



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2022 No 381

BETWEEN:

(1) **BPMS LTD**

(2) **INNOFUND LIMITED**

(3) **INNOFUND INNOVATION INCUBATOR LTD**
PLAINTIFFS

-AND-

THE GOVERNMENT OF BERMUDA
DEFENDANT

Application to strike out allegations of deceit fraud, fraudulent misrepresentation, and dishonesty as disclosing no reasonable cause of action or as frivolous, vexatious or as an abuse of the process of the court under Order 18 rule 19 (1) (a), (b) and (d) of the Rules of the Supreme Court 1985

Appearances

John Hindess of Wakefield Quin Limited for the plaintiffs

Delroy Duncan KC and Ryan Hawthorne of Trott & Duncan Limited for the defendant

Date of Hearing: 13 August 2026

Date of Ruling: 28 September 2026

MARTIN J in Chambers

RULING

Introduction

1. This is the court's Ruling on the defendant's application to strike out various allegations that are made in the Amended Statement of Claim which has been served by the plaintiffs. This Ruling follows earlier interlocutory hearings regarding the service of further and better particulars which had resulted in the court directing the plaintiffs to replead their allegations of deceit, fraud, dishonesty and/or fraudulent misrepresentation.

2. After service of the Amended Statement of Claim, the defendant applied to strike out the amendments along with the original allegations of deceit and/or fraudulent misrepresentation that were made in the writ and the original Statement of Claim. The defendant contended that the amendments in the Amended Statement of Claim which sought to cure the defects in the earlier version of the pleading (and the further and better particulars) still failed to satisfy the minimum requirements of the rules of pleading for allegations of deceit, fraudulent misrepresentation and dishonesty. The defendant also applied to strike out the addition of a liquidated damages claim added as prayer for relief on the grounds that it is barred by a contractual limitation, a breach of fiduciary duty claim that has been added which is not supported by pleaded facts which disclose a proper cause of action, and a prayer for damages for loss of opportunity.

Summary and disposition

3. For the reasons explained in this Ruling, the court has substantially acceded to the defendant's application. The essential reason for the court's decision is that the rules of pleading are intended to ensure a fair process for determining the issues in dispute at trial. The pleading process requires a plaintiff to identify the specific facts relied on in support of the relevant claim so that the defendant can prepare to meet those specific allegations. This is to ensure that the parties know which witnesses will need to give evidence about what facts, and what documents will be relevant to produce by way of disclosure, and which issues of fact and law the court will have to decide.
4. Allegations involving serious misconduct need to be addressed openly and transparently. It is for this reason the procedural rules for pleading fraudulent or dishonest conduct demand that the party alleging dishonesty (in whatever form) must set out all the primary facts relied upon in support of the plea that the relevant action alleged was dishonest. This must include stating clearly what facts are relied upon to justify the court finding that the action taken by the relevant party was dishonest in character rather than innocent or negligent. Those allegations must contain primary facts not just the conclusions the plaintiffs say are to be drawn from the primary facts. The primary facts must be directly connected to (i) the relevant claim of deceit, fraud, dishonesty or fraudulent misrepresentation or other claim and (ii) the loss alleged to have been sustained by the plaintiffs as a result thereof. Dishonesty must be alleged against individuals, with clear and distinct facts to support the allegation that a particular person's conduct was dishonest.
5. In this case, for the reasons explained in the Ruling below, the pleaded claims that relate to the causes of action involving dishonesty do not meet these essential requirements. After several attempts at rectifying the deficiencies, it is clear that the plaintiffs have no prospect of being able to supply the relevant particulars of fact to justify the allegations of dishonesty on the part of any individuals. As a result, the court is satisfied that the plaintiffs cannot remedy the absence of these essential particulars by a further opportunity to amend or re-amend the Statement of Claim.
6. As a result, the court orders that the allegations set out in the Amended Statement of Claim which allege deceit, fraud, dishonesty, fraudulent misrepresentation, reckless or intentional misrepresentation and breach of fiduciary duty against the defendant are to be struck out as

disclosing no reasonable cause of action under Order 18 rule 19 (1) (a) of the Rules of the Supreme Court 1985 (“the RSC”).

7. The court also orders that the amendment adding a claim in respect of a contractual liquidated damages claim is barred by a valid contractual limitation and should be struck out as an abuse of the process under RSC Order 18 rule 19 (1)(d).
8. The court also orders that the prayer which purports to add a claim for loss of opportunity fails to disclose any of the underlying requirements that are necessary to establish such a claim and is to be struck out as disclosing no reasonable cause of action under RSC Order 18 rule 19 (1) (a).
9. The relevant paragraphs of the Amended Statement of Claim which are to be struck out are paragraphs 38, 39, 40, some parts of paragraph 43, paragraphs 49, 50, 55, prayer ii and prayer iii, as described in more detail in the body of the Ruling.
10. In addition, there are insufficient particulars pleaded in respect of some of the remaining claims made in the Amended Statement of Claim which need to be addressed before these claims can proceed to trial.
11. The facts relied upon by the plaintiffs in support of the allegations of knowledge in paragraphs 44 to 48 of the Amended Statement of Claim are required to enable the defendant to prepare to meet those allegations fairly. These further and better particulars must be served by the plaintiffs within 28 days, in default of which these paragraphs are to be struck out. This order has been made pursuant to the court’s powers under RSC Order 18 rule 12 (4).
12. The plaintiffs’ claims have all been intermingled, however it is clear that some claims can only belong to the first or second plaintiff, and it is unclear what independent claims the third plaintiff is making (if any). Further and better particulars must be served by the plaintiffs within 28 days to set out the basis on which the first plaintiff makes claim to relief in respect of losses alleged to have been suffered by the second plaintiff, in default of which the first plaintiff’s claims in relation to those alleged losses are to be struck out pursuant to RSC Order 18 rule 19 (1) (a) and (d). Similarly, further and better particulars must also be served by the second and third plaintiffs to set out the basis on which they assert independent claims in respect of losses alleged to have been suffered by the first plaintiff, in default of which the claims by the second and third plaintiffs are to be struck out pursuant to RSC Order 18 rule 19 (1) (a) and (d).
13. The court is required to manage its own process effectively. This is to ensure a fair trial of the issues in dispute in a proportionate and efficient manner to achieve a fair trial as expeditiously as possible. This includes exercising its powers to strike out claims which do not amount to proper causes of action, or which are bound to fail, or which otherwise represent an abuse of the court’s process. This court is also required to exercise its procedural powers to manage cases in a manner which is fair, cost effective and proportionate. It is not fair, cost effective or proportionate to permit a party to pursue claims which do not comply with the basic procedural rules of pleading a cause of action in accordance with the procedural rules.

14. The court will hear the parties on costs in the light of the Ruling.

Procedural history

15. It is necessary to explain the background to the procedural history in this case in some detail to set in context the application to strike out the plaintiffs' pleaded claims in deceit, dishonesty and fraudulent misrepresentation against the defendant. For ease of expression and consistency, I shall refer to the defendant as "the Bermuda Government" or "the Government" in this Ruling.
16. The generally indorsed writ was issued on 6 December 2022 seeking general damages against the Bermuda Government for breach of two Service Agreements dated 24 August 2020 and 12 April 2021 together with a Memorandum of Understanding dated 24 August 2020 which was alleged to be supported by a Government Guaranteed Loan.
17. The Statement of Claim followed some time later on 17 April 2023. The Statement of Claim alleged two separate heads of claim. The first was a claim in misrepresentation and the second was a claim for breach of contract for failure to pay for services rendered under the Service Agreements.
18. The substance of the misrepresentation claim was to the effect that the Government had entered into two Service Agreements and two Memoranda of Understanding with the Government for the development of a software application (or "app") called "FastPass" but later denied that it had done so. It is said that this denial amounted to a misrepresentation which caused the plaintiffs loss because (in essence) the plaintiffs had incurred costs and liabilities to third parties on the strength of the contractual commitments made by the Government in the Service Agreements and the Memoranda of Understanding. The claim for misrepresentation seeks damages for the misrepresentations and a "loss of opportunity" totalling US\$41,600,000.00.
19. The substance of the breach of contract claim is that the Government failed to pay invoices for services rendered under the first and second Service Agreements totalling BD\$6,582,050.00.
20. After some lengthy procedural delays, the Government sought an extension of time in which to serve a defence. A Consent Order for Directions was agreed by the parties on 28 January 2025 which provided for the service of a defence and (inter alia) for the exchange of lists of documents and service of witness statements and entry for trial.
21. The Government put in a defence and counterclaim denying liability under the first Service Agreement essentially on the grounds that the alleged services provided had not been rendered and that no services had been provided under the second Service Agreement. The Government says that it did not proceed with the contract with the plaintiffs because the plaintiffs not meet the Government's requirements for cybersecurity compliance. The Government says that it paid BD\$1,178,280 in fees under the first Service Agreement under a mistake of fact. Accordingly, the Government seeks restitution or equitable compensation from the first plaintiff in the amount of BD\$1.25 million (for the return of fees paid) and restitution or equitable compensation from the second plaintiff in the amount of BD\$2.5 million (in respect

of a guarantee liability under a bank loan between the second plaintiff and Clarien Bank Limited). The Government also denies liability in respect of the other claims made by the plaintiffs.

22. Following the exchange of lists of documents the plaintiffs complained that the Government's List of Documents failed to include documents which the plaintiffs had expected to be disclosed on the Government's List. The Government responded explaining that unexpected challenges had arisen in the retrieval of documents as a result of the Cyberattack on the Government systems in 2023, but that steps were being taken to address those matters.
23. Subsequently the plaintiffs made an application was made for specific disclosure of categories of documents by the Government. That application was contested on the grounds that the disclosure requested was too broad and did not relate to the pleaded allegations in the Statement of Claim. At the same time, the Government criticised the plaintiffs because the content of the documents produced did not exactly match the List. Various criticisms were also made concerning a number of the pleaded allegations of fraudulent misrepresentation, fraud, dishonesty and deceit. These allegations were said to be vague and directed at the Government as a whole not at individuals. The Government said it was not possible to narrow the search for documents relevant to specific allegations.
24. The court agreed that there was force in many of those criticisms and on 19 August 2025 directions were given to the plaintiffs to provide further and better particulars of the allegations of breach of contract and misrepresentation so that the Government could plead to those allegations specifically and search for documents that related to the allegations set out in the further and better particulars. The matter came back before the court the following month and, as a result of circumstances beyond the plaintiffs' control, the timetable for delivery of the further and better particulars was adjusted in a further order dated 25 September 2025.
25. When the further and better particulars were delivered on 6 October 2025, the Government objected that the new particulars were still insufficiently broad and vague and did not set out the relevant factual averments in support of the pleaded causes of action involving fraud or dishonesty. The court agreed. Rather than complicate the pleadings by ordering revised or yet further supplemental particulars to be served, on 8 December 2025 the court ordered the plaintiffs to serve an Amended Statement of Claim addressing the various criticisms that had been made. This was ordered so that the Government (and the court) had one document in which all the relevant averments in support of the claims of fraudulent misrepresentation and related allegations of dishonest conduct were set out in a comprehensive form, fully supported by all the necessary particulars.
26. An Amended Statement of Claim was duly served on 29 December 2025. The Government then served a further request for further and better particulars of the Amended Statement of Claim, and by agreement time was extended for the Government to serve its Amended Defence until the plaintiffs answered the Government's request for particulars, with consequential directions for the delay in service of the Government's amended List of Documents. A consent order reflecting this agreement was made on 6 March 2026.

The present application

27. Following further inter party correspondence regarding the adequacy of the plaintiffs' responses to the Government's requests for further and better particulars of the Amended Statement of Claim, the Government issued the present application to strike out the paragraphs which allege fraudulent and reckless misrepresentation and deceit against the Government. The Government's position was that the re-pleaded allegations in the Amended Statement of Claim still fail to comply with the rules of procedure which require particulars of the facts relied upon in support of allegations of fraud or dishonesty to be set out in the pleading.
28. The jurisdictional basis of the application is that as a result of the plaintiffs' failure to address its earlier criticisms adequately, the plaintiffs' allegations of deceit, fraudulent misrepresentation and dishonesty (as well as a new allegation of breach of fiduciary duty) fail to disclose a reasonable cause of action and should be struck out under RSC Order 18 rule 19 (1) (a). The Government also sought orders striking out a liquidated damages claim which had been added as an abuse because of the contractual time limitation for claims under the contract, and the claim for loss of opportunity contained in the prayer on the grounds that the claim fails to disclose a reasonable cause of action on the pleadings. These applications were made under RSC Order 18 rule 19 (1) (d) and (a) respectively.
29. The Government also relied upon the alternative grounds that the allegations made in relation to those claims are scandalous, frivolous and vexatious, liable to delay the fair trial of the action and/or are otherwise an abuse of the process of the court. The Government asked the court to invoke RSC Order 18 rule 19 (1) (b) (c) and (d) which empowers the court to strike out the relevant parts of the pleading on those alternative grounds. The Government also sought orders for an adjusted timetable for the service of any Amended Defence, depending on the outcome of the application.

The claims pleaded by the plaintiffs in the Statement of Claim in its original form

30. In order to trace the development of the claims now pleaded in the Amended Statement of Claim (and to understand the context of the criticisms raised by the Government) it is necessary first to summarise the pleaded claims in the original Statement of Claim.
31. The core of the underlying dispute that gave rise to the present proceedings arises out of a contractual framework in which the plaintiffs were engaged to provide software development services for the Government in 2020. The plaintiffs say that this framework was contained in two Memoranda of Understanding ("the MOUs") and two separate Service Agreements.
32. The first MOU which was dated 20 March 2020 is alleged to have outlined the plan for the second plaintiff to establish a venture capital fund to be known as "Innofund Ventures" with the goal of becoming self funding within five years. The first MOU was unsigned.
33. A second MOU was signed between the second plaintiff and the Government on 24 August 2020 which stated that the Government would support the establishment of a vehicle to *"incubate tech companies in Bermuda"* and would *"make strategic investments in tech start*

ups that will attract second and third round funding to Bermuda” and when developed “would be a user-fee based software, that profits are put back into the company”.

34. It is alleged that the second MOU required the second plaintiff to give the Government 10% of the equity in the entity to be called “Innofund Ventures” in return for debt guarantees of BD\$2.5 million to be issued by the Government. It is also alleged that the second plaintiff would be required to give the Government an additional 10% of the equity if the Government made available a total of BD\$10 million in debt guarantees.
35. It is alleged that, on the strength of the MOUs, the second plaintiff entered into a contractual agreement with Ryerson University under the terms of which the second plaintiff became obliged to pay US\$500,000 to Ryerson University, (now known as Toronto Metropolitan University) (“the Ryerson contract”).
36. It is then alleged that the first plaintiff entered into the first Service Agreement with the Bermuda Government on 24 August 2020 for the provision of software development services (as defined). It is pleaded that the first Service Agreement contained a formula for a shared revenue agreement which provided that

“..for the first US\$2.5million pledge of guarantee, the Government shall receive 10% of the Revenue Share if the Government provides \$10M in total debt guarantee(s) and/or commits to the proposed BPMS revenue generation model for arrival fees with a minimum \$10 user fee (unless a lower fee is mutually agreed). All the combined options are to a maximum of twenty percent”.
37. The first Service Agreement provided that invoices for services were due for payment 30 days after receipt. It is alleged that after the execution of the first Service Agreement, the second plaintiff entered into a loan agreement with Clarien Bank Limited for which the Government provided its guarantee, pursuant to the terms of the first Service Agreement. The plaintiffs aver that a second Service Agreement dated 12 April 2021 was executed on behalf of the Government in the same terms as the first Service Agreement. It is alleged that on 6 July 2021 that the Economic Development Department, acting as agent for the Government, instructed the first plaintiff to produce a software app known as “FastPass” pursuant to the Service Agreements. The plaintiffs aver that the first plaintiff “met the request”. The plaintiffs say that on 3 October 2022, the Government ultimately paid the invoices rendered for the work done by the first plaintiff on FastPass between April and October 2021.
38. The plaintiffs allege that following the execution of the first Service Agreement, on 17 November 2020 the second plaintiff entered into a loan agreement with Clarien Bank Limited (“the Clarien Loan”) under which the second plaintiff borrowed US\$2.5 million which the Bermuda Government guaranteed. It is alleged that the loan agreement provided for further advances of up to US\$7.5 million backed by a Government guarantee on the same terms, provided that the second plaintiff met the performance measure provisions in the second MOU. The plaintiffs allege that they met the performance measure requirements, except for one occasion when the plaintiffs say they were not provided the data necessary to provide the services requested.

39. The plaintiffs then allege that the Government made misrepresentations. The only misrepresentation specified under this heading was that the Government asserted on 13 May 2022 that it had never instructed the first plaintiff to produce the FastPass app.
40. It is then alleged that as a result of the misrepresentation on 13 May 2022, the plaintiffs incurred costs between 6 July 2021 until 13 May 2022. The details of the costs alleged to have been incurred as a result of this misrepresentation are not given. However, it is then alleged that the Government never collected the BD\$10.00 per user fee. It is alleged that the plaintiffs entered into the MOUs, the Service Agreements, the Clarien Loan, and the contract with Ryerson University upon reliance of “that” representation, which has caused damages to the plaintiffs. The damages are unspecified.
41. The representation referred to as “that” representation must be a reference to the Schedule to the first Service Agreement in which it is alleged the Government agreed to provide US\$10 million in total debt guarantees *“and/or commits to the BPMS revenue generation model for arrival fees with a minimum \$10 user fee (unless a lower fee is mutually agreed)”* quoted above.
42. The plaintiffs also allege that the Government knew that its failure to pay the first plaintiff’s invoices would cause the financial collapse of the plaintiffs which depended on the timely collection of revenue, and result in a default by the plaintiffs under the Clarien Loan and the Ryerson contract.
43. It is then alleged that the false statements by the Government induced the plaintiffs to enter into the MOUs, the Service Agreements, the Clarien Loan and the Ryerson contract and the plaintiffs claim damages under the Law Reform (Misrepresentation and Frustrated Contracts) Act 1977. In addition, the plaintiffs claim a loss of opportunity “under the tort of deceit” in that they have been damaged by the misrepresentation (singular) of the Government which arose from the inability of the plaintiff (singular) to earn the expected sums from the Service Agreements.
44. The plaintiffs then set out a breach of contract claim in summary form in relation to the non-payment of invoices for works alleged to have been performed under the First Service Agreement, totalling BD\$6,582,050.00
45. The prayer for relief quantified the claim for misrepresentation and loss of opportunity at BD\$41,600,000 without setting out how that sum was made up or what it related to.
46. Against that background, it is unsurprising that the Government sought further and better particulars of the allegations that relate to the misrepresentation(s) alleged, and the particulars in relation to the allegation of deceit, as well as the make up of the damages claims. The plaintiffs replied that they could not provide some of the particulars requested until after disclosure had been given and then launched their application for specific disclosure. This resulted in the order for service of an Amended Statement of Claim which was intended to consolidate the responses given under the further and better particulars and address the criticisms of the pleading. The Amended Statement of Claim was served in December 2025.

47. There followed further inter party correspondence regarding the particulars, but these exchanges did not resolve matters and the present application was made by the Government to strike out certain parts of the Amended Statement of Claim.

The Amended Statement of Claim

48. The Amended Statement of Claim reproduced the allegations in the Statement of Claim in relation to the background (with two small changes that are not material), and the breach of contract claim remains exactly the same. Although Mr Duncan KC made a number of criticisms of the theory on which the breach of contract claim is based, and pointed to the inconsistencies in the pleaded allegations, he did not contend that the pleading of the breach of contract claim disclosed no reasonable cause of action.
49. It is clear that there is a dispute as to whether the first plaintiff performed the services under the first Service Agreement and/or whether it is entitled to payment of the unpaid fees claimed on the one hand, or whether the Government paid those first invoices under a mistake of fact and is entitled to restitution or equitable compensation (in effect repayment) for the bills the Government paid. No further analysis of the breach of contract claim is required at this stage. Those are all matters which will need to go to trial and the court makes no further comment on them.
50. The focus of Mr Duncan KC's submissions on the strike out application was that the particulars supplied in the Amended Statement of Claim do not satisfy the basic requirements of a pleading in pre-contractual misrepresentation, fraudulent or otherwise, or deceit. He also challenged a new claim introduced into the pleading in relation to a cause of action which is barred by limitation, and the pleading of a new cause of action based on an alleged breach of fiduciary duty. These will be considered in turn below.

The procedural framework of pleadings

51. The procedural rules are contained in Order 18 rules 7, 12 and 19 of the Rules of the Supreme Court of Bermuda 1985. Briefly stated, RSC Order 18 rule 7 states that only the facts relied upon by the party must be contained in the relevant pleading. In this context, the word "facts" means primary facts, not the conclusions the party asserts that the court is to draw from those facts. RSC Order 18 rule 12 states that pleadings "must contain" particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence alleged, and particulars of any condition of mind including fraudulent intention must be given. RSC Order 18 rule 19 empowers the court to strike out any allegation which does not disclose a reasonable cause of action or defence, or which is scandalous, frivolous or vexatious, or which will embarrass, delay or prejudice the fair trial of the action or which is otherwise an abuse of the process of the court.
52. The general principles that are applied on a strike out application are well settled and have been summarised in a number of recent decisions of the court¹. It is not necessary to set them

¹ Some recent local examples include **Jimmy Bailey v WE Meyer & Company Limited** [2017] SC (Bda) 5 Civ; **David Lee Tucker v Hamilton Properties Limited** [2017] SC (Bda) 110 civ; **Fidelity National Title Ins Co v Trott & Duncan Ltd** [2019] Bda LR 8; **Hon Sir John Swan v Bermuda Management Holdings Limited and Others** [2026] SC (Bda) 72 civ; **Bentley Friendly Society v HSBC Bank Bermuda Limited** [2026] SC (Bda) 60 civ.

all out again here, but I will refer briefly to the most relevant principles that are engaged by the present application.

53. In assessing whether a reasonable cause of action has been pleaded (namely one which is recognised as being justiciable in a court) the court only takes into account the pleaded facts on the assumption that they are true and capable of proof at the trial². Again, in this context, the facts pleaded that the court takes into account are only the primary facts alleged, not the conclusions that it is asserted the court should draw from those facts³.
54. It is also only in plain and obvious cases that the court will exercise its powers to strike out a pleading or a claim at a preliminary stage. However, where the court is satisfied that the claim or part of the claim (or defence) asserted by a party cannot succeed in law, the court will exercise its powers to prevent the other part from being put to the time trouble and expense of resisting a claim which is hopeless or which is bound to fail. The exercise of these powers is guided by the principles set out in the Overriding Objective in RSC Order 1A which require the court to deal with the matter justly, to ensure parties are on an equal footing, to save costs, and to exercise its powers proportionately and to achieve an expeditious and fair hearing of the matters in dispute.
55. It is also relevant to emphasise that the rules of pleading are not arcane or pedantic legal requirements: they are the established framework for the disposal of proceedings fairly and justly according to law. Departures from the rules can (generally) only be allowed when the court considers that the interests of justice require a relaxation or variation of the particular rule.

The principal ingredients of a cause of action in pre-contractual misrepresentation and deceit

56. Before turning to examine the Amended Statement of Claim in detail, it is also useful to state briefly here the essential ingredients of a cause of action in pre-contractual misrepresentation and deceit.
57. A claim in pre-contractual misrepresentation arises when (i) one party makes a statement of fact, law or their present intention to another party (the representee) with the intention that the representee will rely upon that representation (ii) the representee relies on the truth of the representation made, (iii) the representation is false or materially misleading (iv) the representee's decision to enter the contract is materially influenced by the representation and (iv) the representee suffers a recoverable loss (within the rules of remoteness) as a result of entering into the contract. A representation can be made in words orally or in writing or by conduct, but not (usually) by mere silence⁴.
58. A pre-contractual misrepresentation can be innocent, negligent or fraudulent. The type of misrepresentation affects the remedies that are available, but this aspect does not need to be discussed in detail here. Innocent misrepresentation needs no explanation. A claim for negligent misrepresentation under the Law Reform (Misrepresentation and Frustrated

² The Supreme Court Practice 1999 (the White Book) commentary at paragraph 18/19/6

³ See *Sofer v Swissindependent Trustees SA* 2020 WL 030000837 (CA) discussed below.

⁴ See *Chitty on Contracts* (33rd Edition) Vol 1 paragraphs 7-006 to 7-020 for the general principles that apply in claims for pre-contractual misrepresentation.

Contracts) Act 1977 requires the claimant to show that the representor made a pre-contractual representation of fact, statement which was untrue, the claimant relied upon it and suffered loss. The statute then puts the burden on the representor to show that he or she had reasonable grounds for believing that the representation was true. If the representor fails to establish those reasonable grounds, the representation is treated as having been made negligently.

59. In the case of an allegation of fraudulent misrepresentation (or deceit), the same elements are required as for a pre-contractual misrepresentation described above, but in addition the party alleging deceit must show that the party making the representation knew that the representation was false or materially misleading or made the representation not caring whether it was true or false⁵.

60. The Law Reform (Misrepresentation and Frustrated Contracts) Act 1977 replicates the English Misrepresentation Act 1967 and allows a party to claim damages in lieu of rescission where fraudulent or negligent misrepresentation has been established.

61. In this case, the plaintiffs have invoked the 1977 Act in support of their claim so that they seek damages for misrepresentation rather than rescission of the contract. This Act also restricts the effect of exclusion or limitation clauses for misrepresentation to those which can be justified as being reasonable in the circumstances of the particular case⁶.

Negligent Misstatement

62. The plaintiffs have pleaded their tort claims on the basis of pre-contractual misrepresentation and deceit. There is no pleaded claim which asserts a claim for negligent misstatement. I mention this because Mr Hindess suggested during his argument⁷ that the plea in paragraph 49 of the Amended Statement of Claim which invokes the provisions of the 1977 Law Reform Act also refers to a damages claim in “common law misrepresentation”. He said that this plea encompasses the tort of negligent misstatement, which he said was a free-standing tort which did not require any contractual underpinning. Mr Hindess said that the misrepresentations referred to in the Amended Statement of Claim also support a claim in negligent misstatement. The court is unable to accept that analysis.

63. A claim in negligent misstatement requires that the person making the statement owes a duty of care to the person to whom the statement is made, which is relied upon and which causes loss to the person who relied upon the statement⁸. The duty of care must arise by reason of a special relationship or assumption of responsibility which makes it fair to impose liability, applying the rules of proximity, foreseeability and recoverable loss. The ingredients of this cause of action therefore differ significantly from a pre-contractual misrepresentation claim which have been explained above.

64. However, no material facts whatsoever which could give rise to such a claim in negligent misstatement have been set out in the Amended Statement of Claim. No special relationship

⁵ **Derry v Peek** (1889) 14 App Cas 337 and Clerk & Lindsell on Torts (22nd Edition) at paragraphs 18-01 to 18-08 for the general principles that apply in claims for deceit.

⁶ See *Chitty on Contracts* (supra) at paragraph for a summary of the effect of the equivalent English provisions.

⁷ Courtsmart recording 13 August 2026 at 2.49 pm.

⁸ See *Clerk & Lindsell on Torts* (supra) at paragraphs 8-98-99.

is pleaded, and no facts are given in relation to proximity, fairness or foreseeability. Therefore, and for the avoidance of any doubt, to the extent that the plaintiffs rely on a claim in negligent misstatement, it is entirely absent from the pleading. Accordingly I have not addressed the claim in my detailed analysis of the pleadings.

Contractual claims expressed as misrepresentation claims

65. Some confusion has also arisen in the pleading of the plaintiffs' claims as a result of the use of the term 'misrepresentation' in relation to statements alleged to have been made by Mr Thomas and Mr Jones which relate to the first plaintiff's provision of services under the Service Agreement(s).
66. For example, in paragraph 40 it is pleaded that Mr Thomas stated that the Government had not instructed the plaintiffs to produce the FastPass app and later at paragraph 42 that Mr Thomas instructed the plaintiffs to develop FastPassLite. At paragraphs 43 (v) (vii) (ix) and (xii) it is pleaded that Mr Thomas (and some other unnamed person) confirmed that the data would be provided and the fees would be paid for the services provided. Similarly, it is pleaded in paragraph 43 (xviii) and (xxii) that Mr Jones confirmed that the fees for the services rendered by the plaintiffs would be paid by the Government. These statements are alleged to be post contractual representations alleged to have induced the plaintiffs to continue provide services under the Service Agreements.
67. To the extent that the plaintiffs contend that statements made by the Government's representatives contradict the terms of the obligations undertaken in the Service Agreements, these are not 'misrepresentations'. They may reflect an apparent intention not to honour the Government's obligations under the Service Agreements and in that sense these alleged statements might be relevant to the plaintiffs' claim for breach of contract. Likewise, to the extent that the plaintiffs contend that the Government's representatives are alleged to have confirmed that the Government would pay the fees that were due, those alleged statements might relate to an allegation that the Government had affirmed the contract or performed it in accordance with its terms.
68. In neither case is it correct to refer to these statements as being (mis)representations which induced the plaintiffs to enter into the contract or to continue to perform the obligations the plaintiffs say they had undertaken under the Service Agreements.

The principal arguments

69. In summary, Mr Duncan KC made the uncontroversial and conventional submission that an allegation of pre-contractual misrepresentation must (i) set out the words of the representation made, (ii) state by whom it was made and to whom it was made, (iii) give particulars of what was materially false in the statement at the time it was made, (iv) state why it is alleged that the party making the statement intended the representee to rely upon it, (v) allege that the representee did rely upon it and (vi) state what flowed from the falsity of the statement to cause the representee recoverable loss or damage.
70. Similarly, in a case in which the tort of deceit is alleged, he submitted that the same ingredients must be pleaded with the addition of particulars as to why it is alleged that the person who made the representation knew it was false, or had no honest belief in its truth, or

what facts are relied upon to support the allegation that the person made the representation not caring whether the representation was true or not.

71. Mr Duncan KC also made objection to the introduction of a new claim for liquidated damages which is barred by a contractual limitation period, as well as the introduction of a new claim for breach of fiduciary duty, and the addition of a claim in the prayer for 'loss of opportunity'. No discourtesy is intended in not setting out the whole of the argument in support of Mr Duncan KC's application here. The essential points of Mr Duncan KC's submissions will be addressed in the course of the court's analysis of the pleading.
72. Similarly, no discourtesy is intended in not setting out all the various points made by Mr Hindess in his stalwart defence of the pleaded claims. In essence, Mr Hindess submitted that the particulars pleaded in the Amended Statement of Claim met the requirements of the rules of pleading and that the claim raised a sufficient array of issues of fact which could only be determined at a trial. Accordingly, he submitted that the application to strike out was misconceived. In the course of the Ruling, I will also address the key arguments advanced by Mr Hindess.

Pleading claims in deceit and fraudulent misrepresentation generally

73. Before addressing the analysis of the Amended Statement of Claim it is useful to make some general prefatory observations about the nature and purpose of pleadings generally and to provide an example by which compare the allegations made in this case⁹.
74. Pleadings are not works of fluid prose or descriptive exposition written in high narrative style. Pleadings are stylised, repetitive recitals of 'imperial gallons of fact', expressed with Gradgrindian monotony¹⁰. They serve the purpose of setting out the specific facts which the plaintiff will rely upon to prove the cause of action alleged. The proof of those facts must result in liability in the plaintiff's favour, or no cause of action is properly constituted (i.e. there will be no 'reasonable cause of action' in legal terms).
75. The facts pleaded by a plaintiff are the facts which a defendant must either admit, not admit, or deny. The pleaded facts frame the relevant issues which the parties will contest and which the court must determine if the fact alleged is denied or not admitted. The defendant may also need to state the facts upon which he or she relies to establish a defence to the cause of action pleaded. The pleadings do not (or should not) contain the evidence by which those facts will be proved at trial.
76. The pleaded facts also set the limits of relevance for the disclosure obligations that fall on the parties. The requirement to set out the relevant facts which give rise to the cause of action or defence is not just an old-fashioned legal formality, the requirement goes to the procedural fairness of the conduct of the litigation¹¹.

⁹ Applications to strike out pleadings as disclosing no reasonable cause of action are made with such regularity in the courts in Bermuda that the court considers it would be helpful to provide an illustrative example of what the rules require in claims alleging fraudulent misrepresentation.

¹⁰ *"In this life, we want nothing but Facts, Sir; nothing but Facts!"* (Mr Gradgrind) *Hard Times* by Charles Dickens.

¹¹ See **British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd** [1994] 72 BLR at [33-4].

77. Wide latitude is given to different styles of pleading and there is no single 'correct' formula, however the traditional encyclopaedia of forms and precedents are filled with examples for pleaders to use as a guide or starting point.
78. The rules of procedure expressly provide that a pleading must contain (and contain only) a statement in a summary form of the *material* facts on which the party pleading relies for his claim or defence, but not the evidence by which those facts are to be proved¹². Therefore, it is only the material facts which are essential to prove the cause of action, and the omission of a material fact which is essential to establishing liability will render the claim demurrable.
79. In addition, the rules provide that every pleading must contain the particulars of any misrepresentation, fraud, breach of trust, wilful default, or undue influence on which the party relies, and must give particulars of any fraudulent intention. Where knowledge is alleged, the pleading does not have to contain particulars of knowledge, but the court has power to order in an appropriate case that the pleading party must supply particulars of the facts on which the party relies in support of the allegation of knowledge¹³.
80. By way of example to illustrate how these rules work in practice I set out below a distillation of the essential ingredients of what a basic pleading of deceit or fraudulent misrepresentation (in simplified form) must contain¹⁴:
- (i) The date, time and place the statement of fact, law or present intention (or omission) was made (i.e the representation).
 - (ii) The identity of person who made the representation.
 - (iii) The identity of the person to whom the representation was made.
 - (iv) The exact words used, orally or in documents, or the conduct or omission relied upon as amounting to the representation.
 - (v) The method the statement was conveyed to the representee (orally, in writing, or both), identifying the documents in which the representation was made, or if by conduct, the conduct relied upon and how it amounted to a representation of present fact or present intention.
 - (vi) The facts that show that the representor intended the representee to rely upon the representation.
 - (vii) The meaning of the representation.
 - (viii) The facts that show that the representation was false or materially misleading.
 - (ix) The facts that show that the person who made the representation knew that it was false at the time that the statement was made or had no genuine belief in the truth of the representation or was reckless as to whether the representation was true or false.
 - (x) The facts that show the representee relied upon the representation.
 - (xi) The resulting loss that was suffered by the representee, with any facts relevant to show causation.

¹² RSC Order 18 rule 7.

¹³ RSC Order 18 rule 12.

¹⁴ See e.g. **Groen v Heath** [2024] EWHC 1654 (Ch).

81. The details set out above are often referred to as the ‘primary’ facts. It is not uncommon for the party pleading the case to add a general plea that ‘as a result of the deceit/fraudulent misrepresentation made to the plaintiff by the defendant, the plaintiff has suffered loss and damage’ or words to similar effect. This latter type of plea is commonly referred to as a ‘conclusory fact’, which is really the conclusion that the plaintiff will be inviting the court to draw at the end of the trial. There is nothing wrong with a pleading containing conclusory allegations, but the pleading must contain the primary facts that support them. A litany of conclusory allegations on their own will not establish a properly constituted cause of action¹⁵.
82. The essential pleading requirements for claims asserting fraud or dishonesty are onerous, and rightly so. “*Fraud must be distinctly alleged and as distinctly proved*” is a *dictum* often quoted in this context¹⁶. It is important that any person accused of dishonest conduct (like deceit or fraudulent misrepresentation) must be told explicitly each fact which is alleged against him or her that justifies the allegation so that those allegations of fact can be addressed directly.

The court’s analysis of the plaintiffs’ claims in misrepresentation and deceit

83. The Amended Statement of Claim is not set out in the conventional form. The plaintiffs have simply inserted a number of new paragraphs which are said to supply the necessary particulars to support the original allegations relating to the misrepresentations and the tort of deceit against the Government. This has given rise to some difficulties in addressing the pleading in way that is easy to read or understand. The pleading jumps around between different causes of action and is not laid out in a consistent chronological sequence. As a result, the various separate legal claims are somewhat difficult to untangle.
84. For clarity, references to paragraph numbers in this part of the Ruling are references to the paragraphs in the Amended Statement of Claim unless otherwise stated. The additional particulars introduced by amendment were in three sections. The first is a section dealing with the overview of the agreements and the commercial relationship (paragraphs 24 to 35). In this new section, the pleading explains in narrative form what the plaintiffs allege the commercial purpose of the Service Agreements to have been and set out what the plaintiffs say the understanding of the parties was at the time the contracts were entered into. These paragraphs appear to set out in summary what the plaintiffs will adduce in evidence. Whether these paragraphs are strictly proper “particulars” was not seriously debated, and any points of objection to the content of these paragraphs can be taken (if necessary) at the trial.
85. The second new section deals with the particulars of misrepresentation (paragraphs 37-40, 42 and 43 (i) to xxx) which include several allegations of fraudulent misrepresentation and (possibly) deceit. The third new section deals with further allegations of deceit and a new claim for breach of fiduciary duty (paragraphs 51 to 55). Finally, the plaintiffs have added a new claim in the prayer for the payment of a one-year penalty in the amount of BD\$7,139,120 (prayer (ii)). I shall address each section under those broad headings.

¹⁵ *Sofer v Swissindependent Trustees SA* (supra) at [23] per Arnold LJ.

¹⁶ *Davy v Garrett* (1878) 7 Ch D 473 at 489 per Thesiger LJ.

Misrepresentation

86. The Amended Statement of Claim addresses the particulars of misrepresentation in paragraphs 37 to 40, 42, and 43 (i) to (xxx). It would be onerous and confusing to set out each of these very lengthy paragraphs in full, and so I will address them by briefly describing the general import of the various paragraphs and identify the issues which give rise to difficulty.
87. As an introductory observation, while Mr Duncan KC took objection to paragraphs 37, 38 and 43, the court does not consider that the entirety of the content of these paragraphs and subparagraphs need to be struck out altogether. Some of the content may be relevant to the plaintiffs' claims in breach of contract and, although the "*particulars*" may amount to a summary of the evidence the plaintiffs intend to adduce (which should not be set out in particulars), they are not otherwise objectionable as either disclosing no reasonable cause of action or as an abuse of process (on any of the available grounds).
88. Sub-paragraphs 37 (i) to (xiv) are a narrative account of events between 25 June 2021 to April 2022, and do not contain any particulars of the misrepresentation(s) alleged to have been relied upon.
89. It is important to restate that the only specific misrepresentation alleged in the original Statement of Claim in paragraph 36 was that the Government had asserted that it had not instructed the first plaintiff to develop the FastPass software app. That statement or "*representation*" is alleged to have been made on 13 May 2022.
90. The first and central logical inconsistency alighted upon by Mr Duncan KC is that the allegation cannot give rise to a coherent claim in misrepresentation. He submitted (in effect) that a statement of fact alleged to have been made on 13 May 2022 could not have induced the plaintiffs to enter into the MOUs (dated 20 March 2020), the Service Agreements (dated 24 August 2020 and 12 April 2021), the Ryerson contract (dated 1 July 2020) or the Clarien Loan (dated 17 November 2020) because the alleged statement was (obviously) made after all those arrangements had been signed or executed and/or (at least partly) performed. He submitted that it is therefore impossible for the plaintiffs' misrepresentation claim to succeed as a matter of legal theory.
91. The second problem identified by Mr Duncan KC is that the pleading does not set out the necessary particulars to support an allegation of misrepresentation. A narrative of what is alleged to have happened does not suffice. This problem requires more detailed analysis.
92. In paragraph 37(i) it is alleged that the instruction to develop the FastPass app was given by Mr Leon Thomas at a meeting on 25 June 2021. The next subparagraphs detail the history of events describing various meetings at which the development of the FastPass app was discussed, and the way it was intended to operate was described (paragraphs 37 (ii) to (vii) (x)). It is alleged that those attending the meeting were aware of the proposed method of funding the project by charging a BD\$10 user fee (paragraph 37 (vi)). It is alleged that a FastPass Steering Committee was established to oversee the development of the FastPass app (paragraph 37 (v)). It is alleged that the attendance of various representatives from the Departments of Immigration, Customs and Health at those meetings "clearly represented" that the Government had ordered the plaintiffs to produce the FastPass app (paragraph 37 (viii)).

It is also alleged that at some of those meetings the statement was made (by an unidentified person) that Cabinet had agreed to pay the bills rendered by the plaintiffs to date (paragraph 37 (xi) (iii)). Further meetings are described at which issues of confidentiality were discussed, and demonstrations of the app were given (paragraph 37 xii) to (xiv). However, no particulars are given in these subparagraphs as to why the instruction alleged to be the misrepresentation (i.e. that the Government had not instructed the first plaintiff to proceed with the development of the FastPass app) was false or misleading at the time it was made.

93. The key allegations in the pleading on which the plaintiffs' case on fraudulent misrepresentation and deceit rest are to be found in paragraphs 37 (xi), 38, 39 and 40. These paragraphs are given detailed consideration as they give rise to several allegations which are the focus of Mr Duncan KC's objection to the plaintiffs' pleading of fraudulent or dishonest conduct without complying with the procedural rules that govern serious allegations of that type.
94. Paragraph 37 (ix) alleges that at the time of the first FastPass Steering Committee meeting (13 October 2021) the Government had already signed a contract with ResQuest, a fact which the plaintiffs say only emerged later in a report by the Attorney General dated 1 March 2023.
95. Paragraph 38 then alleges that from the date on which the Government entered into its contract with ResQuest (which is unspecified), the Government "*knew or ought to have known*" that the Government was not going to use the FastPass app or pay the plaintiffs for the services provided under the Service Agreements. In the alternative, it is alleged that the representatives of the Government made "*these representations*" recklessly without caring whether they were true or not. Paragraph 39 goes on to say that by their words and actions, the representatives of the Government intended that the plaintiffs should rely upon their representations.
96. However, there are no particulars of fact given which support the allegation that the "*representation*" made by Mr Thomas at the meeting on 13 June 2021 to proceed to develop the FastPass app was false at the time he made the statement. Nor are any particulars given as to how that "*representation*" is said to have induced the plaintiffs to enter into the MOUs or the Service Agreements, the Ryerson contract or the Clarien Loan. Nor are any particulars given as to what words or action or conduct of the representatives at the meetings referred to amounted to a representation or of their alleged intention that the plaintiffs should rely upon that "*representation*".
97. Paragraph 38 is also a difficult paragraph to construe logically. Without redrafting the paragraph, the essential meaning appears to me to be that the plaintiffs are alleging that the Government deliberately or recklessly allowed the plaintiffs to continue incurring time and expense in the development of the FastPass app when the Government knew it had already decided to choose another contractor and had therefore decided not to pay the plaintiffs for the work they had performed.
98. However, if that is the gist of the claim, the details of the "*representations*" on which the plaintiffs say they relied must be given. They are not. The plaintiffs simply state that from an unspecified date the Government knew or ought to have known that it was not going to use

the FastPass application or pay for the services. Paragraph 38 goes on to say the Government made “*these representations*” recklessly without caring whether the representations were true or not. No representations are expressly referred to as being the “*representations*” referred to and cannot be gleaned from anywhere else in the pleading. There is no pleading of who said what to whom and when, what was false or misleading or how the plaintiffs relied on the representation or what loss flowed from it.

99. In the course of his responsive argument, Mr Hindess properly accepted Mr Duncan KC’s criticism that a “rolled up” plea which asserts “*knew or ought to have known*” is impermissible in a claim where the essential ingredient of the claim is actual knowledge of falsity of the representation. The expression “*ought to have known*” is consistent with negligence and inconsistent with culpable knowledge or recklessness (i.e. not caring whether the statement is true or false).
100. Paragraph 39 pleads that “*by their words and actions described above, the representatives of the Government intended that the plaintiffs should act on their representations*”. The obvious problem with that plea is that no representations are attributed to anyone, even though the representatives present at the meeting are named. The only “*representation*” that is “*described above*” that potentially relates to this allegation is the reference to a discussion at a meeting on 18 January 2022 at which meeting it is alleged in paragraph 37 (xi) (i) that the Cabinet had decided to pay the first plaintiff’s fees billed to date.
101. It is not said that the person making the statement knew that the Cabinet had decided not to pay the bills rendered up to date but was lying to the plaintiffs, which is the only way such an allegation could fit into the plaintiffs’ theory of claim. No such plea is made, and no particulars of fact are given to support it.
102. It is not permissible to make an allegation that someone made a statement dishonestly (or without believing in the truth of it) unless the particular words or statement are pleaded, by whom it was made, to whom and when, that the statement was made was false and in what respect, and that the person making the statement knew it was false, or had no genuine belief in its truth, stating the facts which support the allegation that the person knew it was false, or the factual basis on which it is asserted that the person made it recklessly not caring whether it was true or false.
103. The logical inconsistency in the pleading is that the plaintiffs accept that the Government did pay the bills rendered up to October 2021, so it cannot be alleged that the Government never intended to pay for any of the services rendered by the plaintiffs. The pleading does not draw any distinction in terms of bills rendered and bills to be rendered in the future.
104. The Government’s defence in these proceedings is that the services were never rendered in accordance with the first Service Agreement and that the Government paid the earlier invoices under a mistake of fact. It may be that the Government’s stance has prompted the plaintiffs to assert that the Government never intended to pay for the services at all. But that is not pleaded, nor could it be on the facts, for the reason already explained. The plaintiffs must plead that maker of the statement knew the statement was false (or had no genuine belief in its truth etc.) at the time it was made. The plaintiffs have not pleaded the necessary

primary facts to support such a claim. The statement about the Cabinet's intention to pay the bills to date is a statement at second hand (because no Cabinet member is alleged to have been present at the meeting), and it is not and cannot properly be alleged that the person (who is not named) who made the statement knew the Cabinet's statement of intention was false or had no reasonable belief in its truth.

105. A further fundamental conceptual difficulty that the plaintiffs face with pleading a "*representation*" that the plaintiffs' bills would be paid is that it is an admitted term of the contract that the Government would make payment within 30 days of invoice. The misrepresentation alleged is that the Government would pay the bills rendered to January 2022. This statement does not lead to a separate claim for damages that flow from an alleged misrepresentation that the Government was going to pay the bills. Even if true, this statement only relates to the contractual claim for the value of the services performed under the contract at the contractual rate.
106. Paragraph 40 pleads that "*these representations*" caused the plaintiffs to incur costs between 6 July 2021 and 13 May 2022. This appears to be a plea that in reliance upon the statement made at the meeting on 18 January 2022 that the Cabinet had decided to pay the first plaintiff's bills to date, the first plaintiff continued to render services under the Service Agreements. This is not what is pleaded, but even if it had been, there is no pleading that sets out how a representation that the bills would be paid up until 18 January 2022 amounted to a representation that all future bills would be paid after that date. In any event, for the reasons already given, such a claim does not give rise to an independent claim in damages beyond the contractual claim for payment for the services actually rendered.
107. Paragraph 40 also alleges that, at a meeting of the plaintiffs and a number of Government representatives on 13 May 2022, Mr Thomas informed the plaintiffs that the Government had not instructed the plaintiffs to produce the FastPass app. At paragraph 41 it is alleged that Mr Thomas said that he had been instructed to state to the plaintiffs' representative that the Government "*did not order FastPass*".
108. At paragraph 42, the plaintiffs allege that the following month, in June 2022, Mr Jones acting as a representative of the Government attended a board meeting (of one of the plaintiff entities) and instructed the plaintiffs to continue the development of what appears to be a different version of FastPass called "*FastPassLite*", which was to be a one-way data transfer app. It is not pleaded, but it is to be inferred from the contractual claim for payment under the Service Agreements that on the strength of that instruction the plaintiffs continued to provide services to the Government. The court does not understand this allegation to add anything to the misrepresentation claim, save to the extent that it is relied upon as an affirmation of the Service Agreements after the Government had allegedly denied that it had instructed the plaintiffs to produce the FastPass app in the first place.
109. Paragraph 43 alleges that the Government has never collected the BD\$10 user fee which was provided for in Schedule 1 of the first Service Agreement quoted above. The plaintiffs say that they relied upon that representation in entering into the MOUs, the Services Agreements, the Ryerson contract and the Clarien Loan and "*said misrepresentation has caused damage to the plaintiffs*" and purport to set out the particulars of the

misrepresentation in subparagraphs (1) to (xxx). However, what appears in those subparagraphs is a further recitation of events, not particulars of the misrepresentation alleged.

110. The most relevant are subparagraphs 43 (i) to (iv) because these deal with the period prior to the entry into the first Service Agreement on 24 August 2020. It necessarily follows that any misrepresentations that induced the plaintiffs to enter into the Service Agreements must have occurred on or prior to that date (for the reasons already explained).
111. It is alleged in 43 (i) that the Premier and Mr Thomas met with representatives of the plaintiffs (or strictly the promoters of the plaintiffs) on 30 January 2020 at which a briefing note was discussed which included the BD\$10 passenger/user fee. This is obviously not a representation.
112. It is alleged in 43 (ii) that there was a “*multi-day*” negotiation at which Mr Thomas “*gave an absolute guarantee*” that the “*fees would be paid*”. The meaning of this sentence is not as clear as it could be. Giving it a generous reading, it could be inferred that this is meant to convey that Mr Thomas gave an absolute guarantee on behalf of the Government that the passenger/user fees would be collected in order to fund the payment of the fees under the Shared Revenue Agreement. On its face, a statement that the “*fees would be paid*” could have been a representation in the sense of it being a present intention, but could only amount to a misrepresentation if the statement was false at the time it was made: i.e. that Mr Thomas knew there was no such intention at the time he made the statement. This is not pleaded.
113. Moreover, in order to support that plea, the plaintiffs have to plead what the true position was. Nothing is said about what the true position is alleged to have been at the time, or that Mr Thomas knew that the statement he made was false at the time it was made.
114. It appears to be the plaintiffs’ case that the Government had decided to proceed with another contractor, and this is alleged to be in breach of the Service Agreements. (This is a point to which I will return). The unspoken premise that lies behind the plaintiffs’ claim seems to be that there was only one source of revenue to fund the Shared Revenue Agreement, and that by choosing to proceed with the ResQuest app instead of FassPass app, that source of revenue was not available to the first plaintiff under the Service Agreement.
115. If this is correct, this claim is not pleaded in a coherent way, and the facts to support such a theory are not set out in the Amended Statement of Claim. The vital and indispensable facts that need to be pleaded in support of a claim in fraudulent misrepresentation (and deceit) are (a) in what respect(s) the statement that the passenger fees would be paid was false at the time it was made (b) that Mr Thomas knew it was false when he made the statement (c) that the first plaintiff relied upon that statement as a material inducement in entering into the contract (d) how the making of that statement led to the breach of the terms of the Service Agreement such that damages for the alleged misrepresentation are justified by the losses alleged to have been incurred.

116. It is alleged in 43 (iii) that the plaintiffs presented the “*structure of the deal with a budget, including the Fee and a \$10 million guarantee*”. This is obviously not a representation by the Government to the plaintiffs (which is a necessary requirement for a misrepresentation) and the relationship of the content of the plaintiffs’ presentation to the terms of the Service Agreement is not explained.

117. It is alleged in 43 (iv) that after several days (in June 2020) the agreement was made in principle as to the basic structure of the data and the fees. It is not clear how this is said to amount to a representation, other than an acceptance in principle of the terms of the terms proposed by the plaintiffs, and these are not set out.

118. At this point in time in the chronology of particulars the first Service Agreement was executed. It is relevant to pause here and look at the terms of the first Service Agreement which is relied upon by the plaintiffs as giving effect to the agreement reached.

119. Schedule 1 of the first Service Agreement provides that there are to be no hourly fees and the Special Conditions related to the Fee are as follows:

“Shared Revenue Agreement. For the first 2.5 million pledge of guarantee to (Innofund Limited”) after the Government is absolved of its debt guarantee to the bank, the Government of Bermuda shall receive ten percent (10%) of the Revenue Share of software.

An additional 10% of the Revenue Share if the Government provides \$10M in total debt guarantee(s) and/or commits to the proposed BPMS Ltd revenue generation model for arrival fees with a \$10 user fee.

All of the combined options are to a maximum of twenty percent (20%).”

120. It is entirely opaque what aspect of the pre-contractual negotiations the plaintiffs say was misrepresented or not reflected in this term of the Service Agreements. It is certainly not pleaded. On the contrary, the plaintiffs expressly rely upon the terms of the Service Agreements.

121. Obviously, the court is not here drawing any conclusions in relation to the ultimate interpretation of the contract. However, in relation to a misrepresentation claim which is premised on a claim that false or misleading statements were made to induce the plaintiffs to enter into the contract on those terms, the terms of the contract are plainly relevant. Without pleading the necessary facts that support the allegation that the statements made by Mr Thomas were inaccurate in a material respect at the time he made them, there can be no claim in pre-contractual misrepresentation.

122. If it is the plaintiffs’ case (as it appears to be) simply that the Government has not performed its part of its contractual obligations in accordance with the agreed terms, that is a claim in breach of contract, not a claim in deceit or misrepresentation.

123. A claim does not lie in misrepresentation because the Government is alleged to have said that it would perform the contract according to its terms and failed to do so, unless it is

alleged that the Government never intended to perform it¹⁷. This is not alleged and such a claim could not stand in the light of the undisputed facts that the Government did in fact perform its obligations (at least in part) (i) by giving the guarantee in respect of the Clarien Loan and (ii) by paying the initial invoices it received. The fact that the Government now denies any liability under the Service Agreements does not answer that point.

124. The bulk of the remainder of paragraph 43 relates to statements made at various times by various persons that the fees would be paid, even though there is some ambiguity in places what specific fees are being referred to. (The references could in some places be taken to mean the passenger/user fees, and in other places it could be taken to mean the fees due to the first plaintiff.)
125. The history of the execution of the second Service Agreement is also given briefly, but it was on the same terms and there is no allegation that there were any misrepresentations made in relation to the second Service Agreement. It is again accepted that the Government paid the fees for the period April to October 2021 and alleged that the promises of payment “*induced*” the plaintiffs to continue working. These details take the matter no further forward and are only relevant to the plaintiffs’ claim for contractual payments not to a misrepresentation claim.
126. There is a curious side track at paragraph 43 (xxv) to (xxx) which refers to a proposal to restructure the Clarien Loan which was rejected by the plaintiffs. It is not relevant to any of the pleaded claims for relief.

Deceit

127. The allegations in paragraphs 44 to 50 and 55 relate to claims involving alleged intentional misstatement, reckless misstatement and deceit. These claims all appear to be related, so I will deal with them together.
128. Paragraphs 44 to 48 advance the proposition that the Government knew that the plaintiffs depended on the cash flow that was anticipated from the collection of passenger or user fees (the difference if any between which is not explained) and a failure to pay those fees would precipitate a default by the second plaintiff under the Clarien Loan and the Ryerson contract.
129. No allegations are made to join these points up to a cause of action or claim that is articulated in the Amended Statement of Claim. It appears that the plaintiffs are implying that the Government deliberately caused the failure of the plaintiffs by withholding the payment of fees under the Service Agreements and the provision of the data required to activate the FastPass app. However, none of this is pleaded. In order to make such serious allegations, the plaintiffs would have to plead all the material facts to support a claim by giving details of how it is alleged that the Government had that intention and who it was that took the relevant steps or failed to take the relevant steps and what the associated losses are that flow from the conduct alleged.

¹⁷ *Axa Sun Life Services plc v Campbell Martin Ltd* [2011] EWCA Civ 133 [27] per Stanley Burnton LJ.

130. As explained earlier in this Ruling, the tort of deceit requires the plaintiffs to allege that the maker of the statement knew that it was false at the time it was made, or had no genuine belief in its truth or was reckless as to its truth or falsity, and then to set out the plaintiffs' reliance upon it in entering into the contract, and the losses that are alleged to have flowed from it. All the same deficiencies that have been explained in relation to the misrepresentation claim apply with even greater force to the allegations in deceit. It is not enough to simply throw in the word 'deceit' to constitute a cause of action. Deceit is a more serious allegation and always requires detailed underlying facts to be pleaded to justify it.

131. In **Sofer v Swissindependent Trustees SA**¹⁸ the English Court of Appeal summarised the requirements of pleading dishonesty in the following way:

- (i) *Fraud or dishonesty must be specifically alleged and sufficiently particularised, and will not be sufficiently particularised if the facts alleged are consistent with innocence: **Three Rivers District Council v Governoer and Company of the Bank of England (No 3)** [2003] 2 AC 1.*
- (ii) *Dishonesty can be inferred from primary facts, provided that those primary facts are themselves pleaded. There must be some fact that tilts the balance and justifies an inference of dishonesty, and this fact must be pleaded: **Three Rivers** at [186] (Lord Millett).*
- (iii) *The claimant does not have to plead primary facts which are only consistent with dishonesty. The correct test is whether or not, on the basis of the primary facts pleaded, an inference of dishonesty is more likely than one of innocence or negligence: **JSC Bank Moscow v Kekhman** [2015] EWHC 3073 (Comm) at [20-3] (Flaux J as he then was)*
- (iv) *Particulars of dishonesty must be read as a whole and in context: **Walker v Stones** [2001] QB 944B (Sir Christopher Slade).*

132. Mr Hindess advanced the submission¹⁹ that the pleading does assert facts from which dishonesty can be inferred. His suggestion is that because it is pleaded that the Government knew that it had (allegedly) already contacted ResQuest for the same service it can be inferred that the Government had entered into the Service Agreements with the plaintiffs dishonestly.

133. The central submission that underpins the plaintiffs' case is set out in paragraph 59 of the plaintiffs' written submissions as follows:

"The representations pleaded are active statements of fact: that the Government had instructed the production of FastPass (ASC/37(i) and (ii)), and that the fee was "assured" (ASC/43 (xii) to (xiv). What was withheld—that the Government had already contracted with ResQuest for the same service—is precisely what makes those statements absolutely false."

134. This is a surprising submission. Because it is alleged that a party entered into two contracts with two separate contractors to provide the same services, it does not follow that there was

¹⁸ (supra) at paragraph [23] per Arnold LJ.

¹⁹ See paragraphs 56 to 60 of the plaintiffs' written submissions.

any dishonest intention in doing so. The conduct alleged does not ‘*tilt the balance and justify an inference of dishonesty*’: the conduct alleged is equally consistent with an entirely innocent explanation.

135. For example, it could equally show an intention to get a fully developed product from two competing contractors in order to choose the better of the two, or it could be as a result of internal miscommunication, or negligence or an innocent mistake. The consequence that flows from engaging two contractors to develop a software app to fulfil the same function is that the Government may have to pay for the same product twice. No primary fact is alleged which could justify an inference of dishonesty. It simply cannot be inferred from the simple fact that the Government engaged another contractor at the same time to develop another software app alone that someone has acted dishonestly (and it is not said which person or how they are alleged to have been dishonest).
136. In the course of argument²⁰ Mr Hindess also said the plaintiffs rely upon paragraphs 37 (xi) and 43 (xii) to (xiv) as the primary facts that support the plea of deceit. Paragraph 37 (xi) pleads that the Cabinet had decided to pay the fees billed by the first plaintiff, that the plaintiff would not have direct access to the vendors (in breach of contract) and would have to go through the central information department. Paragraph 43 (xii) to (xiv) pleads that the data would be provided and the fees would be paid.
137. It is not possible to infer from these statements that there was a dishonest misrepresentation which induced the plaintiffs to enter the Service Agreements: these statements post dated the contracts. It is not said what was false about these statements, nor whether the person making the statements knew they were false or how reliance on these statements led to a recoverable loss. It cannot be inferred from the plea at paragraphs 37 (xi) and 43 (xii) to (xiv) that the statement that the fees would be paid was false and that either Mr Thomas or Mr Jones knew that these statements were false at the time. Those statements are also consistent with honest belief. The court will not ordinarily infer dishonesty from unpleaded primary facts²¹.
138. Applying the principles in **Sofer** set out above, an allegation of dishonesty will not be sufficiently particularised if the facts alleged are consistent with innocence (**Sofer** principle (i)). In addition, while the plaintiffs do not have to plead facts which are *only* consistent with dishonesty, there must be *some* facts(s) from which an inference of dishonesty may be drawn which is *more likely* than innocence or negligence (**Sofer** principle (iii)). There are no primary facts alleged from which it is possible to draw an inference of dishonesty, still less one which is more likely than innocence or negligence.
139. On the contrary, Mr Duncan KC pointed out it is expressly provided in the Service Agreements that the Government engaged the first plaintiff on a nonexclusive basis²². Mr Duncan KC submitted that the only inference that can be drawn from that term of the contract is that the plaintiffs knew that there were (or were at least likely to be) other

²⁰ Courtsmart recording 13 August 2026 at 3.16.15 and 3.20.44 pm.

²¹ See **Three Rivers District Council (No 3)** (supra).

²² Clause 2.13.

competing products under development from other contractors at the same time. The court agrees.

140. In addition, the representations alleged to have been made (i) that the first plaintiff had been engaged and (ii) that the fees were assured were both made after the first Service Agreement had been executed, so it is impossible to see how the basic requirements of a claim in deceit can be made out.

141. Paragraph 49 is a reprise of the earlier claims in misrepresentation but adds the word “false” without giving any particulars of which statements were false or how the relevant statements induced the plaintiffs to enter into the contracts earlier referred to. This claim is therefore also defective for the same reasons explained above.

142. The court will not repeat the same analysis here that has already been given above, save to say that paragraphs 44 to 50 and 55 in the Amended Statement of Claim in no way justify the allegation of dishonesty or the assertion of a claim in deceit.

The loss of opportunity claim

143. In paragraph 50 the plaintiffs make a claim for loss of opportunity “*under the tort of deceit*” as a result of the plaintiffs’ “*inability to earn the expected sums from the Service Agreements*”. The amount of the loss of opportunity claim is quantified in prayer (iii) as BD\$41,600,000.00.

144. A claim for loss of opportunity is also a special kind of claim. In order to make a claim for loss of opportunity, the plaintiffs need to set out (i) a duty on the part of the Government which has been breached (ii) that the breach of that duty affected the opportunity of the plaintiffs to make a commercial profit measurable in monetary terms (iii) what the plaintiffs say they would have been able to do to fulfil that opportunity (iv) why that the opportunity is not mere speculation or optimism (v) why the loss of opportunity falls within the applicable rules of remoteness and (vi) how the quantification of the value of the lost opportunity is calculated, discounted by any relevant contingencies.

145. None of this is pleaded or supported by the particulars of fact on which the plaintiffs rely. The calculation of the quantum of damage in prayer (iii) is not broken down or justified by reference to any of the necessary ingredients of a properly pleaded loss of opportunity claim: it is just a very large number. This is not a claim that includes all the necessary particulars of a loss of opportunity claim and therefore fails to disclose a reasonable cause of action.

Recklessness

146. Paragraph 55 reiterates the misrepresentation claims but adds the adverb “recklessly” and alleges that the Government “intentionally” induced the plaintiffs to enter into the Service Agreements. I will not repeat the same analysis given above, save to say that none of the relevant particulars are given that could justify the allegations made in this paragraph. These are conclusory allegations and do not amount to a proper plea of reckless or intentional misrepresentation which must be supported by primary facts.

The breach of fiduciary duty claim

147. It is alleged in paragraph 51 that Mr Jones (in his capacity as accounting officer) owed a fiduciary duty to determine whether the 'program' was fundable and to make a clear recommendation to Cabinet. This is a new claim. The plaintiffs then allege that this duty required Mr Jones to cancel the contract and to pay the termination fee. It is then alleged that the Government induced the plaintiffs to continue to work in circumstances where the necessary information and data was being withheld.
148. In paragraph 53 the plaintiffs say their position is that the fee negotiated with the first plaintiff had been 'granted' to ResQuest, and that Mr Thomas was aware of this.
149. It is then alleged in paragraph 53 that Lt Colonel Lamb (in his capacity as procurement officer) owed a fiduciary duty to determine whether the plaintiffs' 'program' could continue and to make the appropriate representations to Cabinet. It is alleged that Lt Col Lamb failed in that duty and that all the relevant information should have been presented to the Cabinet, and that the plaintiffs ought to have been informed of the Government's internal deliberations.
150. It is then alleged that Mr Jones ought to have determined whether the 'program' was sustainable without the fees being collected, but 'regardless' never instructed the plaintiffs to stop work. It is alleged that the plaintiffs continued to work in reliance on the Government's representations.
151. These allegations lack any of the essential elements of the cause of action of a breach of fiduciary duty. First, it is not said how this alleged duty arose. It is not alleged that it was a contractual duty, nor that it arose as a result of the contractual relationships earlier pleaded²³. Normally a contractual relationship defines the extent and limit of the obligations undertaken between the parties to the contract. If an additional obligation is alleged to arise, then the basis of the claim that there was an additional extra-contractual duty that arose alongside or in addition to the contract, this must be specifically pleaded²⁴.
152. Second, it is not alleged that the duty was owed to the plaintiffs. Instead, it appears that the duty is alleged to have been owed to the Cabinet. It is not said how or why there was such a duty, but it follows that if there was such a duty, only the Cabinet or the Government could assert a claim based on the breach of the alleged duty, not the plaintiffs.
153. Third, the extent of the duty and what it actually related to is entirely unclear. There is a reference to a 'program' but this is not defined. It does not relate to the contractual commitments earlier referred to. In context, it apparently refers to the Government's initiative to stimulate tech start up businesses. How this relates to the plaintiffs' claims is entirely unspecified and lacking in detail. It is apparently an allegation that the Government had not properly thought through the financing of the initiative, but even if it is, that allegation takes the plaintiffs' claims no further forward.

²³ The Government is not generally held to owe fiduciary duties unless there are specific facts alleged which create a relationship of trust. *Tito v Waddell No 2* [1997] 1 Ch 106.

²⁴ *Bristol & West Building Society Ltd v Mothew* [1998] Ch 1.

154. Finally, there is no link made between how the alleged breach of duty gave rise to a quantifiable loss. This is an essential ingredient of a claim asserting a breach of fiduciary duty. The fact that Mr Thomas is alleged to have known that the Government had decided to engage ResQuest is insufficient. When did Mr Thomas know that? It is not pleaded that Mr Thomas knew that the Government had decided to proceed with ResQuest when he (is alleged to have) made the statement that the passenger/user fees would be paid (paragraph 43 (ii) of the Amended Statement of Claim).
155. Without a pleading of all the elements of a complete cause of action, the breach of fiduciary duty claim is fundamentally defective and fails to state a reasonable cause of action, namely one which contains all the elements of a complete cause of action which will result in liability if those facts are proved at trial.

The ‘contractual penalty’ claim

156. The plaintiffs have added a new claim for the enforcement of a ‘contractual penalty’ clause, more properly termed a ‘liquidated damages’ clause, as a result of the early termination of the contract, representing one year’s fees for the year following termination, namely 2023. This claim is problematic for several reasons. First, it is not pleaded in the body of the Amended Statement of Claim but has just been tacked on as part of the prayer for relief. Second, it appears to include a claim for revenue already included as part of the breach of contract claim. Third, there is no plea that justifies the clause as being reasonable and proportionate as an estimate of the damages. These are the essential details that are required to formulate a properly constituted claim for liquidated damages.
157. In addition, and most significantly, the liquidated damages ‘claim’ was added by way of amendment after the expiry of the contractual limitation of time for the making of any claim under the contract. Clause 14.7 of both the first and the second Service Agreements provides that all claims must be commenced within one year after the cause of action has accrued and prohibits the extension of time by the court.
158. It is well established law that contractual limitations for limiting claims in point of time are enforceable in the same way that statutory time limits are valid and enforceable²⁵. The rules relating to amendment do not allow for claims to be added by way of amendment when the statutory time limit has expired if the limitation point is taken by the defendant against whom the claim is made. Mr Duncan KC has raised the limitation issue by way of objection to the liquidated damages claim as an abuse of process. He relies on the long line of cases that support the notion that a party cannot by amendment add a claim which has become statute barred, and the relation back principle does not allow that claim to be treated as if it had been made at the outset of the proceedings (i.e. within the limitation period).²⁶
159. The point can be taken without requiring the issue to be formally pleaded, provided that the defendant has made it clear that limitation is to be raised by way of defence.

²⁵ **Granville Oil & Chemicals Ltd v Davis Turner & Co Ltd** [2003] EWCA Civ 570; **Grayken v Grayken** [2011] Bda LR 14 (CA).

²⁶ **Welsh Development Agency v Redpath Dorman Long Ltd** [1994] 4 All ER 10; **Paragon Finance v DB Thakerar & Co** [1999] 1 All ER 400; **Payabi v Armstel Shipping** [1992] 1 QB 907.

160. Mr Hindess argued that the Amended Statement of Claim was ordered, so it must be taken that leave to add the claim has been 'granted', therefore the Government is too late to raise a limitation defence. This is a thoroughly bad point. It is true that the court directed service of an Amended Statement of Claim to address all the prior objections raised by the Government, when the court ought more correctly to have directed the plaintiffs to serve a draft Amended Statement of Claim so that leave would still be required. This was plainly what was intended by all concerned, but even allowing for this point to be taken, there are several reasons why the court cannot accept the plaintiffs' submissions.
161. First, this new claim for liquidated damages was entirely undisclosed at the time the order for the service of the Amended Statement of Claim was made, so this is the first time the Government has had an opportunity to object to it. It cannot be right that the plaintiffs can add hitherto unformulated claims and then seek to deny the Government to object to it being included on grounds of limitation of action simply because the court ordered service of an Amended Statement of Claim.
162. Second, an application to apply to strike out a claim on the basis of an abuse can be made at any time, or by the court of its own motion. The Government has therefore properly taken the limitation objection, whether it is by objection to the claim as part of a leave application to add a new claim, or as an application to strike out the new claim as an abuse of the process. It is well established law that if a party evinces an intention to raise a limitation defence, even if not formally pleaded, the court will allow the objection to be taken under the ground of abuse of process²⁷.
163. Third, for the reasons explained in paragraph 156, the claim in the prayer does not disclose a properly formulated claim in any event.

General points

164. The plaintiffs say that they are unable to provide details of the date on which the Government entered into the contract with ResQuest until the Government provides its disclosure. Similarly, the plaintiffs say that particulars of the misrepresentations which were known to be false by the Government cannot be provided until disclosure is given.

General disclosure or discovery

165. The plaintiffs' stance is based on a misunderstanding of the procedural framework for pleading and disclosure under the RSC 1985. It is basic to the litigation process that the plaintiffs must state in their pleadings the factual basis for the claim being made so that the Government can answer the facts alleged by admission or denial. Once the parties have joined issue with the claims, the parties must give disclosure in relation to the facts and matters that are relevant to the claims and defences made in the pleadings. The duty of disclosure is very wide and encompasses all documents and materials which may directly or

²⁷ **Ronex Properties Ltd v John Laing Construction Ltd** [1983] 1 QB 398.

indirectly enable the opposing party to advance their own case or damage the disclosing party's case or lead to a useful line of enquiry²⁸.

Specific disclosure or discovery of specified documents

166. An application for specific disclosure of documents is also governed by the rules of procedure²⁹. It is impermissible to make an application for specific disclosure unless the party seeking disclosure can show that the document is likely to exist and is in the possession, control or power of the disclosing party. Speculative applications based on guesswork, supposition or suspicion are not permitted. The application for disclosure must also relate to the pleaded allegations. The plaintiffs have not made an application for specific disclosure of documents relating to the ResQuest contract or documents that relate to the internal communications of the persons named in the Amended Statement of Claim.

Pleading fraud or dishonesty

167. It is well established that it is not permissible for a party to allege fraud, deceit or dishonesty without having any prima facie evidence of fraud in the hope that something will emerge in disclosure which can justify the allegation³⁰. However, if after disclosure has been given, materials are disclosed which justify an amendment to include a claim in fraud or dishonesty, then the court will give leave to amend to include a claim based on that material.

168. These procedural rules are reinforced by the rules of professional conduct which do not permit a barrister and attorney to allege fraud (which includes deceit or any other type of dishonesty) unless the barrister has prima facie evidence of fraud to justify the pleading and has written instructions from his or her client to allege fraud³¹.

The plaintiffs' claims

169. All of the claims asserted by the plaintiffs in the Amended Statement of Claim are pleaded as the claims of all the plaintiffs, on the basis that each plaintiff has the right to make all the same claims as the others.

170. This is obviously not correct or sustainable in law. For example, only the first plaintiff can make the claims for breach of the Service Agreements because it is the only plaintiff which is party to those contracts. The second and third plaintiffs are not parties to those agreements.

171. Similarly, only the second plaintiff can claim to have suffered losses as a result of entering into the Clarien Loan and the Ryerson contract. The first and third plaintiffs are not parties to those contracts and cannot have suffered losses as a result of the claims alleged.

²⁸ *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55. It is noted that in modern commercial litigation the court may take a more focused issue-based disclosure, but the starting point in Bermuda remains the historic scope set out in the *Peruvian Guano Co* case.

²⁹ RSC Order 24 rule 7.

³⁰ *Three Rivers District Council v Governor & Co of Bank of England (No 12)* EWHC 816 Comm [6] and [22] per Tomlinson J.

³¹ Rule 41 of the Barristers' Code of Professional Conduct 1981.

172. The third plaintiff has not suffered any pleaded loss of any kind, which is unsurprising as it was the vehicle that was alleged to have been created to act as the ‘incubator’. If the loss of opportunity claim is said to be one which relates to the third plaintiff, it is not explained what the basis of the third plaintiff’s claim is (deceit or fraudulent misrepresentation or breach of contract) how that loss is said to have been incurred, and how it was an economic loss that was foreseeable. It therefore does not meet the minimum requirements for the pleading any of the causes of action pleaded.

Conclusions on the pleaded claims

Breach of contract

173. As I noted at the beginning of this Ruling, the basic claim that was pleaded originally was a relatively straightforward claim in breach of contract. The essential claim is for payment for services rendered by the first plaintiff to the Government under one or the other of the two Service Agreements, and for consequential losses alleged to flow from those breaches in relation to the costs alleged to have been incurred as a result. The Government has denied liability for breach of contract on the grounds that the services were not performed in accordance with the contracts and has denied liability for the other consequential losses alleged. The Government is claiming recovery of the payment of the guarantee in relation to the Clarien Loan, and restitution of the payments made under the Service Agreements.
174. The court is not here assessing any of the potential merits of those claims, defences or counterclaims, but is simply recording that these are matters that will have to be fought out at trial in the normal way. Therefore, paragraphs 1 to 35 of the Amended Statement of Claim will remain unaffected by the court’s Ruling.
175. However, paragraphs 44 to 48 of the Amended Statement of Claim allege knowledge on the part of the Government that its failure to pay for the services under the Service Agreements and to provide data (to the first plaintiff) would lead to various consequences. These claims all appear to relate to the breach of contract claim, but the allegations do not explain how the knowledge alleged in these paragraphs is said to have been gained by the Government.
176. The rules of procedure do not require particulars of knowledge to be pleaded as a general rule. However, on the face of it, the knowledge alleged in these paragraphs seem to be matters which fall within the plaintiffs’ own knowledge rather than as matters that would naturally be within the knowledge of the Government as a whole. In order to be meaningful, an allegation of knowledge must be attributed to a particular person rather than the Government as an organisational entity.
177. In light of the uncertainty created by the pleading of these claims, in my view it is necessary for the plaintiffs to provide particulars of the matters on which they rely for the Government’s knowledge of the matters alleged in these paragraphs pursuant to the court’s power under RSC Order 18 rule 12 (4) (a).
178. The plaintiffs are therefore ordered to provide further and better particulars of the various pleas of knowledge alleged in paragraphs 44 to 48 within 28 days, in default of which these paragraphs are also to be struck out. It goes without saying that these particulars must contain

the material primary facts relied upon, and identifying which individual is alleged to have known what, when and how that knowledge is alleged to have been gained.

179. At the same time, the plaintiffs are ordered to provide further and better particulars of which claims are asserted by which plaintiff and under what head. It is clear that the claims for breach of contract alleged can only relate to the first plaintiff because it is the only plaintiff that is party to the Service Agreements.
180. The second plaintiff is the party alleged to have undertaken liabilities under the Clarien Loan and the Ryerson contract. It is necessary for the second plaintiff to articulate the precise legal basis on which it claims it has suffered a loss as a result of the Government's alleged breaches of the Service Agreements with the first plaintiff, or otherwise how it asserts an independent claim against the Government. A purely economic relationship between the first and second plaintiffs would not be enough by itself to establish a cause of action.
181. It is also not clear what the factual and legal basis is upon which the first plaintiff alleges that it has suffered a loss as a result of the entry into the Clarien Loan and the Ryerson contract, since any alleged losses fall to the second plaintiff not the first plaintiff, and no claim is available to the first plaintiff, unless this is explained by something in the pleading.
182. Similarly, it is unclear what cause of action is asserted by the third plaintiff if any. The court has struck out the loss of opportunity claim which appeared to be the only potential claim which might involve the third plaintiff, but it is not possible to tell if there is some other claim that is intended. This must be clarified one way or another so that the Government and the court can understand which party is claiming what. These particulars must also be provided within 28 days, in default of which the claims by the second and third plaintiffs shall be struck out as disclosing no reasonable cause of action and as an abuse of the process of the court pursuant to RSC Order 18 rule 19 (1) (a) and (d).

The deceit and fraudulent misrepresentation claims

183. For the reasons explained, the essential ingredients of the claims in deceit and misrepresentation have not been pleaded. The allegation of the 'misrepresentations' relied upon post date the execution of the relevant contracts and so there can have been no inducement to enter into those agreements and other arrangements caused by the plaintiffs' reliance on the statements alleged to have been made. The theory on which the plaintiffs' claims are based is therefore misconceived in law and discloses no reasonable cause of action. There is no prospect of these defects being cured by amendment. These claims are therefore to be struck out as failing to disclose a reasonable cause of action pursuant to RSC Order 18 rule 19 (1) (a).
184. The specific paragraphs that are ordered to be struck out of the Amended Statement of Claim in relation to these claims are:
- (i) paragraphs 38, 39, 40;
 - (ii) the second, third and fourth sentences of paragraph 43 commencing "*The Plaintiffs entered into the MOUs...*" to "*The particulars of the said representations are as follows:*";

- (iii) subparagraphs 43 (xxix) and (xxx);
- (iv) paragraphs 49 and 50.

Recklessness and intentional misrepresentation

185. Paragraph 55 makes the allegation that the Government was reckless and intentionally acted in a manner to induce the plaintiffs to enter into the contracts and continue to provide services. For the reasons explained, these allegations are impermissible and paragraph 55 must also be struck out as disclosing no reasonable cause of action under RSC Order 18 rule 19 (1) (a).

The breach of fiduciary duty claim

186. For the reasons explained, the breach of fiduciary duty claim does not constitute a reasonable cause of action on the facts pleaded. The relationship between the plaintiffs and the Government was contractual. As Mr Duncan KC submitted, there is no relationship which could possibly give rise to a claim for a breach of fiduciary duty owed to the plaintiffs. Therefore paragraphs 51 to 54 are to be struck out as disclosing no reasonable cause of action pursuant to RSC Order 18 rule 19 (1) (a).

The loss of opportunity claim

187. This claim is made under paragraph 50 which has been struck out for other reasons relating to the underlying claim of deceit. In the prayer the loss of opportunity claim is said to arise under the claim of misrepresentation, which has also been struck out. To the extent that the paragraph asserts a separate loss of opportunity claim which could arise in contract, the court makes it clear that such a claim is also struck out as failing to disclose any of the elements which must be pleaded in support of such a claim. Paragraph 50 and the plea in prayer (iii) is therefore also struck out as disclosing no reasonable cause of action pursuant to RSC Order 18 rule 19 (1) (a).

The liquidated damages claim

188. This claim only appears in prayer (ii) of the Amended Statement of Claim. There is no articulation of the claim in the body of the pleading. For the reasons explained, this claim is out of time and is barred by the contractual limitation period of 1 year from the date the cause of action accrued. The court therefore orders that the plea in prayer (ii) is to be struck out as an abuse of the process of the court pursuant to RSC Order 18 rule 19 (1) (d).

Re-amended Statement of Claim

189. In light of the paragraphs which have been struck out, the plaintiffs are to serve a Re-amended Statement of Claim to take account of those deletions within 28 days of the date of this Ruling, and to add the particulars ordered in paragraphs 178 to 182 above.

Amended Defence and Counterclaim

190. As a result of the directions given above, the Government's time for service of an Amended Defence and Counterclaim is extended until 28 days after the service of the Re-amended Statement of Claim particulars ordered in paragraphs 178 to 182.

Costs

191. In light of the submissions made by Mr Duncan KC at the end of his address to the court, the court will hear the parties on the question of the disposition of the costs of the present application.

Order

192. The Government's attorneys are to prepare an order setting out the terms of the Ruling above. In the meantime, the court can proceed to list the costs issue for hearing. The timetable for service of particulars and the Amended Defence and Counterclaim is not to be delayed pending the determination of the costs issues,

Dated this 30th day of September 2026



THE HON. MR. JUSTICE ANDREW MARTIN
PUISNE JUDGE OF THE SUPREME COURT