**IN THE HIGH COURT OF SOUTH AFRICA**
**(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

SIGNATURE DATE: 31 March 2023

Case No. 17/18098

In the matter between:

**PWR** Plaintiff

and

**DISCOVERY LIFE LIMITED** First Defendant

**GENESIS ADVISORY SERVICES (PTY) LTD** Second Defendant

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**JUDGMENT**

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**WILSON J:**

1 The plaintiff, to whom I shall refer as PR, challenges the repudiation of his claim on an insurance policy he held with the first defendant, Discovery. The relevant part of the policy required Discovery to pay out a lump sum once it was satisfied that PR had become "totally and permanently unable" to work as a stockbroker. PR claims that, at some point between 28 December 2014 and

30 November 2015, he did become totally and permanently unable to carry on that work. During that time, he suffered a string of deeply traumatic events that have left him with a combination of post-traumatic stress disorder and unspecified bipolar mood disorder. PR says that, despite psychotherapy, occupational therapy and an extensive range of drug treatments, he will never recover to the extent necessary to work as a stockbroker. Indeed, there was no serious dispute that, at the time I heard evidence, over 8 years after the events that triggered PR's condition, PR was not able to work as a stockbroker, and there was no sign that he would be able to do so in the foreseeable future.

2 Discovery nonetheless repudiated PR's claim. It did so on the basis that PR's insurance cover expired on 30 November 2015, and that there was no evidence that he had become totally and permanently unable to perform as a stockbroker by that date. During argument at the close of the trial, Mr. Mundell, who appeared for Discovery, also submitted that, even if there was such evidence, and indeed even if it was true that PR became totally and permanently unable to perform as a stockbroker by 30 November 2015, the legal question before me is not whether Discovery's repudiation of the claim was correct. It is whether the repudiation was reasonable on the information PR supplied to Discovery at the point that PR submitted his claim. Even if I were to hold, as a matter of fact, that PR had become totally and permanently unable to perform as a stockbroker by 30 November 2015, I could not properly conclude that Discovery's repudiation of the claim was unreasonable.

3 The outcome of this trial accordingly hinges on two principal issues. The first is whether PR's condition, and accordingly the incapacity it caused, had become permanent by 30 November 2015. The second is whether, if PR's condition had become permanent on 30 November 2015, Discovery was nonetheless justified in repudiating PR's claim. That question itself raises the ancillary issue of the appropriate test to be applied in assessing a life insurance company's repudiation of a claim.

4 Whatever the correct approach, the parties were agreed that if Discovery was not entitled to repudiate PR's claim, then Discovery owes PR R25 086 456.94.

5 It is accordingly to an examination of the nature, causes and consequences of PR's condition, together with an assessment of Discovery's reaction to PR's claim, that I now turn.

**PR's condition**

6 It is common ground that PR was, prior to the onset of his condition, a very successful stockbroker. The insurance policy he took out with Discovery is itself evidence of his success. The pay-out due in the event of permanent incapacity was over R25 million. The monthly premium due on the policy was in the region of R20 000. These very large sums bespeak a highly lucrative occupation. PR's job was concomitantly demanding. Both Dr. Panieri-Peter, PR's treating psychiatrist, and Ms. Abu-Haj, his occupational therapist, gave unchallenged evidence that PR's work as a stockbroker required a resilient personality and fine judgment. PR's work involved the investment of his clients' funds, and the skilful purchase and sale of financial assets in a manner that would maximise the return on those funds. The job was high-pressure and

high stakes. It also required, like all jobs that involve a degree of deal-making, an agile set of social skills.

7 The financial rewards of PR's work included the money necessary to purchase a villa in Mauritius. On 28 December 2014, PR was on holiday at the villa with his girlfriend, with whom he was in a long-term and loving relationship. On that day, PR's girlfriend drowned in a swimming pool at the resort of which PR's villa was a part. PR found his girlfriend floating in the swimming pool. He tried to resuscitate her, but without success.

8 For reasons that are not clear from the evidence, and which are not in any event directly relevant to the questions before me, PR then fell under suspicion of murdering his girlfriend. On 2 January 2015, PR was arrested and questioned by the Mauritian police. He was charged with his girlfriend's murder and detained pending trial. On the same day, PR appears to have suffered some sort of breakdown. He was admitted to the secure ward of a local hospital, and stayed there for four days. On 8 January 2015, PR was seen by a Mauritian state psychiatrist, a Dr. Banymandhub. He was apparently in a state of psychological distress. Dr. Banymandhub saw PR again on 4 February 2015. Dr. Banymandhub noted evidence of depressive illness. By 31 March 2015, PR had lost 20kg, and, according to Dr. Banymandhub's notes, PR looked mentally and physically exhausted.

9 Dr. Panieri-Peter first saw PR some nine months later, on 8 December 2015. PR's legal representatives had asked Dr. Panieri-Peter whether PR was fit to stand trial. Dr. Panieri-Peter was asked to interview PR and form an opinion. By that time, PR's condition had deteriorated further. He had lost 30kg since

his incarceration. He was agitated, tearful and at times incoherent. His memories were confused. He could not sustain a logical narrative account of his experiences. He became more distressed as the interview went on.

10 On 9 December 2015, Dr. Panieri-Peter saw PR again. At first, PR appeared calm and lucid, but his mental state deteriorated as the interview went on. He described his arrest and incarceration. He described being held in a dark airless room, often in filthy conditions. He was clearly distressed by his girlfriend's death, but he also spoke of the death of his own former self. He broke down when discussing his earlier admission to a psychiatric ward. He lost all coherence towards the end of the interview, especially when discussing his girlfriend's death.

11 At that point, Dr. Panieri-Peter diagnosed PR with two conditions: post-traumatic stress disorder and major depression with psychotic features. She considered that PR might be suffering from bipolar mood disorder, but was unable to confirm that diagnosis on the information then available to her.

12 Shortly after her meetings with PR, Dr. Panieri-Peter was informed that PR's legal representatives no longer acted for him, and a new legal team had been appointed. That team declined to pursue the point that PR was unfit to stand trial, and so Dr. Panieri-Peter's evidence was no longer required.

13 PR was eventually acquitted of his girlfriend's murder. In March 2016, he returned to South Africa, and was hospitalised in Pietermaritzburg. He was diagnosed with post-traumatic stress disorder and major depression.

14 In September 2016, PR contacted Dr. Panieri-Peter. He told her that he had been informed that she had visited him in prison in December 2015. He could not remember these visits and sought details of the interview from her. These interactions led to Dr. Panieri-Peter giving an opinion to PR's legal representatives in relation to his insurance claim. That opinion remained that PR suffered from post-traumatic stress disorder and major depression with psychotic features. Bipolar mood disorder remained a possibility, but Dr. Panieri-Peter still could not be sure of that diagnosis.

15 After that opinion was given, during October 2016, Dr. Panieri-Peter became PR's treating psychiatrist, and has remained his treating psychiatrist ever since.

16 On 28 August 2017, after consulting with Dr. Lund, who treated PR at Pietermaritzburg, PR was admitted to Kenilworth Hospital in Cape Town. There he stayed for several weeks. He received psychotherapy, group therapy and various pharmacological treatments.

17 Over the course of her treatment of PR, Dr. Panieri-Peter adjusted her diagnosis to one of post-traumatic stress disorder and unspecified bipolar disorder. In relation to his post-traumatic stress disorder, PR suffers from intrusive, recurrent and involuntary memories, and dissociative reactions. He is angry and occasionally self-destructive. He dissociates from himself and is estranged from others, including his family. He travels constantly, seeking to avoid confronting his trauma or forming meaningful relationships with others. He still cannot remember critical aspects of his ordeal. In relation to his bipolar disorder, PR experiences periods of intense irritability, little sleep, loquacity,

distraction and agitation. He also experiences periods of withdrawal, emptiness, indecision, guilt, and worthlessness. His weight fluctuates.

18 PR cycles through these symptoms repetitively. Dr. Panieri-Peter has sought to control them with drugs, but finding the right combination has proved challenging. The prescription of anti-depressants, for example, which would ordinarily be a useful tool in addressing post-traumatic stress disorder, may intensify some symptoms of PR's bipolar disorder. The interaction between the two conditions makes treatment difficult.

19 Dr. Panieri-Peter testified that PR's condition has had a significant and lasting impact on his daily life. PR does not drive. He struggles to keep appointments. He finds it difficult to make bookings online. He spends a lot of time indoors. He is estranged from his family. He becomes irrationally angry. PR's diagnoses, in combination, lead to what Dr. Panieri-Peter called "thought disorder", a disorganised way of thinking that manifests in abnormal speech. PR struggles to sustain conversations of any length.

20 This evidence was supported by Ms. Al-Haj, who testified that PR had gone through an extensive programme of occupational therapy, the upshot of which was that, in her view, PR could not reasonably expect ever to work as a stockbroker again. He is incapable of sustaining the required performance in the kinds of high-pressure situations in which he used to thrive. He lacks judgment, the ability to connect with clients and other brokers and the ability to work well under pressure. Ms. Al-Haj's prescription was that PR finds some other occupation with fewer demands on his mental acuity and the robustness of his mood.

21 Dr. Panieri-Peter summed up the effect of PR's condition by saying that he has "lost who he was". Having regard to the narration Dr. Panieri-Peter and Ms. Al-Haj gave of PR's psychiatric injuries, and the condition in which those injuries have left him, that summation seems apt.

**The possibility that PR's condition will improve with further treatment**

22 There is very little about this characterisation of PR's condition that is in serious dispute. The joint expert minutes show a large degree of overlap on the characterisation of PR's current condition. Nobody seriously suggests that PR is not a gravely ill man. The thrust of Mr. Mundell's cross-examination of Dr. Panieri-Peter focused rather on whether (a) Dr. Panieri-Peter was sufficiently independent from PR to give a reliable expert opinion and (b) whether an improvement in PR's condition is not still possible, such that he cannot be said currently to be permanently incapacitated. It was also suggested, at least in the joint minutes, that PR may himself be hindering his recovery by not adhering to his drug treatment regimen, and by drinking excessively.

23 Dr. Panieri-Peter engaged thoughtfully with all these propositions. She accepted that the standard practice is not for treating psychiatrists to express a forensic medico-legal opinion on a patient's state and chances of recovery. She nonetheless asserted that there was nothing unreliable about her opinion. That seems fair, since so much of it is common cause. Mr. Mundell did not press the case that Dr. Panieri-Peter's evidence was, evaluated on its own terms, unreliable. He contented himself with the proposition that Dr. Panieri-

Peter's clinical relationship with PR was unusually close for someone giving a forensic opinion.

24 On PR's chances of recovery, Dr. Panieri-Peter expressed the view that there was no significant likelihood of PR's condition improving in the foreseeable future. She came to this conclusion in April 2019, having treated PR for the better part of 3 years. Although Mr. Mundell challenged neither that conclusion nor the fact that Dr. Panieri-Peter reached it in good faith, he pressed Dr. Panieri-Peter on the extent to which she communicated her view to PR, and to the experts Discovery retained and with whom she compiled her joint minutes. In particular, Mr. Mundell questioned Dr. Panieri-Peter on the extent to which she disclosed the nature and effectiveness of the various treatments she had given PR.

25 It is fair to say from their evidence that Discovery's experts, Professor Lippy and Professor Grobler, had not been fully briefed on the range of treatment PR had received. Both agreed that PR's condition was serious, and that it had not improved. However, both experts expressed the view, in their joint minutes, that it could not be said that PR had reached the maximum medical improvement that a proper course of treatment could produce. Both experts said that better balanced drug regimens and more intense talking therapy, and occupational therapy, may yet yield an improvement in PR's condition.

26 With varying degrees of enthusiasm, both experts stuck to this view in their evidence, but neither was able to contradict the fact that PR had in fact received courses of treatment that they had characterised as necessary in their opinions, and that their opinions had been given on the basis that PR had

not had the benefit of these treatments. There was a suggestion that PR might benefit from anti-depressants, but both Professor Lippy and Professor Grobler accepted the risk that anti-depressants may exacerbate PR's bipolar disorder. They also accepted that whether to prescribe them was a matter of clinical judgment which had to take into account a number of circumstances. Anti-depressants are not a sure-fire method of achieving a real improvement in PR's condition. Neither expert was willing to contradict Dr. Panieri-Peter's view that anti-depressants were not an appropriate prescription in PR's case.

27 Professor Lippy raised the concern that there were indications on two tests he administered that PR might be exaggerating his symptoms. But neither he nor Mr. Mundell sought to make much of this. As far as I could tell, these test results were against the grain of all the other evidence: that PR genuinely suffers from two serious psychiatric conditions that, in combination, have debilitated him.

28 Finally, there were concerns, first, that PR was not adhering to his drug regimen, and second, that he had admitted to sporadic episodes of binge drinking. PR himself accepted in an interview with Professor Lippy that his adherence to his drug regimen was not perfect. However, Dr. Panieri-Peter stated in her evidence that imperfect adherence to prescribed drug regimens is a fact of clinical life. Eighty percent adherence to any particular regimen is generally considered to be acceptable from the perspective of ensuring that the treatment is efficacious. Dr. Panieri-Peter said that PR was at least 80% adherent. Neither this fact nor Dr. Panieri-Peter's view that 80% adherence is

adequate to ensure that the drugs were efficacious was challenged in cross-examination.

29 It was accepted that PR sometimes binge drinks. It was also accepted that, generally speaking, excessive alcohol consumption will exacerbate his symptoms, and, perhaps, hold back any expected recovery. However, Dr. Panieri-Peter pointed out that a distinction had to be drawn between binge drinking as a bad habit acquired independently of PR's condition, and binge drinking as a symptom of that condition. Dr. Panieri-Peter's view was that PR's drinking was very much a symptom of his condition rather than a wholly independent habit capable of preventing him from recovering to the extent that he might be able to resume his occupation. This was not seriously challenged. In those circumstances, it would be artificial to hold PR's drinking responsible for any failure to recover from his condition. It was not, in any event, seriously contended that, but for PR's drinking, a full recovery from his condition would be possible.

30 Taking all this into account, it has, in my view, been established, on a balance of probabilities, that PR suffers from post-traumatic stress disorder and unspecified bipolar mood disorder; that such improvement in PR's condition that may have been achieved by the application of the appropriate techniques of treatment and care has already taken place; and that, notwithstanding that treatment and care, PR's condition renders him totally and permanently unable to resume his occupation as a stockbroker.

**When did PR become totally and permanently incapacitated?**

31 That is, of course, by no means dispositive of the issues before me. The next question is whether, on a balance of probabilities, PR's condition permanently incapacitated him on or before 30 November 2015, when his policy with Discovery expired. Mr. Peter accepted that, for the claim against Discovery to succeed, the evidence had to show that PR permanently lost his capacity to work as a stockbroker on or before that date.

32 Professor Lippy accepted that, by 30 November 2015, PR must have been incapacitated. The psychiatric injuries that led to his condition had been inflicted. He had seen his girlfriend's corpse. He had attempted, unsuccessfully, to resuscitate her. He had been arrested and incarcerated on suspicion of her murder for almost a year. He had already suffered a serious breakdown shortly after his arrest. PR's state on 8 and 9 December 2015 indicated a chronic mental illness that could not have developed over the week between the expiration of PR's policy and Dr. Panieri-Peter's first meeting with him. Dr. Panieri-Peter said that the person she met on 8 December 2015 is not much changed from the person PR is today. There has been improvement in his condition, but the improvement has not been dramatic.

33 Professor Lippy nonetheless expressed the opinion that it would not have been possible to say, on 30 November 2015, that PR had become "totally and permanently" incapable of performing as a stockbroker, because it would have been impossible to assess whether or not that capacity might be recovered with appropriate care and treatment. This is obviously true. But it is not the same as saying that PR did not in fact become permanently incapacitated on

that date. The question is whether, since that date, PR has been rehabilitated by means of appropriate care and treatment to the level at which he is again able to perform as a stockbroker. If he has not, and if the appropriate care and treatment has been exhausted, then PR's incapacity is permanent, and it was permanent on 30 November 2015. There is plainly a difference between the fact of a condition, and the evidence necessary to establish that fact. While nobody could have identified the permanency of PR's condition on 30 November 2015, it is clear on the evidence that I have summarised that the condition was in fact permanent, even if the evidence necessary to establish that permanence has only subsequently come to light.

34 On a balance of probabilities, I find that PR was incapacitated on 30 November 2015; that he has remained incapacitated since then; and that the care and treatment that might have rehabilitated him has been exhausted. It follows from this that PR was "totally and permanently unable" to perform as a stockbroker on or before 30 November 2015, but not earlier than 28 December 2014.

**Was Discovery's repudiation of PR's claim reasonable, and does it matter?**

35 Perhaps acknowledging that the weight of evidence is that PR was "totally and permanently unable" before his policy with Discovery expired, Mr. Mundell submitted in argument that the legal question before me was not whether it had been established as a fact that PR had become permanently incapacitated by that date, but whether Discovery had unreasonably concluded that he had not. In advancing this proposition, Mr. Mundell relied on the text of the policy, on PR's pleaded case, and on the decision of the

Supreme Court of Appeal in *The Southern Life Association Limited v Miller* 2005 JDR 0042 (SCA) ("*Southern Life*").

36 Clause 6.3 of PR's policy with Discovery states that Discovery will pay out a capital sum "once it is established to the satisfaction of Discovery Life that [PR is] totally and permanently unable" to work as a stockbroker. That text was parsed in PR's particulars of claim to mean that PR had to establish facts that would satisfy a "reasonable insurer in the position of [Discovery] of [PR's] total and permanent inability to perform the plaintiff's nominated occupation as a stockbroker due to sickness, injury, disease or surgery". Discovery admitted this averment.

37 In *Southern Life*, the Supreme Court of Appeal decided, at paragraph 35, that, where a life policy is expressed in these terms, the question is not whether the claimant is actually incapacitated, but whether the insurer's opinion to the contrary is reasonable. If it is, then the insurer is justified in repudiating the claim.

38 However, the reasonable insurer test, as Mr. Mundell formulated it, is not a test of general application. It is a test that can only be applied where justified by the text of a particular policy. That text must be read as whole in light of the circumstances in which the policy was taken out. It seems to me that the policy PR held from Discovery in this case was somewhat different from the policy the Supreme Court of Appeal considered in *Southern Life*. Although clause 6.3 of the policy states that Discovery would pay out on being satisfied of PR's incapacity, that clause must be read in the context of the policy as a whole. Clause 6.1.1 of the policy describes the Capital Benefit under the policy,

against which PR lodges his claim, as one which pays “a capital amount in the event of [PR] being medically impaired to a degree that [he is] unlikely to be able to generate an income”. The language here is objective. The benefit accrues at the point the impairment comes into existence. The entitlement to the benefit does not depend upon Discovery forming any particular opinion.

39 Mr. Peter argued that these two clauses had to be read together. Their dual effect was, he argued, that the benefit vests in PR at the point his incapacity objectively exists. It is paid out, however, only when PR satisfies Discovery that his incapacity is in fact permanent.

40 It seems to me that Mr. Peter’s formulation is necessary in order to give the policy efficacy. It is inconceivable that Discovery could have failed to attend to the distinction between the advent of an injury and point at which Discovery could be satisfied that the injury has caused permanent incapacity. The purpose of the policy is to insure against the event that triggers the incapacity, but there may be some time between that event and anyone being able to say that the injury has actually caused a permanent incapacity. There will of course be cases were permanent incapacity is clear at the point of injury. For example, a professional rock climber whose legs are both amputated below the knee cannot fail to satisfy their attending physicians or their insurer at the point of injury that they will never be able to perform as a professional rock climber again.

41 But cases that clear are likely to be rare. There will inevitably be, in most cases, a lag between the onset of the permanent incapacity, and the point at which anybody can say that the incapacity is permanent. It seems to me that

that the text of Discovery's policy recognises this by drawing a distinction between the onset of the incapacity (clause 6.1.1) and proof to Discovery's satisfaction that the incapacity is permanent (clause 6.3). In cases of mental illness brought on by trauma, that lag between the onset and the identification of the permanent incapacity may be months or years long.

42 It follows from all this that Discovery's liability under the policy was triggered at the point that PR's inability to perform as a stockbroker objectively became permanent. But its duty to pay out on the policy was only triggered once it could be reasonably satisfied that PR's condition had become permanent – in other words, once there were facts in existence that would have satisfied a reasonable insurer that PR's incapacity had become permanent.

43 The first triggering event – the event that established Discovery's liability – was the onset of PR's permanent incapacity on or before 30 November 2015. The second triggering event – the event that established Discovery's duty to pay out – was the point at which there existed facts that would have satisfied a reasonable insurer that PR's incapacity was permanent. In my view, that happened in April 2019, when Dr. Panieri-Peter formed the view that there was no realistic prospect of significant improvement in PR's condition.

44 It follows from all this that Discovery became liable under the policy on or before 30 November 2015. It had a duty to pay out, at the very latest, by 1 May 2019, because that is when a reasonable insurer would have known that PR's incapacity was permanent. The subjective reasonableness or otherwise of Discovery's opinion of whether and when PR's condition became permanent is irrelevant to its duties under the policy.

45 However, even if the question before me were confined solely to an assessment of the reasonableness of Discovery's conduct in repudiating PR's claim, it seems to me that Discovery has not conducted itself reasonably.

46 Discovery repudiated PR's claim on 25 August 2016. Its letter rejecting PR's claim is hard to parse. It vacillates between the proposition that PR has no claim because his policy had by that time expired (paragraphs 12 and 18), and the proposition that it had not at that point been established that PR's incapacity had become permanent on or before 30 November 2015, and that PR's claim was not "ready for assessment" (paragraphs 13 to 17).

47 This confusion was deepened in an email dated 15 September 2016, in which Discovery's Legal Manager, a Ms. Malgee, reiterated that the information then available did not establish the onset of a permanent incapacity on or before 30 November 2015 (paragraph 5), and that "any reports dated after the lapse date" would not be taken into account in assessing PR's claim (paragraph 6).

48 Even on the interpretation most charitable to Discovery, this position was far from reasonable. It entailed the proposition not just that PR had to have suffered the onset of a permanent incapacity on or before 30 November 2015, but that he had to have assembled, by that date, all the information necessary to prove it. On the facts of this case, that was obviously impossible.

49 It was also inconsistent with Discovery's policy, properly construed. Once PR submitted his claim, Discovery was under a duty to establish whether PR had suffered a permanent incapacity on or before 30 November 2015, as it was that event that triggered its liability under the policy. There was no basis in the policy, or in reasonableness, on which Discovery could properly have refused

to consider that question by reference to documentation generated after the policy expired. Once it is accepted that there is a difference between the onset of a permanent incapacity and the existence of facts that would satisfy a reasonable insurer that the capacity is indeed permanent, then there is no rational basis on which the insurer may decline to consider documents generated after the policy has expired.

50 This case illustrates the point. Everyone agrees that PR's incapacity could not have been diagnosed as permanent until an appropriate course of care and treatment had been administered. In this case, the kind of treatment required – in the form of drugs, in the form of psychotherapy, and in the form of occupational therapy – can take months or years to perfect and to implement. In order to assess whether PR's condition was permanent Discovery had to have regard to evidence generated well after his policy expired. In closing the door to that evidence when it repudiated PR's claim, Discovery was plainly unreasonable. Had it conducted itself reasonably, it would have become aware, by no later than 1 May 2019, that PR's incapacity had become permanent, and it would have been bound to pay out on the policy by that date.

**Order**

51 For all these reasons, I find that Discovery is liable to PR under the policy. I will order it to pay to PR the sum agreed between the parties as representing the amount due to PR if his claim succeeds. Interest will be payable on that amount from 1 May 2019, being that date on which a reasonable insurer would have been satisfied that PR's incapacity had become permanent.

52 Accordingly, I grant judgment for the plaintiff judgment for -

52.1 Payment of the sum of R25 086 456.94.

52.2 Interest on that sum at the prescribed rate from 1 May 2019 to the date on which it is paid.

52.3 The plaintiff's costs of suit, including the costs of one senior counsel.

**S D J WILSON**
Judge of the High Court

This judgment was prepared and authored by Judge Wilson. It is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 31 March 2023.

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| HEARD ON: | 20 to 24 February 2023 |
| DECIDED ON: | 31 March 2023 |
| For the Plaintiff: | J Peter SC<br>Instructed by Martini-Patlansky Attorneys |
| For the First Defendant: | A Mundell SC<br>Instructed by Keith Sutcliffe and Associates |