Alpha Developments Limited et al &
Barclays Wealth (Guernsey) Limited et al
Royal Court
19th June, 2014

JUDGMENT
30/2014

Plaintiffs' application to further amend their amended Cause.

IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)

Civil No 1387

BETWEEN

(1) ALPHA DEVELOPMENTS LIMITED
(2) ALPHA DEVELOPMENTS (CHELSEA) LIMITED

Plaintiffs

and

(1) BARCLAYS WEALTH (GUERNSEY) LIMITED
(2) SHARON ANN PARR
(3) WARNER THOMAS KOLLER
(4) GAVIN ANTHONY ST PIER
(5) STEPHEN PERRY LE RAY
(6) BARCLAYS WEALTH DIRECTORS (GUERNSEY) LIMITED
(7) BARCLAYS WEALTH CORPORATE OFFICERS GUERNSEY LIMITED

Defendants

Judgment
(on Plaintiffs' application to re-re-re-amend the Cause)

Statutes
Law Reform (Tort) Guernsey Law 1979 ss 5(4), 11

Guernsey Law Authorities
Holdright Insurance v Willis Corroon Management (25 August 2000)
Yaddehige v Credit Suisse 2007-8 GLR 282
Jefcoate v Spread Trustee Company Limited and others (17 April 2013 No 11/2013)
Fairhead v Praxis Holdings (2nd April 2014 No 13/2014)

Jersey Law authorities
Boyd v Pickersgill [1999] JLR 284

English Law authorities
Forster v Outred [1982] 1 WLR 86,
Baker v Ollard & Bentley (1982) 126 SJ 593
Nykredit v Edward Erdman [1997] 1 WLR 1627,
Three Rivers v Bank of England (No 3) [2001] 2 All ER 513,
Law Society v Sephton [2006] *2 AC 543,*
Pegasus Managemnet v Ernst & Young [2010] EWCA Civ 181.
British Telecommunications v Luck and others [2014] EWHC 290 (QB)

Judgment

Application

1. This is an application by the Plaintiffs, Alpha Developments Limited ("AD") and Alpha Developments (Chelsea) Limited ("ADC") for leave further to amend their amended cause in this action against the Defendants. This judgment is in a relatively summary form, having regard to the fact that this is a case management decision.

Background

2. AD is a Guernsey company. It owns ADC which is an English company. The first Defendant ("Barclays Trustees") is a company incorporated in Guernsey and is a provider of company administration services, including the appointment of appropriate directors. The second to seventh Defendants are all Guernsey resident individuals or registered companies and were the appointed directors of AD and ADC at material times.

3. The owner of AD is another Guernsey company, Construction Alpha Ltd ("CA") and has the same directors (or at least directors from the same company administration group) as AD and ADC. CA is owned by Sunny Gulch Village Ltd, which has different directors and is itself owned by the Sunny World Trust, a trust which is administered by a different administrator. The Defendants assert that the substantive settlor of the Sunny World Trust is, or was, Mr Chernukhin. At the material times, Mr Chernukhin was a beneficiary of the trust, but it is said (although this may be a matter of some dispute) that Mrs Chernukhin was not. Mrs Chernukhin is one of the Third Parties in the present action.

4. On 2nd July 2007 AD acquired ADC, which owned a development site with an existing planning permission (for "Scheme A") in Chelsea, in London and entered into a Facility Letter with Bank of Scotland ("BoS"), providing for funding of some £81M. This funding comprised an immediate Refinancing Loan in respect of the acquisition of ADC with its site of about £56M, which was immediately drawn down, a future Development Loan to fund the cost of developing the site of some £25M, which was never drawn down, and an interest roll-up facility. An interest hedging arrangement was also transacted with BoS on the same day, as required by the Facility Letter.

5. The whole of the Facility Letter, its subsequent implementation and its continuance was predicated on AD's and ADC's developing the site in accordance with Scheme A. This was warranted on the taking of the Facility Letter, and was to be re-warranted each time a tranche of finance was drawn down or an interest payment fell due. No material variations in the proposals for Scheme A were to be made without the written consent of BoS. The availability of the roll-up interest facility was conditional upon AD having achieved a specified target of pre-sales (off plan) within set periods, again in respect of the Scheme A development. BoS also took security (debentures and a legal charge) over AD's ownership of ADC and also over the site.

6. However, those who would ultimately benefit from the development were already investigating a potentially more profitable development scheme, "Scheme B". This scheme had been worked up since March 2007, but would require a new planning permission. At much the same time as the offer of the Loan Facility from BoS was being considered, therefore, the strategy for development was also being reconsidered, and in June 2007, AD's Board resolved to pursue the alternative strategy of Scheme B. The necessary new planning permission was sought in January 2008, and was approved conditionally upon execution of a Section 106 agreement regarding provision of affordable housing, in July 2008. (In English planning law, a Section 106 Agreement is the mechanism by which a local authority can agree enforceable terms or conditions in respect of a proposed grant of a planning permission.)

7. Shortly afterwards, however, came the financial crash. BoS adopted a policy of reducing and minimising its lending. It therefore complained, in October 2008, that AD was in breach of the Facility Letter in various respects, and stated that the Development Loan was therefore not available and that AD was no longer entitled to take advantage of the interest roll-up facility. AD disputed this but paid the interest under protest.

8. In December 2008 BoS issued a Notice of Default under which it proposed to call in the Refinancing Loan, again for breaches of the Facility Letter which were unremedied and said to be irremediable. In addition to the matters above, it relied on a failure by AD to provide financial information in accordance with the precise requirements of the Facility Letter. AD protested. It issued, but did not then serve, an English claim against BoS disputing its right to enforce and withdraw.

9. In January 2009, those Defendants who still remained directors of AD and ADC resigned, and new Boards replaced them. AD then refused to make interest payments (etc) to BoS. In March 2009 it served its claim, but apparently also refused to execute the s. 106 Agreement with regard to Scheme B, so that planning permission for that scheme was then formally refused. In April 2009 BoS issued a further Notice of Default, now claiming to call in the Refinancing Loan as well as unpaid interest payments, and it also exercised its right to appoint a Receiver over the site.

10. In December 2009, the litigation between AD and BoS was settled on the basis that BoS would take the proceeds of sale of the site and a contribution to its litigation costs in full discharge of all its claims against the Alpha companies.

This action

11. This action was commenced with an effective date of 1st March 2010. It was initially commenced only by AD and, I infer, only against the First Defendant, Barclays Trustees. It has since been amended three times, adding in ADC as 2nd Plaintiff, and the 2nd to 7th Defendants. I am not concerned with how or why the earlier amendments took place; the starting point for this application is the present form of the cause.

12. The essence of the action is that AD/ADC claim that they lost the chance to complete the development of Alpha Place because of the withdrawal by BoS of its finance in December 2008, and that that withdrawal was caused or enabled only by the events of default under the Facility Letter, which events were the consequences of breaches of duty by the Defendants as directors of AD and ADC (and/or breach of contract in the case of D1).

13. I have read, and have had careful regard to, the terms of the Re-re-Amended cause of 3rd July 2012, so as to compare it with the proposed further amended cause. I have been provided with a tracked change copy, and also a clean copy, of the latter. I have also had regard to the terms of the further pleadings, in particular the Responses, in the cause.

This application

14. The issue of the further amendments to the Cause now proposed was first canvassed at a case management hearing on 27th May 2014, which took place after issue of this application, dated 6th May 2014. It was adjourned to 12th – 13th June for a 1½ day hearing.

15. The proposed amendments are quite extensive in their text. Some are consequential, or are matters of elaboration or expression to which the Defendants take no objection (eg in Paragraph 9 where "gross negligence" is amended to "negligence and/or gross negligence"). The Defendants provided a list of the minor amendments to which they consented in the skeleton argument filed by their advocate on their behalf. Certain other amendments, where the dispute with regard to amendment was relatively simple in its compass, were dealt with on the first day of the adjourned hearing.

16. As to the more major proposed amendments, with regard to which the argument strays into some quite intricate issues of law, I heard full argument from both advocates (Advocate Bell for the Plaintiffs and Advocate Dunster for the Defendants), and I indicated that I would deliver my decision in concise form after further consideration. I am grateful to both advocates for their well argued and helpful submissions. The decision is perhaps not as concise as I would have wished, but I have drawn a balance, as a matter of proportionality, between going into all their arguments in great detail, and only going into those arguments which I have found necessary for my decision. Some indication of the former is, however, necessary as background, and I have carefully considered all the points which were made, even if I do not mention them here.

17. The following appear to me to be the three main changes, or expansions, of the cause as presently pleaded which are introduced by the proposed amendments, and upon which I reserved my decision.

18. First, the complaints made against the Directors (individual or corporate) of the two Plaintiffs have previously tended to be pleaded in respect of both Plaintiffs together, and as the cause originated as a claim by AD, a Guernsey company and the company which entered into the Facility Letter directly, they have focussed on the position of directors and their duties by reference to a Guernsey context. A large part of the proposed amendments is concerned with splitting out the way in which the claims are formulated so as to relate them to AD and to ADC separately, the latter being an English registered company. This, naturally, has led to references to English statute law regarding the duties, in particular duties of care, owed by directors to their companies.

19. The Defendants suggest that this change of focus, which they would say amounts to a new cause of action, has been prompted by the fact that under Guernsey law the directors may be entitled to claim the benefit of contractual indemnities from the company with regard to negligence, whilst in English Law, under the Companies Act 2006, such indemnities are invalid; the only relief available to a negligent director lies in the ability of the English court (and specifically it *is* the English Court) to release him/her if thought fit, and it may therefore be arguable that no effect could be given to this in Guernsey proceedings. I make it clear here that I do not regard this point, even if it were the case (as to which I express no opinion) to be a particularly material point in considering whether, as a matter of law and procedure, the amendments now desired by the Plaintiffs to their pleading ought to be permitted. Just because an amendment may introduce a case with more serious consequences for the Defendants than the ones hitherto pleaded does not seem to me to make an otherwise permissible amendment impermissible, or unjust.

20. Second, and following, (it appears) from points pleaded in the Defences or possibly in witness statements, there is now a clear pleading proposed, not merely of breaches of duty of care in the context of committing or permitting the breaches of the Facility Letter terms and giving grounds for BoS to claim to enforce its rights under the Facility Letter and throw over the agreement and call in its Loan, but also of breaches of duties of care (etc) in causing the AD to enter into the Facility Letter in the first place, knowing that the intention was not to build Scheme A but to replace it with Scheme B.

21. Third, there is much change and expansion of the damages claimed, including alternative claims and calculations based on different perceptions of loss (including, in the end, a mere claim for allegedly wasted expenditure, rather than the entire alleged loss of profit).

The Objections

22. There were originally six identified "groups" of amendment within the proposed Re-Re-Re-Amended Cause to which the Defendants objected. The grounds of their objection fell under three broad heads:

(1) that the proposed amendment introduces a new cause(s) of action, which is/are prescribed;

(2) that the proposed amendment is embarrassing, for lacking proper particularisation and/or not being readily comprehensible; and

(3) that the proposed amendment has no real prospect of success.

23. The first objection raises the greatest complexity of argument. The second class of objection is (as Advocate Dunster accepted) readily dealt with, where it is the only objection, by requiring further redrafting either to clarify the proposed case, or to provide proper particulars. The third is separate and generally more easily identifiable, although at times, in this case, it also forms part of the first objection.

Outline of material arguments and principles relating to permitted amendments

24. With regard to the first objection, Advocate Bell's primary argument was that even if the relevant amendments introduced a new cause or causes of action, they nonetheless arose out of substantially the same facts as the cause(s) of action already pleaded, and the court therefore had a discretion, which it should exercise, to allow the amendments in. His secondary argument was that in any event, even if treated as entirely new and separate causes of action, those causes of action were either not prescribed at all having regard to the principles of prescription as applied to torts causing financial loss, or were not prescribed because the Plaintiffs were subject to an *empechement d'agir* in the nature of an *empechement de fait* with regard to pursuing those causes of action until December 2008 or January 2009, so that this application to amend had been launched well within the relevant period of prescription. This *empechement* was because, until the replacement of the Boards of each company in January 2009, the Plaintiffs were not in a position to bring claims against their own directors. It is in the application of these secondary arguments, which are in dispute between the parties, that the greatest complexities of legal argument in the case arise.

25. The principles to be applied in Guernsey Law with regard to permitting amendments to a cause, in particular where it is claimed that the cause of action is prescribed (and here I remind myself that whilst prescription is a species of limitation of action, unlike English law, where limitation bars the remedy but not the right, in Guernsey law, prescription extinguishes the cause of action itself) were distilled by the Bailiff in *Jefcoate v Spread Trustee Company Limited and others* (17 April 2013 No 11/2013)at [52] into a series of propositions lettered (a) to (m). In a judgment such as this I do not need to set these out in full. They have since also been applied by the Deputy Bailiff in *Fairhead v Praxis Holdings* (2nd April 2014 No 13/2014) and I apply them here.

26. In essence, the sequential approach of the *Jefcoate* principles is that there is a presumption in favour of allowing amendment if this can be done without injustice, effectively a procedural injustice, to the other party; see (e); it will not normally be just to allow an amendment if doing so would defeat a defence of prescription which might otherwise be available at the time of the application to amend, a situation which will arise if the relevant prescription period has expired between the date of the original issue of the claim and the date of the application to amend, because any permitted amendment will then date back to the original date of issue: see (f); obviously, this consequence is objectionable if the amendment would introduce a new cause of action, but it will not apply if it is merely elaborating a cause of action already pleaded; see (g); even if the amendment does, on analysis, introduce a new cause of action, if this arises out of the same or substantially the same facts as a cause of action already pleaded, then the court will have a discretion to allow it to be made: see (h); although it will still not allow the amendment if it would be unjust to do so: see (i).

27. The advocates are agreed that I am here concerned with prescription in the Guernsey law of tort. Difficulties arise from the following aspects of that tort law.

28. Damage is a necessary constituent of a tort and therefore the cause of action is constituted only when damage is suffered. However, and especially in financial cases, the Plaintiff may not appreciate that he has suffered the damage or loss or that he is vulnerable to doing so. The question then arises whether time starts to run against the Plaintiff for the purpose of prescription when the damage is found to have been suffered, or only when he has a sufficient degree of knowledge (and this is not a simple point) that he has a cause of action.

29. English law on limitation holds it to be the former, but has statutory provisions which delay the commencement of limitation in certain circumstances, such as "concealed fraud" and mistake, with an ultimate statutory cut-off period of 15 years (Latent Damage Act 1986). Guernsey Law might have gone down the route of some other jurisdictions of holding that the test was the second, but in *Holdright Insurance v Willis Corroon Management* 25 August 2000, Day DB felt constrained by the inclusion of s. 5(4) and (in particular) s,11 of the Law Reform (Tort) Guernsey Law 1979, which specifies similar extensions to the English statutory time extensions with regard to what is there called "limitation", to hold that it must be inferred that it was the former. Advocate Bell submits that this is incorrect, not binding on me, has been inferentially disapproved by the Guernsey Court of Appeal in *Yaddehige v Credit Suisse* 2007-8 GLR 282, and that it ought to be held that Guernsey Law adopts the "reasonable discoverability" test. On this basis he argues that the torts complained of in the amendments did not crystallise until October 2008, when the vulnerability of the Plaintiffs to hostile action by BoS became apparent and appreciated.

30. Advocate Bell is prompted to do this, however, by the second point of difficulty in this area. This is that opinions may differ – and the line of very many English cases on the subject shows that they plainly have differed – as to when it can, or should, be held that the Plaintiff actually suffers the necessary damage in the context of financial loss resulting from (in particular) the impact of professional negligence as a tort. (As a matter of contract, this issue does not, of course, arise, because a cause of action for breach of contract is not dependent on damage being caused.) Both advocates have cited several authorities to me, and in particular *Forster v Outred* [1982] 1 WLR 86, *Nykredit v Edward Erdman* [1997] 1 WLR 1627, *Three Rivers v Bank of England* (No 3) [2001] 2 All ER 513, *Law Society v Sephton* [2006] *2 AC 543,* and *Pegasus Managemnet v Ernst & Young* [2010] EWCA Civ 181. I have read each of these cases, and also some of the authorities referred to in them. I have also read the most recent case of *British Telecommunications v Luck and others* [2014] EWHC 290 (QB). I find them extremely difficult to reconcile, and, indeed, even where the House of Lords appeared to think it has given clear and extensive guidance, *(Sephton)* before very long, the Court of Appeal felt able to distinguish or limit this guidance and come to a rather different kind of result (*Pegasus).*

31. Whilst these cases all agree that the mere incurring of a purely contingent liability is not "damage" until the contingency falls in, they do not provide any clear test for what is, or is not, a pure contingency. There is agreement that, in order to constitute the tort a "sufficiently measurable financial loss" must be sustained *(Nykredit),* but there is no agreement as to the test for recognising what <u>is</u> such a sufficiently measurable relevant loss (apart from a conceptual and not greatly helpful distinction drawn between merely "being worse off", which is not enough, and "being financially worse off", which is). In some cases a distinction has been drawn between so-called "no transaction cases", (eg *Nykredit*), ie where the Plaintiff would not have entered into any transaction at all but for the relevant negligent advice, - in which case it was held that the Plaintiff suffered no damage until the value of its security position was in fact less than the outstanding loan, - and so-called "wrong transaction" cases, such as *Pegasus* and the various cases there cited in Paragraph [60], where the Plaintiff would, it is found, have entered into a similar transaction but on different terms. In those cases, it has sometimes been held that the Plaintiff suffers no loss until the effects of the "wrong" transaction crystallise to his disadvantage, but others have given rise to a line of

authority that the Plaintiff suffers loss immediately on entering into the "wrong" transaction on the grounds that he is sufficiently damaged by "not getting what he ought to have got". This principle has been held to apply even where the Plaintiff may in fact have got, through the "wrong" transaction, something of more value than what he expected to get, eg *Baker v Ollard & Bentley* (1982) 126 SJ 593. Yet other cases have been held not to fall into either class. In all the cases the courts have recognised that identifying either the time when damage in fact occurs ("no transaction" cases) or the measure of damage which first occurs ("wrong transaction" cases) may be extremely difficult. However, and probably as a result, there is a general consensus in the cases that the time when it should be held that a "sufficiently measurable [financial] loss" has occurred, so that the cause of action has crystallised, is highly fact sensitive.

32. I have to say that I find it extremely difficult to discern any totally satisfactory logic in the above cases, let alone to reconcile them into a coherent principle. Immediately obvious examples seem to me to be the supposed distinction between "no transaction" and "wrong transaction" cases in itself, since in each case it is accepted that the actual transaction would not have happened, and the distinction then seems to rest on findings, or even speculation, as to what would have happened, often depending on the subjective attitude of the Plaintiff and the other parties to the flawed transaction. This is scarcely a promising basis for formulating a principle of law. I also find it difficult to understand how merely "not getting what one 'ought' to have got" can properly be regarded as "damage" for the purpose of the law of tort if it cannot then be realistically quantified in terms of a monetary loss – which is what has always been recognised as being necessary in the realm of torts sounding in financial loss. This approach appears to me to owe more to indignation, and the influence of considerations regarding contractual breach, than to the logic of the law of torts. However, the key point for present purposes is that, if this *is* the correct basis for assessing when a cause of action in tort crystallises under Guernsey law, it is acknowledged to be very highly individual and fact specific. As a matter of procedure, that is not a very satisfactory or desirable basis for making a potentially far reaching decision at the interlocutory stages of a case.

33. Similar, although less acute, concerns arise about the application of the doctrine of *empechement d'agir*, which is a peculiarly Guernsey law concept. Of course, Advocate Bell only needs to resort to this concept if it is necessary to do so in order to defeat a prescription defence which is arguable because the relevant "damage" suffered by the Plaintiffs is held to have been suffered before 6th May 2008. The earliest potentially relevant date is (factually) 2nd July 2007, the date of execution of the Facility Letter and of the first cash drawdown. If relevant damage was not suffered until BoS first complained about alleged breaches of the Facility Letter, (apparently 14th May 2008 at the earliest) it was within time on any basis. The position is similar if Advocate Bell is correct that the relevant triggering event is not the suffering of damage, but the test which he advocates, namely the "reasonable discoverability" of the cause of action. That test can (and he argues it does here) defer the start of the prescription period after the occasion on which damage is found to have been suffered. (I note that it cannot advance it, because even if the potential claim is apparent before damage is actually suffered, the Plaintiff cannot "discover" that he *has* a cause of action until it is constituted by the relevant damage occurring).

34. The cases cited show that for *empechement de fait*, as a species of *empechement d'agir* to operate, there must be more than merely ignorance that the Plaintiff has a cause of action. (This is leaving aside questions of how far such ignorance must be objectively reasonable, or how far ignorance merely of fact or also of law qualifies: see per Sumption JA in *Boyd v Pickersgill* [1999] JLR 284.) There must be, in all the circumstances, either alone or as well, an "impediment amounting to a practicable impossibility" of the Plaintiff's bringing proceedings: again, see *Boyd* (above), per Beloff and Southwell JJA, approved by Day DB in *Holdright Insurance v Willis Corroon Management* (above) and also in *Yaddehige v Credit Suisse* (above) - which last case also illustrates the close relationship between *empechement d'agir* and the possible test for the actual commencement of the prescription period as being the reasonable discoverability of the cause of action rather than the mere accrual of damage.

35. In the present case, Advocate Bell argues that on any basis the Plaintiffs were *empeches d'agir* until at least December 2008 but probably January 2009, when new Boards were appointed, not so much because they were ignorant of the causes of action, but because the directors whom the Plaintiffs would have to sue were the very directors of the companies who would have to take and implement the decision to sue, and, they could hardly be expected to do that. Advocate Dunster, on the other hand, argues that this is too rigid a concept, and that if one is looking at *practical* impediments, then there really was none, because the ultimate beneficiaries of the companies' activities, Mr and Mrs Chernukhin knew about the proposals to implement Scheme B rather than Scheme A, as well as the terms of the Facility Letter and they, or entities ultimately under their control, were able to remove the Board and replace it at any time. This argument again, illustrates the relatively refined and potentially fact specific arguments that may arise on the application of the doctrine of *empechement.*

36. I have come to the conclusion that I do not need to decide between many of the interesting and difficult arguments which were canvassed before me. In respect of the amendments on which I had not adjudicated at the end of the hearing, I am going to give leave for these to be made. My broad reasons are given below, in relation to each material group of amendments, including re-capping with regard to the amendments which were largely dealt with at the oral hearing.

37. I prefer to deal with the second group of amendments first, as this appears to be more logical.

(I) New Paragraphs 12A-F, 19(a), 24(a) 27(a) and 28A

38. These amendments plead expressly that in entering into the Facility Letter, the Notice of Drawdown and at each Interest Payment date the Defendants (and in particular the directors of AD) should have considered the suitability of these contractual arrangements with BoS, in the light of the known intention that AD would pursue a different scheme from Scheme A, to which the arrangements were tied, and realised that consequently it would risk being unable to comply with and/or were breaching the terms of the loan finance, with disadvantageous if not disastrous potential consequences. They would then either have negotiated different terms for the Facility Letter, or sought alternative funding, or asked for BoS' consent to Scheme B or proceeded with Scheme A after all, and their failure to do so was (grossly) negligent.

39. Necessarily, therefore, these amendments relate to matters taking place at or shortly before 2nd July 2007 in particular (although also during the period between that date and 1st March 2008, which apparently therefore includes two more quarterly Interest Payment Dates on which the warranties as to the nature of the development were repeated).

40. Advocate Dunster makes the following objections to this proposed group of amendments.

    i. In that they are allegations that, in effect, the Defendants as directors of AD were negligent in causing it to enter into the Facility Letter etc in the first place, they plainly raise a new and different cause(s) of action from those presently pleaded, relating to later events (such as later implicit repeating of warranties under the terms of the Facility Letter when these were untrue and failing to provide financial information in accordance with requirements).

    ii. Any such tort was constituted when relevant damage occurred.

    iii. This happened on 2nd July 2007 when AD entered into the Facility Letter, took the first Drawdown, and gave the initial warranties with which it was not planning to comply.

iv. *Prima facie* therefore, this cause or causes of action was/were prescribed by the date of this application (although they would not have been if made in the original Cause) and therefore their introduction would defeat a defence of prescription.

v. These new causes of action are not founded on facts contained in the previous pleadings of the Cause, nor on substantially the same facts. This is illustrated principally by the new pleading of Paragraphs 12A –F.

41. Advocate Bell argues that the amendments are not new causes of action, but merely elaborate existing ones. He further argues that even if they are, they *do* arise out of substantially the same facts as the causes of action already pleaded when one considers the scope of material pleaded in the Re-re-amended Cause; he further submits that one can also have regard to the facts and matters pleaded in the Plaintiffs' Response to requests for further information (made by way of *exceptions de forme* in the Defences), which materials can and should be treated, therefore, as part of the existing pleaded case.

42. He further points out that causes of action based on the repeating of untrue warranties at each Interest Payment Date are clearly not prescribed in respect of repetitions after 6th May 2008 in any event, and it would be illogical to distinguish beween these and those repeated before 6th May 2008.

43. He argues that the test for the accrual of the cause of action in tort is or ought to be the "reasonable discoverability test" which gives a date in October 2008 (when BoS began to seek to enforce its rights and the damaging position became apparent to the company's management).

44. He argues that even if the test were the accrual of damage, this is a case where "sufficiently measurable financial damage" did not fall on AD until the same point in October 2008, because the damage suffered as at 2nd July 2007 was a "pure contingency" at that time.

45. He further argues, in any event, that prescription did not start to run against AD until December 2008/January 2009, by reason of the company suffering from an *empechement d'agir* until that time, owing to the constitution of AD's Board being those who would have had to bring proceedings against themselves, as already referred to above. This, he argues provided the necessary impediment amounting to a practical impossibility of bringing proceedings, and is a matter quite apart from any ignorance of the company as to the possibility of doing so.

46. I have already recorded Advocate Dunster's grounds for refuting that last argument, above.

47. I have decided that these amendments should be allowed. My principal reason for this is that I take the view, having carefully looked at the scope of the material, from reading of the existing Cause and the terms of the responses to requests for further information sought by the Defendants in relation to this or its predecessors and which thereby in my judgment became incorporated into the Cause, that the relevant facts have already been sufficiently referred to and relied upon so as to make the nature of the alleged breaches of duty sufficiently apparent already. If one assumes that the Plaintiffs can prove the facts they have already asserted, then the further assertion that it was also, in those circumstances, negligent of the Directors, by much the same token, to enter into the Facility Letter in the first place, is to my mind quite evident and obvious. All the new amendments appear to me to do is to make that implication express, and gather into a cogent, clear and efficient form the particular details that will be alluded to when making such an argument.

48. I consider that Advocate Bell's point that the allegation also relates to repeat warranties, some of which are on any basis not prescribed, serves to underline the point that the broad facts alleged against the Defendants, and out of which various individual causes of action are pleaded to arise, are perfectly clear, in relation to causes of action which are not prescribed,

and it requires little or no extension to apply the same arguments relative to matters to which the Defendants now object. The only thing which might be affected by the time point (ie the point that the selfsame arguments are applicable in respect of interest payment dates before 6th May 2008 and afterwards) would possibly be the measure of damage, but in my judgment that is insufficient to suggest that the causes of action do not arise out of substantially the same facts as are already pleaded.

49. I also consider it to be just to allow the amendments to be made. The principle is that all amendments should be allowed, however late and however much they may be the product of second thoughts (or even discovery of facts arising from the evidence in the case as it progresses) provided this can be done without injustice to the other parties. In my judgment, as indicated above, the basic complaints being made have been sufficiently apparent all along, so that the scope of investigation and evidence preparation by the Defendants has not been, and will not be, significantly or unreasonably extended by permitting the Plaintiffs to advance the arguments and contentions now made expressly in these amendments.

50. That is enough to deal with the application in respect of this group of amendments. I should add, however, that even if I were wrong, and these amendments did not arise out of substantially the same facts as causes of action already pleaded (as I think they do) I would still have permitted the amendment on the grounds that I was not satisfied that the causes of action were prescribed by the date of this application. I do not need to decide the question whether the test for the commencement of time running for the purpose of prescription in Guernsey law is that of damage alone, or is that of reasonable discoverability. Nor, if I came to the conclusion that it was the former, do I need to decide the very knotty problem of when it should be held that damage accrued in this particular case, ie whether merely being limited in one's apparent flexibility, and running the risk of not being able to pursue one's possibly preferred scheme would constitute immediate "sufficiently measurable" damage as at 2nd July 2007. This is because, even assuming that Advocate Dunster's arguments in this regard were to be preferred, I would accept Advocate Bell's argument that the running of time was postponed by reason of *empechement d'agir*, and the constitution of AD's Board being those who would have to bring proceedings against themselves. I am satisfied that this provides, in law and as applied to the facts here, an impediment amounting to a practical impossibility of bringing the necessary proceedings.

51. I emphasise that I would make that decision on the facts of this case. Advocate Dunster invited me to find that if the immediate shareholder of a company with a claim against its directors for negligence knew all the facts necessary to constitute the cause of action, including that damage (in the sense of the risk of loss, devaluing the assets of the company as he submits it did here) had been suffered, the company would not then be *empeche d'agir*, because that shareholder would be in a position to remove the Board and institute the relevant proceedings, forthwith. He accepted, however, that if I did not accept that "high water mark" argument, he would not be able to persuade me that such an argument would negative *empechement* on the more complex facts of that particular case.

52. I am not attracted to his "high water mark" argument as it seems to me to disregard the principles of separate corporate personality. However, the facts of this case, are in any event, hugely more complicated in relation to the hierarchy of ownership of the company and (potentially) any knowledge of those who it would have to be argued might be in a position to take such action, than even the "high water mark" position, and this satisfies me that this argument would not be sustainable on the facts of this case.

53. I should add that, in rejecting Advocate Dunster's argument, I would have taken into account his point that the Plaintiff's argument would appear to allow the owner of a company, despite knowing all the facts of a director's negligence, to delay changing the Board for many years and then do so, enabling the company to bring what by any standards would be a stale claim. Neither the general Guernsey law of tort, nor the doctrine of *empechement* has a cut off period equivalent to that of the English Latent Damage Act 1986. I am not, however, swayed by that

argument, not least because even if the doctrine of *empechement* did not itself contain any apparent basis for disapplying it in such a case, it seems to me that any such unacceptable result would be likely to be readily defeated by arguments of ratification, waiver, or suchlike. The prospect of potentially stale claims being unreasonably brought therefore does not cause me to doubt the application of the doctrine of *empechement* in the circumstances of this case, if necessary.

54. I should also add that if I had been of the view that the arguments as to when damage accrued or whether the doctrine of *empechement d'agir* could or could not be invoked were crucial to my decision on these amendments, I would have still allowed the amendments to be made - but on a condition that the Plaintiffs did not seek to argue at trial that the relevant date for any prescription defence in respect of the matters contained in those amendments was earlier than 6th May 2008.

55. I note the Bailiff's comment in *Jefcoate* that one should in principle disallow an amendment if a defence of prescription *might* be defeated if the amendment were permitted to be made, and that the burden of satisfying the court that this will not happen is on the Plaintiff wishing to amend, rather than, as in the case of an application to strike out, on the Defendant seeking to strike out. However, any such actual decision is highly fact sensitive as already noted, and dependent, in a case such as this, on potentially very refined factual findings, which it is entirely inappropriate to embark upon at an interlocutory stage. The court has an inherent jurisdiction to impose terms in relation to the granting of any procedural permission, including permitting amendment. In my judgment, in a situation such as this, the court can effectively guard against the possibility that permitting an amendment "may" defeat a defence of prescription which would be (and ought properly to be) available by the date of the application to amend but would not be available if the amendment were made so as to date back to the date of the original cause, by imposing a suitable condition such as I have indicated, upon the grant of leave to amend.

56. I would take this course, in particular, because it seems to me that if I disallowed the amendments on this basis, particularly with regard to *empechement,* it would be open to the Plaintiffs forthwith to issue a new Cause pleading the selfsame matters as in the disallowed amendments, thereby placing the Defendants in the position of having to seek to strike out the Cause for prescription, at which point the burden would be on the Defendants to prove that the case could not succeed, a hurdle which, in the light of the evidence position, could not, in my judgment be surmounted. The second Cause could then be "crocheted" (or consolidated) with the existing cause for trial, thus achieving, in effect, the same position as would be achieved by the condition I would be minded to impose.

57. I repeat, however, that the above situations do not in fact arise, because my primary decision is that these amendments should properly be permitted in any event, because they arise out of substantially the same facts as facts already pleaded in support of existing causes of action.

58. I should add that there was an apparent objection that these causes of action were not supported by the Plaintiff's evidence. This was not really persisted in. It would go only to disallowance for futility, ie because of there being no reasonable prospects of success. I reject that argument whilst expressing no view on the strength or merits of the case itself.

(II) New paragraphs 10A, 10B, 46A and reference back to those paragraphs in paragraphs 11, 28, 53, 54A and Appendix 1

59. This was the first group of proposed amendments. Advocate Dunster makes the following arguments in objection to them, some of which mirror his objections to the group of amendments dealt with above:

i. These amendments constitute new causes of action, now pleaded against the Defendants as directors of ADC, rather than AD. They raise complaints about their conduct at the time of the taking of the Facility Letter.

ii. They newly introduce references to the statutory duties of directors of English companies contained in ss 172-4 of the English Companies Act 2006.

iii. Any such tort was constituted by relevant damage occurring, and this occurred, on 2nd July 2007 when ADC became reliant on funding which was provided by a facility with which AD as its parent could not, or did not intend to, comply.

iv. These new causes of action are not founded on facts contained in the previous pleadings of the Cause but in witness statements and disclosed documents; they therefore do not arise out of "the same or substantially the same" facts as causes of action currently pleaded.

v. They contain a new complaint of "bad faith" pleaded by reference to s 174 of the Companies Act 2006, which is not properly particularised, if indeed it is sustainable.

vi. They stand no reasonable prospect of success, in that they hopelessly attempt to "make new law" in suggesting that directors of a subsidiary company owe to it a duty to know the business, and financial arrangements of a parent company and take steps to prevent the parent company from acting to what will be the subsidiary company's detriment.

60. I reject the above objections and will allow the amendments for the following reasons.

61. First, I accept that these amendments actually do introduce new causes of action. This arises from two elements, namely, first, reliance on the terms of the English Companies Act 2006 and the statutory duties contained in it, and, second, from the now clear pleading of allegations of breach of duty in relation to the entering into of the Facility Letter, albeit here in relation to duties alleged to fall on the relevant Defendants as directors of ADC rather than AD. However, as before, I am satisfied, from reading the existing Cause and the terms of responses sought by the Defendants in relation to this or its predecessor vesions which thereby became incorporated into the Cause, that the relevant facts have already been sufficiently referred to and relied upon so as to make the factual nature of the alleged breaches of duty sufficiently clear in relation to ADC.

62. Given that I have already allowed the amendments in relation to the direct pleas against AD, this has been made all the more clear, and I can see no logic in disallowing these amendments when allowing the former. In my judgment it is permissible to look at the amendments which I am allowing in relation to AD, and once that is done, it is very easy to see that the amendments in relation to ADC add very few further truly factual allegations. Once the facts surrounding the "error" in entering into the Facility Letter in its then terms are sufficiently pleaded, as in my view they are, then in my judgment, the consequences of those facts in relation to ADC and the Defendants as directors of ADC are also sufficiently obvious, and sufficiently closely connected with the causes of action already pleaded between the Plaintiffs and the Defendants, that any "new" cause of action can be fairly said to arise out of the same or substantially the same facts. In fact, the essence of the new pleading is largely arguments of law, eg the existence and application of the Defendants' duties as directors of ADC.

63. I also consider it to be just to allow the amendments to be made, for reasons similar to those mentioned above. As already mentioned, I do not consider any possible argument that the second Plaintiff, as an English company, may be better placed to sue on such a cause of action in Guernsey than would the First Plaintiff, as a Guernsey company, to be any form of injustice in relation to the principles of permitting or disallowing amendment to pleadings. In my judgment, the basic complaints being made have been sufficiently apparent all along that

the scope of investigation and evidence preparation by the Defendants has not been and will not be significantly or unreasonably extended by permitting the Plaintiffs to litigate the express complaints now made in these new amendments.

64. I reject the suggestion (and Advocate Bell disavowed any intention of so contending) that the amendments include an allegation of "bad faith". This is merely the mirror reflection of the wording of the English statute, which seems to me to mean nothing more than "genuinely", in context. I do not regard the amendments as being capable of being construed as an allegation of bad faith.

65. I also reject the argument that the amendments should be disallowed for showing no reasonable prospect of success. Whilst Advocate Dunster characterises the case made as being one of "new law", in my judgment it is not so extreme that it can be said to be plainly misconceived at this stage, or to be otherwise demurrable. I accept Advocate Bell's argument that that is the thrust of the essential test, although the burden of showing that the amendment is capable of being sustained in this respect lies upon him, rather than the opposite burden lying on Advocate Dunster.

66. For those reasons I will allow this group of amendments, as well.

67. As regards the objections raised by Advocate Dunster with regard to prescription and there being no sufficient *empechement d'agir*, I reject these for like reasons, and on a like basis, to those I have set out in relation to the group of amendments with regard to AD.

(II) Paragraph 26

68. This is a minor amendment and was dealt with in the course of the hearing. I accept Advocate Dunster's argument that it is technically not appropriate to plead an alleged admission (though disputed to be such, in the present case) in Defences as an amendment to the Cause, although I note that this appears to have been permitted ihee n a previous version of the Cause. As such, it is, of course, actually pleading evidence, and not a fact constituting the relevant cause of action at all. It was agreed at the hearing that this objection would be removed if the reference to an alleged admission in the Defences were deleted, and only the bare factual assertion were made, and I directed that this should be done.

(III) Paragraphs 35B – H

69. This is again a minor dispute. The Defendants object that the amendments are embarrassing as they "lead nowhere". The Plaintiffs say that they lead to one aspect of their claim for loss. In my judgment, on balance, they should be permitted, as the Plaintiffs should be permitted to plead whatever facts they think they will seek to rely upon in support of their case. They may wish to consider, however, and make clear, where they later make any claim loss referable to these allegations: see section (VI) below.

(V) Paragraphs 45(a) and (b)

70. These amendments (regarding complaints as to the Plaintiffs accounts having been qualified, and suchlike) are objected to on the grounds that they plead evidence, and that they are "embarrassing" as pleaded because they are insufficiently particularised and lead nowhere. The Defendants do not in their argument, in fact, raise objections on the basis of these being alleged new causes of action which are prescribed.

71. In my judgment, and largely as discussed at the hearing, these objections are unfounded. It does not appear to me that these allegations are merely pleading evidence, and the Plaintiff's response that they "lead" to a claim for loss appears to me to be correct, as a matter of logic (although I make no comment about the strength of the allegation).

72. It does appear to me that further particularisation under Paragraph 45A(a) of the respects in which the accounts of AD were qualified and/or alleged to be unsatisfactory, and under Paragraph 45A(b) of the respects in which the relevant budgets were not to BoS' satisfaction, and how this was a breach of obligation in the Facility Letter may well be appropriate, and should be given, but I find that to be the only objection to this amendment, and I regard it as insufficient grounds for not permitting what I find to be otherwise an intelligible assertion.

(VI) Paragraphs 55 – 55B and Claims 2A and 2B

73. These amendments relate to the Plaintiffs' claimed loss and damage, and are objected to on the grounds that they are embarrassing for not making sense. They were discussed at the hearing, and I indicated that I was minded to accept Advocate Dunster's criticisms, as I myself found the reasoning and calculation of the alleged losses impossible to follow from the form of the proposed pleading itself. This arose partly from the structure of the apparent, relatively generalised, calculations, partly from the use of unclear expressions such as "Value of development applied in reducing Bank obligations", and partly simply from the fact that the figures used were not explained or broken down.

74. I said at the hearing that in principle amendments of the nature which the Plaintiffs were seeking to make, in order to explain the way or ways in which they claimed to calculate the loss which they claimed from the Defendants, would be quite permissible. The constituent element of a tort is damage suffered, and quantifying this in detail is not an essential part of the cause of action itself. I also indicated to the Plaintiffs that I saw no problem in their claim for damages being quantified in various different ways, if necessary in a series of alternatives which would presumably start with their primary position and provide "fall back" claims if their higher positions were not accepted by the court. Such alternative assessments might easily arise from different possible ways of seeking to identify or define the loss alleged to have been caused by the relevant alleged tort.

75. However, it seemed to me that the Defendants' objection that they really could not understand the calculation of losses without further particulars or an explanatory narrative had force. In the circumstances I directed that the Plaintiffs should reformulate these paragraphs to try to deal with the objections made to them, and hopefully this would provide a form of pleading which the Defendants would be able to consent to.

Disposal

76. It follows from the above that, whilst much of the proposed Re-re-re-amended cause will be permitted as it stands, there are some alterations which require to be made, mainly as a result of my directions at the hearing itself of which the parties are already aware. The Plaintiffs should prepare a further final version of the proposed amendments with the principles of this judgment and the matters canvassed at the hearing in mind, and hopefully this can be finalised either on paper or at the next case management conference scheduled for this case.

77. A final form of my order on this application should if possible be agreed between the parties as well.

Hazel Marshall
Lieutenant Bailiff

19th June 2014

