

Judgment 10/2009

**Hutcheson et al v Spread Trustee Co Ltd – Royal
Court (Civil Action File 906) – 25 February 2009**

**Trusts (Guernsey) Law, 1989 as amended – Royal Court Civil Rules, 2007 (Rule 52) –
strike-out application – strike-out should not be used by Defendant to fine-tune
pleadings but rather to remove serious allegations which have no substance –
application dismissed**

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

Civil 906

The 25th day of February, 2009 before Sir de Vic Carey, Lieutenant Bailiff; sitting alone

Between:

SARAH ANN ACATOS HUTCHESON ET AL

Plaintiffs

v

SPREAD TRUSTEE COMPANY LIMITED

Defendant

On the application of the Defendant, dated the 4th
September, 2008, for, inter alia, strike out of part of the Cause, in the terms attached hereto;

WHEREAS, on the 6th day of February, 2009, THE
COURT, having heard Advocates J.P. Greenfield and I.C. Swan, Counsel for the Plaintiffs
and Defendant respectively, RESERVED JUDGMENT;

THE COURT this day DELIVERED Judgment in
the terms attached hereto, DISMISSED the application for strike out and GRANTED costs to
the Plaintiffs.

M A TOSTEVIN

Her Majesty's Deputy Greffier

Babbé

I C Swan

12.09.08

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

SARAH ANN ACATOS HUTCHESON ET AL

Plaintiffs

-v-

SPREAD TRUSTEE COMPANY LIMITED

Defendant

SPREAD TRUSTEE COMPANY LIMITED whose address for service is at 18 – 20 Smith Street in the parish of Saint Peter Port in the Island of Guernsey (“the Defendant”)

APPLIES TO THE COURT

for an ORDER:-

1. That there be a trial (before a Judge sitting alone) of the following preliminary issue of law, namely:
 - (a) whether the inability of the terms of a trust to relieve a trustee of liability for a breach of trust arising from his own gross negligence (contained in Section 34 (7) of The Trusts (Guernsey) Law, 1989 (“the 1989 Law”), as amended by Section 1(f) of The Trusts (Amendment) (Guernsey) Law, 1990 (“the Amendment Law”), and now contained in Section 39(7) of The Trusts (Guernsey) Law, 2007)) applies to breaches of trust occurring prior to 19 March 1991 (the date on which the Amendment Law came into force); and
 - (b) if it does, whether it applies to breaches of trust occurring prior to 22 April 1989 (the date on which the 1989 Law came into force).
2. (Consequential upon a determination that such prohibition does not apply to breaches of trust occurring prior to 19th March 1991) that paragraph 53(2) of the Plaintiff’s Cause and the second

sentence of paragraph 2 of the Plaintiff's Réplique be struck out, pursuant to RCCR 2007, rule 52.

3. Giving directions in relation to the hearing of the said Preliminary Issue.
4. That paragraph 53 (1) of the Plaintiff's Cause be struck out pursuant to RCCR 2007, rule 52 as disclosing no reasonable grounds for bringing an action and/or as being an abuse of the Court's process and/or otherwise likely to obstruct the just disposal of the proceedings.
5. That the costs of this Application be reserved.

This 4TH day of September 2008

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I C SWAN

Advocate for the Defendant

**Approved Judgment
25 February 2009**

**IN THE ROYAL COURT OF GUERNSEY
ORDINARY DIVISION**

Between

SARAH ANN ACATOS HUTCHESON ET AL

Plaintiffs

-v-

SPREAD TRUSTEE COMPANY LIMITED

Defendant

**Advocate for the Plaintiffs: J P Greenfield
Advocate for the Defendant: I C Swan**

Judgment delivered 25th February 2009

**Perfected Judgment of Lieutenant Bailiff Carey on Defendant's application to strike out
part of the Cause**

Introduction

1. On 6th February 2009, I heard two applications from the Defendant and one from the Plaintiffs for amendment of the Cause. I have stood over until today two of the applications, namely, that from the Defendant for the trial of a preliminary issue and that from the Plaintiffs for leave to amend certain parts of the Cause to enable Counsel to reflect further. However, having heard argument I did indicate that I would hand down a written judgment on the third application, that for strike-out of part of the Plaintiffs' pleading. Events have overtaken us and I am now delivering that judgment. I would add that we have now reached the situation where I have been able to grant the Defendant's application for the trial of the preliminary issue and give directions for a timetable to enable it to be heard on 14th May 2009. So far as the applications for leave to amend the Cause, to which objections were raised by Mr. Swan are concerned, these have now been answered to Mr. Swan's satisfaction by Mr. Greenfield's further

amendments to the Cause for which I have given leave on the usual terms that he must be responsible for any additional costs that have been incurred in the amendment.

Judgment on the Strike-out Application

2. Mr. Greenfield has also sought leave this morning to amend further paragraph 53 part of which Mr. Swan has sought to have struck out of the Cause and I will now read out the amendment that I am permitting Mr. Greenfield to make to that paragraph, again on the basis that any responsibility for the costs thrown away will rest with him.

“By reason of the facts pleaded in this Cause and in particular (but not limited to) the commercial and contractual relationship between the former and/or retiring Trustees and the Defendant (the full details of which will be known to the Defendant) the continued control at all material times of Mr. Rowe over all matters relating to the settlement, the descendant Defendant’s failure to carry out any/or any proper investment review and/or pursue any claim for compensation against the former and/or retiring Trustees-

(i) The Defendant accepted responsibility for, acquiesced in, approbated and adopted the Former and/or Retiring Trustees actions so it is now directly liable therefore; and/or

(ii) By reasons of its own breach of trust and/or gross negligence in failing to take action against the Former and/or Retiring Trustees, the Defendant is itself liable to make good to the settlements for the benefit of the Plaintiffs the monies which would have been recovered had the Defendant pursued timeously a proper complaint against the Former and/or Retiring Trustees.”

3. Mr Swan’s point on this remains as argued before me on the 6th February. He submits that the Defendant cannot be liable for breaches of trust committed by the previous Trustees, although he accepts that it may have to compensate the Plaintiffs if it failed to take proceedings against them.

4. This particular pleading, as it stood originally when I heard this matter on 6th February has been contained in the original cause since it was served in 2004. It has been pleaded to by the Defendant's previous Advocate. He dealt with the pleading quite shortly by saying that it was misconceived as a matter of law and observing that no further particulars had been provided.
5. I accept that I should approach issues of strike-out in the same way as the Courts of England have done and the basic principle should be that strike-out should not be used to fine-tune pleadings at the behest of the Defendant, but should be used to get rid of serious allegations which have no substance and which if left in would involve the Defendant in considerable extra work responding to them.
6. Mr Greenfield wishes to rely on the unusual circumstances surrounding the Defendant's taking on these trusteeships, the lack of investigation and the wide indemnities given to the previous Trustees and says that this in some way negatives any argument that the Defendant can escape liability for losses that are alleged to have been incurred throughout the life of the trust. I see what Mr Swan is seeking to argue but I do not have the same difficulty in understanding the thrust of the Plaintiffs' allegations. Even if it were entirely clear what precisely the Plaintiff is arguing in the words objected to, as one is invited to do in all cases such as this, one looks at the cause as a whole.
7. The allegation made in the cause is that Mr John Rowe, a Chartered Accountant who had the conduct of the matter on behalf of the Trustees (including the Defendant Company) to use the words of para 47B of the amended pleading:

“had at all times acted as de facto sole Trustee”

and in effect that no other person who had served as an individual trustee or as an officer of the Defendant had had any input into the trusteeship, a situation that had continued following the appointment of the Defendant. This is an important issue for trial and as always, allegations are often pleaded in different and alternative ways. The words sought to be struck out may not be necessary or add anything to the Plaintiff's case. That is a matter for trial. I am not persuaded that the continued inclusion of words to which Mr Swan objects will make his task any more complex. He may wish to rest with his predecessor's defence on this point to which I have already referred.

8. As the old White Book of 1998 stated at page 351 paras 18/19/17 (quoted by Collas DB in Williams v Dixcart 15th June 2007):

“The mere fact that an opponent’s pleading contains some unnecessary matter is not sufficient good reason- for an application under this Rule”

9. I also take Mr Greenfield’s point- that we are in an area where the Law is developing. Guernsey has developed a commercial fiduciary industry, with a somewhat different pedigree to that epitomised by the solicitors of Lincolns Inn Fields of the nineteenth and twentieth centuries. The exact extent to which our Court is going to impose on Trustees responsibility under our relatively recently enacted Trust legislation, when things are alleged to have gone wrong is very much open for judicial consideration and I should not at this stage seek to restrict the issues by interfering with a few words in a very fully pleaded Cause
10. I accordingly dismiss this application for strike out.

..... Suzanne M. O’Neill
Wednesday 4th March 2009