

**Judgment 19/2013**

**Tchenguiz v Investec Trust (Guernsey) Limited  
Royal Court  
26<sup>th</sup> June, 2013**

---

**Application by the Defendant to strike out the Plaintiff's amended cause dated 9<sup>th</sup> December, 2011.**

**Approved Text  
26.06.2013**

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

**Between: ELIZABETH TCHENGUIZ Plaintiff**

**-v-**

**INVESTEC TRUST (GUERNSEY) LIMITED Defendant**

**Hearing date: 18<sup>th</sup> April 2013**

**Judgment handed down: 26<sup>th</sup> June 2013**

**Before: Richard James McMahon, Esq., Deputy Bailiff**

**Counsel for the Plaintiff: Advocate I C Swan**

**Counsel for the Defendant: Advocate J M Wessels**

**Cases, legislation and materials referred to:**

The Royal Court Civil Rules, 2007

*Wessedah Foundation v Barings (Guernsey) Limited* [2005-06] GLR 141

The Civil Procedure Rules

*Farah v British Airways* (unreported, 26 January 2000)

*X (Minors) v Bedfordshire CC* [1995] 2 AC 633

*Carlyle Capital Corporation Limited (in liquidation) v Conway* (unreported, 5 March 2012)

*Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664

*Lewin on Trusts* (18th ed.)

Trusts (Guernsey) Law, 2007

Trusts (Guernsey) Law, 1989

*Freeman v Ansbacher Trustees (Jersey) Limited* [2009] JLR 1

Trusts (Amendment) (Guernsey) Law, 1990

*Spread Trustee Company Limited v Hutcheson* [2011] UKPC 13

### Introduction

1. By an Application dated 23 February 2012, the Defendant sought to strike out the Plaintiff's Amended Cause dated 9 December 2011 on the ground that it discloses no reasonable grounds for bringing an action. At the conclusion of the hearing on 18 April 2013, I announced that I would not be granting the Defendant's Application in full. Accordingly, because the Plaintiff's case would be continuing, I encouraged the parties to liaise about how to progress matters whilst I reflected on whether I would accede in part to the Defendant's Application. I now set out the reasons in relation to the decisions I have reached.

### Background

2. The Application is supported by an Affidavit of Luis Gonzalez, a director of the Defendant, which was sworn on 22 February 2012. In it he explained a little bit about the chronology, placing the events that form the subject-matter of the Plaintiff's case into context, and exhibited the relevant documentation. For the purposes of the Application, on behalf of the Defendant, Advocate Wessels has readily acknowledged that the case as pleaded on behalf of the Plaintiff has to be accepted by the Defendant as if every allegation has been proved, even if there are elements that will be denied in the event the matter proceeds.
3. The Plaintiff has two brothers, to whom I will refer using the initials "RT" and "VT". At the relevant times, the Defendant was trustee of four trusts associated with the Plaintiff's family. The first in time is a Guernsey trust settled by her father on 11 March 1986, to which I will refer as "the TS". The Plaintiff has always been a beneficiary of the TS. The second trust is a BVI trust, which was declared by Rhone Trustees Limited on 25 October 1988. I will refer to it as "the TFT". The Defendant became the trustee of it in November 1997 and, by virtue of a Deed of Addition Appointment and Indemnity dated 3 April 2008, the Plaintiff was added as a beneficiary, but only at a time which post-dates the events about which she complains.
4. The Plaintiff's father expressed his wishes to the Defendant that the family's trust arrangements might be re-structured in such a way that the Plaintiff and her two brothers effectively had distinct funds. Part of a letter of wishes he wrote to the Defendant dated 20 March 2007 stated:

*"I would like you to consider establishing a sub fund under [the TS] for the benefit of my daughter Lisa and her family ("Lisa's Fund"). Lisa or Lisa's Fund should receive, when you are able, the title to [an identified house] and a total sum of £50 million paid as to £10 million per annum for 5 years in equal shares from the RT and the VT Funds or, or, [sic] from the jointly held ... group and jointly held independent assets or, if these funds are not established for any reason, from the Trust itself. The first payment should be made on or about 31 March 2007."*

As a first step in carrying out those wishes, a new trust, to which I will refer as "the TDT", was declared on 26 March 2007. The TDT was created for the benefit of RT and his family. It is a Jersey trust. The Plaintiff was added as a beneficiary, but only for limited purposes which are not relevant to her case against the Defendant, on 19 October 2007.

5. By a Deed of Appointment dated 5 April 2007, a further discretionary trust was established with the Defendant as its trustee. If only for consistency, I will refer to it as "the LT", although its fuller name appears in various English law reports dealing with the not inconsiderable litigation spawned by the failure shortly thereafter of the Plaintiff's marriage. The governing law of the Deed is expressed to be the law of Guernsey, although the governing law of the trust is the law of Jersey. The Plaintiff and her children and remoter

issue are specified as the beneficiaries. The property appointed to the LT was described in the Deed as being some shares and an amount of capital. The value of those shares plus a portion of the capital was regarded as representing a contribution drawn from VT's notional "pot" within the TFT. It equated to £5 million. The remainder of the capital (£4,420,268.91) was regarded as representing a contribution from RT's notional "pot", also taken from within the TFT. The notional sources of these assets were explained by the Defendant in replies to the Plaintiff's Request for Further and Better Particulars given on 25 November 2011.

6. The balance of the assets being treated as coming from RT's "pot" was omitted from the Deed of Appointment. However, it is the Plaintiff's case that the asset in question to be settled into the LT was an investment held by Thorson Investments Ltd in the Hermitage Fund (hereafter referred to as "the Hermitage Shares"). That investment was 720.99 ordinary class shares, which were valued at £579,731.09. In her witness statement, which was exhibited to Mr Gonzalez' Affidavit, the Plaintiff has explained how she had originally identified this investment and why she selected it as something she wished to see transferred into the LT once it had been established. For the purpose of its Application, the Defendant accepts that it took a decision that the Hermitage Shares should be transferred to the LT, although it argues that it is important to consider the capacity in which it did so and whether the Plaintiff is legally permitted to complain about what it then failed to do.
7. The mathematics relating to the various assets show that the Defendant approached the question of giving effect to the Plaintiff's father's wishes in such a way as to draw equally on assets that might otherwise be VT's and RT's right down to the last penny. It was, therefore, a very precise exercise. The position is further clarified in documents prepared in 2010 on behalf of the Plaintiff in relation to her ancillary relief proceedings in England. By the time of appointing assets to the LT, there were really three separate funds, as desired by the Plaintiff's father, namely the TFT for VT, the TDT for RT and the LT for the Plaintiff.
8. On or about 18 July 2007, the Defendant had prepared in draft the documents needed to give effect to the proposed transfer of the Hermitage Shares about which the Plaintiff now complains. This documentation included a board resolution for Thorson Investments Ltd to transfer those shares to a company that was already held within the LT as part of the property appointed under the Deed of 5 April 2007; a resolution of the receiving company; and a resolution in respect of the trustee of the LT accepting the appointment of the Hermitage Shares. None of those documents was executed. It was intended that the transfer of these shares would be reflected in an adjustment to the loan balances between the TFT and the TS. The involvement of the TS is significant because the Plaintiff was a beneficiary of that trust.
9. Thorson Investments Ltd was a company wholly owned by the Defendant. It was an asset of the TFT until 23 or 24 August 2007, on which date it was appointed to the Defendant and Bayeux Trustees Ltd as trustees of the TDT. The Hermitage Shares continued to be held by Thorson Investments Ltd but, on 10 December 2008, receivers were appointed in respect of that company. Thorson Investments Ltd was then placed into liquidation on 18 August 2009. The Hermitage Shares were never transferred in to join the other assets of the LT. Accordingly, the Plaintiff complains that there has been a corresponding shortfall into the assets that were intended to be appointed to the LT in 2007.
10. The Defendant ceased to be trustee of the TS, the TFT and the LT on 9 April 2010 when it entered into a Deed of Appointment and Retirement under which Rawlinson & Hunter Trustees SA replaced it. On 2 July 2010, the Defendant was removed as trustee of the TDT by the Protector of that trust, RT.

#### Procedural matters

11. The Plaintiff's Cause was tabled on 6 May 2011. It seeks equitable compensation from the Defendant in the sum of £579,731.09, which it is said represents the Plaintiff's loss

occasioned by the Defendant's alleged breach of duty to give effect to the decision to transfer the Hermitage Shares into the LT or, following an amendment, to appoint an asset of equivalent value. The original Defences were filed four weeks thereafter and other procedural steps were taken over the following months.

12. The Defences were amended in a document dated 28 October 2011, which was the subject of a Consent Order permitting the proposed amendments on 23 November 2011. As Advocate Swan highlighted, the amendments made were not responsive to changes made to the Plaintiff's case, but were rather a second attempt to articulate the Defendant's case. The most significant changes, which have led to the present Application, are built around the inserted paragraph 16 of the Amended Defences:

*“Despite the way in which the allegations are sought to be framed, the Plaintiff's claim is in fact a claim that the Defendant is in breach of its duties as trustee of the TFT and/or the TDT. The Plaintiff was at no relevant date a beneficiary of the TFT or the TDT. At the relevant dates, the Defendant owed no fiduciary duty or other duty of care in equity to the Plaintiff to ensure that assets held within the TDT or the TFT were appointed to her. The Plaintiff accordingly has no standing to pursue the claim.”*

In short, the Defendant applies to strike out the Plaintiff's Cause in its entirety on the ground that she has no *locus standi* to sue for breach of trust, nor for breach of the equitable duty of skill and care. As Advocate Wessels puts it, the Plaintiff is really alleging a breach of a trust of which she was not, at the relevant time, a beneficiary. Her interest was in the TS and, once settled, the LT. She had no interest in the TFT. Similarly she had no interest in the TDT at first and, when she was added as a beneficiary of the TDT, it was only for limited purposes, which do not assist her in respect of this claim.

13. The Plaintiff responded by amending her Cause to insert paragraph 17A (in accordance with what was previously indicated at paragraph 6 of her Réplique dated 9 December 2011):

*“Further or alternatively if, which is denied, (but as contended by the Defendant for the first time in its Amended Defence), the Defendant lacked the ability to arrange for a transfer of the [Hermitage Shares], then the Defendant should have transferred an asset of like value to the [LT] from assets within its control and its failure to do so constitutes a breach of duty.”*

On behalf of the Defendant, Advocate Wessels has queried how this allegation can properly be pursued when there are no facts pleaded to support it (see, e.g., the requirement in rule 10(2)(a) of the 2007 Rules) and the evidence points towards the conclusion that all the Plaintiff wanted was the transfer of the Hermitage Shares and what she alleges is that a decision was reached to effect that transaction, which was not then carried through.

14. A further issue raised in the alternative by the Defendant is that, having retired its trusteeship of the TS, it is exonerated from liability by virtue of clause 16 of the trust instrument.

#### Principles applicable to strike out

15. Rule 52(2) of the Royal Court Civil Rules, 2007 provides:

*“The Court may strike out a pleading if it appears to the Court-  
(a) that the pleading discloses no reasonable grounds for bringing ... an action ...”*

Neither Advocate referred me directly to any Guernsey case relating to the principles to be applied under this rule. The wording is similar to rule 36(1) of the Royal Court Civil Rules, 1989, under which a pleading could be struck out if “it discloses no reasonable cause of action”, which might be regarded as being words of a more technical legal nature than the plainer English in the current rule 52. Rule 36(1) of the 1989 Rules was considered by Carey

B in *Wessedah Foundation v Barings (Guernsey) Limited* [2005-06] GLR 141. After having considered guidance set out in the *Supreme Court Practice 1999*, the learned Bailiff adopted the approach under the equivalent rule of procedure in English law and concluded that “*It is only in plain and obvious cases that recourse should be had to the summary process under this rule*”.

16. Advocate Swan, on behalf of the Plaintiff, drew attention to part of the commentary in the English *Civil Procedure Rules* relating to rule 3.4, the wording of which has been mirrored by Guernsey’s 2007 Rules. The passage in para. 3.4.2 of that commentary to which he referred explains that:

“*Statements of case which are suitable for striking out on ground (a) include those which raise an unwinnable case where continuance of the proceedings is without any possible benefit to the respondent and would waste resources on both sides (Harris v Bolt Burdon [2000] L.T.L., February 2, 2000, CA). A claim or defence may be struck out as not being a valid claim or defence as a matter of law (Price Meats Ltd v Barclays Bank Plc [2000] 2 All E.R. (Comm) 346, Ch D). However, it is not appropriate to strike out a claim in an area of developing jurisprudence, since, in such areas, decisions as to novel points of law should be based on actual findings of fact (Farah v British Airways, *The Times*, January 26, 2000, CA referring to Barrett v Enfield BC [1989] 3 W.L.R. 83, HL; [1999] 3 All E.R. 193).”*

The proposition referred to drawn from *Farah v British Airways* derives from para. 42 of the judgment (*per* Chadwick LJ):

“*As Lord Browne-Wilkinson observed in Barrett v LB Islington [1999] 3 WLR 83, unless it is possible to give a certain and affirmative answer to the question whether the claim would be bound to fail, the case is not one in which it was appropriate to strike out the claim in advance of trial. Lord Browne-Wilkinson went on to point out that in an area of the law which was uncertain and developing, it could not normally be appropriate to strike out. He emphasised the importance of the principle that the development of the law should be on the basis of actual facts found at trial and not on the basis of hypothetical facts assumed (possibly wrongly) to be true on the hearing of the application to strike out. There are observations to the like effect in Lord Browne-Wilkinson’s speech X (Minors) v Bedfordshire County Council [1995] 2 AC 633 at pages 741 and 741 [sic]; and in the judgment of Sir Thomas Bingham, MR in E (A Minor) v Dorset County Council at page 694 in the same report.”*

17. I accept that these principles are equally applicable as a matter of Guernsey law and adopt them as the approach to take in respect of rule 52(2)(a) of the 2007 Rules. Accordingly, I accept Advocate Swan’s submission that “*even if the claim were to be considered a weak one, that is not a sufficient basis on which to strike it out*”.
18. Advocate Swan further linked what Lord Browne-Wilkinson said in his speech in *X (Minors) v Bedfordshire CC* [1995] 2 AC 633 with the way it was cited with approval by the Guernsey Court of Appeal in *Carlyle Capital Corporation Limited (in liquidation) v Conway* (unreported, 5 March 2012). Albeit that the passage has been introduced rather tangentially, one paragraph from Lord-Browne-Wilkinson’s speech helpfully explains the potential importance of considering whether a fact-finding exercise is called for:

“*Much more difficult is the question whether it is appropriate to decide the question whether there is a common law duty of care in these cases. There may be cases ... where it is evident that, whatever the facts, no common law duty of care can exist. For example, in considering the question whether or not a discretionary decision is justiciable, the answer will often depend on the exact nature of the decision taken and the factors relevant to it. Evidence as to those matters can only come from the defendants and is not presently before the court. ... if, on the facts alleged in the*

*statement of claim, it is not possible to give a certain answer whether in law the claim is maintainable then it is not appropriate to strike out the claim at a preliminary stage but the matter must go to trial when the relevant facts will be discovered.”*

19. The passage from para. 3.4.2 of the commentary to the CPR quoted above continues as follows:

*“A statement of case is not suitable for striking out if it raises a serious issue of fact which can only be properly determined by hearing oral evidence (Bridgeman v McAlpine-Brown January 19, 2000, unrep., CA). An application to strike out should not be granted unless the court is certain that the claim is bound to fail (Hughes v Colin Richards & Co [2004] EWCA Civ 266; [2004] P.N.L.R. 35, CA (relevant area of law subject to some uncertainty and developing, and it was highly desirable that the facts should be found so that any further development of the law should be on the basis of actual and not hypothetical facts)).*

*Where a statement of case is found to be defective, the court should consider whether that defect might be cured by amendment and, if it might be, the court should refrain from striking it out without first giving the party concerned an opportunity to amend (In Soo-Kim v Youg [2011] EWHC 1781 (QB)).”*

These are further principles that I have borne in mind in considering Counsel’s submissions. In particular, I have found it useful to consider whether the Plaintiff’s case, in whole or in part, is “bound to fail”. This creates a high threshold to be satisfied by an applicant wishing to strike out a pleading.

#### Plaintiff’s locus standi

20. At the time of the events about which she complains, the Plaintiff was a beneficiary of the TS. She was also a beneficiary of the LT. Her Amended Cause pleads that the Defendant in its capacity as trustee of the TS and trustee of the LT breached the duties set out in paragraphs 15 and 16 respectively. The focus on the duties associated with those two trusts was expressly clarified at paragraph 4 of the Plaintiff’s Réplique. The Plaintiff has made no complaint about the actions of the Defendant in its capacity as the trustee of the TFT or the TDT. Advocate Wessels submitted that this was a fatal flaw in the way the Plaintiff’s case had been advanced. Even on the Plaintiff’s case, following the decision of the Defendant as trustee of the TS, there was a cascade of actions that needed to happen before the Hermitage Shares could find their way into the LT. The Plaintiff’s complaint is more about what entities other than the Defendant should have done. Being distinct entities, they cannot simply be looked through for present purposes and treated as being part and parcel of the Defendant’s overall undertaking. The duties those entities owe, which have not in any event been pleaded, would still need to be analysed to ascertain whether or not any relationship with the Plaintiff existed giving rise to duties owed to her. In the absence of any relationship, there can be no duty (see Bank of New Zealand v New Zealand Guardian Trust Co Ltd [1999] 1 NZLR 664). Whilst he quite properly and fairly accepted that the humans involved with all the relevant entities are the same people, Advocate Wessels submitted that, on the Plaintiff’s case, there was no such relationship and so no duty. He further noted that Advocate Swan had not produced any authority in support of a proposition that a duty is owed to someone such as the Plaintiff where there is no relationship.
21. The entitlement in principle of someone like the Plaintiff to pursue court proceedings in an appropriate case was accepted by the Defendant by reference to the analysis set out in para. 39-69 of *Lewin on Trusts* (18th ed.):

*“An object of a discretionary trust or fiduciary power has ... a right to require the exercise of discretion in the case of a discretionary trust and a right to require the consideration of an exercise of discretion in the case of a fiduciary power, and though that right gives the beneficiary no more than an expectation of benefit, it is an expectation which is protected by the right conferred on the beneficiary and to that*

*extent is more than a mere hope. The traditional approach of the court was to draw a line between discretionary trusts and fiduciary powers. Objects of discretionary trusts had locus standi to bring an action to secure the trust fund and their rights in it, while objects of fiduciary powers had locus standi to seek a removal of trustees who failed to give due consideration to an exercise of their fiduciary powers, but none to seek any other kind of relief, with the possible exception of a claim to enforce an exercise of the power in special circumstances. In our view, following the decision of the Privy Council in Schmidt v Rosewood Trust Ltd [an Isle of Man decision [2003] 2 AC 709], locus standi does not depend on the distinction between discretionary trusts and fiduciary powers. And objects of both discretionary trusts and fiduciary powers have locus standi to seek relief for the protection of their rights, though the court has a discretion to determine what relief, if any, should be granted. As was said in that case:*

*“The right to seek the court’s intervention does not depend on entitlement to a fixed and transmissible beneficial interest. The object of a discretion (including a mere power) may also be entitled to protection from a court of equity, although the circumstances in which he may seek protection, and the nature of the protection he may expect to obtain, will depend on the court’s discretion.”*

However, Advocate Wessels submitted that the approach taken by the Plaintiff muddled the duties owed by the Defendant. Just as section 27 of the Trusts (Guernsey) Law, 2007 provides that “A trustee shall keep trust property separate from his own property and separately identifiable from any other property of which he is trustee” (which is in identical terms to its predecessor provision, section 23 of the Trusts (Guernsey) Law, 1989), the fiduciary duties owed by a trustee of more than one trust must also be kept separate. A trustee has to go through different and distinct thought processes in relation to each such trust.

22. In support of his submission that standing to sue for breach of trust does not extend to the Plaintiff, Advocate Wessels relied on a further passage from *Lewin on Trusts* (at para. 39-67):

*“It is our view that only beneficiaries, that is those to whom the trustees are liable to account, who have a present or future interest or potential interest in the subject matter of the claim, and the other trustees, have standing to take proceedings in respect of a breach of trust. This would exclude from this right other parties who may have an indirect interest in the affairs of the trust, such as settlers, protectors and the beneficiaries’ family members. The trustees do not stand in a fiduciary relationship to such persons.”*

He also relied on the way in which these issues, in broad terms, were dealt with by the Royal Court of Jersey in *Freeman v Ansbacher Trustees (Jersey) Limited* [2009] JLR 1. In that case, Birt DB (as he then was) explicitly declared (at para. [42]) that he had no doubt that the law of Jersey was that set out in *Lewin*, “namely that the object of a fiduciary power (whether a trust power or a mere power) has locus standi to apply to the court for relief and that such relief can include the reconstitution of the trust fund where loss has been caused by a trustee’s breach of trust. It will be a matter of discretion for the court as to what relief, if any, should be granted in any particular case.” I endorse that statement as being equally applicable as a matter of Guernsey law. Because the Plaintiff was not a beneficiary of the TFT, in which the Hermitage Shares were held, the Defendant’s position is simply that she has no standing to complain about the Defendant’s failure as trustee of the TFT to take steps to transfer the Hermitage Shares out of the TFT.

23. In response, Advocate Swan submitted that the question of what duties are owed by a trustee is often fact-sensitive. The Plaintiff’s case is that a duty is owed to her because the Defendant, as trustee of the TS, was able to get assets with a view to appointing them pursuant to that settlement but then failed to do so. Advocate Swan argued that there is a

difference between a duty to do the impossible and a duty to do something possible, but which subsequently becomes factually impossible to perform. In relation to the former, he accepted that the Plaintiff could not force the Defendant, as trustee of the TS, to appoint to the LT any asset not within the TS. However, focusing on capacity and power mischaracterises the issue because the Defendant, as trustee of the TS, was able to make a request to the trustee of the TFT, which just happened to be itself, that a transfer of the Hermitage Shares be effected, thereby enabling the Defendant as trustee of the TS to give effect to the decision it had reached in relation to them. Put another way, the obligation on the Defendant pursuant to its duty of care and skill owed to the Plaintiff was to implement its decision insofar as it was able to do so. Because there has been no suggestion of any legal bar to effecting transfer existing, but rather there appearing to have been a simple oversight through failing to complete documents that had been drafted, that may amount to a breach of duty, which could only be resolved on the evidence at trial.

24. Advocate Swan submitted, in particular, that it is question of fact whether the absence of cooperation from others (and, because the same humans were involved, he suggested there must be an argument that they could, and should, have acceded to any such request) was causative of a breach of duty. In that regard, he highlighted the solicitors' letter in 2010, from which it could be inferred that it had been carefully prepared with apparent input from the Defendant and in accordance with the position as it was believed to be, in which it had been recorded that what had been envisaged by everyone at the time had actually been done. He suggested that the absence of any explanation given by the Defendant as to why that incorrect position had been set out in the 2010 letter spoke volumes. In his submission, the issue does not turn solely, as suggested by Advocate Wessels, on whether the Plaintiff had the power to compel the Defendant to do something. Accordingly, because it could not be said that there was certainty that the Plaintiff's case is not maintainable, the Defendant has failed to meet the high threshold imposed for the Cause to be struck out. Put simply, the Court cannot resolve questions about the scope of the Defendant's duty without examining the facts, so the Defendant's attempt to strike out must fail.

#### *Discussion*

25. Whilst the Plaintiff's position is not straightforward, I cannot, on the material before me, say that her action against the Defendant is bound to fail. This is not a case where the Plaintiff had no existing relationship with the Defendant. Had she been a true "outsider" with no adequate interest, she could not sue for breach of duty. The existence of the relationship between the Plaintiff and the Defendant means that there are some factual issues that will need to be resolved and explored before deciding whether the duties of care pleaded can be established and, if so, whether there have been breaches causing loss, as alleged. The inter-relationships may, on closer analysis following evidence, be shown to preclude her from complaining about what has happened but it is, in my judgment, premature to reach that conclusion at this stage. In that regard, I found the passage from Lord Wilkinson's speech in X v Bedfordshire CC (*supra*) particularly helpful.
26. Further, although there is an attraction to the simple legal analysis presented by Advocate Wessels, I have reminded myself that the way the Plaintiff has put her case is to raise allegations against the Defendant in its capacity as trustee of the TS and, perhaps less obviously, as trustee of the LT. It is clear from the approach set out in *Lewin on Trusts* that the Plaintiff has standing to sue the trustee of those two trusts, which is what she has done. Had she actually brought her claims against the Defendant as trustee of the TFT, alleging failure to transfer the Hermitage Shares away from the assets of that trust, I am sure she would have been met with the same argument now made that, because she was not at the relevant time a beneficiary of that trust, she had no standing to sue the trustee of the TFT. Such a claim would potentially have been bad in law and susceptible to be struck out, which is no doubt why that course of action has not been adopted. Whilst I have some sympathy with Advocate Wessels' analysis of what he submits the Plaintiff is really complaining about, I am mindful of the need to take both parties' pleadings as being the way they have chosen to mount and resist these claims and do not feel it appropriate to look behind them.

The Plaintiff may well run into difficulties trying to circumvent the argument that she is ignoring the trust and corporate structures that were in place but that is, I believe, something that can only properly be resolved once the evidence has been given at a trial.

27. The Plaintiff has, it seems, carefully targeted her complaint against the Defendant. I consider that Advocate Wessels' submissions about the true nature of the Plaintiff's claim overlook the way in which she has chosen to proceed. By approaching the matter through compartmentalising the roles and relationships as completely as he has, Advocate Wessels has attempted to show that there is no argument left open to the Plaintiff. Advocate Swan, though, has persuaded me that there is a possibility that he can plot a pathway through the minefield laid by Advocate Wessels and, because I entertain a doubt about whether Advocate Wessels' submissions are legally sound, especially before the full facts have been explored, I am obliged to dismiss the Application on this ground. Therefore, without needing to comment further on whether her claim has merit or suffers from any apparent weaknesses, for the purposes of determining the Application, all I need to say is that I am not certain that the claim is an unwinnable one, meaning that the Defendant has failed to satisfy the high threshold imposed by rule 52(2). That is why I gave the decision I did at the end of the hearing on 18 April 2013.
28. In the light of that conclusion, I do not need to deal with the question of whether the case involves a developing area of the law. That said, I reject Advocate Wessels' submission that the absence of any case law covering what is being raised by Advocate Swan means this is not a developing area of the law. In my view, a legal issue can be said to form part of a developing area of the law where there is presently no authority, whether domestically or from another jurisdiction, but one can see that there might be arguments both ways on a point. If the issue in question is a serious issue worthy of the Court's consideration, the law will then be developed through the handing down of a reasoned decision of it. I also note that *Farah v British Airways* refers to "novel points of law". As such, this situation can be regarded as the first stages of developing the law in readiness for subsequent decisions, perhaps even from an appellate court, thereby developing the law more fully. In those circumstances, if it were necessary to do so, I also conclude that this would be the type of case in which it would be inappropriate to strike out the pleading.

#### Exoneration of Defendant

29. The alternative submission made by the Defendant in support of its Application to strike out the Plaintiff's Cause rests on clause 16 of the TS trust instrument, which is headed "INDEMNITY OF RETIRING TRUSTEE" and provides as follows:

*"If a trustee retires from the trusts hereof or becomes by reason of residence or place of incorporation incapable of acting as a Trustee hereof such Trustee shall be released from all claims demands actions proceedings and accounts of any kind on the part of any person (whether in existence or not) actually or prospectively interested under this Settlement for or in respect of the Trust Fund or the income of the Trust Fund or the trusts of this Settlement or any act or thing done or omitted in execution or purported execution of such trusts other than and except only actions:-*

- (i) arising from any fraud or fraudulent breach of trust in which such Trustees or (in the case of a corporate trustee) any of its officers was a party or privy*
- (ii) to recover from such Trustee such property or the proceeds of trust property in the possession of such Trustee or previously received by such Trustee (or in the case of a corporate trustee) any of its officers and converted to his or its use."*

30. On behalf of the Defendant, Advocate Wessels accepts that the law of Guernsey since 1990 has been that a Guernsey trustee cannot be exempted for liability for gross negligence. That was the effect of the amendment to section 34(7) of the Trusts (Guernsey) Law, 1989 made by section 1(f) of the Trusts (Amendment) (Guernsey) Law, 1990. The current provision is section 39(7) of the 2007 Law:

*“The terms of a trust may not –*

- (a) relieve a trustee of liability for a breach of trust arising from his own fraud, wilful misconduct or gross negligence, or*
- (b) grant him any indemnity against the trust property in respect of any such liability.”*

Section 80(1) further provides a definition of the phrase “*terms of a trust*” as meaning “*the written or oral terms of a trust and any other terms applicable under its proper law*”. Advocate Wessels proceeded to submit that clause 16 of the TS trust instrument does not operate so as to exonerate the trustee from liability during the trusteeship but instead gives a release from liability on retirement and so can be distinguished from the reasoning applied by the Privy Council in *Spread Trustee Company Limited v Hutcheson* [2011] UKPC 13.

31. In this regard, Advocate Wessels sought to draw a functional difference between a provision of the trust deed, which is necessarily controlled by the rest of the trust deed, and something that has been voluntarily negotiated and so is outwith the “*terms of the trust*”. He submitted that clause 16 could be read as if it had been written into the Deed of Retirement and Appointment of Trustees dated 9 April 2010 under which the Defendant was replaced as trustee of the TS by Rawlinson & Hunter Trustees SA, and so not caught by the statutory prohibition in section 39(7).
32. These submissions were met with short shrift by Advocate Swan, who considered the distinction sought to be drawn as “*specious*”. He also submitted that section 43 of the 2007 Law, dealing with the position of outgoing trustees, needed to be borne in mind, rather than overlooked. The relief from liability afforded to an outgoing trustee duly surrendering the trust property held by or vested in him or otherwise under his control does not extend to any liability “*arising from a breach of trust to which he (or, in the case of a corporate trustee, any of its officers or employees) was a party or was privy*”. I tend to agree.
33. Having not been referred to any authority on the point, the ordinary meaning I attribute to the word “*relieve*” in section 39(7) (and its predecessor) is that it encompasses “*release*”. If a retiring trustee is “*released from all claims*”, etc, he, she or it will, I think, be relieved of liability and the statutory prohibition is against such relief being given in respect of something that arose from the trustee’s “*own fraud, wilful misconduct or gross negligence*”. However it is viewed, the purported release is a mechanism to exempt the Defendant from being sued in respect of any such liability that arose during the course of its trusteeship. Insofar as clause 16 of the TS trust instrument, when executed, validly provided a retiring trustee with a release in respect of gross negligence, the amendment made by the 1990 Amendment Law and continued in section 39(7) of the 2007 Law has reversed the position. Because clause 16 of the TS trust instrument was effectively modified in this way by the operation of that legislation, it cannot, in my judgment, be read now as forming a part of the Deed of Retirement and Appointment. Being part of the “*terms of a trust*” in accordance with section 80(1) of the 2007 Law, clause 16 is, in my view, unavailable to benefit the Defendant in the manner suggested by Advocate Wessels. Accordingly, the Application to strike out the Plaintiff’s Cause on this ground also fails.

#### The Plaintiff’s Amended Cause

34. The final matter raised by the Application is whether, despite the attempt to strike out the Plaintiff’s Cause in its entirety having failed, there should be a partial strike out. In particular, Advocate Wessels has criticised the insertion of new paragraph 17A because the assertions made are inconsistent with the remainder of the Plaintiff’s pleaded case and contradicted by her own evidence. He was also keen that this point should not be overlooked in dealing with the other grounds attacking the Plaintiff’s entire case and invited the Court not to regard it as preferable to leave everything pleaded in play if it was inappropriate to do so.

35. I have given careful thought to these arguments. I have had regard to Advocate Wessels' submission that, if the Court is considering the possibility of the pleadings being further tidied up, it must necessarily "*consider the direction of travel*". I have, therefore, reviewed the full procedural history outlined above and reminded myself that the Plaintiff's Amended Cause was, at least in part, a response to the way in which the Defendant amended its Defences to introduce the argument on the Plaintiff's *locus standi*.
36. It goes without saying that the Plaintiff is required to articulate her case clearly. However, as Advocate Wessels noted, again very fairly and properly, the Plaintiff's witness statement was dated 13 October 2011 and the amendments to her pleadings were not made until a couple of months thereafter. The evidence I have seen, therefore, pre-dates the amendments made and I take that factor into account in the approach that follows. There does, however, appear to me to be a mis-match between the specific allegation against the Defendant about the Hermitage Shares, which is made in the pleadings through a series of inter-related paragraphs and supported by the evidence prepared at that time, and the alternative, wider allegation that has been introduced by paragraph 17A of the Amended Cause. That paragraph begins "*Further or alternatively*" yet there is nothing preceding it as currently set out in the pleading laying the foundation for this new allegation. Indeed, paragraph 17A is, as noted by Advocate Wessels, inconsistent with, e.g., paragraph 5 of the Amended Cause, which pleads a specific decision and makes no mention at all of any alternative fallback position.
37. Rather than simply ruling without more ado that paragraph 17A of the Amended Cause be struck out, I consider it appropriate first to put the Plaintiff to her election. If she wishes to pursue the allegation made in paragraph 17A of her Amended Cause, the pleading must be amended further so that the Defendant fully understands the case being alleged against it in this regard. I am taking this step bearing in mind the approach set out in the commentary to the CPR quoted earlier and which I repeat here: "*Where a statement of case is found to be defective, the court should consider whether that defect might be cured by amendment and, if it might be, the court should refrain from striking it out without first giving the party concerned an opportunity to amend*". If, however, the Plaintiff is not minded to amend her Cause further, then paragraph 17A, the words "*nor from any alternative asset*" in paragraph 18 and paragraph (2A) of the prayer will all be struck out.
38. In order to give the Plaintiff sufficient time to consider the implications before making her election, I will direct that either an application to amend or, if agreement about any proposed amendment can be reached, a Consent Order must be submitted within 21 days of this judgment being handed down. In default of either step being taken by the Plaintiff, as I have indicated, the offending parts of the Amended Cause will be struck out and would not thereafter be capable of being pursued by her.

### Conclusion

39. For the reasons given, the Defendant's Application is largely dismissed. In particular, I regard this as a case where there remains some prospect of the Plaintiff succeeding, however weak her case might be, which means that the Cause cannot be struck out under the summary process pursuant to rule 52(2). However, the Amended Cause is, in my view, in need of further attention and the Plaintiff must decide how she wishes to proceed in the next few weeks. Given the outcome, I propose to reserve the costs of this Application. However, if Counsel wish to deal with the costs consequences before the case concludes, application can be made to a suitable Interlocutory Court.
40. I am grateful to both Advocates for their helpful and clear written and oral submissions in this matter. I further hope that, in the time it has taken to provide this judgment, Counsel have managed to take a sensible approach in relation to what now needs to be done and have made good progress regarding the next stages of this action.