

## BERMUDA

### SUPREME COURT

#### *Kingate Global et al -v- Kingate Management et al* [2016] SC (Bda) 3 Com

#### APPLICATIONS TO STRIKE OUT - ORDER 18 RULE 19 OF THE RULES OF THE SUPREME COURT ("RSC")

The Plaintiffs sought an order for certain applications within an earlier Summons of the Defendants to either be summarily dismissed under the power of the Court outlined in *Williams & Humbert -v- W&H Trade Marks (Jersey) Ltd* [1986] 1 AC 368 ("Williams & Humber") or under its inherent jurisdiction. Alternatively, they sought an order that the Summons be stayed generally, pending the final determination of preliminary issues in the Court of Appeal. In the further alternative, they sought directions for the service of evidence with respect to the hearing of the Summons.

In the Summons, the Defendants had sought orders pursuant to RSC Order 18, Rule 19 or under the Court's inherent jurisdiction that certain of the allegations made by the Plaintiff against certain of the Defendants should be struck out as they disclosed no reasonable cause of action. Hellman J summarised the test in *Williams & Humbert*, the leading authority on when the Court should refuse to permit a strike out application, as follows: that if the Court was satisfied that the strike out application would be likely to involve serious and prolonged argument, then it will generally not allow the application to proceed, unless it: (i) harbors doubts about the soundness of the pleading; and (ii) is satisfied that the application will either be decisive or appreciably simplify the eventual trial. However, even if these criteria have been met, in exceptional circumstances the Court may nonetheless allow the application to strike out to proceed.

Hellman J then referred to the findings of the Bermuda Court of Appeal in *Broadsino Finance Co Ltd. -v- Brilliance China Automotive Holdings Ltd* [2005] Bda LR 12 as to the principles governing decisions whether to strike out an application: (i) if the basis of the strike out is no reasonable cause of action, it is permissible to only look at the pleadings; (ii) if the basis is that

the claim is frivolous or vexatious, the Court can admit affidavit evidence; (iii) that the power to strike out a claim under Order 18 Rule 19 or inherent jurisdiction should only be exercised in plain and obvious cases and that therefore to succeed a defendant must show there is no realistic possibility of the plaintiff establishing a cause of action; and (iv) that the test is whether there is a fair and reasonable probability of the defendants having a real or *bona fide* defence. The Plaintiffs had stressed the points that a strike out application should not become a mini-trial on the documents, and that a strike out application is not an appropriate vehicle for determining controversial points of law in a developing area.

Hellman J then turned to the facts of the case and found that the present strike out application would likely involve serious and prolonged argument. He referred to each limb of the allegations that the Defendants sought in their previous Summons to have struck out from the Statement of Claim and found that each would involve developing questions of law best decided at trial, and that he did not harbor doubts as to the soundness of the Statement of Claim. He found that there were no exceptional circumstances nonetheless justifying the Court in hearing the application, and that accordingly the Defendants' strike out application should not be permitted to proceed.

Although he was not required to do so, the Judge also considered whether the strike out application would simplify the trial so as to make the risk of proceeding with the application sufficiently worthwhile. He found that while there was uncertainty regarding the outcome of the strike out, had he been satisfied that the strike out application had any realistic chance of success he would have concluded that to allow it would simplify the trial significantly enough to allow the application to go ahead.

Irrespective of this, he granted the primary relief sought by the Plaintiffs and dismissed the applications to strike out in the Defendants' previous Summons.

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