Judgment 21/2010 **(1) IFS Investments Ltd et al v Manor Park (Guernsey) Ltd et al; (2) Manor Park (Guernsey) Ltd et al v IFS Investments Ltd et al - Royal Court (Civil Action Files 817 and 987) – 13 April 2010**

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(1) Cause 817 – péremption – application under Royal Court Civil Rules, 2007 (Rule 50) to restore action to the Rôle des Causes à Plaider - matters to be taken into account in the exercise of the Court's discretion – impecuniosity of applicant – extent of delay – application dismissed.

(2) Cause 987 – application to strike out or dismiss the action – (a) whether the cause disclosed no reasonable grounds for bringing an action – whether plea of fiduciary duty could be sustained – lack of particulars alone not a ground for striking out parties to have an opportunity to make further submissions as to whether the plea of fiduciary duty could be remedied by particulars – (b) whether the cause should be dismissed for want of prosecution – effect of Exceptions de Fond having been raised by the defendants - held that plaintiffs not guilty of such inordinate and inexcusable or contumelious delay as to justify dismissal for want of prosecution - application dismissed.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

Civil 817/987

The 13th day of April 2010 before Catherine Mary Newman QC, Lieutenant Bailiff, alone

Civil 817

IFS INVESTMENTS LTD

Plaintiff

MANOR PARK (GUERNSEY) LTD

First defendant

MANOR PARK GUARANTEED INVESTMENTS LTD

Second defendant

MR ALAN DAVID WILLIAMS

Third defendant

ADVOCATE GILLIAN SARAH DINNING

Fourth defendant

AND

Civil 987

MANOR PARK (GUERNSEY) LIMITED

Plaintiff

IFS INVESTMENTS LIMITED

First defendant

INTERNATIONAL FUND SERVICES (GUERNSEY) LIMITED

Second defendant

IFSH HOLDINGS LIMITED

Third defendant

MR JAMES ARTHUR TOOTHILL

Fourth defendant

MR PAUL DONALD SMITH

Fifth defendant

MS COLEEN WILSON SCOTT

Sixth defendant

MR JEFFREY CHARLES LANYON

Seventh defendant

Whereas on the 19th, 20th, 23rd October and 9th and 11th November 2009 the Lt Bailiff heard applications in Civil Cases No 817: IFS Investments Limited v Manor Park (Guernsey) Limited and Others and Civil Case No 987: Manor Park (Guernsey) Limited v IFS Investments Limited and Others. And in Case 817 heard thereon Advocates A M Ozanne, R I C E Harris P Richardson C M Fooks counsel for the Plaintiff, the first and third Defendants, the second Defendant and the fourth Defendant respectively and in Case 987 Advocates R I C E Harris and A M Ozanne counsel for the Plaintiff and third, fourth, fifth and sixth defendants respectively, the Lieutenant Bailiff this day handed down judgment in the terms attached hereto and

1. Dismissed the application to restore Case 817 to the Rôle des Causes à Plaider

2. As respects Case 987 consented to hear submissions, if asked by the Plaintiff to do so, as to whether the plea of fiduciary duty in relation to the First and Third Defendants can be remedied by particulars, and directed that for such a hearing draft particulars are to be provided to the Defendants and the Greffe four working days in advance of any hearing.

3. Declined to dismiss the cause in 987 for want of prosecution.

S M D ROSS
HM Deputy Greffier

Approved Judgment
13 April 2010

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

Before:

CATHERINE MARY NEWMAN QC, LIEUTENANT BAILIFF

In the matter of:

IFS INVESTMENTS LTD

Plaintiff

MANOR PARK (GUERNSEY) LTD

First defendant

MANOR PARK GUARANTEED INVESTMENTS LTD

Second defendant

MR ALAN DAVID WILLIAMS

Third defendant

ADVOCATE GILLIAN SARAH DINNING

Fourth defendant

AND

MANOR PARK (GUERNSEY) LIMITED

Plaintiff

IFS INVESTMENTS LIMITED

First defendant

INTERNATIONAL FUND SERVICES (GUERNSEY) LIMITED

Second defendant

IFSH HOLDINGS LIMITED

Third defendant

MR JAMES ARTHUR TOOTHILL

Fourth defendant

MR PAUL DONALD SMITH

Fifth defendant

MS COLEEN WILSON SCOTT

Sixth defendant

MR JEFFREY CHARLES LANYON

Seventh defendant

1. I have heard applications in Civil Cases No 817: IFS Investments Limited v Manor Park (Guernsey) Limited and Others and Civil Case No 987: Manor Park (Guernsey) Limited v IFS Investments Limited and Others. In 817 there are two applications – the application to restore to the Rôle dated 6th May 2009 and the application for costs dated 5th February 2007.

Application to Restore to the Rôle – Cause 817

2. I shall deal first with the application by IFS to restore the action to the Rôle, it being common ground that the action has gone périmée.

3. Very briefly, the Cause is that the Defendants are liable to the IFS in malicious falsehood, for unlawful interference with trade or business and for breach of contract as a result of which IFS has suffered loss and damage. It is alleged that

there were conspiracies between Defendants which frustrated the launch of a new open ended guaranteed fund with Norwich Union International Limited from which IFS would have earned fees. The damages sought are said to be very considerable.

4. The parties were very largely agreed on the law applicable to actions which have gone périmée. It is a long established principle of Guernsey law dating back at least to the first half of the 19th Century: see the history set out in *Ogier v Grand Havre Holdings Limited (30th May 2006).* If no action is taken for a period of one year and one day after the last step in the proceedings the action becomes automatically barred. Any party can apply to the Court for an order that the action be restored under Rule 50 of the Royal Court Civil Rules 2007. In the present case IFS accepts that it bears the burden of showing that it is just in all the circumstances for the action to be restored.

5. The applicable cases show that Court has a wide discretion to exercise. See *Guernsey Annandale Tile Company (1980) Limited v Haines (6 November 1997 CA)* per Southwell JA, *Stoneman v Cummings (1999) and Henniger v Robinson (14th October 2005).* Naturally that discretion must be exercised judicially. Among the factors to be taken account are

    a. the position of the Plaintiff and the effect on the Plaintiff if the action is not restored;

    b. the history of the action and the inactivity or activity of the Plaintiff and of its legal representative, which led to the action becoming périmée;

    c. the position of the Defendants and the effect on the Defendants and their case of the action being restored;

    d. any other special circumstances relating to the action and its conduct by the parties;

    e. the general circumstances in Guernsey relating to the relevant class of litigation, including, for example, any difficulties in securing legal representation for impecunious Plaintiffs;

    f. each case turns on its own facts.

6. Where the parties part company is in relation to whether or not a letter written to the Greffe by IFS' former Advocates on 3rd February 2006 stating that they no longer acted could be said to be a step in the action preventing the actions from going périmée.

7. IFS say that it can. The Defendants say that there must be an active procedural inter partes step. In *Henniger* Lieutenant Bailiff Talbot QC appears to have indicated, at paragraph 26, that an active procedural inter partes step is required.

8. It might be said that it is not essential to my finding to decide this point, because it is conceded by IFS that the action has gone périmée. However, the Advocates argued the point and in my judgment the length of time for which the action has been extinguished before an application is launched to restore it is certainly capable

of being a factor to take into account in deciding whether to restore. In this case, following the commencement of the action, Defences were served and on 14th July 2005 lists of documents were exchanged. The following day the Advocates for the First and Third Defendants wrote to IFS' Advocates (not the firm now instructed) stating that their documents were available for inspection. No steps to inspect were ever taken. There was a hearing on 11th May 2006 in a separate case, Civil Case No 942, to which the First and Third Defendants are not parties, at which time the case was still alive. It was accepted on behalf of IFS that the hearing was not a step in this action. That being so the Defendants say that the action was extinguished by no later than 15th July 2006.

9. I do not accept the submission that a letter to the Greffe from a firm of Advocates is inevitably a step in the action which could prevent an action from going périmée. In the light of the concession made about the 11th May hearing, I accept the submission that the last active step was the offer of inspection on 15th July 2005. Thus the action went périmée at close of business on 16th July 2006. That appears to have been a Sunday, so the action was extinguished the following day. That makes it two months under 3 years before the application was made to restore the action to the Rôle.

10. In December 2006 Mr James Toothill sought to issue applications for directions in his own name, but he is not a party to the action. That attempt does not, in my judgment, constitute a step in the action.

11. There was a hearing for directions in Civil Case 987 on 22nd January 2007. On that day the court listed the hearing under Civil Case 987 but this case was also mentioned and Advocate Harris submitted that this action was already périmée. He also helpfully made clear, in Mr Toothill's presence, since IFS was not represented by a professional Advocate, that there were provisions in the RCCR which enabled IFS to apply to the Court to restore the action to the Rôle, and that the December 2006 application was not sought to be brought by IFS but by Mr Toothill personally, and that he was not a party. The Court told Mr Toothill that an application to restore had to be made. It was made plain that on 11th May 2006 he had been given no assurance that the action would never go périmée and he accepted that.

12. In his affidavit in support of IFS' application dated 6th August 2009, Mr Toothill says that he did not know what he had to do after the hearing of 11th May 2006. The obvious thing to do would have been to take up the offer of inspection of documents. This did not happen.

13. IFS asserts that it is impecunious. It says that for some time it had difficulties getting representation because it owed its previous advocates money. An English firm called Citylaw were involved in March 2009 at least in helping IFS to find representation. It is clear that considerable sums were spent in the past, and bills run up and left unpaid. Mr Toothill says that he personally funded some of IFS' legal costs. But the detail of why all of this came to an end and what his and IFS' resources and liabilities are is lacking. Moreover it has been disclosed that Mr Toothill has professional employment with a well known company on the Island. IFS accepts that any difficulties it had in obtaining representation were resolved by April 2009 and it has both funding and representation. The evidence of impecuniosity relied upon is only in his affidavit dated 6th August 2009. That

affidavit simply asserts that IFS is impecunious without giving any detailed analysis of or evidence about its financial position.

14. If impecuniosity is to be relied upon it must be demonstrated not merely asserted. I do not find the evidence of impecuniosity descends to sufficient detail to satisfy the court that IFS has, as it asserts, experienced difficulties in obtaining necessary help in order to prosecute the action and that it has suffered any prejudice because of lack of funding.

15. IFS asserts that it has become embroiled in multiple actions and interlocutory applications. It cites 11 actions and applications in its skeleton argument as examples of these.

16. As for the 11 actions and applications cited, one has settled, three were dismissed, two others are brought by persons who are not parties to these proceedings, one is an action in the petty debts court in relation to disputed costs, one seeks recusal of an advocate who no longer appears to be acting anyway, one is ready for trial but no date has been fixed by the parties, and the last two are before me. I take the view that the Court should now do what it can, in the exercise of its duty to manage cases under Rule 38 of the RCCR 2007, to streamline these two actions to make them less cumbersome and costly to try.

17. IFS says that there is an overlap between the issues in this action and in Civil Case 987 which means that it would be unjust not to restore this claim.

18. I cannot accept that conclusion follows from the premise. I asked Advocate Ozanne, who argued the case for IFS, whether any aspects of IFS' case could not be raised by way of defence, set off or counterclaim in action 987. She acknowledged that there was nothing which could not be so raised. In fact, the Third and Fourth Defendants are not parties to action 987, but the acknowledgment implicitly recognises that it is not necessary to join the individuals to pursue the fundamental allegations made in 817 within the framework of 987.

19. IFS correctly says that at the hearing on 22nd January 2007 Advocate Harris asserted that this action was périmée, which IFS now contend was not the case; but it is said that Mr Toothill was confused by this statement and unsure what to do as he had made an application to the Court in December 2006. This is described as an issue about Advocate Harris' 'conduct'. I do not accept that that is a correct way to describe the issue. It is really raised as part of the explanation of IFS' inactivity. In any event, as I have already stated, at that January 2007 hearing it was made plain to Mr Toothill that an application to restore was the way forward, if restoration was indeed sought.

20. An affidavit in opposition to IFS' application has been sworn by Alan Williams, a director of the First Defendant and himself the Third Defendant. He explains that many new investors have subscribed to the Second Defendant Fund since the action became périmée, and the prospectus which they would have seen contained no reference to these proceedings given that they had been extinguished. Nor did the Second Defendant Fund's accounts provide explanations about the proceedings once they had been extinguished.

21. Mr Williams believed that the threats to the First Defendant's and his own reputation had also died with the action.

22. I am not in a position to make any finding about one suggestion made, namely whether or not these proceedings were, when issued or at any subsequent time , a 'try-on' The emails of 21st April and 1st October 2004 in which Mr Toothill says that the timing is right to 'turn up the heat' and he wants to 'increase the pain' to encourage settlement do not make attractive reading, but there has been no cross examination of him on these emails and it would not be right for me to make a finding about his motive in using such language absent cross examination.

23. Although I note the submission that IFS is not in good standing with the Registrar of Companies in Guernsey, it does not yet appear to be in the course of being struck off, and I have not given weight to that factor.

24. The Fourth Defendant also swore and served an affidavit describing the impact of the proceedings upon her. She says that she has been severely prejudiced both personally and professionally by the fact of this litigation and the publicity surrounding it. She has found the lack of progress difficult to explain to those who ask. She says that she was told (she does not say by whom, which is technically unfortunate) that it would be hard for her to find work while the action was on foot, but she says that once the action went périmée she felt able to return to work.

25. IFS says that it is at liberty to issue fresh proceedings if the action is not restored to the Rôle. Whether or not it is at liberty to do so or should do so is a matter for its advisers to consider with it. There may or may not be problems of prescription and abuse of process in attempting so to do. If there are, they have been created by IFS' inactivity for a long period of time. It is not a compelling factor either way.

26. The purpose of the rules about peremption are clear. Parties are expected to make progress in litigation at a reasonably expeditious pace. See *Le Moigne v Hargetion (1995) and Stoneman v Cummings (1999).* Since each case turns on its own facts I do not believe that it will be productive to conduct a minute comparison of the facts or time periods in other reported cases. I have applied the settled principles and taken into account the documents prepared for the hearing and referred to and the oral and written submissions made.

27. There can be no gainsaying the fact that the action did not proceed expeditiously. This is commercial litigation which needs to be taken seriously by those who instigate it. Ultimately the allegation of impecuniosity has not been satisfactorily made good with evidence. It was for IFS to devote adequate resources to its own litigation or decide if separate proceedings were really justified. Where professional people are made individual defendants and very serious allegations made about their conduct I accept that the existence of the proceedings will be a cause of strain and may prejudice them professionally; they deserve to have such allegations dealt with promptly or abandoned.

28. I have considered carefully the submission made by Advocate Harris that IFS has been somewhat cavalier about the action going périmée. I realise that although Mr Toothill is plainly an intelligent and experienced professional he is not a lawyer and the peremption of an action is something which can happen without anyone being notified of it if one is not keeping a careful lookout. I have considered carefully

whether IFS merits a special indulgence because of this. In my judgement IFS does not merit a special indulgence and the epithet of 'cavalier' is apt. If Mr Toothill was indeed unaware of the risk he ran in taking no steps to inspect or otherwise move matters forward he can have been in no doubt about what he had to do after 22nd January 2007. At the very least IFS could have issued and lodged with the Greffe an application to restore and sought a hearing date. Nothing was done. Moreover, in a letter which he wrote to the Fourth Defendant's Advocates on 4th March 2007, Mr Toothill robustly asserted that the action was not périmée and revealed no confusion or lack of understanding, merely disagreement with the proposition being advanced that it was périmée. IFS did not make any application to restore the action to the Rôle for over two years more. It accepts that it took no procedural steps after the 22nd January 2007 hearing and admits that the action was périmée by no later than 24th January 2008. On 5th February 2007 the First and Third Defendants issued an application for their costs of the action which had gone périmée. On 6th May 2009 this application for restoration to the Rôle was made.

29. IFS delayed over 27 months from being told what to do by the Court to apply to restore and over 15 months from the date upon which it acknowledges that the action had been extinguished before issuing the application to restore. Taking everything into account the Court declines to exercise its jurisdiction to restore the action to the Rôle and dismisses the application.

Application to Strike Out or Dismiss – Cause 987

30. I now turn to the application, dated 6th May 2009, to strike out or dismiss the action 987. The application was brought by IFS Investments Limited, the First Defendant, IFSH Holdings Limited, the Third Defendant, Mr Toothill the Fourth Defendant, Mr Smith the Fifth Defendant and Ms Scott the Sixth Defendant. They were all represented by Advocate Ozanne. I will refer to them collectively as 'the Defendants'.

31. Although the application to strike out or dismiss is made on three grounds, it was only argued on the first and third ground raised, namely that it disclosed no reasonable grounds for bringing an action and want of prosecution. Although The Fourth Defendant's evidence was drafted with a view to supporting all three grounds, the second ground of the application was not argued at the hearing. Furthermore, it was only one aspect of the pleaded case which was attacked, namely the claim for breach of fiduciary duty. Accordingly I shall say nothing about ground 2 which was abandoned, or the other aspects of the pleading.

32. The principles on which the court acts when striking out a claim on the ground that it discloses no reasonable ground for bringing proceedings are well settled and the parties were in agreement about them. The pleading must be obviously unsustainable. It is a high test, and not met by showing that a pleaded case has weaknesses which may lead it to fail.

33. The test for dismissal for want of prosecution is likewise well settled and was similarly not a matter of dispute. There must have been inordinate and inexcusable delay in the prosecution of the action, leading to a substantial risk that it is not possible to have a fair trial of the issues, or which has caused serious prejudice, and the fact that the prescription period has not expired is not a conclusive reason for not dismissing the action if such delay has been established.

34. At the hearing, the only complaints pursued were as follows:

    a. Paragraph 20 does not say how the fiduciary duties arose; no basis for the duty is pleaded. It is necessary to plead the factual aspects of the relationship giving rise to the duty of loyalty;

    b. Paragraph 29 is inadequately particularised;

    c. Paragraph 38 is a pleading of dishonesty; it is not pleaded as a fraud, nor as giving rise to a proprietary interest. There is a 6 year prescription period for such *droit personnel et mobilier* claims. It has expired in respect of claims for breach of fiduciary duty.

35. Taking each of these in turn, I deal first with the complaint that paragraph 20 does not adequately set out the basis upon which a plea of fiduciary duty can be sustained. Such a duty arises when one person has undertaken to act on behalf of another in circumstances which give rise to a relationship of trust and confidence: see *Bristol and West Building Society v Mothew [1998] Ch 1 18* per Millett LJ. It is a question of fact to be determined by examining the specific facts and circumstances surrounding the relationship: insofar as this is not obvious it was expressed by La Forest J in *LAC Minerals v International Corona Ltd FSR* [1990] Supreme Court of Canada 441 at 454-6.

36. Paragraph 20 of the pleading does not stand on its own. It is pleaded that :

    a. The Plaintiff provided management services to Manor Park Guaranteed Investment Funds Limited ('the Fund') (paragraph 3);

    b. Between June 2001 and November 2003 the administration of the Fund in the Channel Islands was carried out by the Second Defendant (paragraphs 6 and 11);

    c. This was done pursuant to a Distribution Agreement and an Administration Agreement each entered into in June 2001 between the Plaintiff/the Fund and the Second Defendant (paragraph 15). Copies of the Agreements are exhibited to The Fourth Defendant's affidavit in support of his application to strike out or dismiss. The parties to the Distribution Agreement were the Plaintiff and the Second Defendant, then called FnP Fund Services Limited. The parties to the Distributor Agreement were also the Plaintiff, and the Second Defendant (paragraph 21);

    d. The Fourth Defendant, who together with the other individual defendants was a director of the Second Defendant at the material time, described these agreements for the administration and distribution of the Manor Park product as a 'joint venture' and a 'closely linked partnership relationship' (paragraph 16);
    e. The Fourth and Sixth Defendants were allowed to use business cards which bore the name 'Manor Park' as well as the name of the Second Defendant (paragraph 18);

f. Business opportunities were pursued through the use of the Manor Park brand for the benefit of the Plaintiff (paragraph 19);

g. The Administration Agreement provided that the Second Defendant could not do anything which might prejudice the Plaintiff's business (paragraph 22.14 referring to Clause 16 (1));

h. The persons carrying out the business and the duties were the Individual Defendants. They were the 'eyes and ears' of the Plaintiff in the Channel Islands, they kept all its records and operated its bank accounts (paragraph 30);

i. The Plaintiff could not appoint anyone else to act for it as the agreements were exclusive (paragraphs 22.6 to 22.8);

j. The Plaintiff was dependent upon the Second Defendant for its business in the Channel Islands (paragraph 30);

37. The case is that the Plaintiff was, therefore, particularly vulnerable to what was done by the individuals exercising the discretion or power on behalf of the Second Defendant and that these arrangements gave rise to a fiduciary duty owed by the Second Defendant to the Plaintiff.

38. In my judgement that is an adequate plea to support a claim of fiduciary duty. It sets out sufficient to show, if proved, that facts existed aligning the Second Defendant with the protection and advancement of the Plaintiff's interests in a manner which could be shown at trial to have properly given rise to a fiduciary relationship. At any event, I could not say that it is plain and obvious that there was no fiduciary relationship. The question is one for a trial. The problem seems to be that all parties have agreed that the Second Defendant is to be treated as no longer being a party because it has been struck off. Proving that it did owe such a fiduciary duty may nevertheless continue to be important to set the background facts in their proper context.

39. It is also asserted, at paragraph 20, that IFS Investments Limited, the First Defendant, and IFSH Holdings Limited (the Third Defendant) owed such fiduciary duties. It is pleaded that the First and Second Defendants are wholly owned subsidiaries of the Third Defendant. The Third Defendant was incorporated in April 2001 and the First Defendant was incorporated in March 2002, its purpose being to provide management, administration and distribution services to funds. It is alleged, at paragraphs 15 and 16, that the Third Defendant was said by the Fourth Defendant to be part of the joint venture and of the closely linked partnership relationship. Nothing more is said to base the plea of fiduciary duty in respect of the First and Third Defendants and unless that can be fleshed out by amendment it should indeed be struck out. It is entirely unclear what the First and Third Defendants are said to have been responsible for doing, or why there should have been fiduciary obligations on them. It does not follow from the fact that the First and Third Defendants are or may be related to the Second Defendant that they would necessarily owe the same duties.

40. Finally, it is alleged at paragraph 29 that the directors of the Second Defendant, the Individual Defendants, also owed fiduciary duties to the Plaintiff.

41. Advocate Ozanne accepted that as a matter of law it was indeed possible for the directors of company A to owe a fiduciary duty to company B; see for example *JD Wetherspoon v Van de Berg and Others [2009] EWHC 639* in which a director of the Defendant company, which was the agent of the Claimant company and owed it a fiduciary duty, was found to have owed a personal fiduciary duty to the Claimant. Advocate Ozanne accepted that the question of whether a director of company A owes a fiduciary duty to company B is a question of fact. Advocate Ozanne did not seek to argue that English law and the law of Guernsey would be different in this respect.

42. However Advocate Ozanne argued, correctly, that a personal fiduciary duty would not stem simply from being the director of a company which itself owed a fiduciary duty. More was required, In *Cross v Benitrust & Others (6th April 1998)* the allegation was that directors owed fiduciary duties to third parties by virtue of their position as directors. This failed.

43. The Plaintiff argues that it relies upon the existence of relationships between MPG and the Individual Defendants. The Fifth Defendant was a director of the Plaintiff so it he owed a personal fiduciary duty to the Plaintiff. As for the Fourth and Sixth Defendants it was they who wanted to become involved with the Fund and the new structure was set up for that purpose. The Individual Defendants were the persons by whom the obligations and duties of the Second Defendant were to be carried out. When they acted, they were obliged to act in the Plaintiff's interests and on its behalf. They could bind MPG by exercising their own discretion and judgment and MPG was vulnerable to them and dependent on the proper performance of their Rôles. Paragraphs 11-30 set out this line of argument. In my judgment that is a sufficient pleading.

44. Paragraph 29 is said to be inadequately particularised. It identifies what duties are said to be owed. Lack of particulars alone is not a ground for striking out. If particulars are required they can be requested.

45. The complaint about Paragraph 38 leads into the argument that were the claim for breach of fiduciary duty to be struck out, it could not be brought by fresh proceedings because it would be prescribed. It is an argument which is relevant to consideration of the application to dismiss for want of prosecution. The plea is one of a dishonest breach of fiduciary duty by a course of conduct said to have commenced in early 2002 and continued until abut 24th December 2003. The proceedings were commenced against the First, Second, Fifth and Seventh Defendants on 26th August 2005 and against the Third Fourth and Sixth Defendants on 16th September 2005. The Defendants accept that a claim for breach of fiduciary duty has a six year prescription period. I was very grateful for the helpful note on prescription and laches provided by Advocate Ozanne. The proceedings were commenced within the 6 year prescription period but fresh proceedings in relation to the same breaches would be outside the ordinary period of prescription, unless the Plaintiff could rely on Section 7 of the Trusts (Guernsey) Law 1989 as amended or find some other way of extending the primary period. I need say nothing more about prescription or laches in this judgment.

46. Accordingly I will hear submissions, if asked by the Plaintiff to do so, about whether the plea of fiduciary duty in relation to the First and Third Defendants can

be remedied by particulars, and for such hearing draft particulars are to be provided to the Defendants and the Greffe 4 working days in advance of any hearing. To that extent, the application is partially successful.

Dismissal for Want of Prosecution- Cause 987

47. Turning now to the application to dismiss for want of prosecution, the summary chronology was not in dispute. The proceedings began in August 2005 and Defences were served on 7th October 2005. The Defences were rudimentary vehicles for Exceptions de Fond. It is acknowledged that speaking Defences will be required should the case go forward. On 7th October 2005 these proceedings were adjourned sine die as is customary when Exceptions de Fond are pleaded. That adjournment stopped time for peremption from running: *Nigerian Television Authority v Trans-Com (International) Limited (15th February 1985).*

48. On 26th February 2006 the Defendants were required to lodge materials with regard to their Exceptions de Fond and directions were given by the Court to set a timetable for the hearing of the Exceptions.

49. The Fourth Defendant sought an extension of time for compliance with the directions and an extension was granted until 13th April. On 13th April 2006 the Fourth Defendant wrote to the Plaintiff's advocates once again, this time saying that pressure of work on a big project meant that he was not ready to comply with the directions. An extension was granted to the 30th April. The evidence, which was copious, was served in May 2006. It raised a number of points and introduced some material which the Plaintiff said was 'without prejudice'. The Plaintiff served a reply on 26th May 2006. and 1st August 2006.

50. In August 2006 the Fourth Defendant asked Advocate Harris to arrange a time for the hearing of the Exceptions. On 30th August 2006 the Fourth Defendant asked the Deputy Greffier for advice about the procedures to follow. His email, recorded at paragraph 40 of his affidavit in support of the strike out application and exhibited to it, shows that he fully appreciated that as the Exceptions were his application it was for him, not Advocate Harris, to make a request for a hearing date. He said that he was unsure what to do because having read an affidavit filed by Advocate Greenfield he did not understand what the next step should be. He also indicated that he was not available for a hearing until mid September. On 9th November the Fourth Defendant was told to set out what directions he was asking for. On 22nd November he sent to the Greffe a draft application for directions but failed to serve it. This was pointed out to him by the Greffe, He confirmed that he had done this on 14th December 2006. On 6th December 2006 the Fourth Defendant said that he was happy to have the hearing in the New Year. A further directions hearing was then listed for 22nd January 2007.

51. At that hearing it was clear that the Defendants' Exceptions were not ready to be heard. Accordingly directions were given. The Defendants were given 4 weeks to serve their skeletons and authorities on the Exceptions, with the Plaintiff having 4 weeks thereafter too answer and the Defendants 3 weeks to reply.

52. A clear explanation was given to the Fourth Defendant who was present that it was his responsibility to seek a hearing date once the Exceptions were actually ready for hearing. I am satisfied that he understood the explanation. Unfortunately he omits

mention of this explanation from the procedural history in his affidavit in support of this application.

53. On 9th March 2007 Advocate Harris wrote to the Fourth Defendant pointing out that he had not complied with the directions for service of his skeleton argument in relation to the Exceptions.

54. On 14th March 2007 the Fourth Defendant lodged a skeleton but no authorities. That skeleton argument shows a formidable command of the law for a litigant in person. The authorities were lodged on 27th March 2007.

55. On 25th April the Fourth Defendant collected the Plaintiff's skeleton and authorities from Advocate Harris' office. He says that when he collected the skeleton he indicated that the Defendants would be filing a response in the form of an affidavit. It is common ground that he communicated the fact that he would have significant comments on the skeleton, but it is not agreed that he said that it would be in the form of an affidavit.

56. 16th May 2007 the Fourth Defendant asked for an extension for his responses. He was granted an extension until 28th May 2007. On 29th May he was not ready but he emailed Advocate Harris that 'our response' would be 'forwarded shortly'.

57. On 31st July Advocate Harris asked the Fourth Defendant to confirm that the Defendants still intended to serve responses to the Plaintiff's skeleton argument. On 10th August the Fourth Defendant replied that an affidavit was awaited from a person within Royal Bank of Scotland International Limited. He said that he would be introducing the affidavit in response to the Plaintiff's skeleton argument and he would revert when Mr Smith the Fifth Defendant returned from holiday.

58. On 23rd August 2007 Mr Rodger's affidavit was given to Advocates Harris and Greenfield. It was sworn on behalf of the then Fifth and Seventh Defendants. Nothing indicated that it was served on behalf of all of the Defendants, and that it took the place of a reply skeleton for which provision had been made in the directions. The Fourth Defendant asserts that from the email of 10th August the Plaintiff should have known that it was the response to the skeleton. There is some force in this, but it is also fair to say that the Plaintiff was expecting a further communication after Mr Smith returned from holiday.

59. Moreover if indeed this was the Defendants' final word on the Exceptions then the next step should have been for them to fix a hearing for the Exceptions. No progress was made by any of them to set down the Exceptions for hearing.

60. On 18th January 2008 the Plaintiff therefore brought the matter back to the court for directions pursuant to an Application signed on 11th January 2008. That application expressly stated that the Fourth Defendant had stated that it was his intention to lodge further documents in response to the skeleton argument and authorities served by the Plaintiff on 24th April 2007 but had not done so. The Fourth Defendant did not serve any evidence or write to the Plaintiff saying that nothing further was to be forthcoming, nor did he then argue that such should have been plain from the August 2007 correspondence. That application was heard by the Deputy Bailiff who, because of a conflict, adjourned it for a date to be fixed. Even then no

application was made by the Fourth Defendant or any Defendant to set down the Exceptions for hearing.

61. On 16th January 2008 the Fourth Defendant emailed the Greffe suggesting that the court had asked Advocate Harris to fix hearing times for the 'next hearings'. If that is meant be a reference to the hearing of the Exceptions it is inaccurate. At paragraph 53 of his affidavit Mr the Fourth Defendant complains that Advocate Harris had been directed to prepare a bundle of documents for 'the' hearing but had not done so. Since no hearing had been fixed this criticism is misplaced. The Fourth Defendant claims, in the same paragraph, that Advocate Harris had been directed to list the Exceptions de Fond and did not do so. It is simply inaccurate to say that Advocate Harris had been directed to list the Exceptions de Fond. He had not.

62. On 12th September 2008, by consent, the Seventh Defendant was allowed to withdraw from the case on the grounds of ill-health.

63. The period of delay between mid-January 2008 and the next hearing for directions is not the fault of the parties as I caused difficulties by being unable to offer an early date to return to Guernsey. However the fact that the next hearing was to be only one for directions in accordance with the Plaintiff's request is the fault of the Defendants, who did not apply to fix a hearing date for the Exceptions themselves. The fact that the Plaintiff did not do so is not a matter of criticism: there was some confusion about whether or not Mr Rodger's affidavit was really the Defendants' final word on the Exceptions and that could indeed have been cleared up by better communication but more importantly it was not the Plaintiff's application.

64. On 8th January 2009 Advocate Harris wrote to the Fourth Defendant saying that he had not received the additional material which he had been awaiting, thus demonstrating that, rightly or wrongly, he thought that further material was to be forthcoming. The Fourth Defendant did not respond to disabuse him. On 15th January 2009 the Plaintiff applied for directions, since nothing had happened to fix the hearing for the Exceptions. This was a conventional way of bringing the matter back to court so that the Defendants could be asked about their intentions and suitable directions could then be made.

65. At the hearing on 9th April 2009 the Defendants indicated that they did not have any further material which they wished to serve. Despite this, they said that they were not ready to list the Exceptions for a hearing as they might withdraw or recast them. A side issue was to be determined first, namely whether the Defendants had improperly referred to 'without prejudice' material in their evidence.

66. At a directions hearing on 19th August 2009 the Defendants stated unequivocally that they were withdrawing their Exceptions.

67. This history shows considerable ambivalence on the part of the Defendants about their Exceptions and a lack of will to get on with having them heard culminating in the complete abandonment of the Exceptions.

68. Advocate Harris argued that once the Exceptions were issued that amounted to an application by the Defendants to strike out the action. The process of raising Exceptions de Fond is a matter of Guernsey customary law which pre-dates the provisions allowing applications to strike out. The RCR 1989 did not remove the

customary procedure but added a new procedure to the toolkit. Defences had to be tabled raising the Exceptions. The analogy between these Exceptions and an application to strike out is manifest. In order to succeed on the Exceptions the Defendants would have to show that there were no admissible facts consistent with the pleadings which might be proved at trial which would allow the Plaintiff to succeed in the action: see *Cherub Investments Ltd v Channel Islands Aero Club (Guernsey) Ltd (CA January 13th 1982)* as cited in *Yaddehige v Credit Suisse [2007-8} GLR 282.*

69. The reason why the Cause was adjourned sine die in accordance with the practice is that when Exceptions de Fond are raised the correct procedure is for the Exceptions to be dealt with first. Once the Cause was adjourned sine die the Plaintiff could not progress its action. The Fourth Defendant accepted that it was up to the Defendants to make the running on the Exceptions. Advocate Ozanne was more guarded, and criticised the Plaintiff for not having fixed a date for the hearing of the Exceptions, but she accepted that when exceptions such as these were served she would not expect the Plaintiff to press for a full Defence to be served until the exceptions were dealt with.

70. So once the Cause was adjourned sine die the Plaintiff's claim was effectively roadblocked: it is common ground that the Defences had not yet been properly pleaded as they would need to be; until the Exceptions were heard there was nothing which the Plaintiff could do to get on with the underlying action. Whilst one might argue that the Plaintiff was sometimes generous in not chasing the Defendants as vigorously as it might have done, the reality is that the failure to get the Exceptions ready for hearing and heard is the responsibility of the Defendants promulgating them and not of the Plaintiff. If the Plaintiff is guilty of inordinate delay, and I do not say that it is, then the delay is excusable and not contumelious in any way.

71. I do not find that the Plaintiff is guilty of such inordinate and inexcusable or contumelious delay as would justify dismissal for want of prosecution and therefore I do not strictly need to consider prejudice. Advocate Harris argued that any prejudice suffered by the Defendants is self inflicted because it was their responsibility to get on with the Exceptions. That is very largely correct but in case I am wrong and he is wrong on that matter I will now turn to consider prejudice.

72. The Defendants do not clearly state which periods of delay they seek to blame the Plaintiff for. The most likely candidates would be August 2007 to the hearing in January 2008 and mid January 2008 to January 2009. The gap between April 2009 and August 2009 was also one in which nothing happened. The first period was perhaps a little too generous to the Defendants but was not inexcusable nor was it contumelious. I have already explained that the second of those periods of delay is not the fault of the Plaintiff. The third period is one in which the Defendants were considering their position with regard to the Exceptions. It was perhaps also generous to the Defendants. The absence of clarity about the Defendants' contention in this regard would make consideration of prejudice very difficult were it not for the fact that the evidence of prejudice is very thin.

73. The Fourth Defendant deposes that he could not afford representation since 2005, but it is clear that he has received legal advice during that time and has had some help from a London-based solicitor; in any event since April 2009 he has had the services of AO Hall. It is difficult to see how any of the possible periods of delay

could have prejudiced the Defendants in this respect, if anything things have improved now that representation is available.

74. The Fourth Defendant deposes that in September 2007, only a few weeks after the commencement of the first possible period of delay, his family home was repossessed by HSBC because he was not able to make loan repayments on loans taken out between June and October 1999 and an overdraft taken out between 2001 and 2002. This therefore cannot be the result of any delay for which the Plaintiff could be held responsible. The Fourth Defendant says that he is prejudiced in the job market because of the litigation generally and feels unable to move on. He refers to wage arrests but unclear how wage arrests were contributed to by this action. He has found work as an accountant working for Jacksons Garage. Whilst the general slow progress of this Cause will undoubtedly have increased the period for which he is not free of it, this level of general complaint is inadequate to show the necessary prejudice.

75. Although the Fourth Defendant alleges that he is impecunious he does not attempt to hold the Plaintiff responsible for this and I need say no more about it.

76. Ms Scott the Sixth Defendant swore an affidavit on 11th May 2009 in which she says that she has suffered reputational damage in the 4 years since the proceedings were begun. She believes that she would be unlikely to be able to find a new job in the financial sector because of the litigation. She too has been able to get a job at Jacksons Garage. The preparation of the litigation has taken up time and been a source of sustained pressure. She does not say they have all lost jobs, investments and homes as a result of the litigation still less as the result of any particular period of delay for which the Plaintiff is responsible.

77. Mr Smith the Fifth Defendant also served a draft affidavit which is dated May 2009. His difficulties as a result of the various disputes between Manor Park entities and IFS entities led to him selling his house, he says, in late 2004, before these proceedings began. These proceedings hampered him in his employment because he could not sustain or take up any directorships of any fund listed on the stock exchange. He found the litigation stressful. In May 2008 he found a position with RMB Investment Services Limited. He is Managing Director and therefore holds a senior position. There is nothing in this evidence which could sustain a claim that any particular prejudice has been suffered by the Fifth Defendant as a result of any period of delay for which the Plaintiff could be held responsible.

78. Accordingly the court declines to dismiss the Cause for want of prosecution.