

Legislation, Cases and References relied upon in this Judgment:

Ketteman and Others v Hansel Properties Limited [1988] 1 All ER 38
Clarapede & Co v Commercial Union Association (1883) 32 WR 262
Cobbold v Greenwich LBC, (1999, unreported)
Ogier v Grand Havre Holdings Limited [2000] 29 GLJ 80
Worldwide Corporation Limited v GPT Limited [1998] EWCA Civ 1894
Hoechst United Kingdom Limited and Others v Inland Revenue Commissioners [2003] EWHC 1002 (Ch)
Paragon Finance PLC v D B Thakerar & Co [1999] 1 All ER 401
Welsh Development Agency v Redpath Dorman Long Limited [1994] 1 WLR 1409
Alhamrani v Alhamrani [2007] JLR 44
Goode v Martin [2001] 3 All ER 562
Cherub Investments Limited v Channel Islands Aeroclub (Guernsey) Limited Guernsey Court of Appeal, January 13th 1982
Habibsons Bank Limited v Standard Chartered Bank (Hong Kong) Limited [2010] EWCA Civ 1335
T G Cann Limited v Crown Packaging UK PLC [2007] EWHC 1271 (QB)
Nottinghamshire and the City of Nottingham Fire Authority v Gladman Commercial Properties and Another [2001] EWHC 1918 (Ch)
United Dominions Corporation Limited v Brian Pty Limited [1985] HCA 49
Goldcorp Exchange Limited [1995] 1 A. C. 74, at page 98E
Cunningham v Cunningham and others [2009] JLR 227
The Trusts (Guernsey) Law
The Law Reform (Trust) (Guernsey) Law, 1979
Bagus Investments Ltd v Kastening [2010] JLR 355
Yaddehige v Credit Suisse Trust Limited [2007 – 2008] GLR 282
Boyd v Pickersgill and Le Cornu 1999 JLR 284
Public Services Committee v Maynard 1996 JLR 343
Her Majesty's Commissioner for Revenue and Customs v Begum and others [2010] EWHC – 1799 – (Ch)
Kuwait Oil Tanker Co SAK v Al Bader [2000] 2 All ER (Comm) 271
Silver Falcon Enterprises Limited v International Hellenic Operations Limited (Guernsey Court of Appeal 20th October 1994)

Overview

1. This is an application by the Plaintiffs, for whom Advocate Lund appeared, for leave to amend their *Cause*. The Second Plaintiff is the son of the First Plaintiff. The First to Fifth Defendants are all part of the same group of companies offering trust and fiduciary services in Guernsey and were represented by Advocate Greenfield. The Sixth Defendant is described by the Plaintiffs as a project manager who for over twenty years had carried out development projects financed by the First Plaintiff. The Seventh and Eighth Defendants are described as associates of the Sixth Defendant. The Sixth to Eighth Defendants were all represented by Advocate Peter Ferbrache.
2. The application for leave to amend was fiercely contested by all the Defendants. The parties' submissions are contained in a number of skeleton arguments. The hearing of the application was originally listed for two days but was not completed in that time. Unfortunately, more than six months elapsed before all the parties and the Court were able to resume and complete the oral submissions, at the conclusion of which I reserved my decision.
3. The project to which the case relates involved the acquisition of a number of former National Coal Board properties, comprising 19 sites, with the intention of investigating the development potential of each property and selling it at a profit. At the time of acquisition, it was recognised that some sites had significant potential while others had little or no potential. The project was conducted through a structure of companies and trusts of which the First to

Fifth Defendants were the trustees and to which they provided directors and administration services.

4. The First Defendant was the trustee of all the four trusts involved. The Plaintiffs were included in the class of beneficiaries of two of the trusts, the Sixth Defendant was a beneficiary of a third and the Eighth Defendant was a beneficiary of the fourth trust. The company through which the project was initially conducted was Whitchurch Holdings Limited (“WHL”). The First to Fifth Defendants held the shares of WHL in trust and acted as the directors and the administrators of WHL.
5. The allegations are detailed and varied but the essential complaint is that some of the properties were sold too cheaply and, in some instances, that disposals were made to or for the benefit of one or other of the Sixth and Seventh Defendants. The original *cause* described the project as a joint venture, to which the only party was the First Defendant in its capacity as trustee of each of the trusts. It alleged breaches of trust, breaches of duty and gross negligence in the administration and management of the Plaintiffs’ two trusts and their holdings of shares in underlying companies. It also alleged a conspiracy between all the Defendants to cause loss to the beneficiaries of the Plaintiffs’ trusts.
6. The relief claimed includes damages to make good the losses to the trust funds.
7. The principal amendments in the draft amended *cause* include: the addition of the First Plaintiff and the Sixth to Eighth Defendants as parties to the joint venture on an and/or basis; detailed express and implied terms of the joint venture, including allegations of fiduciary duties owed by and to the parties to the venture; particulars of the trustees’ breaches of duty; allegations of dishonest assistance and knowing receipt; permission to bring a derivative action; and further particulars of the alleged conspiracy.
8. Advocate Lund submitted that the proposed amendments fall into three broad categories:
 - (a) further particulars of existing allegations;
 - (b) further causes of action; and
 - (c) clarification of matters pleaded or correction of errors in the original pleadings.

She said that the principal reason for the amendments was that they arose out of matters pleaded by the Defendants in their defences.

9. The Defendants strongly denied that their defences could be said to give rise to the amendments and objected to the amendments on a number of grounds, including that:
 - (a) they included new causes of action brought outside the expiry of the relevant limitation period;
 - (b) the Plaintiffs could not seek to rely upon any *empêchement d’agir*;
 - (c) they contain allegations of new facts sought to be added at too late a stage in the proceedings; and
 - (d) they are inadequately pleaded and are bound to fail or have no reasonable prospect of success.
10. In their defences to the Plaintiff’s original *cause* (filed by the First to the Fifth Defendants on 11th February 2011 and by the Sixth to the Eighth Defendants on 18th March 2011) all the Defendants pleaded that the causes of action alleged against them were prescribed by the expiry of the relevant limitation periods. It should not have come as a surprise to the Plaintiffs that the Defendants oppose the proposed amendments on the ground the causes of action are prescribed. That should have been anticipated by the Plaintiffs in preparing their amendments.

11. Much of the argument before me focussed on the proposed amendments to the joint venture allegations and on the question of whether the Plaintiffs were seeking to introduce new causes of action after the expiry of relevant limitation periods. In this judgment, I will deal with those issues before going on to consider the other grounds of objection.

The Joint Venture

12. In their original *cause*, the Plaintiffs pleaded what they described as a joint venture, (starting at paragraph 19 of the original *cause*). To have described it as a “joint venture” was misleading because the only alleged participant in the joint venture was the First Defendant. As its name suggests, a joint venture is an undertaking in which more than one person participates. In the original *cause*, it was alleged that the First Defendant had agreed to fund the project using funds from its trusts and to divide the profits between three of its trusts. The allegation amounted to nothing more than a decision taken by the First Defendant in respect of each of the trusts concerned. In my view, it was not a **joint** venture.
13. The purpose and scope of the joint venture was originally pleaded as being:

“to acquire a number of ex National Coal Board sites, to develop the sites, enhance the value through planning consent and then to sell on the sites for the best possible sale value and or return to the participants of the joint venture, namely [the three trusts]”.

The Second to Fifth Defendants were not named as joint venturers but were alleged to have been involved in the operation of the project in their capacities as directors and shareholders of WHL. The Sixth Defendant was alleged to have been appointed to act as project manager *“to maximise the development potential and to achieve the best possible price for each of the sites.”*

14. In the proposed amended *cause* the allegations are significantly different. First of all, there are new participants in the joint venture named in paragraph 19. The First Plaintiff, who had not pleaded that he was a participant, now alleges that he is and he seeks to plead that others may also have participated although he does not allege with any certainty who did so. The proposed pleading reads as follows:

“In or about August 1997 Mr Sidney Jefcoate and/or the First Defendant as Trustee for [each of the three trusts] on behalf of each Trust, and/or the Sixth and/or the Eighth Defendants agreed to combine and participate in a joint venture.”

15. The pleading of the parties to the joint venture on an and/or basis is unsatisfactory when in a response to *Exceptions de Forme* raised by the Fifth to Eighth Defendants, the Plaintiffs stated that the Sixth and Eighth Defendants were parties to the joint venture. If that is their case, I agree with the Defendants that it should have been more clearly pleaded. Advocate Ferbrache had a further objection on behalf of the Eighth Defendant because he was alleged to have been a party even though the allegation is that the joint venture was concluded orally at a meeting at which the Eighth Defendant was not present.
16. In paragraph 20, the description of the purpose and scope of the joint venture has been expanded and extended from the allegation in the original *cause* quoted above. The proposed amendment is:

“to acquire a number of ex National Coal Board sites, to investigate (a) whether the value of such sites could be enhanced by obtaining planning consent and if so obtain such consent; (b) whether there was any other valuable feature of the sites (such as the possibility of extracting minerals); and (c) whether there was (sic) any other steps that could be taken (short of developing the property by erecting buildings thereon) that would enhance the value of the site and to take such steps.

Thereafter the objective was to sell on the sites for the best possible sale price given the enhanced value of the properties and pay the proceeds into the trust structure for the benefit of [the three trusts]. The joint venture was initiated by the sixth defendant, who approached Sidney Jefcoate with the proposal. The approach followed a course of dealing between Sidney Jefcoate and the sixth defendant of 20 years in which Sidney Jefcoate had provided finance for acquiring properties and the sixth defendant had provided expertise in managing and selling the properties. They in turn approached the first defendant to provide fiduciary services in relation to the carrying out of the joint venture”.

17. The previous allegation that the First Defendant wholly provided the funding for the project has been deleted. In its place, in a revised paragraph 21, the Plaintiffs plead some express terms of the joint venture in six sub paragraphs and in a new paragraph 21A, they seek to imply a number of terms “for reasons of obviousness and/or business efficacy and/or necessity” in four sub paragraphs. In a new paragraph 21 B, they also pleaded that the parties to the joint venture owed each other certain specified fiduciary duties. None of the alleged terms were in the original *cause* and the alleged fiduciary duties are also new.
18. The details of the transactions entered into during the operation of the joint venture are not sought to be amended. The key dates and a summary of the allegations are:

In 1997 nineteen sites were purchased by WHL for £571,025.

- (a) 16th July 1999 – plot 12 Coadcae Tip was sold by WHL for £18,000.
- (b) 11th October 1999 – plot 7 Thomastown was sold by WHL for £1 with further consideration up to a maximum of £375,000 upon completion of five properties upon the site. It was part of a much larger residential development; on 26th February 1999 planning permission had been given for 46 units on the plot. Subsequently 37 houses were constructed and sold for a total of £3,186,600. Alternatively it is alleged that the market value of the site when sold by WHL was £1,150,000.
- (c) 7th March 2000 – WHL sold plot 5, the office at Aberaman to a company owned by the Sixth Defendant for £340,000. It was subsequently sold for £200,000 to a company owned by the Sixth Defendant and administered by the First Defendant or connected or associated with it. In November 2005 planning permission was granted for residential development for 50 dwellings on 3 acres of the site. It is alleged that the market value when sold by WHL was £1,000,000 and the current value for approximately 70 houses, 40 apartments and 3 office buildings is £3,500,000.
- (d) 11th June 2001 – WHL transferred plot 6 Woodlands Road for £50,000. It passed to a company administered by the First Defendant or a company connected or associated with the First Defendant. The market value when transferred by WHL was £200,000.
- (e) 4th December 2001 – WHL transferred plot 10 for £3,500. No further allegations are made in respect of this property.
- (f) 14th August 2003 – WHL transferred part of plot 2, the Penallta site to a company beneficially owned by the Sixth Defendant for £1. The site comprised 9 acres and included several pithead buildings. At that date it had planning consent for multiple uses including housing, employment, shop, pub and other uses. In 2007 and 2008 26 residential units were constructed and 12 units sold for a total of £1,654,375. It is alleged the market value when transferred from WHL was £1,450,000. Further planning consent has been granted and it is alleged the lost profit to the joint venture is £3,850,000.
- (g) 24th January 2004 – WHL transferred Plot 14, Pentwyn Road, Ammanford for £21,325 when the market value was £40,000 however the site has development potential and should be worth £500,000 in the medium to long term.
- (h) 26th March 2004 – WHL transferred Plot 1, Taff Merthyr to a company connected to the Seventh Defendant for £218,000. It had the benefit of planning consent for residential development and the market value at that date was £1,800,000.

- (i) 21st June 2004 – WHL transferred part of Plot 2, the Penallta site for £13,120,000. The site had the benefit of planning consent and it is averred the conduct of the Defendants in relation to this part of the site should have been replicated with all other sites. Nevertheless it is alleged that the Sixth Defendant wrongfully appropriated plant and/or minerals to himself or entities connected to him worth £1,000,000.
- (j) 13th August 2004 part of plot 8, Pantygraig Wen was transferred for no consideration to a third party when the market value was £20,000 and there is a sandstone resource within the site which should have been investigated to establish whether there were significant mineral right values.
- (k) 2nd September 2004 – 8 other plots were transferred for £450,000 to a company of which the First Defendant was trustee for one of the trusts administered on behalf of the Plaintiffs, but not on behalf of the three trusts that owned WHL. The Sixth Defendant was not appointed as project manager to complete the joint venture upon the same terms as for the other properties and subsequently the properties were sold as follows:
 - (l) 5th September 2005 – Plot 4, Factory Road, Bargoed was sold for nil consideration when the market value was £15,000. It was acquired by a company beneficially owned by the Seventh Defendant acting as nominee for the Sixth Defendant.
 - (m) 6th December 2005 –plot 13, Crosshands was sold to a company beneficially owned by the Sixth Defendant for £500,000 when the value was £2,250,000.
 - (n) 16th March 2006 –part of Plot 8, Pantygraig Wen was transferred to a company beneficially owned by the Seventh Defendant for no consideration.
 - (o) 29th March 2007 –plots 15, 16 and 19 were sold to a company administered by the First Defendant or an associated entity and controlled by the Seventh Defendant and associated with the Sixth Defendant for £1,000,000 when the market value in relation to all of the sites at the time was £3,300,000. Further the site has or had a coal deposit with a value of approximately £10,000,000.
 - (p) 6th June 2007 – plot 18, Abernant Colliery was sold for £150,000. No further allegations are made in respect of this property.

Prescription

- 19. In this judgment I am not concerned as to whether any of the causes of action pleaded in the original *cause* are prescribed. The question is whether any of the proposed amendments seek to introduce new causes of action after the expiry of the relevant limitation period. All parties are agreed that for present purposes, the date at which time ceased to run is the date of the application for leave to amend.
- 20. The dates when key procedural steps were taken in these proceedings are:
 - (a) 8th November 2010 the proceedings were commenced when the Plaintiffs issued the original *cause* by summonses addressed to the eight Defendants.
 - (b) 18th March 2011, the Sixth, Seventh and Eighth Defendants filed defences.
 - (c) 11th February 2011 – the First to Fifth Defendants filed their defences.
 - (d) 27th May 2011 – the Plaintiffs filed *répliques* to the defences of the First to Fifth Defendants and to the defences of the Sixth to Eighth Defendants.
 - (e) 10th June 2011 – the Plaintiffs applied to file the amended *cause*.
 - (f) 26th October 2011 – the Plaintiffs filed requests for further information of the Defendants' defences.

In other words, any new cause of action that would normally be subject to a six year limitation period is prescribed if the cause of action accrued before June 2005 and any new cause of action subject to a three year limitation period is prescribed if it accrued prior to June 2008.

21. The Defendants all pleaded *exception de fond*. In their defences, the First to Fifth Defendants pleaded that “*the Plaintiffs are barred from bringing the cause or alternatively parts of the cause by virtue of the relevant periods of prescription under the statutory laws of Guernsey.*” The Sixth to Eighth Defendants pleaded that the Plaintiffs’ claims in respect of the disposal of properties that occurred prior to November 2004 were all prescribed and that complaints in respect of invoices issued prior to that date being false were also prescribed, the Plaintiffs having failed to commence proceedings within six years of the date when the causes of action were said to arise.
22. However, the First Plaintiff asserts that the date on which time began to run was delayed by operation of the maxim *empêchement d’agir* or, more precisely, an *empêchement de fait*. The assertion relies upon a conversation between the First Plaintiff and Paul Schreiber of the First to Fifth Defendants alleged to have taken place in 2003. The details of the conversation were pleaded in paragraph 17 of the original *cause*:

“17. Further on or about the 23rd July 2003 [the First Plaintiff] consulted with Michael Eades of Carey Olsen regarding his concerns about the actions of the Sixth Defendant. Mr Eades advised that [the First Plaintiff] express his concerns to Mr Paul Schreiber immediately. Consequently [the First Plaintiff] immediately visited the offices of Mr Schreiber. Mr Schreiber representing the First Defendant and/or the Second Defendant and/or the Third Defendant and/or the Fourth Defendant and/or the Fifth Defendant orally agreed with [the First Plaintiff] that:

17.1 he would act impartially.

17.2 he would obtain the written approval of [the First Plaintiff] the Sixth Defendant and the Eighth Defendant to any proposals, transfers or investment decisions.

17.3 he would provide [the First Plaintiff] with full accounting details of all transactions.”

23. The details of the conversation are denied by all of the Defendants. In the defences of the First to Fifth Defendants, they denied paragraph 17 of the *cause* and, in paragraph 70 of their *prétentions*, averred the following:

“Paragraphs 17 and 18 are denied and it is further denied that any additional duties were imposed on any or all of the Defendants as pleaded. [The First Plaintiff] had a very short conversation with Paul Schreiber in July 2005 not July 2003 as alleged when [the First Plaintiff] asked whether further significant properties would be sold. At this point in time there were few properties left and consequently Paul Schreiber advised [the First Plaintiff] that Crosshands was available for sale, that some properties would be transferred to [the Seventh Defendant] and that only Wernos Washery and Abernant remained. Paul Schreiber offered [the First Plaintiff] the opportunity to look at the accounting records upon request only.”

24. For their part, the Sixth to Eighth Defendants asked for further particulars of the “concerns” allegedly expressed to Michael Eades and/or Paul Schreiber. The Plaintiffs responded in their *réplique* to the defences of the Sixth to Eighth Defendants. In the section headed “Response to the *exception de forme*” and in relation to paragraph 17, the Plaintiffs alleged:

“That the First Defendant was being pressured by the Sixth Defendant to use the joint venture to give favourable treatment to the Sixth Defendant’s interests and was failing to keep [the First Plaintiff] apprised of the progress of the joint venture. [The First Plaintiff] was concerned that Mr Schreiber was not acting impartially or reporting to him and accordingly asked him to make full and frank disclosure of all proposed decisions in the performance of the joint venture.”

25. In reply to the question “When did the First Plaintiff first have those concerns?”, they averred that:

“[The First Plaintiff’s] concerns had been developing over the period of up to two years before seeking advice from Mr Eades.”

In other words, the Plaintiffs’ pleaded case is that the First Plaintiff’s concerns had been developing since 2001 and he was sufficiently concerned that he sought legal advice from Advocate Eades in July 2003 and discussed the matter immediately thereafter with Paul Schreibke.

26. Whilst I am reviewing the *réplique*, I note that the Sixth to Eighth Defendants asked whether the First Plaintiff discussed those concerns with the Second Plaintiff. The reply was “*Not at the time*”. They added that the latter’s only involvement was to introduce a purchaser to plot 5 but in or about late 2008/early 2009 the First Plaintiff kept his son abreast of matters as he came to know them.

The Court’s approach to amendments

27. I begin my review of the legal issues on which I was addressed by setting out the general, well-established principles which govern the exercise of the Court’s discretion to permit amendments to pleadings. In Ketteman and Others v Hansel Properties Limited [1988] 1 All ER 38, Lord Keith of Kinkel said:

“the rule is that amendments should be allowed if necessary to enable the true issues in controversy between the parties to be resolved, and if allowance would not result in injustice to the other party not capable of being compensated by award of costs.”

28. Lord Keith quoted from Clarapede & Co v Commercial Union Association (1883) 32 WR 262 where Brett, M. R. famously said:

“the rule of conduct of the Court in such a case is that however negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs; but if the amendment will put them into such a position that they must be injured, it ought not to be made.”

29. More recently, in Cobbold v Greenwich LBC, (1999, unreported) Peter Gibson L J (with Sedley L J concurring) said:

“the overriding objective (of the CPR) is that the Court should deal with cases justly. That includes, so far as is practicable, ensuring that each case is dealt with not only expeditiously but also fairly. Amendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon provided that any prejudice to the other party caused by the amendment can be compensated for in costs, and the public interest in the administration of justice is not significantly harmed.”

30. I accept that those general principles are as applicable under Guernsey law as they are in England. In Ogier v Grand Havre Holdings Limited [2000] 29 GLJ 80, Sumption JA summarised the approach to amendments in Guernsey at page 42C:

“Whether a litigant (represented or unrepresented) should be allowed to amend his pleadings depends on what justice requires in the particular case. Over elaborate definition is probably undesirable. It is enough for present purposes to make three

points, which broadly reflect the existing practice of the Courts of this Island. The first is that in the ordinary course it will not be just to allow an amendment if it would defeat a plea of prescription that would otherwise be available to a Defendant. This is a principle on which the English Courts acted for many years at a stage when their rules were no more elaborate than those of Guernsey are now. Secondly, an amendment should not be allowed if the case introduced by it can be seen to have no realistic prospect of success. The test for this purpose is the same as the test for striking out an existing pleading under Rule 36 of the 1989 Rules. Thirdly, apart from considerations of prescription, the mere fact that the change effected by a proposed amendment would involve introducing a new cause of action or that it would substantially alter the character of the proceedings or the burden of conducting them is not a reason for refusing leave to amend, provided that the change can be made without inflicting injustice on the other parties of a kind incapable of being compensated by an order for costs.”

31. The Guernsey Court of Appeal’s decision in Ogier predated the introduction of the Royal Court Civil Rules, 2007 and must now be read in the light of the overriding objective in Rule 1. The over-riding objective has reinforced the requirement for courts to deal with cases justly so the general principles governing the Royal Court’s approach to amendments have not been altered by the new Rules. Lord Sumption’s (as he now is) judgment remains valid and binding.
32. Advocates Greenfield and Ferbrache both submitted that I should take account of the fact that the amendments were being made at a late stage in the proceedings. Advocate Peter Ferbrache relied upon Worldwide Corporation Limited v GPT Limited [1998] EWCA Civ 1894 as authority for the proposition that where other litigants would be inconvenienced by an amendment to a pleading:

“the onus will be a heavy one on the amending party to show the strength of the new case and why justice both to him, and his opponent and other litigants, requires him to be able to pursue it.”

33. In Worldwide, the application to amend was made late, during the course of a lengthy trial in the Commercial Court. In the present matter, a trial is still some way off and although there have been drawn-out procedural exchanges, I do not believe that I need take any account of the stage at which the Plaintiffs made their application to amend. I therefore do not need to take account of any of the number of authorities to which I was referred that considered whether or not to allow late amendments.

New causes of action – the legal principles

34. Advocate Lund acknowledged that the Plaintiffs were seeking to add new causes of action but said that they should be permitted to do so because the proposed new causes of action all relate to facts and circumstances already pleaded and merely seek to clarify the issues on which the Jurats will, in due course, have to decide the outcome of the case. (I am assuming that the trial will be held before a Court in which the fact finders will be the Jurats but I must state, for the avoidance of any doubt, that there has been no application and no decision as to whether this is a case where it would be preferable for a judge to sit alone).
35. She also submitted that no relevant limitation period expired between the date of the commencement of proceedings in November 2010 and the date of the present application in June 2011 and so the application should not be allowed to be defeated on the grounds of prescription; the case should be allowed to go to trial where the facts will be established by the Jurats.

36. Her alternative submission was that if there are new causes of action which might be considered to have been brought after the expiry of the limitation period, the Plaintiffs are entitled to claim that the start of the limitation period was delayed by an *empêchement d'agir* or more precisely, an *empêchement de fait*.
37. Several different issues are engaged by these submissions. Do the amendments seek to plead new causes of action? If so, are they *prima facie* prescribed? If so, has the running of time been delayed as a result of circumstances amounting to an *empêchement de fait*? In reviewing the relevant legal principles, I begin with the following passage from paragraph 24 of the judgment of Park J in Hoechst United Kingdom Limited and Others v Inland Revenue Commissioners [2003] EWHC 1002 (Ch):

“Where an amendment to a claimant’s pleading is proposed outside the limitation period the first question is whether the amendment would involve the addition or substitution of a new cause of action to or for the cause or causes of action already pleaded. If it would not, the court has a discretion to allow the amendment. If the amendment would add or substitute a new cause of action, another question has to be asked: would the new cause of action arise out of the same facts or substantially the same facts as those out of which a cause of action which has already been pleaded arises? If it would, the court has a discretion to allow the amendment. If it would not, the court may not allow the amendment.

It may be helpful to express the effect in the negative. An amendment for which permission may not be given is one of which the following three propositions are true:

- i. The amendment is sought to be made outside the limitation period.*
 - ii. The amendment involved the addition or substitution of a new cause of action.*
- and*
- iii. The new cause of action does not arise out of the same facts or substantially the same facts as a cause of action already pleaded.*

Two critical concepts which feature in the foregoing formulations of the legal position are those of a cause of action and of the limitation period. A cause of action in this context is not so much the label attaching to a claimant’s claim (for example “breach of statutory duty” or “money paid under a mistake of law”). Rather, it is the set of facts which entitles the claimant to relief:-

“Every fact which is material to be proved to entitle the plaintiff to succeed – every fact which the defendant would have a right to traverse”.

(Brett, J in Cooke v Gill (1873) 8 CP 107 at 116). See also Diplock, LJ in Letang v Cooper [1965] 1 OB 232 at 242-3:

“A cause of action is simply a factual situation, the existence of which entitles one person to obtain from the court a remedy against another person”.”

I was urged by counsel to have regard to the above and other recent English decisions but for reasons I explain later, care must be taken because Guernsey does not have the same legislative provisions as in England.

38. In England, the proper approach to an application for leave to amend after the expiry of the limitation period was confirmed by the Court of Appeal in Paragon Finance PLC v D B Thakerar & Co [1999] 1 All ER 401:

“leave to amend by adding a new cause of action should not be given unless the plaintiff can show that the defendant does not have a reasonably arguable case on limitation which will be prejudiced by the new claim or that the new cause of action arises out of the same or substantially the same facts as a cause of action in respect of which he has already claimed relief”.

In that case, the Court of Appeal applied its earlier decision in Welsh Development Agency v Redpath Dorman Long Limited [1994] 1 WLR 1409.

39. Leave will not be granted where the effect of an amendment is to deprive the defendant of an accrued limitation defence. The Court of Appeal explained that:

“By the combined effect of Section 35(3) – (5) of the [Limitation Act] 1980 and RSC Order 20 Rule 5(2) and (5), however, the Court may not allow any such amendment after the expiration of any relevant limitation period unless the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action.”

40. It is clear from the judgment that the Court reached its decision because of the provisions of the Limitation Act and of the RSC. Section 35 of the 1980 Act is entitled “New claims in pending actions: rules of court”. Sub-section (3) provides that except as provided in section 33 (in respect of claims for personal injury or death) or by rules of court, no court shall allow a new claim after the expiry of any limitation period. Sub-section (4) provides for rules of court to allow a new claim if the conditions specified in sub-section (5) are satisfied. Such conditions include *“if the new cause of action arises out of the same facts or substantially the same facts as are already in issue”*.

41. It was pursuant to those statutory powers that RSC Order 20 was enacted and has been replaced by CPR 17.4. None of the counsel who appeared before me drew my attention to the statutory basis for CPR 17.4 which is unfortunate because as far as I am aware, we have no equivalent provision under our law. Section 8 of The Law Reform (Tort) (Guernsey) Law, 1979 contains provisions equivalent to section 33 of the 1980 Act enabling the Court to override time limits in actions involving personal injury and fatal accidents but there are no similar provisions in respect of other actions.

42. Furthermore, we do not have an equivalent rule to CPR 17.4. The only relevant rule is RCCR 59 which simply provides that *“No party to an action may amend his pleadings except with the consent of the other parties or by leave of the Court.”* The principles that must guide a Guernsey Court depend on what justice must require in the particular case, as Lord Sumption said in the quotation from Ogier cited above. In relation to limitation, he said:

“in the ordinary course it will not be just to allow an amendment if it would defeat a plea of prescription that would otherwise be available to a Defendant. This is a principle on which the English Courts acted for many years at a stage when their rules were no more elaborate than those of Guernsey are now”.

43. Counsel referred me to decisions of the Jersey courts. In Alhamrani v Alhamrani [2007 JLR 44], Commissioner Page, sitting in the Jersey Royal Court refused leave to amend pleadings to introduce new claims which were objected to on two grounds; first, that they did not disclose a cause of action and second, that they were barred by limitation. During the course of his judgment, he questioned whether the proposed new causes of action could fairly be said to arise out of the same facts or substantially the same facts as the abandoned cause of action and he referred to a passage from the judgment of Colman J. in the English case of Goode v Martin [2001] 3 All ER 562 which he said had been reversed on appeal but on a different point, at page 566:

“Whether one factual basis is ‘substantially the same’ as another factual basis obviously involves a value judgment, but the relevant criteria must clearly have regard to the main purpose for which this qualification to the power to give permission to amend is introduced. The purpose is to avoid placing a defendant in the position where if the amendment is allowed he will be obliged after expiration of the limitation period to investigate facts and obtain evidence of matters which are completely outside the ambit of, and unrelated to those facts which he could reasonably be assumed to have investigated for the purpose of defending the unamended claim.”

44. It is instructive to note that the Jersey courts have regard to whether an amendment arises from the same or substantially the same facts as already pleaded and that they do so not because of any statutory provisions but for the purpose explained by Commissioner Page. In my view, their approach is entirely consistent with Lord Sumption’s statement that the Court must have regard to the justice of the matter when deciding whether to grant leave to amend.
45. In reality, the qualification adds little to the Court’s considerations. The first question to consider is whether a proposed amendment amounts to a new cause of action, the test for which involves the factual matrix, not the label attached to the cause of action, as Park J said in Hoechst. If a proposed new claim does not involve new factual circumstances, it is not treated as a new cause of action for these purposes. If it is not a new cause of action, the court will have a discretion as to whether to allow the amendment. For that reason, whilst the recent English authorities must be approached with some degree of care as they may involve CPR 17.4, it is clear that the general principles upon which they are based are applicable here in Guernsey.
46. The English decisions are also helpful in identifying the steps that have to be considered. First it is necessary to decide whether a proposed amendment seeks to add a new cause of action or merely to amend an existing pleading, then to consider whether it would defeat a plea of prescription that would otherwise be available. The latter step involves consideration of the length of the relevant time period as well the date on which time started to run, after allowing for any *empêchement d’agir*.
47. The other principles set out by Lord Sumption must also be taken into consideration, including that *“an amendment should not be allowed if the case introduced by it can be seen to have no realistic prospect of success”*, in relation to which counsel suggested that the test to be applied is the test laid down by the Court of Appeal in Cherub Investments Limited v Channel Islands Aeroclub (Guernsey) Limited Guernsey Court of Appeal, January 13th 1982 in respect of an *Exception de Fond* namely:

“the test of whether an Exception de Fonds can succeed or not is whether there are no facts which might be proved at the trial which would allow the plaintiff – no admissible facts consistently with the pleadings which could be proved at the trial – which would allow the plaintiff to succeed in the action”.

48. Such principle is not unique to Guernsey, the same test was applied by the Court of Appeal of England and Wales in Habibsons Bank Limited v Standard Chartered Bank (Hong Kong) Limited [2010] EWCA Civ 1335. I prefer the formulation *“no realistic prospect of success”* to the test applied by Gray J in T G Cann Limited v Crown Packaging UK PLC [2007] EWHC 1271 (QB) who said:

*“the real question is whether the amendments now proposed ... have **some** prospect of success”* (emphasis added)

49. In my opinion, there are two different situations and two different tests to be applied. The question of whether an *Exception de Fond* can succeed is different from whether to allow an amendment. In Ogier, Lord Sumption defined the test applicable as to whether an amendment has a realistic prospect of success by reference to Rule 36 of RCCR 1989 dealing with a strike-out which is a broader test than in Cherub as it includes grounds that the cause is scandalous, frivolous or vexatious or may embarrass or delay the fair trial of the action or is otherwise an abuse of the process of the Court.
50. Above all else, it is important to do justice and therefore to bear in mind the cautionary words of advice of Peter Smith J in Nottinghamshire and the City of Nottingham Fire Authority v Gladman Commercial Properties and Another [2001] EWHC 1918 (Ch):
“one must never lose sight of the fact that it is the overriding duty of the Courts to come to a just and correct result and if for one reason or another because of the creation of a gloss or an over technical approach to pleadings a party is unable to deploy a case or give evidence which justice requires it to be able to deploy then it is not an appropriate exercise of a discretion.”
51. Fortunately in this jurisdiction we have had far fewer applications of a technical nature objecting to pleadings or amendments of pleadings since The Royal Court Civil Rules, 2007 came into force but nevertheless the cautionary words of Peter Smith J are important to bear in mind when considering applications of this nature.
52. Applying the authorities to which I have referred, I summarise the approach of the Guernsey Courts to amendments in the following way:
- (a) The Court has a wide discretion under RCCR 59 to permit amendments where one or more of the parties have not consented.
 - (b) The discretion must be exercised judicially having regard to legal principles.
 - (c) The overriding objective requires that cases be dealt with justly.
 - (d) What justice requires depends on the circumstances of the particular case but includes taking account of the matters particularised in RCCR 1(2), which will be of special importance when a late amendment is sought.
 - (e) In general, amendments should be allowed so that the real dispute between the parties can be adjudicated provided that any injustice to the other party can be compensated for in costs.
 - (f) In the ordinary course it will not be just to allow an amendment if it will defeat a defence of prescription that may otherwise be available.
 - (g) If a defence of prescription may be defeated, it is necessary to establish whether the proposed amendment seeks to introduce a new cause of action.
 - (h) What constitutes a new cause of action is not determined by the label attaching to the proposed claim but by the factual situation which is required to be proved to entitle the plaintiff's claim to succeed. If the new cause of action which is sought to be added or substituted arises out of the same facts or substantially the same facts as a cause of action already pleaded, the Court will not normally regard it as a new cause of action and hence will have a discretion to allow it.
 - (i) However, even if the new cause of action arises from similar, or substantially the same, facts as already pleaded, the court will disallow the amendment if the justice of the situation so requires.
 - (j) Where a new cause of action may be prescribed, the effective date as to when the limitation period expired is the date of the application although if the amendment is permitted, the effect is that it is deemed to date back to the date if the original proceedings.
 - (k) When considering the limitation period, it is necessary to have regard to any period of time during which the plaintiff was *empêché d' agir*.
 - (l) An amendment will not be allowed if the case introduced by it has no realistic prospect of success.

- (m) Apart from considerations of prescription, the mere fact that the change effected by a proposed amendment would involve introducing a new cause of action or that it would substantially alter the character of the proceedings or the burden of conducting them is not a reason for refusing leave to amend provided that the change can be made without inflicting injustice on the other parties of a kind incapable of being compensated by an order for costs.

New causes of action – application of the legal principles in this case

- 53. The causes of action pleaded against each of the Defendants in the proposed new cause are: against the First Defendant, breach of trust, breach of fiduciary duty and conspiracy; against the Second and Third Defendants, dishonest assistance, breach of duties as directors of WHL and the successor companies and conspiracy; against the Fourth and Fifth Defendants, breach of trust, breach of duty and conspiracy; against the Sixth Defendant, breach of fiduciary duty, dishonest assistance, knowing receipt and conspiracy; against the Seventh Defendant, knowing receipt and conspiracy; and against the Eighth Defendant, conspiracy.
- 54. Of those, the new causes of action sought to be added are: against the First Defendant, breach of fiduciary duty; against the Second and Third Defendants, dishonest assistance; against the Sixth Defendant, breach of fiduciary duty, dishonest assistance and knowing receipt; and against the Seventh Defendant, knowing receipt. In addition to those new causes of action, some of the existing causes of action are to be amended to such an extent that the Defendants say they amount to new causes of action.
- 55. Advocate Lund submits that all the so-called new causes of action arise out of the same or similar facts to those pleaded in the original cause and do not amount to any new factual situation.
- 56. The new causes of action for breach of fiduciary duty arise out of the fiduciary duties that are said to have existed between the parties to the joint venture. The amended pleading of the joint venture requires proof of an agreement between the First Plaintiff and at least one of the other alleged parties, on the express and implied terms set out. The original cause required nothing similar as the only party to the joint venture was alleged to be the First Defendant. In my view, there is a substantial difference between a business decision taken by a trustee that a number of trusts of which it is the trustee will participate in a business venture and, on the other hand, an agreement between two or more people to pursue a joint venture with the purpose and scope detailed in the proposed amended cause and subject to the express and implied terms set out therein.
- 57. I am inclined to agree with Advocate Lund that, although the description of the scope and purpose of the joint venture has been enlarged in the amended cause, it could be described as being merely a more complete description of what was alleged previously hence to be similar to the original pleading. However, where I disagree with her is in respect of the proposed pleading of the express and implied terms of the joint venture as well as the introduction of allegations of fiduciary duties, all of which amount to new material facts the Plaintiffs were not seeking to establish in their original cause and are, in my view, a new factual situation.
- 58. Two of the proposed express terms illustrate the extent of the new pleading. First, in the proposed paragraph 21.2 it is alleged that the First Defendant was responsible for ensuring that any disposal of a property was on the best terms. In order to establish that fact, the Plaintiffs will have to prove that under the terms of the joint venture such a duty was imposed on the First Defendant. It is different from the allegations in the earlier cause, where the pleaded case was that the First Defendant was responsible for funding the project whilst the operations of the project were conducted by other Defendants.

59. Second, in the proposed paragraph 21.5, it is said that the First Defendant and/or the Sixth and/or Eighth Defendants would be responsible for taking all necessary steps to prepare the sites for sale. Again, there was no such allegation in the original cause. In the original, some general duties were alleged in respect of the First Defendant, including in paragraph 12.6 “to carefully monitor and supervise the performance of the joint venture” (an allegation that is not sought to be amended). In paragraph 22.4, the Sixth Defendant was alleged to have been appointed to act as project manager to maximise the development potential and to achieve the best possible price for each of the sites” (another allegation that is not sought to be amended). It was, arguably, part of the duties of the Sixth Defendant under the terms of the original cause to prepare sites for sale as being within the scope of what was required of him in his role as project manager but the new paragraph 21.5 is additional to what was alleged previously. It requires the Plaintiffs to establish that one or more of the First, Sixth and Eighth Defendants had agreed to take on responsibilities for the preparation of the sites for sale which is a case that the First and Eighth Defendants were not facing under the terms of the original cause.
60. Such new allegations are significant because of the breaches of duty that are sought to be added in the new cause. The breaches of duty in the new cause would fail if the Defendants against whom breaches are alleged were not party to the joint venture and if the duties and obligations that they are said to have agreed are not proved. In my view, the allegation that such duties existed requires proof of new or additional factual circumstances.
61. My view is reinforced by looking at the proposed implied terms. Again, I highlight two of them. Paragraph 21A.1 alleges that the First Defendant would conduct appropriate due diligence before contracting to sell any site. In paragraph 21A.3 it is said that if further funds were required that could not be obtained from the trusts or from loans, the First Defendant would approach the beneficiaries for funding. Nothing similar to either of those allegations was in the original cause.
62. Advocate Ferbrache addressed me on the legal principles that govern when it is appropriate to imply terms in a contractual relationship, with a view to persuading me that the allegations have no reasonable prospect of success. I do not propose to deal with those submissions in any detail. The legal principles are well established but their application in any given case is a factual matter that is best left to the Jurats at trial. At this stage in the proceedings it would require a level of analysis that goes beyond what is appropriate on an application for leave to amend. It is likely to lead to a conclusion that some of the implied terms have little prospect of success whereas others do have a reasonable prospect. In my opinion, it is best to leave the Jurats to decide which terms can properly be implied when they have heard all the facts.
63. It is when one looks at the fiduciary duties pleaded in paragraph 21B that it becomes even clearer that the Plaintiffs will have to establish a new set of material facts that did not have to be proved under the original cause. In the original cause, there were no allegations of any fiduciary duties owed to and by each of the joint venturers. The newly pleaded fiduciary duties include inter alia a duty that the participants in the joint venture were “not to put themselves in a position where their duties conflicted with their own interests”. It is not at all obvious as to why such a duty should be imposed on parties to a contractual relationship concerning a project to develop a number of sites.
64. It is accepted law that fiduciary duties may exist between joint venturers, see *United Dominions Corporation Limited v Brian Pty Limited* [1985] HCA 49 and a number of other Australian cases cited by Advocate Ferbrache. However, the courts have been reluctant to infer that fiduciary obligations arise in an ordinary commercial or contractual relationship. As Lord Mustill said in *In re Goldcorp Exchange Limited* [1995] 1 A. C. 74, at page 98E:

“the essence of a fiduciary relationship is that it creates obligations of a different character from those deriving from the contract itself. Their Lordships have not

heard in argument any submission which went beyond suggesting that by virtue of being a fiduciary the company was obliged honestly and conscientiously to do what it had by contract promised to do. Many commercial relationships involve just such a reliance by one party on the other, and to introduce the whole new dimension into such relationships which would flow from giving them a fiduciary character would (as it seems to their Lordships) have adverse consequences.”

65. Thus, in the present case, in order to prove the existence of fiduciary duties between the joint venturers, the Plaintiffs will have to establish facts of legal significance which did not have to be proved under the original cause. I therefore have no doubt that the claims for breaches of fiduciary duties amount to a new cause of action.
66. The proposed amendments to paragraph 31 (“Trustee Breaches of Duty”) also have to be considered. They were not identified as a new cause of action by Advocate Lund because the original cause included allegations under the same heading “Trustee breach of duty”. However, the label attached to a remedy or allegation is not decisive as Park J said in *Hochst*. What matters are the factual allegations relied upon.
67. In the proposed amendments, paragraph 31 is greatly expanded in order to accommodate the Plaintiffs’ complaints arising from alleged breaches of the express and implied terms of the joint venture inserted by the new paragraphs 21, 21A and 21B. As I have said, I am of the opinion that the new express and implied terms of the joint venture are substantially different in the proposed cause from how they were pleaded in the original. It must therefore follow that in order to establish the new allegations of breach of trust in paragraph 31, the Plaintiffs will have to establish new, materially significant facts and, for that reason, the proposed amendments to paragraph 31 amount to the pleading of a new cause of action against the First Defendant.
68. The proposed amended cause seeks to introduce claims for dishonest assistance against the Second, Third and Sixth Defendants. In order to decide whether they amount to new causes of action, it is necessary to look first at the elements that are required to be proved as a matter of law. In the absence of a relevant Guernsey authority, I was referred to decisions of the Jersey and English courts.
69. Advocates Lund and Ferbrache both referred to the judgment of Birt, DB in *Cunningham v Cunningham and others* [2009 JLR 227]. In paragraph 36, he said:

“36 The requirements for dishonest assistance were authoritatively established in *Royal Brunei Airlines SDN. Bhd. V. Tan* (6), and subject to further refinement in *Twinsectra Ltd v Yardley* (8) and *Barlow Clowes Intl. Ltd v. Eurotrust Intl. Ltd.* (1). The matter is conveniently summarized in the headnote of the latter case in *The All England Law Reports* which reads as follows ([2006] 1 All ER at 333-334):

“In considering whether a defendant’s state of mind was dishonest an inquiry into the defendant’s view about standards of honesty was not required. A defendant’s knowledge of a transaction had to be such as to render his participation contrary to normally acceptable standards of honest conduct. There was no requirement that he should have had reflections about what those normally acceptable standards were. Consciousness of the dishonesty required consciousness of those elements of the transaction which made participation transgress ordinary standards of honest behaviour; it did not also require the defendant to have thought about what those standards were.”

It is therefore an objective test of dishonesty.”

70. I accept the submission that, under Guernsey law, the test of dishonesty will be the same as under English and Jersey law. Hence, I accept that in Guernsey there is an objective test of dishonesty to be applied.

71. Paragraph 40, Birt DB emphasised

“40 It has to be borne in mind that “dishonesty” for the purposes of dishonest assistance is not the same as fraud or dishonesty in the criminal field. It is a wholly objective test. Nevertheless, it is still a serious allegation to make and full and proper particulars must be provided in respect of any person against whom such dishonesty is alleged. Each defendant is entitled to know exactly what is relied upon so as to suggest dishonesty on his part.”

72. I accept that his observation applies under Guernsey law as it applies in Jersey. Proof of dishonest assistance will require proof of the requisite dishonesty which is a new fact that did not feature in the claims pleaded in the original cause. I am therefore satisfied that it does indeed amount to a new cause of action.

73. Similarly, the new causes of action in knowing receipt require proof of the relevant knowledge which is a legally significant new fact that would have to be proved if leave is granted to amend.

74. So far I have considered each of the new causes of action as if there was only one cause of action under each separate head of claim or ‘label’. In other words, only one breach of trustee duty, only one act of dishonest assistance, a single act of knowing assistance etc. In fact, under each ‘label’ there are a number of separate causes of action. The facts alleged about each and every one of the plots of land acquired as part of the joint venture are different. For example, in relation to the trustee’s breaches of duty, the particulars of breach of duty pleaded in paragraph 31 of the amended cause involve separate allegations in respect of each of the plots about which complaint is made. The factual circumstances of the disposal of each of the plots are different. Consequently, it is my view that each plot involves a separate cause of action because each involves a different factual situation.

75. The first sale of a plot took place in 1999 and the last in 2007, respectively 12 and 5 years before the application to amend. It follows that under different heads of claim, there are some new causes of action that may have been prescribed at the date of amendment and others that were not.

Prescription

76. A decision as to which causes of action are prescribed and which are not demands an analysis of when time normally began to run in respect of each remedy, the length of the relevant limitation period and whether the running of time was delayed or interrupted by reason of an *empêchement de fait*.

77. Advocate Lund submitted that if a limitation period had not expired between the date of the original cause and the date of the amendment, it could not be said that allowing the amendment would deprive the defendant of a defence. My understanding of her submission is that on the facts of the present case, time began to run either in 2003 (the date when the First Plaintiff met with Adv Eades and Paul Schreiber) or in 2009 (when the First Plaintiff had another conversation with Mr Schreiber) and thus any six year limitation period expired at the earliest in 2009 or, at the latest it will not expire until 2015. In other words, either it was prescribed both at the date of the original cause and also at the date of the amendment or it was not prescribed at either date. Hence, if I were to allow the amendment I would not thereby cause any injustice to the Defendants because at trial when the facts are established, it will be found that the case was prescribed at the date of commencement of the proceedings or it is not even at the date of the amendment. The amendment will not have deprived the Defendants of an available defence and will have caused no injustice which, as Lord Sumption identified in *Ogier* is the overriding concern.

78. Whether or not such a submission is correct in law, the factual circumstances of the present case are not so straightforward as to involve a simple choice between 2003 and 2009 for all causes of action. The onus is on the Plaintiffs to show that the Defendants do not have a reasonably arguable case on limitation. It cannot be correct to leave the issue until all the facts have been established at the end of the trial if the effect of allowing the amendment will have been to deprive the Defendants of a possible defence.
79. Advocate Lund submitted that there is uncertainty as to when, as a matter of law, time begins to run. For example, she said that in tort or contract it may run either from the date the cause of action accrued or from the date when the facts were reasonably discoverable by the Plaintiffs. In my view, it would be unjust to allow any amendment that relies upon a submission that the cause of action accrued only when the facts were reasonably discoverable by the Plaintiffs if the correct legal position may be that time ran from an earlier date being the date of the acts giving rise to the cause of action and the earlier date would give rise to a plea of prescription whereas the latter date would not do so.

Limitation periods – trust law

80. The prescription period relating to claims for breach of trust is governed by section 76 of The Trusts (Guernsey) Law 2007:

“Limitation and prescription.

76. (1) No period of limitation or prescription applies to an action brought against a trustee –

(a) in respect to any fraud to which the trustee was a party or was privy, or

(b) to recover from the trustee trust property or the proceeds thereof –

(i) held by or vested in him or otherwise in his possession or under his control, or

(ii) previously received by him and converted to his use.

(2) Subject to subsections (1) and (3), the period within which an action founded on breach of trust may be brought against a trustee is –

(a) three years from the date on which the claimant first has knowledge of the breach, or

(b) where the claimant was at the time of the breach of trust a minor or a person under legal disability –

(i) three years from the date on which his guardian first has knowledge of the breach, or

(ii) three years from the date on which the claimant ceased to be a minor or a person under legal disability,

whichever first occurs.

(3) Subject to subsection (1), no action founded on breach of trust may be brought against a trustee after the expiration of 18 years immediately following the date of the breach.”

81. Advocate Lund submitted that “fraud” for the purposes of section 76(1) included an equitable wrong. She said that dishonesty is needed which she defined as an intention by a trustee to pursue a course of action knowing it to be contrary to the beneficiaries’ interests or being recklessly indifferent as to whether it is so contrary. She said it also includes constructive trusts and that a director of a company is treated as a trustee of the property of the company

under his control so that if he misappropriates company assets, he is deemed to be constructive trustee of the assets.

82. Regarding section 76(2), Advocate Lund suggested there may be two alternative definitions of “date of knowledge” which, she submitted, demonstrated that the legal position is uncertain: whether it was the date of the Plaintiffs’ actual knowledge or the date on which they could with reasonable diligence have discovered the cause of action; or, if the trust assets are transferred to another trustee who thereby steps into the shoes of the Plaintiffs, is it the date on which the successor trustees had knowledge?
83. In relation to the “reasonable diligence” test, she conceded that, on the facts of the present case, the test was likely to be synonymous with the “practical impossibility” test applicable to an “empêchement de fait”, which I consider later in this judgment.
84. The concept of time running from a plaintiff’s date of knowledge is not unique to The Trusts (Guernsey) Law. The same expression is to be found in section 5(4) of The Law Reform (Trust) (Guernsey) Law, 1979 where the legislation helpfully provides guidance as to what facts the plaintiff may have known. In the Trusts Law, there is no such definition but I do believe it involves a discoverability element and hence that Advocate Lund was correct to concede that on the facts of this case the date on which the Plaintiffs acquired the knowledge of a cause of action for the purposes of section 76 of the Trusts Law is the same as the date on which any “empêchement” ceased to operate.
85. I cannot accept that a plaintiff’s date of knowledge is deemed to be the date on which a successor trustee acquired sufficient knowledge. The phrase used in section 76 (2) (a) is “the date on which the claimant first had knowledge of the breach”. The natural meaning of the section is that it applies to the claimant’s knowledge of a breach of trust. If the trust property is transferred to another trustee who acquires knowledge of the breach of trust at a later date, the claimant cannot be allowed to say that he was entitled to delay bringing an action for breach of trust because of the successor trustee’s later knowledge. In my view, time must run from the earliest date at which the claimant had knowledge of the breach.
86. Advocate Peter Ferbrache, appearing on behalf of the Sixth to Eighth Defendants, made submissions as to what period of limitation applies in respect of claims for “knowing assistance” and “knowing receipt”. He submitted that confusion arises because the terms “constructive trust” and “constructive trustee” apply in two different circumstances. The issue was relevant to his clients because, unlike the First to Fifth Defendants, they were not professional trustees and there are no allegations of express breaches of trust made against them.
87. The legal issue was considered in Paragon Finance where Millet L.J. described the two types of constructive trust in the following passage at page 408-409:

“Regrettably, however, the expressions ‘constructive trust’ and ‘constructive trustee’ have been used by equity lawyers to describe two entirely different situations. The first covers those cases already mentioned, where the defendant, though not expressly appointed as trustee, has assumed the duties of a trustee by a lawful transaction which was independent of and preceded the breach of trust and is not impeached by the plaintiff. The second covers those cases where the trust obligation arises as a direct consequence of the unlawful transaction which is impeached by the plaintiff.

A constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of property (usually but not necessarily the legal estate) to assert his own beneficial interest in the property and

deny the beneficial interest of another. In the first class of case, however the constructive trustee really is a trustee. He does not receive the trust property in his own right but by a transaction by which both parties intend to create a trust from the outset and which is not impugned by the plaintiff. His possession of the property is coloured from the first by the trust and confidence by means of which he obtained it, and his subsequent appropriation of the property to his own use is a breach of that trust. Well-known examples of such a constructive trust are *McCormick v Grogan* (1869) LR 4 HL 82 (a case of a secret trust) and *Rochefoucauld v Bousted* [1987] 1 Ch 196 (where the defendant agreed to buy property for the plaintiff but the trust was imperfectly recorded). *Pallant v Morgan* [1952] 2 All ER 951, [1953] Ch 43 (where the defendant sought to keep for himself property which the plaintiff trusted him to buy for both parties) is another. In these cases the plaintiff does not impugn the transaction by which the defendant obtained control of the property. He alleges that the circumstances in which the defendant obtained control make it unconscionable for him thereafter to assert a beneficial interest in the property.

The second class of case is different. It arises when the defendant is implicated in a fraud. Equity has always given relief against fraud by making any person sufficiently implicated in the fraud accountable in equity. In such a case he is traditionally though I think unfortunately described as a constructive trustee and said to be ‘liable to account as constructive trustee’. Such a person is not in fact a trustee at all, even though he may be liable to account as if he were. He never assumes the position of a trustee, and if he receives the trust property at all it is adversely to the plaintiff by an unlawful transaction which is impugned by the plaintiff. In such a case the expressions ‘constructive trust’ and ‘constructive trustee’ are misleading, for there is no trust and usually no possibility of a proprietary remedy; they are ‘nothing more than a formula for equitable relief’: *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 2 All ER 1073 at 1097, [1968] 1 WLR 1555 at 1582 per Ungood-Thomas J.”

88. The passage was cited by Birt, B. sitting in the Royal Court of Jersey in *Bagus Investments Ltd v Kastening* [2010 JLR 355] when he had to construe the meaning of article 57 (1) of the Trusts (Jersey) Law 1984 which is substantially the same as section 76 (1) of our 2007 Law. I respectfully adopt the reasoning of the Jersey Bailiff and his conclusions. Describing the second of Millett L.J.’s two classes of case as a “Class 2 constructive trust” he said at page 368:

“I consider that the overwhelming likelihood is that English law considers that class 2 constructive trustees, which include dishonest assisters and those guilty of knowing receipt, are not trustees for the purposes of s 21 (1) of the Limitation Act 1980 and that, accordingly, claims against them are subject to the ordinary limitation provisions and become prescribed after the appropriate period.”

89. Sir Michael Birt went on to compare the respective English and Jersey limitation provisions before concluding in paragraph 45 of his judgment (page 371 of the report):

- “(i) Jersey law is similar to English law in relation to constructive trusts and would undoubtedly recognise the two different types or classes of constructive trustee described in the English cases by Lord Hoffmann in [*Peconic Ind Dev. Ltd v Lau Kwok Fai* (2009) 11 ITEL 844];
- (ii) I accept that the wording of art.57(1) is not identical to S.21(1) but it is very similar. The Jersey provision was clearly based on the English provision and I do not consider that the minor differences in wording necessarily lead to the conclusion for which Advocate Blakeley contends;
- (iii) These two aspects provide a strong basis for considering that the reasoning of the English courts in relation to the interpretation of S.21(1) may be equally applicable to art. 57(1).”

90. Our Law is very similar both to the Jersey statute and also to the English law. For the same reasons as Bailiff Birt gave, I conclude that Guernsey law also recognises the two classes of constructive trust. Hence I come to the conclusion that claims against dishonest assisters and those guilty of knowing receipt are subject to the ordinary limitation provisions and are not limited to the period laid down in section 76 of our Trusts Law of 2007.

Limitation periods – the law of tort

91. Section 4 of the Law Reform (Tort) (Guernsey) Law 1979, provides that, except in relation to actions for damages for personal injuries, “an action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued”.
92. The general provision is subject to a qualification in section 11 of the 1979 Law that where the action is based on fraud or mistake “the period of limitation shall not begin to run until the plaintiff has discovered the fraud or mistake, as the case may be, or could with reasonable diligence have discovered it.”
93. In relation to section 4, the Plaintiffs submitted that there is no conclusive Guernsey authority as to whether the date of the cause of action is:
- i) when the relevant actionable damage occurs, regardless of the plaintiff’s knowledge; or
 - ii) when the plaintiff ought reasonably to have discovered all the facts upon which the cause of action is based.
94. In support of the submission, Advocate Lund relied upon the judgment of the Guernsey Court of Appeal in *Yaddehige v Credit Suisse Trust Limited* [2007 – 2008] GLR 282 where it was held (citing the headnote at page 284) that:
- “it was unclear on the authorities whether in Guernsey time began to run when the relevant actionable damage occurred, regardless of knowledge (as is England and Wales), or (as in some Commonwealth jurisdictions) when the existence of the facts or cause of action should reasonably have been discoverable to the plaintiff.”
95. In paragraph 34 of his judgment (paragraph 35 of the reported judgment), Smith JA said:
- “given the limited scope of this appeal it is neither necessary nor appropriate to come to a firm conclusion on this issue. It may or may not arise as a live issue at the trial. If it does it will fall to be considered in the light of the facts as found and not necessarily as presently assumed.”
96. Thus, the Court of Appeal did not resolve what they described as the legal uncertainty as to when a cause of action in the law of tort accrues in this Island. In *Yaddehige*, the Court of Appeal had to deal with assumed facts on a preliminary point. I am in a similar position and will have to look only at the facts as pleaded. The actual circumstances of the case, what happened when, who said what to who and so on, will be matters for the Jurats if and when this case eventually comes to trial. In view of the uncertainty as to the factual issues and the law, Advocate Lund submitted that the case should be permitted to proceed to a trial where these issues will be resolved.
97. In making that submission, Advocate Lund failed to have regard to who has the burden of showing that a party would lose the benefit of a limitation defence that would otherwise be available to them. As I have said, where a plaintiff seeks to add a new cause of action to an existing cause, the test to apply is that laid down in *Ogier*; the amendment will not be allowed if it might deprive the defendant of a limitation defence. In other words it is necessary to look

at a defendant's case at its highest to see whether they may have a limitation defence. Whereas if a plaintiff's case had been pleaded in the proposed amended terms from the outset of the case, the correct approach would have been to take the plaintiff's pleaded case at its highest and apply the test laid down in *Cherub Investments* as to whether an exception de fond may succeed.

98. The *Cherub Investments* test was applied by the Court of Appeal *Yaddehige v Credit Suisse Trust Limited and Others* [2007-08 GLR 282] at paragraph 11. The Court of Appeal added "thus, in considering this appeal we must take the plaintiff's pleaded case at its height." It is to be noted that neither of those cases involved an application to amend the plaintiff's claim; both were concerned with a case as it had been pleaded from the outset.

Limitation periods – the law of contract

99. In contract, the limitation period is six years pursuant to the *Loi relative aux Prescriptions* 1889. I have always assumed that in Guernsey, as in England, time begins to run from the date of the breach of contract, being the date when the cause of action arose. I believe that to be consistent with the understanding that a breach of contract is actionable without proof of damage. However, I note that in *Boyd v Pickersgill and Le Cornu* 1999 JLR 284, Southwell JA implied that the reasonable discoverability approach may be available in relation to claims for breach of contract under Jersey law (see p294). If so, I accept that might also be the law in Guernsey. Fortunately, I do not need to resolve that issue in this judgment because any uncertainty must be resolved in favour of the Defendants when considering an amendment involving a new cause of action that may be prescribed, for the reasons I have given above.

Empêchement d'agir

100. *Yaddehige* is the leading authority in this jurisdiction on *empêchement d'agir*. The Court of Appeal accepted that the maxim was part of our Guernsey *coûtume* although its boundaries were uncertain. When it applies, it operates to suspend the prescription period in favour of the plaintiff suffering from an impediment that made it practicably impossible for him to discover the facts needed to support the cause of action, or the existence of the cause of action itself. Time begins to run only when the impediment is lifted. In *Yaddehige* the Court of Appeal approved and adopted two Jersey Court of Appeal cases *Public Services Committee v Maynard* 1996 JLR 343 and *Boyd v Pickersgill and Le Cornu* 1999 JLR 284.
101. In *Maynard*, Southwell JA said the underlying principle is the practical impossibility of the Plaintiff being able to exercise his rights and he continued at page 354:

"mere ignorance does not bring the maxim into operation ... where there is an impediment creating such a practical impossibility of which ignorance is a part, then the maxim may come into operation and may prevent time running."

102. In *Boyd*, Beloff JA at page 291 said

"in my view, the epithet "practical" deployed in *Maynard* ... softens rather than strengthens the concept of impossibility. It requires a consideration of what is in fact, not in theory, possible. While ignorance of a cause of action does not per se trigger suspension of the limitation period, it may, in appropriate circumstances, constitute or create a relevant impediment ...

The test, as it seems to me, is whether the ignorance of the cause of action is reasonable in all the circumstances, reasonable, that is, both in respect of the facts giving rise to the cause of action and that a cause of action arises in such circumstances".

103. Boyd and Yaddehige both involved a plaintiff's claim against her legal advisers. At page 293 in Boyd, Beloff JA concluded:

“that while the appellant was instructing the respondents, there was prima facie, no practical possibility of her appreciating any failure of the respondents to advise her (appropriately)”.

Mr Beloff was also a member of the Court in Yaddehige and agreed with the leading judgement delivered by Smith JA. Carey JA agreed with both Smith and Beloff JJA and added the following at paragraph 50:

“for my part, I consider that in an age in which the prudent man is encouraged to place his affairs, be they legal, medical, financial or otherwise, in the hands of professional consultants, the client should be entitled to rely on such advice or services being rendered to him with competence and with care. It is not for the client in such circumstances, where he does not have any expertise of his own, to be continuously auditing or obtaining secondary advice on what is being done for him by those experts. I venture to suggest that it may be inequitable for that consultant, when the client claims there has been a failure on the part of the consultant giving grounds for action against him in contract or in tort, to be able to use prescription as a shield. It should not be open to him to allege that the client should have been aware of the failings claimed to give rise to the cause of action, at a time when the client was relying and was still entitled to be relying on the consultant to discharge the duties for which he had been retained. In such circumstances, I further cannot see that it is necessary to allege fraud or deliberate misrepresentation by the retained consultant.”

104. In my respectful view, Sir de Vic Carey's observations need to be read in their proper context. It is to be noted that neither of his fellow judges said whether they agreed or disagreed with what he said. His remarks should not be seen as contradicting or undermining the test to be applied, as approved in the two Jersey Court of Appeal cases. I believe that his remarks should be viewed as a comment on what may or may not be practically impossible in a situation where a lay person is receiving, and continuing to receive, advice from a professional expert. What he said is that in circumstances where the lay client has no expertise of his own, it is not necessary for the lay client to seek advice from a second expert in the same field in order to audit or advise upon the advice given by the first expert. However, that is a different situation from the facts of the present case.
105. In the present case, Advocate Lund seeks to draw parallels with Boyd and Yaddehige on the basis that the First to Fifth Defendants were professionals providing professional services to the Plaintiffs. In my view, the present case is distinguishable. It was not necessary for the Plaintiffs to instruct another trustee or professional to review or audit the work of the First Defendant in order, for example, to verify whether Mr Shreibke on behalf of the first five Defendants was doing what, in paragraph 17 of the cause, it is alleged that he agreed to do when he met with the First Plaintiff on 23rd July 2003. The First Plaintiff did not require professional, expert assistance to establish whether matters were progressing as agreed. It was a matter of fact as to whether the First Plaintiff had been, and was being, asked to give his written approval to any of the proposals, transfers or investment decisions involved with the project and whether he was being provided full accounting details of the transactions as had been allegedly promised to him. He knew himself whether that was happening and did not need an expert to tell him.
106. It is not sufficient for the First Plaintiff to say that he relied upon the assurances given by Mr Shreibke as to what he would do. There was no practical impediment to prevent him finding out whether Mr Shreibke was acting as allegedly promised.

107. No other possible impediment is pleaded and I am therefore not persuaded that, on the facts pleaded by the Plaintiffs, the First Plaintiff was empêché.

108. The Defendants' Advocates correctly submitted that the position of each of the Plaintiffs needs to be addressed separately as different factual considerations apply to each of them. I agree with them that nothing is pleaded in respect of the Second Plaintiff that would amount to an empêchement d'agir to prevent time running against him for limitation purposes. The Second Plaintiff was not present at the meeting with Mr Shreibke in July 2003. It is said that he did not become involved until 2008 or 2009 but nothing is pleaded by way of any impediment in respect of him prior to that date.

Prescription – the present application

109. The Plaintiffs applied to amend their cause on 10th June 2011. Any new cause of action which was prescribed as at that date will not be allowed. As I have said, the operations of the joint venture spanned such a long period of years that some causes of action were prescribed whereas others that arose within either six years or three years before that date may proceed, depending on the length of the relevant prescription period.

Amendments with no realistic prospect of success

110. Objections are also made to a number of the proposed amendments on the grounds that they would have no realistic prospect of success.

111. The original action was issued on 8th November 2010. If the application to amend is granted, the effect will be to back date the date for determining whether a limitation period has expired from 10th June 2011 to 8th November 2010. Without admitting that the Plaintiffs were seeking to add new causes of action, Advocate Lund submitted that any new cause of action that was already prescribed on 8th November 2010 should still be permitted because there would be no injustice as the Defendants would not thereby be deprived of any limitation argument otherwise available to them, they could still argue limitation.

112. In my opinion, if the cause of action was always prescribed, it would have no realistic prospect of success and thus would fall foul of the second principle identified by Lord Sumption in *Ogier*. If a cause of action even when taken at its highest is prescribed, it can have no reasonable prospect of success and should not be allowed to proceed.

113. Advocates Greenfield and Ferbrache both criticised the proposed draft amended cause for containing insufficient particulars of the allegations of dishonest assistance. Advocate Lund's response is that the Plaintiffs have provided the best particulars they are able to provide based on their current knowledge of circumstances of the case. She submitted that if the particulars provided are currently insufficient, I should not strike out the proposed amendment but adjourn the application to enable further particulars to be pleaded in a fresh application to amend. Similarly in respect of the allegations of knowing receipt, Advocate Peter Ferbrache submitted that they are entirely un-particularised and liable to be struck out. For her part, Advocate Lund submitted that there should be a further opportunity given to the Plaintiffs to amend if I am persuaded that the current draft allegations are insufficient.

114. I concluded above that the test of dishonesty for the purpose of dishonest assistance is objective. It is explained in paragraph 28-46 of *Snell's Equity*, 31st edition as a requirement that the plaintiff must establish that a defendant

“knew that ordinary honest people would regard his assistance as dishonest in all the circumstances. This will depend on how precisely he knew the facts which amounted to the breach of trust, and the extent to which his assistance in the transaction

involved a commercially unacceptable risk of knowingly implicating himself in the trustee's wrongful conduct."

115. In the present case, what is alleged is that the Sixth Defendant knew that the properties were held on trust, that the objective of the joint venture was to increase the value of the properties, that selling at an undervalue would compromise the objectives of the joint venture and would be a breach of trust; nevertheless he assisted and did not disclose the nature of his assistance to the First Plaintiff.
116. The Defendants did not take issue with the fact that the properties were not directly held as assets of the trusts but instead were owned by companies who in turn were owned by the trusts. I will assume that the properties are to be treated as if they were trust assets.
117. In relation to the state of the Sixth Defendant's knowledge, whether he acted dishonestly has to be judged in the light of what he knew and how he acquired the knowledge. It seems to me that the key issue is what he knew as to the value of the properties at the time of the relevant sales. Yet the particulars pleaded do not specify what he is alleged to have known. Dishonesty is a serious allegation and the Sixth Defendant is entitled to be told what it is alleged he knew that supports the allegation of dishonesty on his part. It is not sufficient simply to say that he knew they were trust assets. The Plaintiffs will have to prove that he knew the properties were being sold at an undervalue.
118. I have to decide whether to disallow the amendment or to adjourn the application to enable it to be more fully pleaded. Advocate Lund submitted these were the best particulars they can give although by asking for an adjournment she is implying that they could do better.
119. After careful consideration, I have decided to disallow the amendment. The Plaintiffs have had several attempts to plead their case and yet what is alleged here falls some way short of an allegation with a realistic prospect of success.
120. A similar situation applies to the claim for knowing receipt. The state of knowledge that must be established has not been pleaded with sufficient particulars to enable the Defendants concerned to understand properly the case they have to answer. For the same reason as I gave in respect of the claim for dishonest assistance, I would not allow an adjournment but instead would disallow the application to amend in so far as it relates to this cause of action.
121. The Defendants also object to the proposed new allegations of fiduciary duties owed by and to the participants in the joint venture on the ground that they have no realistic prospect of success even if they are not prescribed. Advocate Lund submitted that it will be necessary to establish the facts at trial before applying the legal principles to establish whether this is one of those situations where fiduciary duties arise between the joint venturers.
122. In this instance, I have looked at the Plaintiffs' pleaded case at it is highest and I have failed to see how the Court could impose fiduciary duties on the joint venturers in addition to whatever express terms they agreed between themselves and such implied terms as it may be appropriate for the Court to infer. The words of Lord Mustill quoted above from his speech in re Goldcorp are applicable here.
123. For that reason, I accept the Defendants' submission that the allegations of fiduciary duties would have no reasonable prospect of success even if they are not prescribed.
124. The allegations of conspiracy pleaded in the draft amended cause were criticised as being wholly unparticularised or inadequately particularised both by Advocate Greenfield and by Advocate Ferbrache. In reply, Advocate Lund argued that the Plaintiffs had pleaded the best particulars they are able to provide at this stage and sought to rely upon the decision of David

Richards J in Her Majesty's Commissioner for Revenue and Customs v Begum and others [2010] EWHC – 1799 – (Ch) in which he cited a passage from the judgment of the Court of Appeal delivered by Nourse LJ in Kuwait Oil Tanker Co SAK v Al Bader [2000] 2 All ER (Comm) 271, in paragraph 42 of his judgment

“Secondly, the origins of all conspiracies are concealed and it is usually quite impossible to establish when or where the initial agreement was made or when or where other conspirators were recruited. The very existence of the agreement can only be inferred from overt acts. Participation in a conspiracy is infinitely variable: it can be active or passive. If the majority shareholder and director of a company consents to the company being used for drug smuggling carried out in the company's name by a fellow director and minority shareholder, he is guilty of conspiracy. Consent, that is agreement or adherence to the agreement, can be inferred if it is proved that he knew what was going on and the intention to participate in the furtherance of the criminal purpose is also established by his failure to stop the unlawful activity.”

125. All counsel referred to the authoritative decision on conspiracy and the economic torts in this jurisdiction namely that of the Guernsey Court of Appeal in Silver Falcon Enterprises Limited v International Hellenic Operations Limited where in the masterful judgment of the Court delivered by Le Quesne JA he said:

“Every conspiracy involves a combination of two or more persons, natural or legal, with a view to carrying out certain action. In the nature of things, it is rarely possible for a Plaintiff who claims against alleged conspirators to particularise when, where and in what terms the combination was effected. He must be able to particularise those who he says were parties to the combination, but to expect him to give particulars of the conspiracy as if it were a commercial contact is unrealistic. Realising this, the Courts have required him to particularise the overt acts through which the conspiracy was carried out. We adopt the statement of principle laid down in this respect by Salmon, J in Marrinan v Vibart [1963] 1 QB 234 at p.238:

“... the gist of the tort of conspiracy is not the conspiratorial agreement alone, but that agreement plus the overt act causing damage. It is true that the crime of conspiracy is the very agreement of two or more persons to effect an unlawful purpose, and any overt acts done in pursuance of the agreement are merely evidence to prove the fact of the agreement. The tort of conspiracy is complete only if the agreement is carried into effect so as to damage the plaintiff.

Accordingly, the acts done in pursuance of the agreement are an integral part of the tort : Crofter Hand Woven Harris Tweed Co. Ltd v Veitch.” (192 AC 435).

On appeal, the judgment of Salmon J. was expressly approved by all three members of the Court: [1963] 1 QB 528.””

126. Advocate Greenfield said that the conspiracy claim was so misconceived that he would be applying to have it struck-out but that would be the subject of a separate application. Advocate Ferbrache has already applied to have the claim against the Eighth Defendant dismissed, my decision on which is the subject of a separate judgment.

127. In this application for leave to amend the *cause*, the proposed amendment that relates to the conspiracy claim is a new paragraph 36A pleading what the Plaintiffs describe as the best particulars they can give of the formation of the conspiracy. In my judgment, it is appropriate that the Plaintiffs be permitted to give further particulars of the conspiracy and hence I give leave to insert the new paragraph 36A. I make no comment in this judgment as to whether there are grounds to strike-out the whole of the claim.

Conclusion

128. There were a number of amendments to which no objection is made, as long as the Plaintiffs pay any costs thereby occasioned.
129. I turn to the paragraphs in the proposed amended *cause* which were strongly contested.
130. Paragraph 19 is where the parties to the alleged joint venture are pleaded. As I have said I regard the pleading on an and/or basis to be entirely unsatisfactory. The Defendants are entitled to know before they come to Court whether it is alleged that they were a party to the joint venture so that they can prepare accordingly. The present pleadings are contradictory. For example, in the Plaintiffs *réplique* to the *Exceptions de Forme*, they pleaded that the Sixth to Eighth Defendants are parties to the agreement. Yet, in paragraph 19, they are named only in the alternative. Such pleading is, in my view, embarrassing.
131. At the hearing before me, all parties proceeded as if all the named Defendants in paragraph 19 are in fact parties to the joint venture. If that is what the Plaintiffs are alleging, they should say so. It is unsatisfactory to leave it as presently drafted in the hope that evidence given at trial might throw light on the details of the joint venture. However, I will not strike out paragraph 19 but I will permit the Plaintiffs to amend in order to specify exactly who they allege to be a party to the joint venture.
132. Paragraphs 20 and 21 plead the essential elements of the agreement between the parties to the joint venture. As I have said, I believe it amounts to a new cause of action or, to be more precise, a number of new causes of action each one relating to individual plots and sites. Some of those causes of action are prescribed. In so far as they are, I am not persuaded that the new pleading arises out of the same or substantially the same facts as originally pleaded. They are in my view new causes of action and as they are out of time, leave will not be given for them to be amended in those instances where the causes of action and the facts relating to them are prescribed.
133. However, I cannot strike them out in full because the dates of the some of the later plot sales are such that the causes of action are not prescribed. Where they are not prescribed, I accept that the Plaintiffs should be given leave to plead the scope and purpose of the joint venture in the manner and form proposed in paragraph 20. Similarly, they should be given leave to plead the express terms sought to be added in paragraph 21. Advocate Ferbrache urged me to find that the express terms as pleaded had no realistic prospect of success. I cannot form that view. Whether or not they succeed will depend upon the oral evidence to be given at the trial.
134. Similarly, the implied terms sought to be pleaded in paragraph 21 A will depend upon the oral evidence and what the Jurats find to be the express terms of the joint venture. I agree that certain of the implied terms are less likely to succeed than others but I do not believe that there is anything to be gained at this stage in the proceedings by carrying out a detailed analysis and ruling out some of the allegedly implied terms whilst retaining others.
135. As for the fiduciary duties sought to be pleaded in paragraph 21 B, I do accept for the reasons I have given that they have no reasonable prospect of success.
136. In paragraph 31, the breaches of fiduciary duties must fall away as I have held that there is no reasonable prospect of the Plaintiffs establishing that fiduciary duties were owed to the parties to the joint venture in the circumstances of this case.
137. As for the particulars of breach of duty pleaded, some are prescribed and others are not. Only those that are not prescribed can be pleaded. Paragraph 31 B alleges that the assistance

rendered by the Second and Third Defendants was dishonest. I accept the Defendants submissions that all allegations of dishonesty need to be properly particularised and that, in the proposed amended cause, the Plaintiffs have failed to give adequate particulars of dishonesty on the part of the Second and Third Defendants with the consequence that what is alleged has no reasonable prospect of success.

138. For the same reason, application or leave to bring a derivative action sought in paragraph 31 C will also not be permitted.
139. The proposed new paragraph 33 relies upon breaches of the fiduciary duties pleaded in paragraph 21 B. That paragraph is not to be included for the reasons I have given and hence paragraph 33 also falls away.
140. Paragraph 35 alleging dishonest assistance to the breaches of trust on the part of the Sixth Defendant is pleaded in a similar way to paragraph 31 B which, as I have said, does not adequately particularise the allegations of dishonesty or the assistance given and hence is not to be permitted. Paragraph 35 B, alleging knowing receipt of certain properties in breach of trust by the Sixth Defendant is subject to what I have said about the limitation period applying to constructive trusts. The same applies to paragraphs 35 D, E and F.
141. As far as the conspiracy claim in paragraph 36 A is concerned, I accept that the proposed amendments are for the purpose of giving further particulars to what was already pleaded in the original cause. Advocate Greenfield has said he will be applying in due course to have the conspiracy claim struck out. Advocate Ferbrache has brought a separate application on behalf of the Eighth Defendant. It is not for me, in this judgment, to decide whether to strike out the conspiracy claim. I allow the proposed amendments on the basis that they give further particulars of what was previously pleaded. I make no comment as to whether the conspiracy claim will survive any attempt to have it struck out.
142. I do not propose to go through the proposed amended cause line by line. Instead, I indicate in general terms what may or may not be permitted and it will be for the Plaintiffs' Advocate to make such amendments as she considers are consistent with my judgment, submit them to counsel for the other parties to seek to agree the changes and then, if agreement cannot be reached, to apply to me for a further ruling.
143. In making those further changes, all allegations of breach of trust to which section 76 of the Trusts Law of 2007 apply, which were pleaded for the first time in the proposed amended cause and which arose before 10th June 2008 must be deleted. In respect of allegations of breach of trust, dishonest assistance, knowing receipt and tort save where fraud is alleged, the relevant date is 10th June 2005. All of the property sales by WHL took place before June 2005 whereas the sales any HIL occurred during the period between June 2005 and June 2008. Hence, some of the allegations relating to the new causes of action may remain when the Plaintiffs further amend their claim to take account of this judgment. That is why I do not regard it as my task to go through the proposed amended cause line by line identifying what can and cannot properly be pleaded; that is a task that can only be carried out by the Plaintiffs' Advocate.
144. Consequently, I have decided to allow Advocate Lund to have one more opportunity to plead her case. I stress that it will be the final opportunity. If it is met with applications for strike out, I will not be sympathetic to any submission by her that she be given a further chance to amend. I also state that the further amended cause must incorporate all the particulars relied upon. It will not be sufficient for her to continue to rely upon replies given to *Exceptions de forme* or to *répliques* or even earlier versions of the *cause*. The revised pleading must stand

or fall as pleaded. In the revised pleading, the Plaintiffs must ensure they provide adequate particulars of the many allegations which have been criticised by the Defendants.

145. Advocate Lund is on notice of the other criticisms articulated by the Defendants. The Plaintiffs have been warned that they may face an application to strike out the conspiracy claim. I will not prejudge any such application nor do I propose to tell the Plaintiffs what they need to do to avoid it.

146. I sincerely apologise to the parties for the length of time it has taken me to produce this judgment. It has taken me far longer than I normally regard as acceptable. I apologise for all the frustrations and inconvenience that my delay has caused.

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

Between:	SIDNEY GEORGE JEFCOATE	First Plaintiff
	STUART LAWRENCE JEFCOATE	Second Plaintiff
	-v-	
	SPREAD TRUSTEE COMPANY LIMITED	First Defendant
	COSIGN SERVICES LIMITED	Second Defendant
	SPREAD SERVICES LIMITED	Third Defendant
	COSIGN NOMINEES LIMITED	Fourth Defendant
	SPREAD NOMINEES LIMITED	Fifth Defendant
	CHRISTOPHER JOHN NICHOLSON	Sixth Defendant
	JOHN FIELD	Seventh Defendant
	JOHN PIPER	Eighth Defendant

APPLICATION BY SIXTH TO EIGHTH DEFENDANTS FOR DISCLOSURE OF FUNDER

Before: Richard John Collas, Esq., Bailiff

Advocate for the Plaintiffs:	Advocate A Lund
Advocate for the First to Fifth Defendants:	Advocate J Greenfield
Advocate for the Sixth to Eighth Defendants:	Advocate P Ferbrache

Legislation, Cases and References relied upon in this Judgment:

The Royal Court Civil Rules, 2007

The Civil Procedure Rules, 1998 (as amended)

The Royal Court (Costs and Fees) (Guernsey) Law, 1969, (as amended)

The Senior Courts Act, 1981

Symphony Group PLC v Hodgson [1994] QB 179

Germany v Flatman [2011] EWHC 2945 (UB)

Dymocks Franchise Systems (NSW) PTY Limited v Todd [2004] 1WLR 2807

T G A Chapman Limited v Christopher [1998] 1WLR 12, 22

Arundale Chiropractic Centre PTY Limited v Deputy Comr of Taxation [2001] 179 ALR 406, 414

Arroyo v B P Exploration Code (Columbia Limited) (Unreported) (6th May 2010)

Mayo Associates v Cantrade Private Bank of Switzerland (CI) Limited [1998] JLR 173

Angenent v Pring (Royal Court judgment 65/2004, 30 December 2004)

Introduction

1. By an Application dated 1st August 2012, the Sixth to Eighth Defendants seek an Order “that the First and Second Plaintiffs and/or the First to Fifth Defendants be ordered to disclose:
 - (i) The identity of any person other than the First and Second Plaintiffs who is funding the litigation”.

The Application also sought an Order as to “the terms upon which such funding is being provided” but, during oral submissions, Advocate Peter Ferbrache (on behalf of the Sixth to Eighth Defendants) confirmed that he was not pursuing the second limb of the Application.

2. The Application is novel in this jurisdiction and raises questions as to the Royal Court’s powers to order costs against a non party and as to its relevant ancillary powers, if any. In the absence of any previous Guernsey authority, I was referred largely to English procedure and to judicial decisions in England and elsewhere, none of which are on all fours with the present application as none of them involved an application for disclosure during the course of litigation at a stage prior to the court making a costs order against the party from whom disclosure is sought.
3. Advocate Lund resisted the Application both on the ground that the Court has no jurisdiction to grant disclosure in such circumstances and also that, even if the Court has the power, on the facts of this case it would not be a proper exercise of the Court’s discretion, especially as the Plaintiffs have been ordered to lodge security for costs in the total sum of £720,000 pursuant to an Order of the Deputy Bailiff in these proceedings dated 13 August 2012. Such security is to be provided in three tranches:
 - £315,000 within 14 days of the making of the Order (which has been paid);
 - £185,000 when applying for case management conferencing; and
 - £220,000 no later than 35 days before the date fixed for the trial.

The Parties

4. The Second Plaintiff is the son of the First Plaintiff. The First Defendant is a trust company and trustee of four named trusts. The Plaintiffs are beneficiaries of two of the trusts, the Sixth Defendant is a beneficiary of another and the Eighth Defendant is a beneficiary of the fourth trust. The Second to Fifth Defendants are companies associated with the First Defendant and provide corporate services including acting as corporate directors of companies through which the activities that give rise to the allegations in the cause were conducted.

5. The Sixth Defendant is described as a project manager, the Seventh Defendant is his associate and the Eighth Defendant provided tax advice to the Sixth Defendant and also to the Plaintiffs.
6. The case involves the operation of a project, described as a joint venture, that was established to acquire former National Coal Board properties with a view to realising any development potential any properties might have and selling them for a profit.
7. In short the project involved the First Defendant as the provider of funding, the Sixth Defendant as the project manager and the Eighth Defendant as the tax advisor. The activities were conducted through companies owned by the trusts of which the First Defendant was trustee and through companies controlled by the First to Fifth Defendants.
8. The proceedings commenced with a cause tabled on the 12th November 2010, which I will refer to as the “Original Cause”. On 10th June 2011 the Plaintiffs tabled an application to amend the cause (“the Amended Cause”). The application to amend is opposed by the Defendants, the hearing in connection with which concluded immediately prior to the hearing of the present application. The parties agreed that the present application may proceed regardless of the outcome of the application to amend the cause and without waiting for the outcome of a separate application by the Eighth Defendant for the claim against him to be struck out.
9. Both versions of the Cause allege a joint venture. In the Original Cause the only party to the joint venture is alleged to be the First Defendant in its capacity as trustee of several trusts of which the Plaintiffs and the Sixth Defendant are beneficiaries. In the Amended Cause, it is alleged that the parties to the joint venture were the First Plaintiff and/or the Sixth and/or the Eighth Defendant and/or the First Defendant. Both versions of the Cause plead detailed allegations about the former Coal Board properties that were acquired. At the risk of over simplifying, it is sufficient for present purposes to say that the allegations include that some properties were sold on at an under value and/or without investigating the full development potential of sites. It is also alleged that some properties were sold to companies owned by the Sixth Defendant enabling him to develop and sell on the properties for his own benefit thereby depriving the joint venture and to the disadvantage of the joint venture.
10. Both versions of the Cause plead a conspiracy on the part of the Defendants to cause loss to the trusts of which the Plaintiffs were beneficiaries.
11. Both versions of the Cause allege breaches of duty by the First Defendant in its role as trustee. The Amended Cause alleges such breaches were induced or assisted by the Second and Third Defendants including dishonest assistance on their part. It further alleges breaches of duty by the Fourth, Fifth and (in the case of the Amended Cause) the Sixth Defendant.
12. The Amended Cause alleges the Sixth Defendant induced or assisted in breaches of trust by the First Defendant and that the Sixth Defendant is a knowing recipient of properties or assets and liable to account as constructive trustee thereof.
13. The relief sought includes a claim for damages to be paid back into the trusts and a claim for account and enquiries to be conducted.

Advocate Ferbrache’s submissions as to the Law

14. The application is brought under Rule 50(2)(p) of The Royal Court Civil Rules, 2007 and/or the inherent jurisdiction of the Court. Rule 50 deals with the Court’s general powers in respect of the conduct of proceedings. Sub rule 50(2)(p) provides that:

“(2) The court may –

(p) take any other step or make any other order for the purpose of managing the case and ensuring the just resolution of the case”.

15. In the absence of any reported authority in Guernsey concerning the scope and extent of rule 50(2)(p), Advocate Ferbrache looked at the commentary on Rule 3.1(2)(m) of The Civil Procedure Rules, 1998 (as amended) which is in almost identical terms.
16. The difference between the two rules is that our rule has substituted the phrase “ensuring the just resolution of the case” for the following in the English rule “furthering the overriding objective”. Guernsey has adopted the overriding objective in Rule 1 of the RCCR and I accept that for present purposes (and maybe for all purposes), there is no difference between the meaning of RCCR rule 50(2)(p) and CPR 3.1(2)(m) because Rule 1(1) of the RCCR provides that “the overriding objective of these rules is to enable the court to deal with cases justly”.
17. Advocate Ferbrache relied upon the overriding objective when submitting that all parties should be placed on an equal footing. He assumed that as the First to Fifth Defendants are being sued in their professional capacity, they will be indemnified out of trust funds and if the Plaintiffs are also being funded from trust funds, as his clients suspect, then the Sixth to Eighth Defendants are the only parties who are not being funded from trust funds and hence they are on a different footing from all the other parties.
18. The Royal Court’s power to order costs derives from Section 1(1) of The Royal Court (Costs and Fees) (Guernsey) Law, 1969, (as amended):

“The costs of and incidental to proceedings in the Royal Court shall be in the discretion of the Royal Court and the Royal Court shall have power to determine by whom and to what extent the costs are to be paid.”
19. I am satisfied that the Royal Court’s discretion thereunder is very broad and is wide enough to include a power to order costs against a non party.
20. In England, The Senior Courts Act 1981, Section 51, provides for the costs of proceedings to “be within the discretion of the courts” and expressly provides in Sub-Section (3) that:

“The courts shall have full power to determine by whom and to what extent the costs are to be paid.”
21. In Advocate Ferbrache’s written skeleton argument, he referred to the guidelines laid down by the English Court of Appeal, for the exercise of that power against non parties in a number of cases including the judgment of Balcombe LJ in *Symphony Group PLC v Hodgson* [1994] QB 179. I will not refer to those guidelines in detail because in his oral submissions, Advocate Ferbrache emphasised the more recent first instance decision of Eady J in *Germany v Flatman* [2011] EWHC 2945 (UB) where the judge took account of the principles laid down by the Privy Council in *Dymocks Franchise Systems (NSW) PTY Limited v Todd* [2004] 1 WLR 2807, a decision in which *Symphony* was cited in argument but not referred to by their Lordships.
22. In *Dymocks*, the Judicial Committee considered the exercise of a court’s discretion to order costs against a non party and dismissed the suggestion that the discretion might be exercised differently in the courts of New Zealand than in an English court saying, at page 2815A in the speech of Lord Brown of Eaton-Under-Heywood:

“Their Lordships are not persuaded that there is in fact any material difference in the approach taken in the various different jurisdictions to the exercise of this discretion.”

Lord Brown continued at paragraph 24:

“24. What, then, are the principles by which the discretion to order costs to be paid by a non party is to be exercised and, in the light of these principles, should the board make the order here sought against Associated [a non party]?”

“25. A number of the decided cases have sought to catalogue the main principles governing the proper exercise of this discretion and their Lordships, rather than undertake an exhaustive further survey of the many relevant cases would seek to summarize the situation as follows:

(1) Although costs orders against non parties are to be regarded as “exceptional”, exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. The ultimate question in any such “exceptional” case is whether in all the circumstances it is just to make the order. It must be recognised that this is inevitably to some extent a fact specific jurisdiction and that there will often be a number of different considerations in play, some militating in favour of an order, some against.

(2) Generally speaking, the discretion will not be exercised against “pure funders”, described in para 40 of *Hamilton v Al Fayed* (No. 2) [2003] QB1175, 1194 as “those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its course”. In their case the court’s usual approach is to give priority to the public interest and the funded party getting access to justice over that of the successful unfunded party recovering his costs and so not having to bear the expense of vindicating his rights.

(3) Where, however, the non party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party’s costs. The non party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes. He himself is “the real party” to the litigation, a concept repeatedly invoked throughout the jurisprudence – see, for example, the judgments of the High Court of Australia in the *Knight* case 174 CLR 178 and Millett LJ’s judgment in *Metalloy Supplies Limited v MA (UK) Limited* [1997] 1WLR 1613.”

23. Consistently with this approach, Phillips LJ described the non party underwriters in *T G A Chapman Limited v Christopher* [1998] 1WLR 12, 22 as “the Defendants in all but name”. Nor, indeed, is it necessary that the non party be “the only real party” to the litigation in the sense explained in the *Knight* case, provided that he is “a real party in very important and critical respects”: see *Arundale Chiropractic Centre PTY Limited v Deputy Comr of Taxation* [2001] 179 ALR 406, 414, referred to in the *Kebaro* case [2003] FCAFC 5, at [96], [103] and [111]. Some reflection of this concept of “the real party” is to be found in CPR r

25.13 (2) (f) which allows a security for costs order to be made where “the claimant is acting as a nominal claimant”.

24. In support of his submission that the court has the power to order disclosure of the identity of a person funding litigation, Advocate Ferbrache cited paragraph 28 of the judgment of Eady J in Germany:

“Where the court has power to order a third party to pay the costs of litigation, there is correspondingly the jurisdiction to require disclosure of information relevant to that issue. It is observed by the editors of Civil Procedure, Vol 1 (2011) at 48.2.2 that the court “necessarily has the ancillary power to order a party to proceedings, or the solicitors who had been on the record for that party, to disclose to the other party the names of those who have financed the litigation. Where the power exists to grant a remedy there must be, inherent in that power, the power to make ancillary orders to make the remedy effective”: see *Abraham v Thompson* [1997] 4 ALL ER 362; *Raiffeisenzentralbank Osterreich v Crossseas Shipping Limited* [2003] EWHC 1381 (comm)”.

Advocate Lund’s submissions as to the Law

25. Advocate Lund submitted that the Court does not have the power to grant the orders sought, either under Rule 50 (2)(p) or under its inherent jurisdiction.

26. She referred to the High Court decision in *Arroyo v B P Exploration Code (Columbia Limited)* (Unreported) (6th May 2010), in which the Defendants sought an order for disclosure of the details of an After the Event insurance policy which the claimants were using to fund their litigation. In that case, the defendants wanted to be put on an equal footing to the claimants (as Advocate Ferbrache’s clients seek to do in the present case). The defendants brought their application pursuant to the English Court’s general case management powers under CPR part 3, 18.1 and 19. At paragraph 51 of the judgment, the Senior Master said:

“Further, it seems to me that the argument based on the “equal footing” or “level playing field”, arising out of the fact that the Claimants can see from publicly available accounts that the Defendant is good for any judgment of costs so that the Defendant should be put into the same position by the court in respect of the Claimants is wrong. The overriding objective was in my judgment not intended to suggest that the Court should exercise case management powers to require a party to disclose what financial arrangements it has in place to pay or its financial ability to pay, an order for costs. It seems to me that if that were intended by the rules of court there would have to be specific provision to that effect.”

27. At paragraph 55, he referred to the specific provisions of the CPR relied upon by the defendant and concluded “in my judgment, the provisions the Defendant identifies do not endow the court with any additional jurisdiction to order disclosure”.

28. Advocate Lund further submitted that the question raises a substantive, rather than procedural, issue. She cited the Jersey Court of Appeal decision of *Mayo Associates v Cantrade Private Bank of Switzerland (CI) Limited* [1998] JLR 173 at page 188 and the Royal Court decision of Talbot LB in *Angenent v Pring* (Royal Court judgment 65/2004, 30 December 2004) as authorities for the proposition that the Royal Court may only exercise inherent jurisdiction in so far as it relates to procedural, rather than substantive, issues and that such jurisdiction should only be used where it is a matter of “necessity”.

29. Regarding the cases cited by Advocate Ferbrache, Advocate Lund submitted they are all distinguishable on two grounds. First, they all involve applications for disclosure after

judgment has been granted. Secondly, in the present case there has been an order for security for costs.

30. In response to Advocate Lund, Advocate Ferbrache submitted that the Order sought is clearly procedural in nature, not substantive. The Court must have the ancillary powers it needs to make an order effective. The decision in Arroyo precedes the judgment of Eady J in Germany and furthermore is a decision of a Senior Master and is specific to contingent or conditional fee agreements.

Factual Basis

31. The factual evidence relied upon by Advocate Ferbrache in support of the present application includes that:
 - 1) In correspondence between his firm and Advocate Lund's firm, no information had been supplied as to how the Plaintiffs are funding the litigation. He submitted that if it had not been funded by the First Defendant through trust assets held by them, it would have been simple for the Plaintiffs to say so.
 - 2) In the Deputy Bailiff's Security for Costs judgment, he had found that the Plaintiffs were acting as nominal plaintiffs on behalf of trusts of which the First Defendant was the trustee.
 - 3) The Eighth Defendant who had been a tax advisor to the First Plaintiff until December 2011 and to the Second Plaintiff until January 2010 stated in an affidavit declared and affirmed on 8th May 2012 that neither of the Plaintiffs have personal assets of any substance against which wasted cost orders could be enforced. The Second Plaintiff had not been successful in business and had borrowed substantially from his father's trusts. The Eighth Defendant said he considered "that it is highly likely that the present litigation has been funded by way of advances and loans made by [the First Plaintiffs] Guernsey Trust" (Paragraph 9).
 - 4) In Advocate Ferbrache's submission, the Deputy Bailiff had taken a conservative view of the level of security for costs required. Consequently, the security that has been ordered is likely to be insufficient to meet the full costs that can be expected to be recoverable in the event that the Sixth to Eighth Defendants succeed. The sum claimed by them in the Security for Costs application was in excess of £1,750,000 and the total sum ordered was £720,000.
32. Advocate Lund questioned whether the Sixth to Eighth Defendants have an ulterior motive in bringing the application. She referred to correspondence in which their Advocates had indicated that they believed the First Defendant may have a conflict of interest if it is funding litigation on behalf of the Plaintiffs when it is also a trustee of trusts of which the Sixth and Eighth Defendants are beneficiaries.

Decision – The Law

33. I accept that the power conferred on the Court by Section 1(1) of The Royal Court (Costs and Fees) (Guernsey) Law, 1969 (as amended) is sufficiently wide to enable the Court, in an appropriate case, to order that the costs of proceedings be paid by a non party.
34. I also respectively adopt the reasoning of Eady J in Germany, at paragraph 28, that "where the power exists to grant a remedy there must be, inherent in that power, the power to make ancillary orders to make the remedy effective".

35. The combination of the two means that the Court has the power to order a party to proceedings to disclose whether its litigation costs are funded by a person who is not a party to the proceedings.
36. The real issue for me to decide is in what circumstances the Court may exercise that power.
37. In *Dymocks*, the Judicial Committee of the Privy Council held (at paragraph 23) that there is no material difference between the approaches taken to the exercise of this discretion in each of various different jurisdictions. I am therefore satisfied that the approach of the Royal Court should be no different from that of the courts of England, New Zealand, Australia and any other similar jurisdictions.
38. I do not find the guidelines in *Symphony* to be particularly helpful in the present case although I recognise that they are a useful summary of the types of circumstances in which costs orders have been made against non parties. Instead, I am guided by the principles identified by the Privy Council and set out in paragraph 25 of its judgment in *Dymocks* (set out above).
39. Advocate Ferbrache did not contest Advocate Lund's statement that all the cases cited to me relate to disclosure of information after the making of a costs order post judgment. I do not know whether the English court has the power to order disclosure at an earlier stage pre-judgment.
40. Advocate Ferbrache submitted that Rule 50(2)(p) empowers the Royal Court to make such an order. In my view, Rule 50 is concerned with the Court's general powers to manage a case during the course of the conduct of proceedings. Indeed the Royal Court Civil Rules 2007 are generally concerned with the conduct of proceedings up to the point of obtaining judgment. They do not concern themselves with the enforcement of a judgment once it has been obtained. For that reason I do not believe that Rule 50(2)(p) is applicable in this instance.
41. In the absence of any written rules, if the Royal Court has the power to make the order sought it can only be pursuant to the Court's inherent jurisdiction and/or as a power ancillary to the costs jurisdiction conferred on the Court by the 1969 Law.
42. A relevant factor is the purpose for which disclosure is required. Advocate Ferbrache has said that, at this stage, he is limiting his request to an order for disclosure of information and nothing more.
43. In my view, I would only have the inherent jurisdiction to make the order if it is necessary for a purpose ancillary to another order the Court could make. At this interlocutory stage, the only purpose of the Order requested in the present Application seems to be to pave the way for an application by the Sixth to Eighth Defendants for security for costs to be lodged by the First Defendant if it is funding the proceedings.
44. In that regard, it is significant that the Royal Court has no express power to order a non party to provide security for costs. The power exists only to make an order against a party to the proceedings. Rule 82(1)(b) of the RCCR gives the Court the power to "order any party to give security for costs in such amount, on such terms and in such manner, as the court thinks just" (emphasis added).
45. In my view, in the absence of an express power, the Royal Court is not able to order security for costs to be given by a non party. It follows therefore that the Court does not need, and does not have, the ancillary power to order disclosure at an interlocutory stage to disclose how a party is funding the proceedings.

46. Even if I am wrong, and I do have such power, I would not be minded to exercise the power on the facts of the present case. The Sixth to Eighth Defendants have obtained an order for security for costs in such amount as the Deputy Bailiff considers to be reasonable. The eventual costs will almost certainly be different from what he has estimated and they may be more than he has ordered (as Advocate Ferbrache submitted) or they may be less. However, the Deputy Bailiff has made his decision as to the likely level of recoverable costs. There is no basis for me to find that his decision is wrong or unreasonable. I must therefore conclude that the Sixth to Eighth Defendants have adequate security for their likely recoverable costs. There is therefore no need for them to have any additional security. It matters not who is funding proceedings; a future order for recoverable costs can be met out of the funds already ordered to be lodged with the Court. For the avoidance of doubt, I should perhaps add that I do not rule out the possibility that if circumstances were to change, the Court may have the power to order additional costs to be lodged if it is appropriate so to order.
47. Alternatively, the purpose of the present application may be to pave the way for an order that costs be paid by the First Defendant if and when an order for costs is made. In my view, there is no need to anticipate future orders. If and when the proceedings reach the stage where the Defendants may have the opportunity to apply for a costs order and if there is then a basis for seeking an order against the First Defendant, the Eighth Defendant will be able to apply for such ancillary orders as may be appropriate at that time.

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

Between:	SIDNEY GEORGE JEFCOATE	First Plaintiff
	STUART LAWRENCE JEFCOATE	Second Plaintiff
	-v-	
	SPREAD TRUSTEE COMPANY LIMITED	First Defendant
	COSIGN SERVICES LIMITED	Second Defendant
	SPREAD SERVICES LIMITED	Third Defendant
	COSIGN NOMINEES LIMITED	Fourth Defendant
	SPREAD NOMINEES LIMITED	Fifth Defendant
	CHRISTOPHER JOHN NICHOLSON	Sixth Defendant
	JOHN FIELD	Seventh Defendant
	JOHN PIPER	Eighth Defendant

THE EIGHTH DEFENDANT'S STRIKE OUT APPLICATION

Before: Richard John Collas, Esq., Bailiff

Advocate for the Plaintiffs:

Advocate A Lund

Advocate for the First to Fifth Defendants:

Advocate J Greenfield

Advocate for the Sixth to Eighth Defendants:

Advocate P Ferbrache

Legislation, Cases and References relied upon in this Judgment:

Silver Falcon Enterprises Limited and Others v International Hellenic Operations Limited and Others
(Court of Appeal 20th October 1994)

Nagle v Feilden [1966] 2 QB 633

International Steel and Tube Industries Limited v Sohail Massood (Royal Court 58/2005)

McDonalds Corporation v Steele

Three Rivers District Council and Others v Bank of England number 3 [2001] 2 All ER 513

Miles v Bull [1969] 1 QB 258

Attorney General v Barker [2000] 1 FLR 759

Nomura International plc v Granada Group Limited [2007] EWHC 642 (Comm)

1. The Eighth Defendant issued an application dated 10th January 2012 which has been referred to as the strike out application. In fact, the application was brought under five headings: Rule 37(1) of the Royal Court Civil Rules, 2007 (removal of a person improperly or unnecessarily made a party); Rule 52 (2) (a) (power to strike out a pleading that discloses no reasonable grounds for bringing an action); Rule 52 (2) (b) (power to strike out a pleading that is an abuse of the Court's process or otherwise likely to obstruct the just disposal of the proceedings); Rule 19 (power to give summary judgment); and the inherent jurisdiction of the Court.
2. There have been a number of written judgments arising from interlocutory applications in these proceedings in which the factual background to the claim has been summarised including my judgment relating to the Plaintiffs' application to amend the *cause*. In this judgment it is sufficient to give a brief summary of the general background to the claim. It arises out of a project to acquire some former National Coal Board properties and to investigate or exploit their development potential before selling the properties. The finance was provided through trusts of which the First Defendant was a trustee and of which the Plaintiffs, a father and son, were among the class of beneficiaries. The operation of the project was conducted through a number of companies administered by the First to Fifth Defendants who are all part of the same group of companies and are professional trust and company administrators. The Sixth Defendant was employed as the project manager. The Seventh and Eighth Defendants were described as his associates. The details of the Plaintiffs' complaints are lengthy and complex but, in short, the allegations are that properties were sold without properly investigating or realising their full development potential and/or at prices less than their true market value and that, in some instances, properties were sold to companies owned by the Sixth and/or Seventh Defendants.
3. It is necessary to look in greater detail at the allegations pleaded by the Plaintiffs in respect of the Eighth Defendant. They are found in the Plaintiffs' original *cause*, in a *réplique* filed in answer to *Exceptions de Forme* raised by the Fifth to Eighth Defendants, and in a proposed amended *cause* which is the subject of a separate application and separate judgment.
4. In their *cause*, the Plaintiffs state that the Eighth Defendant is an associate of the Sixth Defendant and has acted in the capacity of accountant to the Sixth Defendant (paragraph 2.7

of both the *cause* and the amended *cause*). They allege that the Eighth Defendant, together with other Defendants, was party to a conspiracy wrongfully and with intent to injure and/or cause loss to the beneficiaries of the trusts through which the Plaintiffs were funding the settlement and/or by unlawful means whereby the Defendants have combined and conspired to cause loss to the beneficiaries of the trusts.

5. The allegations against the Eighth Defendant pleaded in the original *cause* fell into two categories. First of all that he was present at a number of meetings attended by the Sixth Defendant and representatives of the First to Fifth Defendants at which aspects of the project were discussed (paragraphs 37.3.1 to 37.3.9) and he was present at a meeting that was also attended by the First Plaintiff (paragraph 25.9.7). Secondly, it is alleged that the Eighth Defendant has said that the Sixth Defendant instructed him to destroy relevant files (paragraph 37.2.3).

6. In the Plaintiffs' *réplique*, they provided further details of some of the allegations:

6.1 Under paragraph 11.3 (at page 165 of the pleadings bundle) it is averred that the First Plaintiff expressed concerns at a meeting with Mr Paul Schreiber (representing one or more of the first five Defendants) shortly after 23rd July 2003 to the effect that the First Defendant was not acting impartially, was being pressured by the Sixth Defendant to use the project to give favourable treatment to the Sixth Defendant's interests, and was failing to keep the First Plaintiff apprised of the progress of the project. It is alleged that at the meeting it was decided that the agreement of the First Plaintiff, the Sixth Defendant and the Eighth Defendant would be required for any decisions regarding disposals of properties or other significant matters thereafter.

6.2 In paragraph 25.9.9, the Plaintiffs observed that "*the Eighth Defendant is closely involved in the business of the Sixth Defendant generally and the joint venture in particular and therefore should have been aware of the facts of the matters alleged in this paragraph*".

6.3 In relation to paragraph 37.2.3, they stated that "*the Eighth Defendant told [the First Plaintiff] that the Sixth Defendant attended the Eighth Defendant's office in Bishops Stortford and instructed him to destroy all files relating to anything done with the Sixth Defendant*".

6.4 In the subsequent paragraph, they explained that the files referred to are the files relating to the projects involving the Sixth Defendant.

6.5 In a further answer, the Plaintiffs stated that they do not make any allegations as to who destroyed documents as the information is within the knowledge of the Sixth and Eighth Defendants.

7. Further allegations are pleaded in the proposed amended *cause*. In paragraph 19 it is alleged that the Eighth Defendant may have been one of the parties to the joint venture. Or, he may not have been. The lack of clarity arises because the parties to the joint venture are pleaded on an "and/or" basis so there is no certainty as to who the Plaintiffs allege were party to the joint venture.

8. The proposed amended *cause* contains fresh pleadings of express and implied terms of the joint venture and new allegations that fiduciary duties were owed as between the parties to the joint venture (whoever they may be).

8.1 Paragraph 21.5 pleads that one of the express terms of the joint venture was that "*the First and/or Sixth and/or Eighth Defendants would be responsible for taking*

all necessary steps to prepare the sites for sale, by obtaining such planning consents as could reasonably be obtained to increase the value of the various sites, by identifying any features of the sites (such as mineral deposits) that would naturally enhance their value and finding purchasers for the sites”.

8.2 Paragraph 21A pleads a number of implied terms of the joint venture (implied for reasons of obviousness and/or business efficacy and/or necessity) including that all the parties to the joint venture would keep each other reasonably well informed about the progress of the joint venture and would disclose any important decisions that it was proposed to make.

8.3 Paragraph 21B alleges that each of the parties to the joint venture owed each other fiduciary duties including a duty to carry out the joint venture in good faith, a duty not to make a secret profit and a duty not to put themselves in a position where their duties conflicted with their own interests.

9. Although the Plaintiffs are unclear in the amended *cause* as to who were the parties to the joint venture, there is no similar uncertainty as to who were the parties to the conspiracy. Paragraph 36A.1 pleads that the relevant persons through whom the conspiracy was conducted included the Eighth Defendant. The elements of the conspiracy are addressed in paragraph 36A.4 alleging that all the Defendants knew the properties were held on trust and hence that to dispose of them in breach of trust was wrongful and (in the second paragraph numbered 36A.4) alleging that by acting in furtherance of the conspiracy, the Defendants caused loss to the Plaintiffs knowingly and with intention to do so.
10. The only remedy claimed against the Eighth Defendant in both versions of the *cause* is damages for the loss suffered by the trusts as a result of the alleged conspiracy.
11. The grounds on which the Eighth Defendant seeks to have the claim against him struck out include that:
 - (1) no overt unlawful acts are pleaded against him to support the allegation that he was party to an unlawful conspiracy;
 - (2) it is not alleged that he had actual knowledge of the unlawful and/or dishonest acts alleged to have been perpetrated by others only that he should or must have been aware of what they were doing in furtherance of the alleged conspiracy;
 - (3) any allegation against the Eighth Defendant which is tantamount to dishonesty is inadequately pleaded;
 - (4) the allegation that he is an independent tax consultant who advises the Sixth Defendant is insufficient, without more, to make him a party to an unlawful conspiracy;
 - (5) there is no allegation that the Eighth Defendant in fact destroyed files pursuant to the Sixth Defendant's alleged instruction to do so (an instruction with the Eighth Defendant denies) or, if he did, that such destruction was unlawful;
 - (6) attendance by the Eighth Defendant at meetings is not sufficient, by itself, to support the conspiracy claim.
12. In support of his client's application, Advocate Ferbrache swore an affidavit dated 10th January 2012 to which he exhibited copies of correspondence with the Plaintiffs' Advocates seeking clarification or further particulars of the allegations. In reply, the First Plaintiff swore an affidavit dated 31st January 2012. In it he disclosed that the Eighth Defendant had acted as

his tax adviser between 1994 and about January 2010. He added that the Eighth Defendant has often acted as a professional company secretary to the Sixth Defendant's companies and that a recent search at Companies House had shown that he had acted as Company Secretary for companies to whom some of the former joint venture's National Coal Board properties were sold. I have taken note that such allegations are not alleged by the Plaintiffs in any of their formal pleaded documents.

13. The leading case on conspiracy and the economic torts in this Island is Silver Falcon Enterprises Limited and Others v International Hellenic Operations Limited and Others (Court of Appeal 20th October 1994). Giving the judgment of the Court of Appeal, Sir Godfray Le Quesne JA said:

“Every conspiracy involved a combination of two or more persons, natural or legal, with a view to carrying out certain action. In the nature of things, it is rarely possible for a Plaintiff who claims against alleged conspirators to particularise when, where and in what terms the combination was affected. He must be able to particularise those who he says were parties to the combination, but to expect him to give particulars of the conspiracy as if it were a commercial contact is unrealistic. Realising this, the Courts have required him to particularise the overt acts through which the conspiracy was carried out. We adopt the statement of principle laid down in this respect by Salmon J, in Marrinan v Vibart [1963] 1 QB 234 [see Tab 15 of the Eighth Defendant's bundle] at p.238:

“... the gist of the tort of conspiracy is not the conspiratorial agreement alone, but that agreement plus the overt act causing damage. It is true that the crime of conspiracy is the very agreement of two or more persons to effect an unlawful purpose, and any overt acts done in pursuance of the agreement are merely evidence to prove the fact of the agreement. The tort of conspiracy is complete only if the agreement is carried into effect so as to damage the plaintiff.

Accordingly, the acts done in pursuance of the agreement are an integral part of the tort: Crofter Hand Woven Harris Tweed Co. Ltd v Veitch.”

On appeal, the judgment of Salmon J. was expressly approved by all three members of the Court: [1963] 1QB 528” (at Tab 16 of the Eighth Defendant's bundle).

14. Thus there are three constituent elements of a conspiracy:

- (a) an agreement or combination between two or more persons;
- (b) the overt acts and furtherance of it;
- (c) resulting damage.

15. In the instant case, it is only the Eighth Defendant who is seeking to strike out the conspiracy claim. The other alleged parties to the conspiracy have not brought a similar application. It may be that they accept that they do not have grounds to do so. I note that some overt acts are pleaded in relation to other Defendants separately from any acts pleaded in respect of the Eighth Defendant. In the absence of any overt acts committed by the Eighth Defendant, where is the evidence that he agreed to take part in the conspiracy?

16. It is necessary to plead sufficient particulars in respect of each of the alleged participants in the conspiracy to establish that each and every one of them is indeed a co-conspirator. It is not normally sufficient to plead that overt acts in furtherance of the conspiracy were carried out by some but not all of the participants. Without the evidence that all of the alleged conspirators participated, there would normally be no evidence linking them all into the

agreement to commit the conspiratorial acts. As the Court of Appeal said at paragraph 35 of their judgment in Silver Falcon:

“Particulars of overt acts fulfil two functions; they enable the defendants to ascertain from what material the Court will be asked to infer a combination, and they supply the necessary pleaded causal link between the combination, the acts done pursuant to it, and the damage suffered. A bare plea of conspiracy without some reasonable particularisation of the overt acts stemming from it is liable to be struck out; the Plaintiff must not be allowed to engage in a fishing expedition in the hope that discovery will furnish material to support a case of which at present he is bereft. In considering each of the causes of action set out in para.17 of the Cause we would apply the words of Steyn, L.J. in Creditcorp Ltd v Kingston (unreported but included at Bundle 6, Divider 14):

“A cause of action in fraud which cannot be supported by proper particulars is in the eyes of our law no cause of action at all.”

In relation to the claim there before the Court Steyn, L.J. added:

“Stripped of its mellifluous language, Mr. Burton is in effect asking us for leave to go on a fishing expedition in aid of an unsustainable claim. It would be wrong in principle to accede to this request. I reject this argument.”

We for our part regard it as our duty, when examining the replies to the order for Further and Better Particulars, to bear this principle firmly in mind. It accords, as is to be expected, with Guernsey law (“LOI RELATIVE AUX PREUVES” (1865), s.37):

“La bonne foi est toujours présumée, et c’est à celui qui allègue la fraude à en faire la preuve, bien entendu que pour que cette preuve soit recevable, il faut que l’allégation de fraude soit formulée en termes exprès.”

17. In light of the fact that particulars of overt acts performed by alleged conspirators fulfil two functions, if no overt acts are pleaded against one of the alleged participants there will normally be no evidence that he was a party to the combination. It is in the nature of conspiracies that it can be difficult for the injured party to prove the conspiratorial agreement. Proof is normally provided by evidence of the overt acts carried out in furtherance of it because direct independent evidence of the existence of an agreement may not be available. There may be some cases where independent evidence exists of the agreement but that is not alleged in the present case.
18. In the present case, if there are no allegations that the Eighth Defendant carried out any of the overt acts, there would be no evidence that he was a party to the conspiracy, even if it could be shown that other Defendants conspired to cause damage to the Plaintiffs. The allegation that he attended meetings with other alleged conspirators is not, without more, sufficient proof that he agreed to participate in the conspiracy to injure the Plaintiffs.
19. I turn now to deal with the legal test to be applied to each of the heads under which the Eighth Defendant has brought his application.
20. The test to be applied in respect of Rule 37(1), the power to remove a person who has been improperly or unnecessarily made a party, adds nothing, in my view, to the test to be applied under other heads. For that reason, I do not need to address it specifically.

21. Rule 42(2) (a) concerns the Court's power to strike out a pleading that discloses no reasonable grounds for bringing or defending an action. In a number of decided cases, the Guernsey courts have looked to English authorities for guidance although of course the English authorities are not binding upon us.
22. The starting point is the judgment of Le Quesne JA in Silver Falcon where the Court of Appeal approved the test applicable to striking out proceedings in England as stated by Salmon, LJ in Nagle v Feilden [1966] 2 QB 633: "*It is well established that a statement of claim should not be struck out and the Plaintiff driven from the judgment seat unless the case is unarguable.*"
23. I was referred to a number of cases in which the Court has been requested to strike out pleadings and in which the test has been re-stated but, in my view, all the re-statements accord with and are consistent with the test approved in Silver Falcon.
24. For example, in International Steel and Tube Industries Limited v Sohail Massood, Hancox LB, referred to the decision of Danckwerts LJ in Wenlock v Malony at page 1243 (and he observed that the same Lord Justice also said in Nagle v Feilden at page 648):

"the summary remedy which has been applied to this action is one which is only to be applied in plain and obvious cases when the action is one which cannot succeed or is in some way an abuse of the Court."

He noted that in the same case, Salmon LJ made the celebrated statement that:

"it is well settled that a statement of claim should not be struck out and the Plaintiff delivered from the judgment seat unless the claim is unarguable."

25. In McDonalds Corporation v Steele, Neill LJ made a similar remark when he said that:

"the power to strike out is a draconian remedy which is only to be employed in clear and obvious cases."

26. Rule 19 empowers the Court to give summary judgment in favour of a defendant on the grounds that:

"(a) the plaintiff has no real prospect of succeeding on the claim or issue ... and there is no other compelling reason why the claim or issue should be disposed of at a trial".

It is therefore a two limbed test. Advocate Lund conceded that in respect of the first limb, there is significant overlap between the power of the Court to strike out a pleading and to give summary judgment because the Court is effectively determining the same point.

27. However, in respect of the first limb, she emphasised, with reference to English authorities and to the White Book, that the respondent need only show that there is some prospect, i.e. some chance, of success (paragraph 24.2.3 of the White Book). She also referred to the speech of Lord Hope in Three Rivers District Council and Others v Bank of England number 3 [2001] 2 All ER 513 stressing that in complex cases, issues of fact are only to be settled after the processes of discovery and interrogatories have been completed, after evidence has been led and when the judge can determine the issues in the light of the evidence. Summary judgment was not intended to be an exercise of minute and protracted examination of documents. She drew attention to the following passage in his speech:

"the issues of fact which the claimants seek to raise are highly complex. They relate to matters in which they were not directly involved ... they involve meetings and

discussions between many in which they were not represented ... the Court is normally reluctant to draw inferences of the kind that need to be drawn in this case without seeing and hearing the witnesses.”

28. With regard to the second limb of the test she also urged me to consider that, where “*the claimant’s case appears to be devious and crafty and not plain and straightforward*” some other reason for trial will exist (Miles v Bull [1969] 1 QB 258). Other circumstances which might afford some other reason for trial include a claim of a highly complicated or technical nature which cannot be properly understood until evidence is given.
29. Without conceding that the case against the Eighth Defendant has no real prospect of succeeding, Advocate Lund submitted that I should “consider the big picture” and accept that this is clearly a case which ought to be allowed to proceed to trial.
30. Rule 52(2)(b) concerns the Court’s power to strike out a pleading for abuse of process. There is no definition of “*abuse of process*” in the Royal Court Civil Rules so Advocate Ferbrache invited me to look to English decisions for guidance. In particular, Attorney General v Barker [2000] 1 FLR 759 where Lord Bingham said that it includes “*using that process for a purpose or in a way significantly different from its ordinary and proper use*”. An example of which, Advocate Ferbrache said would be using proceedings for an ulterior or tactical purpose such as to exert pressure or seek disclosure against a person who would otherwise not be a party. Or, as in Nomura International plc v Granada Group Limited [2007] EWHC 642 (Comm) where the court struck out a claim for abuse of process on the basis that the claimant had issued a claim in the absence of any knowledge of the claim and the ability to formulate a claim at the time of issue.
31. Advocate Lund did not substantially challenge those legal submissions but submitted that there is no factual basis for them in the present case. She also referred to a passage in the Court of Appeal’s decision in Silver Falcon where Le Quesne JA said in relation to abuse of process “*this jurisdiction will not be exercised except with great circumspection and unless it is perfectly clear that the plea cannot succeed*”.
32. Referring to the overriding objective in Rule 1(1) of The Royal Court Civil Rules, Advocate Ferbrache emphasised the need, as far as practical, to deal with cases justly by way of saving expense and ensuring a case is dealt with expeditiously.
33. Advocate Lund submitted that by reason of being a party to the joint venture and by reason of being a close associate of the Sixth Defendant, the Eighth Defendant knew that the National Coal Board properties were held on trust and that to sell them in the manner alleged, at an under value and/or to entities associated with the Sixth Defendant was a breach of trust. Such knowledge was sufficient, in her submission, to satisfy the requirements of pleading participation in a conspiracy.
34. In my opinion, the fundamental weakness in the case pleaded against the Eighth Defendant is the failure to allege that he took part in any of the overt acts that are said to have been carried out in furtherance of the alleged conspiratorial agreement. The fact that he attended meetings with other alleged conspirators does not prove that he was party to their illegal agreement. The allegation that he was asked to destroy files does not by itself prove that he carried out the instruction or assisted the Sixth Defendant to do so.
35. I am therefore satisfied that this is one of those plain and obvious cases where it is appropriate to strike out a claim that discloses no reasonable grounds for bringing the action against the Eighth Defendant. I allow the strike out application under Rules 52(2)(a) and 19. And, for what it is worth also under Rule 37(1). In relation to summary judgment, I do not see that there is any other compelling reason why the claim should be disposed of at trial. The

Plaintiffs have already had substantial disclosure from the First to Fifth Defendants, if this is the best they can do by way of pleading a case against the Eighth Defendant, it does not convince me that there is any justification in allowing it to proceed. It would not be right to do so simply in the hope that something might turn up at trial which would entitle the Plaintiffs to succeed.