

Judgment 55/2005

**Flightlease Holdings (Guernsey) Limited et al v.
International Lease Finance Corporation ('ILFC')
– Royal Court (Civil action file 812) –
26 October, 2005**

Companies in voluntary liquidation – liquidators rejected proofs of debt submitted by ILFC – objection by ILFC – procedure set by Royal Court for determining the validity or otherwise of ILFC's claim – leave to amend cause- appropriate test for striking out – whether an arguable case that the alleged misrepresentations were made with actual or apparent authority of each of the other companies – claim in conspiracy – Pauline claim – directions given as to the form in which the cause or statement by ILFC will have to be recast – the sooner the matters truly in issue reach trial the better.

IN THE COURT OF APPEAL OF THE ISLAND OF GUERNSEY

The 26th day of October, 2005 before Richard Charles Southwell Esquire, QC, Lieutenant Bailiff; sitting alone

In the matter of:

- (1) FLIGHTLEASE HOLDINGS (GUERNSEY) LIMITED
- (2) FLIGHTLEASE AIR No 1 (GUERNSEY) LIMITED
- (3) FLIGHTLEASE AIR No 3 (GUERNSEY) LIMITED
- (4) FLIGHTLEASE AIR No 4 (GUERNSEY) LIMITED
- (5) FLIGHTLEASE AIR No 5 (GUERNSEY) LIMITED
- (6) FLIGHTLEASE AIR No 7 (GUERNSEY) LIMITED
- (7) BUCEPHALUS PARTNERS (GUERNSEY) LIMITED
- (8) MSN 1259 PARTNERS (GUERNSEY) LIMITED

(Applicants)

and

INTERNATIONAL LEASE FINANCE CORPORATION

(Respondent)

Whereas on 24th and 25th October, 2005, the

Lieutenant Bailiff heard: -

- (i) an application by the Respondent for leave to amend its statement of claim in the action brought by the Respondent against the Fourth and Fifth Applicants;
- (ii) an application by the Fourth and Fifth Applicants for the striking out as not disclosing a reasonably arguable cause of action of certain paragraphs of such statement of claim, or for the resolution of the issues raised by such paragraphs as a preliminary issue;
- (iii) an application by the Applicants (other than the Fourth and Fifth Applicants) for the striking out of certain causes of action relied on in the Respondent's proofs of debt and

notices of objection, or for the summary resolution of the issues raised by reliance on such causes of action;

- (iv) an application by all the Applicants for the striking out of certain other causes of action relied on in the Respondent's proofs of debt and notices of objection, or for the summary resolution of the issues raised by reliance on such causes of action;

WHEREAS the Lieutenant Bailiff heard thereon on 24th and 25th October Advocate J. M. Wessels for the Applicants and Advocate P. Richardson for the Respondent.

The Lieutenant Bailiff this day handed down judgment in the terms attached hereto and ORDERED that: -

- (1) the Respondent have leave to amend its statement of claim in such action to plead its contractual indemnity claim and claims based on French law, the Fourth and Fifth Applicants not pursuing their application No. (ii) above;
- (2) there are to be struck out of the proofs of debt and notices of objection by the Respondent in the liquidations of the Applicants other than the Fourth and Fifth Applicants the claims alleged in contract and quasi-contract;
- (3) there are to be struck out of the proofs of debt and notices of objection by the Respondent in the liquidations of the Applicants other than the Fourth and Fifth Applicants the claims alleged in fraud, deceit and misrepresentation, save that the Respondent may plead in a revised statement of claim a claim alleged in misrepresentation against the First Applicant (in addition to such claim already pleaded against the Fourth and Fifth Applicants);
- (4) there are to be struck out of the proofs of debt and notices of objection by the Respondent in the liquidations of the Applicant claims alleged in conspiracy, save that the Respondent may plead in a revised statement of claim a claim in conspiracy against the First, Fourth and Fifth Applicants;
- (5) the Respondent has leave to plead in a revised statement of claim a Pauline claim against any company which received money from the Fourth and Fifth Applicants flowing from the alleged fraudulent transactions;

- (6) in so far as the Respondent has leave to plead in a statement of claim the above further causes of action, in addition to those already pleaded, all such causes of action are to be pleaded in one fresh statement of claim (without the addition of underlining or other means of identifying changes), and only causes of action which Counsel for the Respondent considers reasonably arguable are to be pleaded;
- (7) in relation to any causes of action referred to in (3), (4) or (5) above which may be pleaded by the Respondent in the revised statement of claim, the Applicants or anyone or more of them may apply to strike out any such causes of action which Counsel for the Applicants considers not to be reasonably arguable;

AND the Lieutenant Bailiff gave directions as to the interlocutory steps to be taken down to trial, and DIRECTED that: -

- (8) the revised statement of claim containing all appropriate particulars is to be served on or before 25th November, 2005;
- (9) the defence is to be served on or before 23rd December, 2005;
- (10) any application (if any) to strike out any of the causes of action referred to in (3), (4), or (5) above is to be heard by the Lieutenant Bailiff on 19th January, 2006;
- (11) mutual disclosure and inspection of documents are to be completed by 31st January, 2006;
- (12) reports of expert witnesses are to be exchanged on or before 28th February, 2006;
- (13) a case management conference is to be held before the Lieutenant Bailiff on 10th March, 2006;
- (14) summaries of the evidence of witnesses of fact are to be exchanged on or before 7th April, 2006 (or such other date as may be ordered on 10th March, 2006);
- (15) trial bundles, a chronology and a dramatis personae are to be agreed and filed with the Royal Court on or before 28th April, 2006;
- (16) the Respondent is to serve a skeleton argument on or before 5th May, 2006;
- (17) the Applicants are to serve a skeleton argument on or before 11 May, 2006;
- (18) the trial is to commence on 15th May, 2006;

(19) costs of all the above applications and of the directions hearing are reserved to the Lieutenant Bailiff for determination hereafter.

S. M. D. ROSS
Her Majesty's Deputy Greffier

**Approved
Text**

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

Between	Flightlease Holdings (Guernsey) Limited Flightlease Air No. 1 (Guernsey) Limited Flightlease Air No. 3 (Guernsey) Limited Flightlease Air No. 4 (Guernsey) Limited Flightlease Air No. 5 (Guernsey) Limited Flightlease Air No. 7 (Guernsey) Limited Bucephalus Partners (Guernsey) Limited MSN 1259 Partners (Guernsey) Limited	Applicants
	and	
	International Lease Finance Corporation	Respondent

Judgment of Lieutenant Bailiff Richard Southwell QC

**Advocate J.M. Wessels for the Plaintiffs,
Advocate P. Richardson for the Defendant**

**Hearing date: 24th October 2005
Judgment handed down: 26th October 2004**

Judgment

1. These proceedings are within the ambit of the liquidation of a number of Guernsey companies which are themselves within the Swiss Air group of companies. SAir Group (presumably SAir Group AG, a Swiss company) is the ultimate parent of the Swiss Air group of companies, and is therefore the direct or indirect parent of Flightlease AG (“FLAG”) and a company called Swissair, Swiss Air Transport Company Limited (“Swiss Air Transport”). FLAG has a subsidiary, Flightlease Holdings (Guernsey) Limited (“FL Holdings”), which is in turn the parent of various Guernsey companies within the Swiss Air Group. These are as follows:
 - Flightlease Air No. 1 (Guernsey) Limited (“FL1”)
 - Flightlease Air No 3 (Guernsey) Limited (“FL3”)
 - Flightlease Air No. 4 (Guernsey) Limited (“FL4”)
 - Flightlease Air No. 5 (Guernsey) Limited (“FL5”)
 - Flightlease Air No. 6 (Guernsey) Limited (“FL6”)
 - Flightlease Air No. 7 (Guernsey) Limited (“FL7”)
 - Bucephalus Partners (Guernsey) Limited (“Bucephalus”)
 - MSN 1259 Partners (Guernsey) Limited (“MSN”)

These companies together with FL Holdings will be referred to as “the Guernsey companies”. The Guernsey companies, including FL Holdings, but excluding FL4 and FL5, will also be referred to as “the other Guernsey companies”.

2. Particular individuals concerned with the affairs of the Swissair group included Dr. Mario Corti (“Corti”) – at the relevant times Chairman and Chief Executive Officer of SAir Group; Mr. Lukas Knecht (“Knecht”) – at the relevant times a director of FL4 and FL5 and of each of the other Guernsey companies, and an officer of FLAG; Mr. Markus Kreis, an officer of FLAG and attorney in fact for Swiss Air Transport, FL4 and FL5; and Mr. Simon Collins (“Collins”) who was employed by KPMG and acted (with others from KPMG) as a consultant to and on behalf of the Swiss Air Group.
3. The other company concerned in the matters before me is International Lease Finance Corporation (“ILFC”), an American company involved in the business of buying aircraft and leasing aircraft to airlines. It is probably unnecessary to refer in any detail to those who acted on behalf of ILFC. They included Mr. Steven Udvar-Hazy (president and chief executive officer), Mr. John Plueger (executive vice-president and co-chief operating officer, and Mr. Alan Lund (executive vice-president, chief financial officer and co-chief operating officer).
4. I need to set out briefly some of the factual background to the matters I have to decide. Much is in dispute between ILFC and the Guernsey companies. In so far as it is derived from pleadings or other documents setting out ILFC’s case, I have (for the purposes of deciding whether ILFC is to be permitted to pursue that case in the courts of Guernsey) to assume that the facts are correctly set out by ILFC, despite being disputed by the Guernsey companies.
5. It is ILFC’s contention that by March 2001 the Swiss Air group of companies were insolvent, and that this was known to, or ought to have been known to, those acting for the Swiss Air group (and in particular Corti and Knecht). I have to assume that this is correct. Whether or not that is strictly correct, it is clear to me from the documents placed before me that the Swiss Air group was in serious financial difficulties. It appears also to have been known publicly that the group had difficulties, but Corti and others on behalf of the group indicated that the difficulties were surmountable and would be surmounted.
6. In about March 2001 Corti approached ILFC in order to interest ILFC in entering into purchase and leaseback transactions involving aircraft owned by, or contracted to be purchased by, companies in the Swiss Air group.
7. On 29th March 2001 a document was provided to SAir Group by one of the group’s bankers, UBS, in which UBS calculated that SAir Group was over –indebted by between 1 billion and 3 billion Swiss francs. This confirmed an earlier bank presentation by Roland Berger Consulting which showed that the group would soon run out of liquidity. The presenters calculated that to fund its activities in 2001 the group would need an additional 1 billion Swiss francs liquidity, and during the next 3 years additional 5.5 billion Swiss francs liquidity.
8. At the AGM of SAir Group, the parent company, on 25th April 2001 Corti announced that an additional 1 billion Swiss francs facility had been agreed with the group’s bankers, and the formal contract would be signed shortly. It is the contention of ILFC (which I have to assume is correct) that this announcement was untrue, and its untruth was known or ought to have been known by Corti and others acting for the SAir Group. No such facility had by then been agreed with the group’s bankers. In fact the facility was not finally agreed until 11th July 2001, and was made subject to stringent conditions which the group companies were not able to fulfil.
9. The Swiss Air fleet of aircraft was grounded on 2nd October 2001 and the Swiss Air group companies in Switzerland entered into debt moratoriums on 5th October 2001.
10. I now return to the discussions and negotiations between ILFC and Corti, Knecht, Collins and others on behalf of the Swiss Air group, picking up the story from April 2001. In

April and May 2001 there were several meetings between representatives of ILFC and of the Swiss Air group. In the course of these meetings (it is alleged by ILFC) Corti in the presence of Knecht and representing the Swiss Air group made statements similar to the announcement referred to in paragraph 8 above which ILFC say were untrue and known (or ought to have been known) by Corti and Knecht to be untrue. The effect of these statements was that the Swiss Air group had, by obtaining the bank facility of 1 billion Swiss francs, secured its immediate financial future; and on this basis ILFC's representatives considered that ILFC could safely enter into the purchase and lease transactions to which I now turn.

11. On 22nd May 2001 ILFC entered into a purchase agreement assignment with FL4, by which ILFC took over from FL4 the benefits and burdens of a contract to which FL4 had become a party by novation with Airbus Industrie for the purchase of an Airbus aircraft. This agreement is governed by French law. Simultaneously ILFC entered into a lease agreement with Swiss Air Transport for the lease of the aircraft, which is governed by Californian law. The capital cost to ILFC was in excess of the value of the aircraft, and the lease payments were accordingly to be higher than they would have otherwise have been: this was at the request of Corti on behalf of the Swiss Air group companies.
12. On 28th June 2001 ILFC entered into an aircraft purchase agreement with FLAG, FL5 and Swiss Air Transport in respect of 3 Airbus aircraft then owned by FLAG and 1 Airbus aircraft then owned by FL5. This agreement was governed by Californian law. Simultaneously ILFC entered into four lease agreements (also governed by Californian law) with Swiss Air Transport for the lease of the aircraft. Again the capital cost to ILFC was higher than the then value of the aircraft, and the lease payments were increased accordingly.
13. As already indicated, in October 2001 the Swiss companies in the Swiss Air group entered into insolvency. ILFC made claims under the aircraft lease agreements.
14. In January 2004 the Guernsey companies entered into voluntary liquidation, and the Liquidators were appointed in respect of all the Guernsey companies. Before these liquidations the Guernsey companies had entered into an agreement with creditors (not including ILFC) on a basis which was without prejudice to any other claims that might be submitted in the course of the liquidations.
15. Following an earlier hearing on 16th January 2004 of a preliminary application by the liquidators, on 17th March 2004 the Royal Court laid down on an application by the Liquidators a procedure for the submission and determination of claims made by any persons claiming to be creditors of any of the Guernsey companies (other than those which were parties to the pre-liquidation agreement: paragraph 14 above).
16. On 18th May 2004 Dr Vigano (a Swiss lawyer practising in Geneva) submitted on behalf of ILFC (and also seven other Companies) proofs of debt in the liquidations of each of the Guernsey companies, claiming on behalf of ILFC in each liquidation) the same amount of US\$117,520,529.00.
17. On 19th July 2004 the Liquidators lodged notices of rejection of ILFC's proofs of debt in their entirety.
18. On 6th September 2004 Dr Vigano served on behalf of ILFC notices of objection to the Liquidators' rejection of ILFC's proofs of debt.
19. In my judgment, following the service of ILFC's notices of objection the procedure adopted (as requested by the Liquidators) seemed to have departed from what would have been the appropriate way to determine ILFC's claims. The appropriate way, in my view, would have been for ILFC to be permitted or required to start an action in the Royal Court

against the Guernsey companies, in which action the validity or otherwise of all of ILFC's claims could be determined.

20. Instead, the Liquidators requested the Royal Court to adopt a different procedure, and the Royal Court acceded to the Liquidators' request. What the Liquidators did was to divide the issues arising between ILFC and the Guernsey companies in this way:
 - (i) As a "first issue", the Liquidators specified the validity or otherwise of those of ILFC's claims against the other Guernsey companies which had been indicated (in outline only) in the proofs of debt and notices of objection as causes of action in contract, quasi-contract, and fraudulent or other misrepresentation.
 - (ii) As a "second issue", the Liquidators specified ILFC's claims (similarly indicated in outline only) in contract, quasi-contract and fraudulent or other misrepresentation against only FL4 and FL5.
 - (iii) As a "third issue" the Liquidators specified ILFC's claims (also indicated in outline) against all the Guernsey companies (i.e. including FL4 and FL5) based on a cause of action in conspiracy or a Pauline restitutionary claim.
21. The Liquidators then proposed to the Royal Court that the first and third issues should be the subject of an application by them for summary determination by reference to only ILFC's proofs of debt and notices of objection and the documents exhibited thereto, and for summary dismissal of the claims falling within the first and third issues.
22. But in respect of the second issue the Liquidators proposed that this should be the subject of an action in the Royal Court brought by ILFC which should therefore file a cause or statement of claim dealing only with its claims in contract, quasi-contract and fraudulent or other misrepresentation against only FL4 and FL5, and not dealing with ILFC's other claims against FL4 or FL5, or with ILFC's claims against the other Guernsey companies.
23. On 21st October 2004 the Royal Court acceded to the Liquidators' application, and ordered that ILFC should file a statement of claim in respect of only the second issue. On 10th December 2004 ILFC lodged such a statement of claim.
24. On 20th December 2004 the Royal Court ordered that the first and third issues be determined as points of law or applications under Rule 36 (1) (a) of the Royal Court Civil Rules 1989, with provision for skeletons from either side, leading to a directions hearing on 4th March 2005.
25. The Royal Court directed an early hearing for the first and third issues. In respect of the second issue the Liquidators were seeking to strike out of ILFC's statement of claim only paragraphs 32 to 38, in which ILFC sought to rely on a term to be implied in the purchase agreement assignment. In the alternative the Liquidators were seeking a summary decision as a preliminary issue, whether any such contractual term was to be implied.
26. On 29th April 2005 ILFC served a proposed amended statement of claim in which ILFC was seeking to rely also on an express indemnity provision (clause 3.5 of the purchase agreement assignment), for which ILFC was seeking leave to amend.
27. The three issues came before me sitting alone as Lieutenant Bailiff on 23rd October 2005 for determination. In the case of the first and third issues, there were before me only ILFC's proofs of debt and notices of objection, with a number of evidential exhibits. These documents had been prepared by a Swiss lawyer, as I have indicated, were not couched in the form which such documents would take if drafted by a Guernsey advocate,

and in their description of the causes of action relied on and the facts alleged to constitute the causes of action were rudimentary and lacking in specifics. As I said perhaps too many times in the course of the hearing, it is unfortunate that the Royal Court does not have before it a proposed pleading drafted by a Guernsey advocate covering the causes of action included in the first and third issues. That the Court finds itself in this position is, I am afraid, attributable to the Liquidators' insistence that these issues should be dealt with without the benefit of a pleading, and the Liquidators' resistance to ILFC's submission that all its causes of action should be pleaded before any question of striking out or determining preliminary issues was considered. It is true that it was left open to ILFC to submit a draft statement of claim if it wished, but not surprisingly in view of the liquidators' and the court's approach ILFC did not do this.

28. At the hearing Advocate Jeremy Wessels appeared for the Liquidators, and Advocate Paul Richardson appeared for ILFC. I am much indebted to both advocates for their written and oral submissions.

The second issue

29. I asked Counsel to deal with this issue first, and I therefore deal with it first in this judgment.
30. It was agreed by Counsel that before coming to the question of strike out or preliminary issue as to the reliance on an implied term, I had to decide whether or not to give ILFC leave to amend to plead its case based on the contractual indemnity. Mr. Wessels resisted the amendment on these two main grounds:
- (i) that a cause of action based on the indemnity provision had not been foreshadowed in the proofs of debt or the notices of objections, and was therefore out of time;
 - (ii) that though the contractual indemnity provision (clause 3.5 of the purchase agreement assignment) could on its entirely literal construction arguably support ILFC's case, the literal construction was not arguable, and any arguable construction would not support ILFC's case.
31. With all respect to Mr. Wessels' skills of persuasion, both these grounds are in my judgment without merit. As to (1), the order of the Royal Court of 21st October 2004 was that ILFC was to commence an ordinary action. To an ordinary action ordinary principles of procedure apply. The action has not yet reached even the stage of the Liquidators having to file a defence. The action is therefore only at its beginnings. To suggest that such an amendment as this should be refused at this very early stage is inconsistent with long-established authority that amendments should be allowed whenever allowing the amendments will cause the other party no detriment which cannot be remedied where necessary by a suitable costs order. As to (2), in my judgment it is reasonably arguable that on its true construction clause 3.5 supports ILFC's case. It will be open to the Liquidators to persuade the Royal Court at trial that clause 3.5 is to be construed in such a way as not to support ILFC's case. The notion that leave to make the amendment should be refused on the ground that the construction of clause 3.5 relied on by ILFC is incapable of argument is, I consider, misconceived.
32. Accordingly I give leave to make this amendment.
33. In his written submissions Mr. Wessels accepted that, if the amendment were to be permitted, the Liquidators would not pursue the second issue. In paragraph 7 of his reply skeleton he had stated that:

“If the Plaintiff’s application for leave to amend succeeds, then there is no point in the Defendants pursuing the strike-out application, save as to costs, because [FLA] will face the full quantum of the Plaintiff’s claims in any event.”

In his oral submissions Mr. Wessels initially resiled from that acceptance, and sought to argue the second issue on the implied term. But once I had indicated that the amendment would be allowed, Mr. Wessels, after further consideration, decided not to pursue the second issue. Accordingly I do not have to decide at this stage whether the implication of the suggested term is arguable. In any event the implication of a term under Guernsey law may have been overtaken by the reliance on French law to which I turn.

34. As both Counsel recognised, the purchase agreement assignment is governed by French law. The Liquidators placed before the Court two affidavits from an expert in French law, and these were answered by affidavits from another expert in French law submitted by ILFC. It is apparent from ILFC’s expert’s affidavits that ILFC wishes to run an additional case based on French law concepts of good faith and duties of contracting parties to provide information. This case will also have to be pleaded by ILFC by further amendment of its existing statement of claim.

The first and third issues

35. For the purpose of deciding these issues, Mr. Wessels helpfully provided a flow chart (from which Mr. Richardson did not dissent) setting out the “issues” to be determined. It is more convenient, so as to avoid any confusion, to describe these as “stages”.

Stage 1

36. Mr. Wessels submitted that the causes of action included in the third issue (conspiracy and the Pauline claim) were submitted out of time and should not be permitted to be raised. They were, he submitted, new both in form and substance, not submitted within the time frame laid down by the Royal Court on 17th March 2004, not the subject of any application by ILFC for an extension of time, and raised for the first time in the notices of objection.
37. Mr. Richardson submitted that these claims were simply alternatives to the claims submitted in the proofs of debt, based on the same set of facts, and that in any event the Royal Court has a discretion, in liquidations as in other court proceedings, to allow parties to argue different legal claims based on the facts already placed before the Court.
38. In my judgment the Royal Court plainly has such a discretionary power, and in this case it would be unjust and inappropriate to prevent ILFC from relying on the same facts to found different legal claims. I therefore do not disallow ILFC’s reliance on conspiracy and the Pauline claim on this ground.

Stage 2

39. This involves deciding what is the appropriate test for striking out in these proceedings. There was cited to me a wealth of cases on striking out, most from England and Wales. In the present case the application to strike out (or to prevent ILFC from pursuing the disputed claims) is based on ILFC having failed to set out any reasonably arguable cause of action. Such an application, relating however to a defence and to an application to amend a defence, was considered by the House of Lords in *Williams & Humbert Ltd v W & H Trade Marks (Jersey) Ltd* [1986] AC 368. Lord Templeman at pp. 435-436 said this

“...if an application to strike out involves a prolonged and serious argument the judge should, as a general rule, decline to proceed with the argument unless he not only harbours doubts about the soundness of the pleading but, in addition, is satisfied that

striking out will obviate the necessity for a trial or will substantially reduce the burden of the trial itself.”

Lord Mackay at p. 441 expressed a similar approach. Lords Scarman, Bridge and Brandon agreed with Lords Templeman and Mackay. Before this hearing, through HM Deputy Greffier Mr. Simon Ross, counsel were informed that this was the approach I would adopt, subject to any submissions to the contrary. There were no such submissions.

40. As will appear below I had sufficient doubts about the causes of action relied on by ILFC to lead me to Lord Templeman’s second limb, in relation to which I concluded that striking out, particularly if of all these causes of action, would obviate the necessity for a trial in relation to them. There will of course have to be a trial of the action already commenced (pursuant to the order of 21st October 2004) on 10th December 2004.

I do not propose to lengthen this judgment with a discussion of the many cases cited to me, because it seems to me clear that the simple test to be applied is – are the causes of action relied on by ILFC reasonably arguable.

Stage 3

41. Claims in contract and quasi-contract against the other Guernsey companies are included in the proofs of debt and the notices of objection. Mr. Richardson rightly abandoned the claim in contract, and also did not press any claims said to be based on “quasi-contract” (a term no longer used in English law or, perhaps, in Guernsey law) except as concerns the Pauline claims which are of the nature of restitutionary claims. Accordingly in so far as ILFC has sought to claim in contract, and in quasi-contract otherwise than by the Pauline claims, against the other Guernsey companies the Liquidators are entitled to have such claims struck out.

Stage 4

42. This concerns the claims based on fraudulent or other misrepresentation against the other Guernsey companies. The misrepresentations relied on are those pleaded in the statement of claim against FL4 and FL5 as having been made by Corti and others acting on behalf of FL4 and FL5. In the proofs of debt and notices of objection ILFC contends that such misrepresentations were also made on behalf of the other Guernsey companies. The question whether ILFC has made out an arguable case that such misrepresentations were made with actual or apparent authority of each of the other companies is the question I have to decide in relation to this cause of action.
43. The principles of English law relating to actual or apparent authority to enter into contracts are reasonably clear, and are summarised in Bowstead and Reynolds on Agency. It was not suggested on either side that Guernsey agency law is different from English law. There were cited to me the well-known passages in the judgment of Diplock LJ in *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd [1964] 2 QB 480 CA* at pp 502-503 and 505-506. I can summarise the relevant principles in this way:
- (i) actual authority may be express, or it may be implied, for example, from the nature of the position occupied by the putative agent and the nature of the actions undertaken by the putative agent, such as the making of a particular kind of contract;
 - (ii) apparent authority depends on it being shown that
 - (a) the putative principal represented by conduct or otherwise to the other party that the putative agent had authority to enter into the transaction on behalf of the principal;

- (b) such representation was made by a person or persons who themselves had actual authority from the putative principal either generally or in respect of matters such as those covered by the transaction;
- (c) the other party was induced by such representation to enter into the transaction, i.e. the other party relied on such representation.

44. Here, however the acts of the putative agents (Corti and others) were the making of representations to ILFC, representations which, ILFC say, bear prima facie the hallmarks of a deliberate fraud being exercised on ILFC as the victim of the fraud. Principals are liable for the frauds of their agents if the agents are acting within the scope of their authority, whether the fraud is for the benefit of the principals or of the agents: *Lloyd v Grace, Smith & Co* [1912] AC 716 HL). *Armagas Ltd v Mundogas Ltd* [1986] AC 717 HL (E) was a case in which a fraudulent representation was made by an employee. The action against his employer failed because there was no basis for the contention that the employee had actual or apparent authority from the employer to do what he had purported to do. The case was referred to by Mr. Wessels only for some helpful observations by Robert Goff LJ at p. 732 which I set out in full:

“In his judgment in Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd. [1964] 2 Q.B. 480, Diplock L.J. confined his analysis to ostensible authority of an agent to bind his principal to a contract. I, for my part, can see no reason why the same principles should not be applicable to other acts by an agent, for example, the making of representations by the agent, provided that it is clearly understood that, to give rise to ostensible authority, the representation by the principal must be to the effect that the agent is authorised to make the representation on his, the principal’s behalf, so that the third party is entitled to rely upon it as such. On this basis, a representation by an agent within his ostensible authority may give rise to an estoppel against his principal. However, where, as here, it is suggested that it was within the agent’s ostensible authority to communicate to the third party the principal’s approval of the agent entering into a transaction which would otherwise not be within the agent’s authority, the only representation of the principal which can give rise to such ostensible authority is a representation to the effect that the third party can rely upon the agent’s communication of the principal’s approval. It is possible to construct a theoretical case in which such a representation is expressly made by a principal, where he states to the third party that he should look to the agent for the necessary approval, and that he can rely upon the agent’s statement whether such approval has been given. But I can see no basis for concluding, on the facts of the present case, that the defendants ever made any such representation regarding Mr. Magelssen. No doubt, by appointing Mr. Magelssen to his position and allowing him to act as such, they did represent that he had authority to bind his principals to those contracts which an agent in his position ordinarily has authority to make; and no doubt that ostensible authority would embrace the making of such representations concerning the subject matter of any such contract as might reasonably be understood to fall within such usual authority. But that does not, in my judgment, embrace authority by Mr. Magelssen to communicate approval by his superiors to his making contracts which, to the knowledge of the third party, he had no authority to enter into without such approval, with the effect that the defendants would be bound by such communication.”

45. In Dr. Vigano’s proofs of debt and notices of objection it appeared to be suggested that because Corti, Knecht and others led ILFC to believe that they were acting for all or any of the Swiss Air group companies, and in particular for all or any of the Guernsey companies, and because Corti was Chief Executive Officer of the group and Knecht was a director of all the Guernsey companies, and because it had not been suggested to ILFC that these persons were acting on behalf of any particular company in the group, ILFC was entitled in law to rely on those persons as having authority from all the Guernsey companies.

46. Mr. Wessels submitted that such an approach is misconceived in Guernsey law. He submitted that Corti and the other persons would have to have either actual or apparent authority to make the representations from each company which ILFC seeks to make liable for such representations. This would also involve these persons holding themselves out to be acting as agents for each company. But the other Guernsey companies had no involvement in the transactions, and it is not suggested in the witness statements exhibited to the proofs of debt or notices of objection that ILFC relied on such persons as having authority to make the representations on behalf of any of the other Guernsey companies.
47. It seemed to be contended by ILFC that Corti might have had implied actual authority or apparent authority from each of the other Guernsey companies on the footing that he acted as chief executive officer of the whole group, and as one letter indicated, he was in a position to instruct one or more of the Guernsey companies as to the actions to be taken. A similar contention seemed to be made in respect of Knecht by virtue of him being a director of each of the Guernsey companies.
48. In my judgment, the attempt by ILFC to impose liability on each of the other Guernsey companies in reliance on actual or ostensible authority is, on the documents now before me, doomed to failure, with the only possible exception being FL Holdings as I will explain below. The other Guernsey companies were not involved in the relevant transactions. There is no evidence of such companies having given actual authority to Corti or Knecht in respect of the making of the representations, or having held them out as having apparent authority; and there is no evidence of ILFC having relied on these persons having authority from the other Guernsey companies. Accordingly, subject to the possible exception of FL Holdings, I am satisfied that ILFC should not be permitted to pursue the claims against the other Guernsey companies for fraudulent or other misrepresentation, and this part of the proofs of debt and notices of objections should be struck out in respect of those companies. I have considered at length whether ILFC should be given the opportunity to plead this head of claim, but have concluded that the cause of action cannot in any event succeed. I add that though issues of ratification and piercing the corporate veil were lightly touched on, no real weight was placed by Mr. Richardson on either, and in my judgment neither would avail ILFC.
49. I turn to consider the position of FL Holdings, which is the parent company of the Guernsey companies including FL4 and FL5. I begin with the essential features of the fraud alleged to have been perpetrated on ILFC. It is said that the Swiss Air group was insolvent at the time when negotiations with ILFC began in March 2001 and at the times when the transactions were entered into on 22 May and 28 June 2001. Corti and others acting for the Swiss Air group knew that until July 2001 there was no agreement with the group's bankers for further liquidity to be provided, and in July 2001 that the agreement reached with the bankers was subject to such restrictive conditions that the 1 billion Swiss francs liquidity there provided for could not be obtained. Corti and the others were desperate to obtain funds from ILFC which could be used to shore up group companies by moving the funds made available to FL4 and FL5 through the transactions with ILFC to the companies where need was greatest.
50. For the purposes of the Pauline claim (with which I deal below) it is relevant to know where the funds obtained by FL4 and FL5 went from those companies. Mr. Richardson in answer to my questions indicated that ILFC had no knowledge of this, which was known only to the Liquidators who had not made the information available to ILFC. I asked Mr. Wessels whether the Liquidators could provide this information by way of affidavit so as to assist the court and both parties. An affidavit was sworn on 25th October 2005 by one of the Liquidators. This disclosed the following:
- (i) As regards the Airbus repayments obtained as a result of ILFC taking over the purchase obligations of FL4 by the purchase agreement assignment, US\$30 million became available. This sum was not paid to

FL4 but to some other company in the group not yet identified, and probably was used to reduce FL4's inter-company debt to that other company. Further analysis of the financial records would be needed to establish the identity of the other company.

- (ii) As regards the payment of US\$ 42,725,000 by ILFC to FL5, this money went into FL5's account on 28th June 2001. On 29th June 2001 FL5 received another payment of US\$37.8 million from another, as yet unidentified, source. On 29th June 2001 FL5 paid US\$40 million to FL Holdings, and this enabled FL Holdings to repay US\$8 million to SAir Group, to pay all interest due, and to pay a dividend of US\$30 million to FLAG. Further sums were paid by FL Holdings on 2nd July 2001 including repayment of US\$10 million to SAir Group.
- (iii) On 28th June 2001 FLAG received US\$99,440,300, presumably including the moneys paid by ILFC for the aircraft purchased from FLAG.

What this evidence indicates, if the nature of the fraud as contended for by ILFC is correctly stated, is that FL Holdings was intended as part of the fraud to receive US\$40 million of the moneys paid by ILFC to FL5 so that this sum could be used to meet the urgent financial needs of the group.

- 51. Against this factual background it seems to me to be possible that a claim can be made that the fraudulent misrepresentations were made by Corti and others on behalf of FL Holdings as well as FL4, FL5 and Swiss Air Transport. Whether such a claim can be made, and if made, can withstand a further strike out application, are matters for the future. For the present I consider that it would be wrong to prevent ILFC from seeking to make a claim of this kind against FL Holdings in the existing action, and I order that ILFC has leave to add such a claim, if so wished, to the existing pleading.
- 52. I add a further factor for completeness. Mr. Richardson, in answer to my question, indicated that ILFC did not know whether any of the Guernsey companies had any funds available for distribution to creditors. I asked Mr. Wessels to provide this information (which in my view should have been provided to the Court and to ILFC by the Liquidators). Mr. Wessels told me that over US\$90 million in total is held by all the Guernsey companies, and he gave me the following specific figures:

FL4	US\$ 35 million
FL1	US\$ 28 million
FL Holdings	US\$ 26 million
FL5	US\$ 4.7 million

I mention this here because it shows that in terms of potential recovery it would not be a waste of time and effort if ILFC wished to seek to make out a claim in fraud against FL Holdings such as I have indicated.

- 53. That representations were made by Corti to ILFC seems not to be much in dispute, though what the representations were and on behalf of which company or companies is in dispute. I asked Mr. Wessels on behalf of which company or companies he contended the representations were made. He indicated that they were made on behalf of the companies which entered into the transactions with ILFC (FL4, FL5 and Swiss Air Transport), or alternatively on behalf of only SAir Group, the specific company at the top of the group companies of which Corti was chairman and chief executive officer.

Stage 5

54. The claim in conspiracy first appeared in the notices of objection. It seems to me to be closely linked to the claim based on fraudulent misrepresentation, and perhaps does not add much to that claim. The relevant principles are accepted for the purposes of these applications to be those set out in the judgment of Lieutenant Bailiff Catherine Newman QC in *Vardinoyannis v Ansol Ltd & others* (20th November 2001, unreported) at pp. 40-42, paras 80-87. I will not repeat those principles in this judgment.
55. In essence the submissions on this head of claim follow with little distinction the submissions on the claim in fraudulent misrepresentation. My conclusions on it are similar. This is a claim against all the Guernsey companies including FL4 and FL5. As regards all such companies, except FL4, FL5 and perhaps FL Holdings, I can see no basis on which the claim could be maintained. But in relation to FL4, FL5 and FL Holdings, in my judgment ILFC should be given the opportunity to plead a claim in conspiracy, if so wished, against any or all of these three companies by addition to the existing statement of claim.

Stage 6

56. The essential ingredients of a Pauline claim in Jersey law were stated by the Deputy Bailiff of Jersey, Mr. Michael Birts QC, in his remarkable judgment in *Re Esteem Settlement* 2002 JLR 53 in lengthy passages which I do not cite in this judgment. The summary by Mr. Wessels was not challenged by Mr. Richardson, and can suffice for the purpose of these applications as summarising the relevant Guernsey law:-

“132. *In Esteem the Royal Court of Jersey decided that the elements of the Pauline action were as follows:*

- (a) *The person bringing the Pauline action must have been a creditor at the time of the transaction under attack.*
- (b) *For the purposes of the Pauline action, a person is properly described as a “creditor” if the facts giving rise to his claim pre-date the transaction under attack even if such person does not establish that he is a creditor until some date in the future.*
- (c) *The creditor seeking to set aside a transaction must show that the debtor was insolvent at the time of the transaction under attack, or rendered insolvent by that transaction.*
- (d) *The debtor’s insolvency is measured on the balance sheet test.*
- (e) *In order to succeed in an action to set aside a transaction, the creditor must show that the debtor carried out the transaction with the intention of defrauding his creditors.*
- (f) *If the debtor carried out the transaction with more than one purpose, it suffices that the dishonest intention to defraud was a substantial purpose of the transaction.*
- (g) *The Pauline action is by nature a revocatory action which, if successful, leads to the setting aside of the transaction being attacked. The Pauline action does not give rise to any entitlement to compensation either from the debtor or the person with whom the debtor dealt with as part of the transaction under attack.*
- (h) *There are a number of possible defences to a Pauline action, including a defence based upon change of position.*

133. *The Pauline action is a form of relief that a creditor can bring in respect of the affairs of his debtor. The Pauline action is not a means by which the Respondent can establish itself as a creditor of any of the Guernsey Companies since the Respondent's locus as a creditor is an essential pre-condition to the Respondent's ability to bring the Pauline action."*

57. In his oral submission Mr. Wessels rightly emphasised that success in a Pauline claim in respect of a person who has received money from a party to a transaction for the purposes of defrauding that party's creditors does not result in that person becoming a debtor to the party's creditors: rather, the person becomes liable to pay the money back to the party from whom the person received it for the benefit of the party's creditors.
58. This Pauline claim first appeared in the notices of objection. The particular difficulty which ILFC faced in putting forward the claim was that ILFC had no knowledge of what had happened to the money once received by FL4 or FL5. It was for this reason that I asked the Liquidators through Mr. Wessels to supply the further information referred to in paragraph 50 above. It now appears that of the money paid by ILFC to FL5 US\$40 million may have gone to FL Holdings, and onward to the companies mentioned in paragraph 50 (2). It is unclear as yet what happened to the money which FL4 received (US\$30 million) as a result of its transaction with ILFC: it is to be hoped that the Liquidators will carry out the necessary research, but if not this may have to be the subject of a further application to the Court.
59. Mr. Wessels submitted that the Pauline claim against all the Guernsey companies is so clearly misconceived that ILFC should not be permitted to pursue it. But I am not persuaded that I should take this draconian step at this stage:
- (i) If ILFC's case is correct, ILFC was a creditor of both FL4 and FL5 at the time of the purchase and leaseback transactions which had been obtained by fraud.
 - (ii) It appears to be ILFC's case that both companies were then insolvent though it seems that this case could not be fully established without discovery of the relevant documents of the companies.
 - (iii) The inference might be drawn from the circumstances of the fraud that the onward transmission of e.g. US\$40 million to FL Holdings had as one purpose to ensure that this money was not available to the creditors of FL5.
 - (iv) If the transfer of the money from FL5 (and perhaps FL4 also) were set aside, moneys would be returned to those companies and become available to their creditors.
60. In my judgment ILFC should be given the opportunity to plead a Pauline claim as part of its pleading against the relevant company or companies. As regards most of the Guernsey companies this will not be possible, and they will drop out of the picture. I emphasise that I am not at this stage concluding either that a reasonably arguable Pauline claim can be pleaded against any particular company, or that it cannot. I am simply giving ILFC the opportunity to try so to plead if ILFC wishes to do this.

Damages

61. Mr. Wessels made a number of submissions as to the damages apparently claimed by ILFC under different leads of claim. He was particularly concerned with the suggestion that ILFC could claim over US\$117 million from each of the Guernsey companies, and with the further suggestion that ILFC could claim in tort the loss of bargain damages

available in contract. I do not propose to deal in detail with his various points on damages, for two reasons:

- (i) my orders preventing ILFC from pursuing claims against all or most of the other Guernsey companies will of themselves remedy most of the matters of which he complained.
- (ii) Mr. Richardson will now have to draft a new statement of claim. In doing so, he will have to plead the claims for damages in the ways which are appropriate in Guernsey law to each cause of action relied on. If he does not do so, he is likely to be met with a further application by the Liquidators directed specifically to the damages claimed.

62. I am conscious that I have not dealt with all the points raised by Counsel, or with the many other authorities cited by them. I believe, however, that I have dealt with the relevant main points. It seemed to me more important to deliver an early judgment on these interlocutory matters, then to reserve and take a longer time.

Summary

63. I will try to summarise my conclusions in this way:

- (i) ILFC can plead the contractual indemnity claim and claims based on French law in the existing action.
- (ii) ILFC is to be barred from pursuing claims in contract of quasi-contract against the other Guernsey companies.
- (iii) In relation to the fraudulent misrepresentation claims against the other Guernsey companies, these can be pursued (in the existing action) only against FL Holdings, if ILFC wishes to do this. As regards the rest of the other Guernsey companies ILFC is to be barred from pursuing such claims against them.
- (iv) In relation to the conspiracy claims against all the Guernsey companies, these can be pursued (in the existing action) only against FL4, FL5 and FL Holdings, if ILFC wishes to do this. As regards the rest of the Guernsey companies ILFC is to be barred from pursuing such claims against them.
- (v) In relation to the Pauline claims, ILFC may, if it so wishes, pursue these in respect of companies which received money from FL4 or FL5 (including FL Holdings) flowing from the alleged fraudulent transactions.
- (vi) The cause or statement of claim in the existing action will have to be recast in the light of (i) to (v) above. In my view this should be done by Mr. Richardson settling a fresh pleading (without the addition of underlining or other means of identifying changes).
- (vii) When Mr. Richardson comes to settle the fresh statement of claim, he will need to exercise care to include in it only claims which in his professional judgment are reasonably arguable, which I am sure goes without saying.
- (viii) I do not exclude the possibility that once Mr. Wessels and his clients have seen the fresh statement of claim, an application to strike out may

follow. But Mr. Wessels will equally need to be careful to attack by any such application only claims which are in his judgment not reasonably arguable.

- (ix) I emphasise the points in (vii) and (viii) above because too much time and effort has already spent on interlocutories. The sooner that the matters truly in issue reach trial the better.

64. I will now hear submissions as to a timetable to trial which, once fixed, will be adhered to if humanly possible.

Documents for the Court

65. Though in this matter the documents for the Court were well assembled before the hearing, it may assist if I indicate for the future the way in which in my view it is best to assemble them:

- (i) A Court file, containing in chronological order all the pleadings, applications, acts of court and judgments, together with a chronology and dramatis personae.
- (ii) A file of affidavits in chronological order.
- (iii) A file of authorities: first, Guernsey cases and statutes; secondly Jersey cases and statutes; and thirdly English (or other) cases and statutes, with each section in chronological order.