

IN THE SUPREME COURT OF BERMUDA
CIVIL JURISDICTION
2018: NO. 74

BETWEEN:

FIDELITY NATIONAL TITLE INSURANCE COMPANY

Plaintiff

- and -

TROTT & DUNCAN LIMITED

Defendant

SPECIALLY INDORSED WRIT OF SUMMONS

ELIZABETH THE SECOND, by the Grace of God, of the United Kingdom of Great Britain and Northern Ireland and of Our other realms and territories Queen, Head of the Commonwealth, Defender of the Faith:

TO: TROTT & DUNCAN LIMITED

OF: 17A Brunswick Street
Hamilton
HM 10
Bermuda

We command you that within 14 days after the service of this writ on you, inclusive of the day of service, you do cause an appearance to be entered for you in an action at the suit of **FIDELITY NATIONAL TITLE INSURANCE COMPANY** and take notice that in default of your so doing the Plaintiff may proceed therein, and judgment may be given in your absence.

Witness the Honourable Charles-Etta Simmons, Acting Chief Justice of Our said Court the 13TH day of MARCH 2018.

NOTE – This Writ may not be served more than twelve calendar months after the above date unless renewed by order of the Court.

DIRECTIONS FOR ENTERING APPEARANCE

The Defendant may enter an appearance in person or by an attorney either (1) by handing in the appropriate forms, duly completed, at the Registry of the Supreme Court in Hamilton, Bermuda, or (2) by sending them to the Registry by post.

NOTE -- If the Defendant enters an appearance, then, unless a summons for judgment is served on him in the meantime, he must also serve a defence on the attorney for the Plaintiff within fourteen days after the last day of the time limited for entering an appearance, otherwise judgment may be entered against him without notice.

STATEMENT OF CLAIM

The Parties

1. The Plaintiff is a corporation established and existing pursuant to the laws of the State of Florida, United States of America, carrying on business as a title insurer. The Plaintiff's principal offices are located in the city of Jacksonville, Florida.
2. The Defendant is and was at all materials times a local company incorporated pursuant to the laws of Bermuda and carrying on business as a firm of barristers and solicitors practicing from offices located at 17A Brunswick Street in the City of Hamilton.

The Loan and Title Insurance

3. In July 2014 the Plaintiff was approached by Mexico Infrastructure Finance Limited ("MIF") with respect to the purchase of a policy of title insurance from the Plaintiff. MIF was considering and/or negotiating the making of a bridging loan (the "Loan") to a local Bermuda company, Par-La-Ville Hotel and Residences Ltd. ("PLV"). The Corporation of Hamilton (the "Corporation") was to guarantee the Loan by written guarantee, secured by a first legal mortgage over the Par-La-Ville car park, real property owned by the Corporation (the "Property").
4. The purpose of the Loan was to allow PLV to meet the anticipated cost of securing a loan it required to develop the Property into a hotel. The purpose of the guarantee and security over the Property was to facilitate the Loan and the development.

5. Prior to approaching the Plaintiff, MIF approached a competitor title insurance company, Stewart Title Guaranty Company ("Stewart"). Stewart issued a title insurance commitment to MIF which would exempt Stewart from liability under any title policy to be issued arising from (the "Policy Exclusion"):-

"Any claim or loss by reason of any lack of legal or constitutional authority by the Corporation of Hamilton to act as mortgagor and/or guarantor of the Insured Mortgage over the Land[.]"

6. MIF was unsatisfied with the Policy Exclusion and approached the Plaintiff seeking a title commitment which did not contain such exclusion. The Plaintiff was willing to consider issuing a title policy without the Policy Exclusion, but required Bermuda legal advice in relation to, *inter alia*, the Corporation's capacity to enter into the guarantee and first legal mortgage (the "Capacity Issue").

The Retainer

7. The Defendant was retained to provide a formal legal opinion to the Plaintiff in relation to the Capacity Issue.
8. There were implied terms of the aforesaid retainer that the Defendant would exercise the skill and care to be expected of reasonably competent attorneys in performing their duties pursuant to the said retainer. Further, or alternatively, the Defendants owed the Claimant a duty of care in tort to that effect.
9. Furthermore, the Defendant failed to disclose to the Plaintiff any potential conflicts of interest, including based on the Defendant's prior ongoing representation of the Corporation.

The Plaintiff's Instructions and the Opinion

10. The Plaintiff advised the Defendant, and the Defendant was fully and completely aware of the Policy Exclusion in the Stewart title insurance commitment. As set out in the formal written opinion issued by the Defendant dated 19 August 2014 (the "Opinion") on page one:-

"It is a condition precedent of the MIF Loan that the Mortgage be insured by a title insurance policy (the "Title Policy"). Stewart Title Guaranty has issued a title insurance commitment wherein it has raised the following exclusion (the "Policy Exclusion"):

'Any claim or loss by reason of any lack of legal or constitutional authority by the Corporation of Hamilton to act as mortgagor and/or guarantor of the Insured Mortgage over the Land[.]'"

11. At the outset of the retainer, the Plaintiff advised the Defendant that the Opinion was required in order for the Plaintiff to determine whether it would issue a title policy to MIF. If the Defendant advised in the Opinion that the Corporation did not have the capacity to enter into the guarantee and mortgage, or that there was any doubt about such capacity, the Plaintiff would not issue a title policy to MIF or, in the alternative, would not issue a title policy to MIF without an exclusion similar or identical to the Policy Exclusion.

12. The Plaintiff will refer to the Opinion at trial for its full terms and effect. The Opinion states, *inter alia*:-

(i) *"Does the [Corporation] have the Legal Capacity to enter into the Mortgage on the PLV Land and a Guarantee and if so has it been properly exercised?"*

19. Yes."

(ii) *"[The Corporation] is a body corporate and enjoys its own legal entity and existing under the laws of Bermuda by virtue of S.8 Municipalities Act 1923. [The Corporation] possesses the capacity to sue and be sued in its own name under the laws of Bermuda."*

(iii) *"[The Corporation] has all requisite corporate power and authority to enter into, execute, deliver, and perform its obligations under each of the Guaranty and Mortgage and to take all action as may be necessary to complete the transactions contemplated thereby."*

(iv) *"The execution, delivery and performance by [the Corporation] of the Guaranty and Mortgage and the transactions contemplated thereby have*

issued by the Defendant, the Plaintiff would have insisted on a policy exclusion to address the Capacity Issue. Had that exclusion not been acceptable to MIF, the Plaintiff would not have issued the Policy.

16. The Plaintiff will refer to the Policy at trial for its complete terms and effect.

Completion of the Loan

17. After the Policy was issued, MIF completed the transaction in relation to the Loan with PLV. In accordance with the terms of the Loan, MIF advanced \$18,000,000.00 to PLV at an agreed rate of interest and took security over the Property.

Loan Default and Legal Proceedings

18. PLV defaulted on the loan, and on 31 December 2014, MIF issued a demand to the Corporation, in its capacity as guarantor, to pay the entire outstanding balance of the loan, being \$18,000,000.00 plus interest.
19. MIF commenced proceedings against the Corporation to recover under the guarantee. The Corporation consented to summary judgment in relation to MIF's claim. Thereafter, the Corporation commenced fresh proceedings in the Commercial Court of the Supreme Court of Bermuda (2016: No. 241). Those proceedings sought to set aside the consent judgment, *inter alia*, on the basis that the guarantee and mortgage were *ultra vires* the Corporation (the "Proceedings").
20. In a written judgment dated 18 November 2016 (the "Judgment"), the Honourable Justice Stephen Hellman ruled, *inter alia*, that "*In providing the Guarantee, the Corporation acted ultra vires*" and directed that the consent judgment should be set aside.
21. Mr. Justice Hellman also wrote, at paragraph 60 of the Judgment"-

"Competent legal advisors considering the question [of whether the guarantee was ultra vires] in depth could reasonably have concluded that the Corporation had power to give the Guarantee. But they should have appreciated that there was a good arguable case that it did not, and that there was therefore a real

possibility that a court, if called upon to adjudicate the issue, would find that the Guarantee was ultra vires."

22. In the Opinion, the Defendant did not advise the Plaintiff that there was a real possibility or any possibility at all, that a court would find that the guarantee was *ultra vires*.
23. MIF appealed Mr. Justice Hellman's Judgment to the Court of Appeal for Bermuda. In a judgment dated 12 May 2017, the Court of Appeal upheld Mr. Justice Hellman's conclusion that in providing the guarantee, the Corporation acted *ultra vires*.

Breach of Contract / Negligence

24. In breach of contract and/or negligently the Defendant failed to exercise the care and skill to be expected of reasonably competent attorneys in performing their duties pursuant to the said retainer:-
 - (i) By failing to advise the Plaintiff that in giving the guarantee and mortgage the Corporation acted *ultra vires*;
 - (ii) By failing to advise the Plaintiff that there was a real possibility that a court, if called upon to adjudicate the issue, would find that the guarantee was *ultra vires*; and/or
 - (iii) By failing to disclose to the Plaintiff the potential conflict of interest relative to Defendant's prior ongoing representation of the Corporation.

Damages


25. By reason of the matters aforesaid, the Plaintiff has suffered loss and damage and will continue to suffer loss and damage. The Supreme Court of Bermuda and the Court of Appeal for Bermuda have ruled that the guarantee is *ultra vires*.
26. MIF has made demand of the Plaintiff pursuant to the terms of Title Policy seeking to require the Plaintiff to meet MIF's losses as a result of being unable to enforce the guarantee.
27. In accordance with the terms of the Title Policy, the Plaintiff may be required to compensate MIF for loss or damage sustained by MIF by reason of, *inter alia*, the

invalidity or unenforceability of the first legal mortgage over the Property. The Plaintiff is also responsible to compensate MIF for its costs, legal fees and expenses incurred in defense of any matter to which the Plaintiff is liable to indemnify MIF (pursuant to the terms of the Policy).

28. Under the Title Policy, the Plaintiff may be liable to MIF for losses up to \$18,000,000.00.
29. To date, the Plaintiff has expended a sum in excess of \$933,632.80 in legal fees relating to MIF's claim under the Title Policy and expects to incur further legal fees in the future.
30. The Defendant does not maintain professional indemnity insurance or, in the alternative does not have sufficient coverage to meet the Plaintiff's loss.
31. The Plaintiff claims interest pursuant to the provisions of the *Interest and Credit Charges (Regulation) Act 1975*.

AND THE PLAINTIFF CLAIMS:-

- (a) Damages in respect of amounts paid to MIF as a result of the mortgage over the Property being unenforceable, in a sum to be particularized prior to trial;
- (b) Continuing legal costs, fees and expenses incurred in defense of the Proceedings, the sum to be particularized prior to trial;
- (c) Interest on the said damages pursuant to the provisions of the *Interest and Credit Charges (Regulation) Act 1975*; and
- (d) Costs of the present proceedings on an indemnity basis.



Taylors in association with Walkers
Park Place
55 Par La Ville Road
Third Floor
Hamilton HM 11
Bermuda

INDORSEMENT AS TO ATTORNEY AND ADDRESS

This writ was issued by Taylors in association with Walkers, attorneys for the said Plaintiff whose address is Park Place, 55 Par La Ville Road, 3rd Floor, Hamilton, Bermuda, HM 11.

INDORSEMENT AS TO SERVICE

This writ was served by _____ at _____

on the Defendant, Trott & Duncan Limited on _____, the ___ day of _____ 2018

Indorsed the ___ day of _____ 2018

Signed _____

Address _____

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FIDELITY NATIONAL TITLE INSURANCE COMPANY

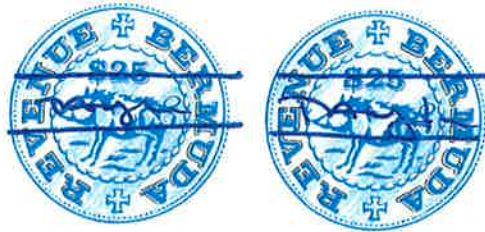
Plaintiff

- and -

TROTT & DUNCAN LIMITED

Defendant

SPECIALY INDORSED WRIT OF SUMMONS



Taylor's
Park Place
55 Par-La-Ville Road
Third Floor
Hamilton HM 11
Bermuda
Tel: 441 242 1500

Ref: KT/cp/C5562.A00294

SUPREME COURT BERMUDA
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