated or associated person or entity has given to me/us any advice (and has made no representation or warranty as to its ability to give such advice) concerning legal or taxation matters, whether in the Cayman Islands or in any other jurisdiction.

List of services and fees charged

Services	Fees
Provision of Registered Office (includes provision of corporate secretary)	US\$1,000
Provision of Nominee Director	\$700.00
General Administrative Services- In accordance with BCSL Fee Schedule	

If the undersigned comprise more than one person, BCSL shall be entitled (in the absence of express written directions to the contrary) to accept instructions from any one of such persons acting singly. If, in such circumstances, BCSL is subsequently instructed by any one of such persons to cease following instructions as herein provided, BCSL shall not accept any instructions from anyone and shall not be obliged to take action with regard to the above-named Company until it receives further instructions signed by all of the beneficial owners thereof.

Dated this 7th day of October 2003

Yours faithfully

ROCHESTER LTD.

Christie Ann Hatcher”



1 46. It is to be noted that a very wide authority is conferred upon the Second Defendant,
2 extending also to each subsidiary, affiliates and associated company of the Second
3 Defendant, and as well as to each Director, officer and employee of any of the
4 foregoing.

5
6 47. It is also to be noted that in conjunction with the terms of the letter the attached
7 indemnity is seemingly incorporated by reference. In those circumstances, even if
8 the attached indemnity which is self-described as a Deed of Indemnity fails as a
9 deed, nonetheless it may arguably still have relevance and bearing as a possible
10 term of the contract itself, and if so it could be relied upon by the Third Defendant
11 for that purpose.

12
13 48. The terms of a copy of the Deed of Indemnity are set out as follows:

14 ***“DEED OF INDEMNITY***

15 *THIS DEED OF INDEMNITY is made this 7 day of October 2003 by the person*
16 *or persons named below (the “Principal”) jointly and severally in favour of:*

17 i) *Bodden Corporate Services Ltd (hereinafter referred to as ‘BCSL’), a*
18 *Cayman Islands company whose registered office is at 802 Grand*
19 *Pavilion Commercial Centre, PO Box 10335 APO, Grand Cayman,*
20 *Cayman Islands;*

21 ii) *Each subsidiary company (past, present or future) of BCSL, direct or*
22 *indirect, and each of its affiliated or associated companies;*

23 iii) *Each Director, officer and employee past, present or future of any of*
24 *the entities referred to in (i) and (ii) above;*

25 iv) *The successors, personal representatives and assigns of the persons*
26 *and entities referred to in (i), (ii) and (iii) above each referred to as a*
27 *“Beneficiary”.*

28 *WHEREAS the Principal has requested the provision of registered office,*
29 *personal Directorship and other services with respect to the company or*
30 *companies listed in the Schedule hereto (each referred to as the ‘Company’).*

NOW THIS DEED WITNESSES as follows:

1. The principal hereby undertakes that no Beneficiary shall be liable for any costs, expenses, liabilities, losses or damages whatsoever of or to the Principal or the company arising out of or in connection with any acts or omissions of any Beneficiary or otherwise relating to the affairs of the Principal or the company excluding only the consequences of the actual fraud of the Beneficiary in question.
2. The Principal hereby undertakes to indemnify and hold harmless each Beneficiary against all fees, disbursements, costs expenses (including legal expenses), proceedings, claims liabilities, losses or damages whatsoever arising out of or in connection with the affairs of the Principal or the company excluding only the consequences of the actual fraud of the Beneficiary in question.
3. This Deed shall be governed by the laws of the Cayman Islands and the Principal hereby submits to the non-exclusive jurisdiction of the Cayman Islands Courts.
4. This Deed shall be binding on the Principal's personal representatives and successors in title.

IN WITNESS WHEREOF the Principal has executed this deed the day and year first before written.

THE SCHEDULE

Name of Company: ROCHESTER LTD.

Registered Office: 802 Grand Pavilion Commercial Centre, PO Box
10335 APO, Grand Cayman

Signed and unconditionally delivered as a Deed by CHRISTI ANN HATCHER
in the presence of:

Notary Public"



1 49. Whatever may be the scope or application of this Indemnity, it appears clear that
2 there is an express exclusion pertaining to the actual fraud of the defined
3 Beneficiary in question. In the instant case that question of whether the Third
4 Defendant through the actions of the First Defendant has forfeited any applicable
5 benefit under the Indemnity and has thereby committed "*actual fraud*", would seem
6 to be a suitable issue of fact and law in any event for the decision of a trial judge.
7

8 50. A copy of a Declaration of Trust appears at page 26 of Exhibit "LMB1". The
9 Original Trustees are Sharon Farrington and Patricia Glasgow and the Declaration
10 is itself dated 7 October 2003. This date could be perhaps of significance in the
11 context of the personal relationship with Ms. Christi Hatcher which Ms. Bodden
12 has previously described.
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1 **THE CURRENT STATE OF THE EVIDENCE**

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3 51. Before referring to the respective submissions of counsel on behalf of the Plaintiff
4 and of the Third Defendant, I formally remind myself at this stage of the wise and
5 cautionary language of Quin J in *Morrison* (*supra*) where he comments at
6 paragraph 137:

7 *"As Lord Bingham stated in E (a Minor) v. Dorset County Council, I have*
8 *considerable unease in endeavouring to decide questions of legal principle*
9 *without knowing the full facts, and, in this case, there is a dispute on a few*
10 *important material facts, and a significant dispute on their interpretation."*
11

12 **THE SUBMISSIONS OF THE PLAINTIFF**

13
14 52. The written submissions on behalf of the Plaintiff are set out at some length and the
15 points made are in some instances reiterated in different forms. However, for the
16 purpose of this application for summary judgment I shall confine myself to the
17 principal highlights.

18
19 53. The Plaintiff's central theme is that the only way that the First Defendant had
20 access to the funds which were misapplied was by virtue of her role and authority
21 as a representative of the Bodden Defendants and that her capacity as a co-trustee
22 has no bearing on the matter whatsoever.

23
24 54. The Plaintiff states that for the purposes of this application the issue to be
25 determined by the Court is whether the defences advanced, and in particular the
26 defence that at all material times the First Defendant was acting in her capacity as a
27 trustee of the Trust, have a realistic prospect of success.



1 55. The Plaintiff submits that the Court should adopt the approach helpfully
2 summarized by Mr. Justice Quin as previously set out. I note however that, as stated
3 above, in the learned Judge's view, the Court should generally not grant summary
4 judgment when there are disputed issues of fact, unless the Court can see with
5 confidence that the issue would be determined in favour of the Applicant.

6
7 56. The Plaintiff submits that it was the Bodden Defendants, their employees and
8 representatives who had control and regulated access to Rochester's Funds. As
9 Trustee of the Trust, Ms. Farrington could not access the Funds without following
10 formal procedures. It is said that the only way the First Defendant was able to
11 commit the theft was by virtue of her role and authority as an employee,
12 representative and signatory of the Bodden Defendants.

13
14 57. It is submitted that the Third Defendant seeks to create the impression that "*the*
15 *state of affairs is far more complicated than it is in reality in order to persuade the*
16 *Court that this is a matter unsuited for summary judgment*" (see paragraph 23 of
17 the Plaintiff's submissions).

18
19 58. The Plaintiff emphasizes that the First Defendant was authorized to receive
20 instructions on behalf of the Bodden Defendants, not to give them on behalf of the
21 Plaintiff. With great respect, I would only comment at this point that this is
22 essentially an issue of contention between the respective parties, the resolution of
23 which may well be appropriate only for a trial judge to decide.

24
25 59. The Plaintiff returns to the subject at paragraph 34:
26
27



1 “34. *The Bodden Defendants suggest that the First Defendant’s actions are*
2 *somehow severable from those of the corporate entities. The reality is*
3 *that the Bodden Defendants had to carry out the services they were*
4 *providing through a human agency. The First Defendant amongst*
5 *others actually performed such a role in practice. Regardless of the*
6 *alleged indemnity the principles of vicarious liability (referred to*
7 *below) fix the Bodden Defendants with the fraud of its employee.”*
8

9 60. Again the Plaintiff argues at paragraph 43 in relation to clause 4.1 of the Standard
10 Terms and Conditions for Corporate Services signed by Ms. Hatcher on 7 October
11 2003:

12 “43. *It cannot be said that the relationship between the parties was informal*
13 *as suggested by the proposed defence. The Bodden Defendants were*
14 *obliged to require signature verification. If they failed to obtain this*
15 *verification of instructions then this was a breach of duty on their part.*
16 *The purpose of this clause is to make it clear that the Bodden*
17 *Defendants were not required to determine the authenticity of signature*
18 *purportedly provided by authorised persons. The clause has nothing to*
19 *do with the actions of their employees, whose role was to receive*
20 *instructions not transmit them.”*
21

22 61. The Court observes in passing that if the Court were to involve itself at this stage in
23 a minute and protracted examination of the documents and facts of the case, such an
24 exercise would conceivably be counterproductive to the purposes for which
25 summary judgment was intended.



1 62. The Plaintiff submits that the victim of the fraud has an action against his fraudster
2 (and their employer) without the need to establish an actual relationship (see
3 paragraph 45 of the Plaintiff's written submissions). This proposition is consistent
4 with the principle in *Lloyd V. Grace, Smith and Co*⁸ that a principal is liable for the
5 fraud of his agent acting within the scope of his authority, whether the fraud is
6 committed for the benefit of the principal or for the benefit of the agent.

7
8 63. This case is of course of very high standing. The issue raised by the Third
9 Defendant, however, appears to be based upon the entanglement of the First
10 Defendant's different roles and upon what as a matter of fact was or might have
11 been the full scope and range of her authority.

12
13 64. The Plaintiff contends at paragraph 48:

14 "48. *The primary position of the Bodden Defendants in this action has*
15 *always been that at the time of the theft the First Defendant was acting*
16 *as trustee and not an employee. This is not the position that was*
17 *presented to the police and if that was the position then it would clearly*
18 *have been relevant to the criminal investigation and the charges faced*
19 *by the First Defendant."*
20



21 65. No affidavit evidence in this hearing has been adduced from Mr. Norman Bodden
22 or Ms. Carol Balls, although Ms. Lynn Bodden has of course sworn an Affidavit.
23 Accordingly at this stage, and without discovery having taken place, I note that in
24 *Morrison*, Mr. Justice Quin observed at paragraph 150 that there was a lack of
25 evidence and before the Court could make any final findings of fact it would
26 require full and frank discovery from Cesar and Deckhouse Construction.
27

⁸ [1912] A.C. 716

1 66. Bearing that observation in mind I must remind myself once again that direct
2 evidence of the letter dated 7 October 2003 only emerged on the 19th October 2015.

3
4 67. With regard to indemnity: The Plaintiff broadly contends at paragraph 33 that the
5 principal to the indemnity is Ms. Hatcher and not the Plaintiff and that in any event
6 paragraph 1 of the indemnity excludes from its operation the consequences of
7 actual fraud.

8
9 68. The indemnity is referred to in paragraph 6 of the Defence submissions and it is
10 there partially set out. The indemnity is apparently signed by Ms. Hatcher, who also
11 signed the letter dated 7 October 2003 under the name "*Rochester Ltd.*"

12
13
14 69. It would appear therefore that the capacity or capacities under which Ms. Hatcher
15 acted would be appropriate matters of fact for the trial judge to determine.

16
17 70. Furthermore, the interpretation, scope and the application of the indemnity,
18 particularly in circumstances such as these, where its meaning is disputed, may well
19 once again be more suitable for final resolution at trial rather than by way of
20 summary disposition.

21
22 71. In this regard, and by way of example only, I remind myself of the Third
23 Defendant's argument that under clauses 1 and 2 of the indemnity there is exclusion
24 only for the consequences of the actual fraud of the Beneficiary in question. In
25 other words, the Third Defendant seeks to argue that it is protected as against the
26 Plaintiff from liability in the absence of the Third Defendant's own actual fraud.



1 72. In oral submissions counsel for the Plaintiff also emphasizes that the signatory on
2 the bank accounts was not any individual but the Third Defendant, and that the
3 mandate resides solely in the Third Defendant as far as both the Plaintiff and the
4 Bank were concerned.

5
6 73. Firstly, it was also orally contended that the Plaintiff was not a party to the
7 indemnity itself and the indemnity was not a defence in any case – although it could
8 conceivably ground a counterclaim.



1 **THE SUBMISSIONS OF THE THIRD DEFENDANT**

2
3 74. The Third Defendant in its written submissions relies upon the principle in *Three*
4 *Rivers* and contends that it has a real prospect of success.

5
6 75. It is argued that the statements made to the police "*were not made with any regard*
7 *to the relationship between the Defendants and the Plaintiff, which relationship was*
8 *entirely irrelevant to the prosecution of Glasgow.*" (see paragraph 10).

9
10 76. In paragraph 11, the point is reiterated that the position of the First Defendant and
11 whether she was acting as a trustee or as an employee was completely irrelevant to
12 the criminal prosecution: "*Whatever her capacity, she stole the money*".

13
14 77. The following point is also made in paragraph 11:

15 "*The reality of the matter as appears from Lynn Bodden's affidavit is that the*
16 *affairs of the Plaintiff and the trust were in the hands of Farrington and*
17 *Glasgow and despite the paperwork there was a course of conduct whereby all*
18 *instructions were received via Glasgow and carried out. The fact that those*
19 *oral instructions were formally ratified indicates an acceptance on the part of*
20 *Farrington that there was a variation in the strict requirement of written*
21 *instructions by this course of conduct.*"
22

23 Paragraph 11 further states:

24 "*Formal procedures were not followed. Farrington acted for Hatcher and the*
25 *Plaintiff and the reality of the situation was that Farrington and Hatcher were*
26 *in the position of shadow directors of the Plaintiff. They provide instructions to*
27 *Glasgow which Glasgow carried out. The fact that Glasgow acted dishonestly*
28 *and not on instructions is the responsibility of Hatcher, Farrington and the*
29 *Plaintiff in accordance with the structure which was set up*".



1 78. Then in paragraph 20 of the submission referring to the indemnity it is pointed out
2 that the indemnity specifically states that the fraud of one insured could not affect
3 the cover extending to the others.
4

5 79. In this regard, reliance is placed upon a finding of Rix J., as he then was, in *Arab*
6 *Bank Plc. v. Zurich Insurance et al*⁹, which states:

7 *"Therefore, this policy is not merely a composite policy with the normal*
8 *attributes of such, but has been specifically designed to provide cover to*
9 *innocent insurers despite the guilt of their close associates and agents".*
10

11 80. The Third Defendant further relies upon the comment of Rix J. at page 273 that one
12 of the functions of the policy in question was to provide cover to an innocent
13 principal (e.g. fellow partners or a company) even where the agent (the dishonest
14 partner or employee) has acted within the scope of his authority or the ordinary
15 course of the principal's business.
16

17 81. At paragraph 31 it is asserted that it would be manifestly unfair to hold the Third
18 Defendant in this instance liable for the acts of the First Defendant.

19
20 82. In oral submissions, counsel for the Third Defendant takes issue with the Plaintiff
21 adopting a formal approach founded exclusively on a corporate governance model,
22 and it is further submitted that the Third Defendant was only a nominee director,
23 paid a fee of CI\$700 a year.

24
25 83. Finally, it is also submitted that the Plaintiff has not sought to dispute factually the
26 manner in which Ms. Lynn Bodden states the arrangements in question were
27 intended to operate.

⁹ [1999] 1 Lloyd's Rep 262 at page 272

THE COURT'S FINDINGS AS TO THE O.14 APPLICATION

84. The Court reminds itself once again that upon the preliminary requirements for proceeding under O.14 having been satisfied, the Plaintiff has to establish a *prima facie* case, and the burden then shifts to the Third Defendant to satisfy the Court why Judgment should not be given against it.

85. The Court also reminds itself that the Defendant is required to show a real prospect of success as the term has been described in a number of leading authorities.

86. For example, in *Swain v. Hillman and Another*¹⁰ Judge LJ states at page 96 B-C that if there is a real prospect of success, the discretion to give summary judgment does not arise merely because the court concludes that success is improbable. Indeed, in the view of this Court it is precisely in cases of that difficult nature where this Court's approach must be a very careful one.

87. In considering this application the Court also takes into account the pleadings which have been filed, the evidence upon which the parties rely, the governing legal authorities themselves and the respective written and oral submissions of counsel.

88. The Third Defendant's primary contention is that the underlying facts disclose that there was no arms' length company administration, but rather an arrangement founded on personal relationships. Correspondingly it is said that the Plaintiff Company was never run as a normal company in any way and that it was simply a vehicle for the transfer of funds to Hatcher and was to be controlled by the trustees, who were, it is alleged, only shareholders and not the board of directors.

¹⁰ [2001] 1 All E.R. 91



1 89. In contrast, the Plaintiff's argument draws attention to the narrow and formal
2 relationship between the Third Defendant in particular and the Plaintiff's bankers,
3 to the exclusion of other evidential factors.

4
5 90. The First Defendant was at all material times co-trustee of Rochester Trust and as
6 trustee a shareholder in the Plaintiff Company. She was arguably also a director of
7 the Plaintiff Company. In addition, she was an employee of the Second Defendant,
8 where she was employed as a Corporate Administrator and Assistant Office
9 Manager. Finally, she was one of two authorized signatories of the Third Defendant
10 and in that capacity had an authority from the Third Defendant to operate the
11 Plaintiff's bank accounts.

12
13 91. The Third Defendant's contention is that taking into account these arrangements
14 and responsibilities and the customized instructions of Ms. Hatcher the First
15 Defendant was still able to operate independently of the signatory mandate, and that
16 she in fact did so. The Plaintiff on the other hand contends that the authority
17 exercised under the mandate of the Third Defendant is the only authority that
18 matters.

19
20 92. I bear in mind the stricture of Quin J. that where there is a dispute of fact, and there
21 is a dispute in this case as to which set of facts are relevant or not relevant, the
22 Court should only grant summary judgment where it can see with confidence that
23 the issue would be determined in favour of the Applicant. In this instance having
24 heard the submissions of the Third Defendant I cannot say with confidence that the
25 Plaintiff's analysis of the facts on this central point would inevitably prevail.



1 93. While the state of affairs put forward in Ms. Lynn Bodden's Affidavit is
2 unconventional and conceivably contrary to the principles of widely accepted
3 corporate governance and responsibility, nonetheless it is not possible for me to
4 conclude that the Third Defendant's case demonstrates no real prospect of success
5 whatsoever, as distinct from what may perhaps be characterized at this stage as an
6 improbable prospect of success.

7
8 94. The Court must also bear in mind that discovery has not yet taken place and that
9 certain of the Third Defendant's evidence has emerged in circumstances which can
10 best be described as accidental and fortuitous. This has led to a relative
11 strengthening of the Third Defendant's arguments or potential arguments in relation
12 to the indemnity related issues, for example.

13
14 95. I find that the Third Defendant has satisfied the Court that judgment should not be
15 given against it and that it has a real prospect of success.

16
17 96. Even if this conclusion on the issue of primary liability is incorrect, nonetheless the
18 indemnity itself, which is arguably incorporated by reference into the terms of
19 agreement set out in the letter of the 7th October 2003, provides a second limb to the
20 Third Defendant's arguments.

21
22 97. The ultimate validity of the indemnity as well as its interpretation and scope are in
23 any event suitable for adjudication by a trial judge. The matter of indemnity has
24 been raised at paragraph 6 of the pleaded Defence. The Plaintiff complains that it
25 has not been raised in proper pleaded form but it is still an issue the consideration
26 of which may be central to the ultimate resolution of these proceedings.

27
28



1 98. Insofar as any amendment maybe sought or required, the governing principle of law
2 is succinctly described by Smellie C.J. in *Cayman Islands Civil Aviation Authority*
3 *v. Island Air Limited*¹¹, where the learned Chief Justice states at paragraph 8:

4
5 *"It is now settled law in this jurisdiction that an amendment should always be*
6 *allowed unless it would cause injustice to the other party or constitute a useless*
7 *claim because no evidence would be available to support it. This principle*
8 *applies at any time up to the time of trial."*
9

10 99. In other words, I consider that, in relation to the indemnity, it would not be in the
11 interests of justice to prevent the Third Defendant from seeking such an
12 amendment, if it so chooses, simply by terminating these proceedings at a
13 premature stage.

14
15 100. As I have indicated, it is the view of the Court that the Third Defendant has indeed
16 satisfied the Court as to why Judgment should not be given against it. Accordingly,
17 I find that in relation to O.14 there are triable issues which ought to proceed to trial.
18 The Plaintiff's application for summary judgment is refused.

19
20 101. Should counsel wish to address me as to costs, I shall hear them at a time
21 convenient to all parties.
22

23 Dated this the 12th February 2016

24 *Robin McMillan*

25

26 **Mr. Justice Robin McMillan**
Judge of the Grand Court



¹¹ 2003 CILR 483