



Broadhead and Spread Trustee Company Limited et al
Royal Court
Civil Case No 1796
26th November, 2014

JUDGMENT
46/2014

Preliminary issue in an action brought by the Plaintiff against the three Defendants in which the Plaintiff claims as residuary beneficiary of two trusts, that the trustees were grossly negligent in failing to manage the affairs of the trusts *en bon père de famille* and with the appropriate degree of skill and care, thereby causing significant financial loss and damage to each trust.

Approved text
26.11.2014

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

BETWEEN: RAYMOND ANTHONY DOBSON BROADHEAD Plaintiff

and

(1) SPREAD TRUSTEE COMPANY LIMITED First Defendant
(2) ANDREW POLLOCK Second Defendant
(3) GEOFFREY WILLIAM ALLEZ Third Defendant

Hearing date: 10th – 14th November 2014
Judgment handed down: 26th November 2014

Before: Her Hon Hazel Marshall QC, Lieutenant Bailiff

Counsel for the Plaintiff: Advocate Christian Hay
Counsel for the First and Second Defendants: Advocate Simon Davies
Counsel for the Third Defendant: Advocate Jeremy Wessels

Cases, texts and legislation referred to:

The Law Reform (Tort) Guernsey Law 1979
The Trusts (Guernsey) Law 2007
Royal Court (Reform) (Guernsey) Law 2008
Yaddehige v Credit Suisse [2007-2008] GLR 282
Jefcoate v Spread Trustee Company and others [2013] (Royal Court Judgment 11/2013)
Freeman v Ansbacher Trustees (Jersey) Limited [2009] JLR1
Viscount of the Royal Court of Jersey v Shelton [1986] 1 WLR 985 (PC)
Hoechst UK v Inland Revenue Commissioners [2004] STC 1486
Haward v Fawcetts (a Firm) [2006] 1 WLR 682 (UKHL)
Ministry of Defence v AB and others [2012] UKSC 9
Spread Trustee Co Ltd v Hutcheson [2012] 2 AC 194

JUDGMENT

Introduction

1. This has been the hearing of a preliminary issue in an action brought by the Plaintiff (“Mr Broadhead”) against the three Defendants, referred to respectively as “STCL”, “Mr Pollock” and “Mr Allez”. In the action Mr Broadhead claims, as a residuary beneficiary of two trusts, that the trustees were grossly negligent in failing to manage the affairs of the trusts *en bon père de famille* and with the appropriate degree of skill and care, thereby causing significant financial loss and damage to each trust.
2. Mr Broadhead is one of four children of Reginald Broadhead (known as “Max”) a resident of Guernsey since the 1970s who died on 7th February 1998 at the age of 86. Mr Broadhead is the third of the four children; he has one older and one younger brother, Nigel and Richard Broadhead, (“Nigel” and “Richard”) and an older sister, Elizabeth, known as “Tilly”. Tilly has, for a long time, lacked capacity to manage her own affairs and she requires 24 hour care at the former family residence which she shared with her father before his death and at which she still lives, at Beaucamps de Haut, Catel.

The “Medina Trust”

3. The Medina Trust is a trust which was settled by Max Broadhead by a Deed dated 23rd October 1997. It replaced a previous similar trust settled on 14th December 1995, but nothing turns on this. The Medina Trust broadly provides for its assets to be applied for the benefit of Tilly during her life, with permission to resort to capital as well as income, and after her death to be shared equally between those of her brothers then living, and in default of any such surviving brother, for Mr Broadhead’s son Bert. STCL is and has at all material times been the sole trustee of the Medina Trust. The Medina Trust holds its assets through a limited company, Medina Limited, of which STCL holds the shares and appoints corporate directors.
4. Prior to 2009, certain of the Medina Trust’s assets were held in a Guernsey registered company called PedNBilly Holdings Ltd (“PBHL”) of which the shares were held by STCL as Trustee and the sole director was Mr Pollock. Mr Pollock was himself a director of STCL from November 1998 until about 2003. He then became a part-time employee or consultant with STCL. Mr Pollock was the sole director of PBHL until he resigned on 30th April 2009. In December 2009 PBHL was wound up (solvently) and its assets transferred to the Medina Trust.

The “Légitime Trust”

5. The Légitime Trust was constituted upon the death of Max Broadhead by his will, as a trust of that portion of his estate which, under Guernsey inheritance laws, devolved upon Tilly as her légitime. Under this law, Tilly was entitled to a life interest in the income and assets of this portion, with remainder to her heirs, namely her three brothers. Mr Pollock and Mr Allez, a partner in the legal firm of Babbé, were at all material times the trustees of the Légitime Trust. They were replaced by Intertrust Trustees Limited, a company under the new banner of the Spread group, until November 2012. Mr Pollock and Mr Allez were also Tilly’s appointed Guardians, at all material times until September 2010, when they were replaced by Mr Broadhead.
6. It can thus be seen that the objective and the effects of the two trusts are broadly the same. The capital assets of both trusts were and are significant, with each well in excess of seven figures.

Factual history

7. A broad history of the matter, derived from an agreed factual chronology and the evidence of Mr Broadhead - is as follows. Mr Broadhead has lived both in Guernsey and the UK, having been educated at Harrow and later Oxford University. He lived with his own family in Guernsey between 1985 and 1991, assisting his father run his business affairs, but then moved to the UK. He had little to do with the Trusts after his father's death, although he began to receive annual statements in 2003. This was from about the time when Mr Pollock ceased to be a director of STCL although remaining as Tilly's Guardian with Mr Allez, and when Mr Broadhead was told that Mr Paul Schreiber would be taking over from Mr Pollock and assuming responsibility for the Medina account. These summaries themselves came from a Ms Zoni, under the reference "Absched".
8. Mr Broadhead retired in stages from 2005. He had decided to move back to Guernsey with his wife after his full retirement in 2009. The move was planned for January 2010. In anticipation of this, and of becoming more closely involved with Tilly's affairs, he began asking questions about the operation of the trusts from early 2009, corresponding with Ms Zoni. He enquired about the very sizeable deposits held in cash or near cash by the Trusts and was told, by both Ms Zoni and Mr Schreiber (in April 2009) that these assets were required to be kept liquid in order to cover the requirements of Tilly's care. He had not been "happy" with this answer. At about the same time, he asked for copies of the Trust Deeds, which he had not seen. These were supplied (although Mr Broadhead says that he infers from documents he has seen later that his request caused quite a stir.) He was concerned about apparent underperformance in the trust portfolios, and was keen (he says) to try to persuade the Trustees to view both Trusts on a "holistic" basis, to have a combined investment strategy accordingly, and to use a new Fund Manager. He wanted to persuade them to go to Ruffer LLP in this regard, rather than remaining with Fortis Asset Management ("FAM") a Spread sister company, as they had hitherto done. Ruffer LLP had been Mr Broadhead's own investment managers, and he reckoned that their performance record was significantly better.
9. At Mr Broadhead's request, there was a meeting in Guernsey in June 2009, attended by Mr Schreiber, Mr Pollock, Mr Allez, Ms Zoni and also Mr Frank Moon, a highly respected fund manager with FAM. Mr Broadhead says that the presence of Mr Moon, together with assurances that he felt he had had from Mr Schreiber about there having been proper consideration of the investment strategy of the Trust Funds, reassured him, at that time, with regard to such matters having been properly considered. He added in evidence, though, that not long afterwards, discoveries such as that Ms Zoni and Mr Moon were an "item", and that Mr Schreiber had not himself been directly involved with running the Medina account up to then, undermined that reassurance. In the event, though, it was agreed to transfer management of the funds, ie the entire portfolio and not just the non-cash investments, to Ruffer LLP. This was effected between July and September 2009.
10. Mr Broadhead received draft notes of the meeting from Ms Zoni. He did not regard them as accurate or complete, and added considerable further comment of his own, which he returned to Ms Zoni on 8th July 2009, whilst emphasising, in the covering email, that it "was not his intention to criticise the past". He had also been supplied with further financial information in the shape of portfolio valuations for each trust at the 15th June meeting. Having looked at these, he raised some specific concerns about what they showed with Mr Schreiber in an email of 8th July 2009. It was in a later telephone call with Mr Schreiber that he says he discovered that Mr Schreiber had not hitherto been directly involved in managing the Medina account, as he had previously believed. There was further correspondence between Mr Broadhead, Mr Schreiber and others over the following four weeks, and Mr Broadhead and Mr Schreiber attended an introductory meeting with Ruffer LLP on 24th July 2009.
11. On 9th August, Mr Broadhead prepared for himself a substantial "Briefing Note on the Guernsey Trusts" which he emailed to his brother, Nigel.

12. In his witness statement, Mr Broadhead describes the state of his knowledge in August 2009 as being that he had been seeking information about the values of the investment holdings and returns for some time, having a strong feeling that there had been underperformance but with no idea as to the reasons for this, not really being satisfied by the explanation for the high levels of cash holdings, having been somewhat reassured as to the past by the apparent involvement of Mr Moon, but wishing to get management transferred to Ruffer PLC because of their apparently better track record. He was also concerned about the level of the Trust expenses, and the size of fees, which he felt were unexplained.
13. He agreed with Nigel, that further investigations should be made. Mr Broadhead knew Advocate Peter Harwood, who was a partner in Mourant Ozannes, an experienced trust lawyer, and Chairman of the Guernsey Financial Services Commission. Mr Broadhead therefore took his information and concerns to Mr Harwood, sending him a copy of the Briefing Note. This was an informal approach. Although he subsequently receiving responses from Mr Harwood, apparently signed as a “Partner” in his firm, Mr Broadhead was not billed for any advice. For this purpose, Mr Broadhead also prepared, from the annual statements which he had had, what he described as a “back of a fag packet” calculation of the extra income which it seemed that the Trusts could have achieved between 2001 and June 2009 if they had been investing with Ruffer LLP rather than as they had done. This produced a basic difference of about £6M.
14. In the course of their exchange of correspondence, it was agreed that Mr Harwood would seek views on the matter from a litigator in his firm. The response was ultimately discouraging, with the litigation specialist advising that “gross negligence is a very high barrier to cross” (a reference to the Trustee exoneration clause in the Medina Trust Deed, mentioned below), and that the Trustees could rely on their express duty to act with “prudence” in the Deed to justify conservative investments, especially for the last 18 months. Mr Harwood also confirmed that he could not see any matter which might excite the interest of the regulators. He was also discouraging, in a telephone conversation, about the significance of the £6M, advising that this did not represent a loss “in law”.
15. Mr Broadhead says that this discouraging advice did not lessen his determination to find out what had been going on, but did lead him to feel that perhaps not much could be done about the financial position unless it should transpire that funds had actually “gone missing”
16. During the rest of the year, Mr Broadhead was taken up with arranging his move to Guernsey, which took place at the end of January 2010. From arriving in Guernsey and being more on the spot, he then discovered disquieting matters, with regard to Mr Pollock apparently making personal use of some trust assets, such as some paintings and a vehicle. These matters are not the subject of these proceedings, and we are not called upon to make any findings about them; they have, we are told, been resolved. However, Mr Broadhead refers to this as background, and a reason for his and his brothers’ disquiet, and consequent energetic renewal of requests for further information as to how the Trusts had been managed.
17. In April 2010, Mr Broadhead wrote a long letter to Mr Schreiber, listing some 14 points of concern which he wanted to discuss, requesting explanations and information, and stating that the family believed that there should be “reparation” for matters such as repayment of unjustified fees, and for “any maladministration and consequent underperformance of the investment portfolios”. He also stated that without satisfactory explanations and response, the family would have no alternative but to “take independent professional advice with a view to seeking a Court order for disclosure”. Mr Broadhead says that this letter was entirely his own and written without any legal input.
18. Unsurprisingly, perhaps, this letter was immediately treated as a complaint by STCL/Intertrust. It was therefore Mr Roy Le Hegerat, the director of Intertrust responsible for dealing with complaints and compliance, who replied fully to Mr Broadhead on 19th May 2010. In a very long letter he dealt with Mr Broadhead’s assertions point by point.

However, he recognised, at the end, that the response would not have dealt with all of his concerns, and proposed various immediate steps to remedy the position (particularly with regard to Mr Pollock's involvement) and suggested a meeting.

19. Over the course of the following few weeks, there was further correspondence, and more information was given. Mr Broadhead says that this was more apparent than real, and it is certainly right to say that Mr Le Hegerat deflected requests for further information on the basis that these had already been dealt with in earlier letters, when in fact the earlier letters had themselves only contained statements that they were regarded as having been sufficiently answered already. However, in the course of this correspondence, on 10th June 2010, a CD ROM was supplied to Mr Broadhead containing the historic portfolio valuations and the accounts of the two trusts (Mr Broadhead says that some were missing but agrees that it was "most") and the accounts of the corporate entities, and some other documents such as investment managers' historic comments.
20. Mr Broadhead says that the information supplied at this time, insofar as it relates to the breaches of trust now in issue, did not materially (if at all) increase his knowledge of material facts from what he had known at the time when he consulted Advocate Harwood. It gave bald figures, but, and importantly, revealed no information about what had happened, and why, and in particular disclosed nothing about forming an investment strategy, taking advice, or reviewing investment performance against strategy.
21. Still feeling frustrated, Mr Broadhead and his brothers therefore consulted English solicitors, Taylor Wessing. In evidence he said that this was in May 2010. Taylor Wessing's first letter to Intertrust was written on 25th June 2010. That letter set out the full range of the Broadhead family's concerns, including "investment matters". It stated that it was not intended to be a pre-action letter, but made it clear that if the concerns were not satisfactorily addressed, the Broadheads would have to consider their position and taking legal recourse in Guernsey for remedies such as disclosure, administration orders, accounts and inquiries, and "such further remedies or other relief as the Court may determine."
22. Correspondence then ensued between the parties' lawyers, Collas Crill having been instructed on Mr Broadhead's behalf in Guernsey. Mr Broadhead stresses that at this time he was not wishing or intending to take legal action, because he still had insufficient information as to what had actually happened. He says that the correspondence was written with a view to trying to induce STCL to provide full information, and the aggressive tone of both his and his advisers' letters, and the internal correspondence between him and his brothers, must all be seen and read with that point in mind, ie that they were out to achieve an object, but that object was not that of bringing proceedings.
23. Mr Broadhead points out that it was only on 15th July 2010 (ie after the key date for present purposes) that he received, from Mr Allez, copy minutes of "guardian" meetings between himself and Mr Pollock, which were in practice also "Légitime Trustee" meetings, and which, he says, first raised matters which form part of the description of his claims in this action but of which he had previously known nothing. He cites, as an example, the Trustees' deciding to open an account with Kleinwort Benson in April 2000 but having done nothing by December, the funds still then remaining in cash. He views this as the first "prima facie" indication that investments had not been properly handled, although still being of the view that there must be other documents which therefore might fill in the gaps and omissions, (such as copies of Trustee Resolutions, which he did not obtain until they were produced, after issue of an application for disclosure, in July 2011.)
24. In November 2010, but obviously having instructed them a little earlier, Taylor Wessing obtained a report from Moore Stephens, accountants, analysing the investment performance figures contained in the information already obtained by Mr Broadhead, and providing, he says, confirmation, for the first time from a professional, of a measure of underperformance.

However, he also says that this still did not give any insight into STCL’s acts or omissions, nor, he thought, anything to substantiate allegations of breach of trust.

25. In April 2011, the decision was taken to make a formal application against the Defendants, on behalf of all the three brothers, for (effectively) pre-action disclosure. This was resisted, apparently generally on grounds of lack of entitlement, or that information had already been supplied. At the hearing in November 2011, Mr Broadhead says that the first important thing which happened was that there was an admission by Advocate Newman, on behalf of the Defendants, that there were no documents to disclose with regard to the taking of investment advice because no such advice had been obtained. The second important thing was that L-B Richard Southwell, hearing the matter, was strongly critical of the Defendants’ actions and attitude, and, as a result, the Defendants capitulated and consented to produce the information requested by Mr Broadhead and his brothers without the hearing being completed.
26. The documents in question were disclosed in January and March 2012. Mr Broadhead says that it was only on receipt of these, and with their paucity (he cites, for example, a “tick box” document with regard to reviewing annual investment performance which, he says, demonstrated a superficial and effectively non-existent attitude to investment review), that he and his advisers were able to identify and articulate the acts and omissions of the Defendants which are the real subject of the complaints in these proceedings. This is because, he says, it is the “omissions, gaps and complete lack of documentation which together amount to the material basis of what I now accuse them of.” This was the first point, therefore, at which (he says) he knew all the material facts that would permit him to formulate a claim against the Defendants. He cites, for example, that whilst he had known before 2012 that there were very sizeable cash holdings, it was only on receipt of this material that he “found out what the Defendants had done with it”, and similarly that it was only then that he found out, not that an investment strategy was not being followed, but that there was apparently no such strategy, to be followed.
27. However, following receipt of this information, in about April 2012, Mr Broadhead and his brothers fell into dispute about whether or not to pursue the Defendants, and whether or not Mr Broadhead should remain as Tilly’s Guardian. Most of the rest of that year was taken up with resolving these disputes, culminating in Mr Broadhead’s standing down as Tilly’s Guardian and the appointment of two independent professionals in his stead. There were then further disputes with his brothers. The detail of this is not important, and it is mentioned simply to explain the further delay in issuing proceedings, before this was done in July 2013.

The action

28. These proceedings were launched on 5th or 6th July 2013. The reason for the uncertainty is that it is not clear on which date the Cause was handed to the Sergeant for service, which is what marks the commencement of an action in Guernsey procedural law. Nothing turns on the precise date and this judgment will use 6th July for short, where possible.
29. By the Cause, Mr Broadhead claims against STCL, as Trustee of the Medina Trust, and against Messrs Pollock and Allez, as Trustees of the Légitime Trust, that, over the period from 2000/2001 to 2008, they failed to act with the reasonable care and skill of a prudent professional trustee (or, in the customary law phrase endorsed in Section 22 of *The Trusts (Guernsey) Law 2007* (“the Trusts Law”) and its earlier manifestations, to act *en bon père de famille*) with regard to the investment of the trust assets, preserving the value of the capital and enhancing the income. In the case of the Medina Trust, in particular, it is also alleged that they failed to observe the terms of the Trust Deed.
30. It is also further alleged, in each case, that the Defendants’ acts fell so far below the standards required of them that they amounted to “gross negligence”. It is consequently alleged, in the case of the Medina Trust, that Clause 1 of the First Schedule to the Trust Deed, which exonerates the Trustees from any liability for “loss to the Trust Fund arising from any

investment or purchase made in good faith”, is not applicable to the loss in this case, pursuant to sub.ss 39 (7) and (8) of the *Trusts Law*. These prohibit the terms of any trust, whenever created, from relieving a trustee of liability arising from gross negligence. It is not clear if there is a similar term in the *Légitime Trust Deed*, but the greater claim is made in respect of the *Medina Trust*.

31. The alleged breaches of trust are set out in Paragraphs 17 and 18 of the Cause in respect of the *Medina Trust* and in Paragraphs 20 and 21 in the case of the *Légitime Trust*. The Plaintiff gives his best assessment of the losses caused to the Trusts, , in advance of discovery and expert evidence, as being some £13,606,530 as regards the *Medina Trust* and some £4,303,304, as regards the *Légitime Trust*.
32. The Defendants deny that they have acted in breach of trust as alleged or at all. They have complained that the actual breach(es) of trust which Mr Broadhead alleges are insufficiently clearly pleaded as regards both particulars of the supposed defaults, and also their dates. However, they also contend that, on any basis, the claim made by Mr Broadhead is time-barred, pursuant to s 76 (2) of the *Trusts Law*. This section is headed “Limitation and Prescription”. Subs. 76(2) states:

“(2) Subject to subsections (1) and (3), [which are not applicable here] the period within which an action founded on breach of trust may be brought against a trustee is

–
(a) three years from the date on which the claimant first has knowledge of the breach.....”

The Defendants allege that it is clear on the documents, and on the Plaintiff’s own evidence, that he had “knowledge of the breach” of which he complains in the Cause, within the meaning of s 76(2), well before 6th July 2010, and in fact as early as August 2009. They say that this claim was therefore statute-barred, many months before the action was commenced, and must consequently be struck out.

33. The Plaintiff resists this. He says that the state of his knowledge prior to 6th July 2010 was never such as to amount to “knowledge of the breach” within the meaning of s. 76(2). He says that this was because the Defendants had unreasonably resisted his requests for further information and documentation relating to their administration of the trusts during the relevant period, so as to enable him to find out what had actually happened and make a proper assessment of it. He was “stonewalled” in this regard, until he was eventually able to bring, in April 2011, the application in this court for production of the relevant documentation which was heard in November 2011. It was only as a result of the admission of Advocate Newman mentioned above, and then at last being furnished, in January and March 2012, with the documents which he had been requesting through his lawyers since at least June 2010, that he became aware of the degree of dereliction of duty with which the Trust’s affairs had been conducted, and hence of the breach(es) of trust which are now identified. It was only, therefore, in November 2011 or January 2012 that he first, “had knowledge of the breach of trust” within the meaning of the relevant section. This cause was launched only six to eight months later, and is therefore not out of time.

This hearing

34. In July 2014, the Defendants applied for the issue of whether the Plaintiff’s cause of action in breach of trust in the above respects was time-barred to be tried as a preliminary issue. The Lieutenant-Bailiff heard this application on 15th July 2014. The Plaintiff resisted this course being taken, citing the well-rehearsed warning that one should be cautious about directing the hearing of preliminary issues, because such a course may often turn out to be a false economy. Unless a preliminary issue is very clearly a short and discrete issue, its trial can easily turn into a major hearing, often turning out to be more complex and with more uncertainties than had been appreciated, and in fact saving no time, and even increasing

expense. He argued that this was such a case; the trial of such a preliminary issue would take at least 10 hearing days, and involve 8 witnesses and at least 20 volumes of documents.

35. However, the Lieutenant-Bailiff did not find this argument persuasive, as it seemed to her that the state of the Plaintiff's knowledge at a particular date (6th July 2010) was a sufficiently clear issue to be conveniently determinable, and that if the result were in the Defendants' favour, there would be a considerable further amount of evidence and argument which would be avoided and costs and resources saved. At the hearing, and by an order perfected on 29th August 2012, she therefore directed the trial of such a preliminary issue, the formulation of which was agreed by the parties and is set out later. In the event, the hearing has been concluded within the four day time period allotted, and only three witnesses, and a manageable amount of documentation have been put before the court.
36. Since the Lieutenant-Bailiff took the view that the preliminary issue might well require findings of fact as to the Plaintiff's knowledge, and how far this fell on a factual basis within the appropriate interpretation of "knowledge of the breach" of trust, she elected to sit with the Jurats, in the usual way. In the event, owing to indisposition of members of the panel of Jurats and the requirements of a Full Court in a serious criminal matter being tried at the same time as this application, only two Jurats rather than the usual three were available on the proposed hearing dates. The parties agreed to the matter proceeding with a bench consisting of the Lieutenant Bailiff and two Jurats, and the matter was therefore able to go ahead.
37. At the hearing, the Plaintiff was represented by Advocate Christian Hay, the First and Second Defendant (STCL) by Advocate Simon Davies, and the Third Defendants by Advocate Jeremy Wessels. The bench unanimously expresses its appreciation for their scholarly and focussed skeleton arguments, and their helpful and courteous presentation of their cases and of the evidence.

General

38. This is a decision of the Court, and this written judgment has been prepared in accordance with Section 16(5) of the Royal Court (Reform) (Guernsey) Law 2008. Pursuant to Section 14(2) of the 2008 Law, the Lieutenant-Bailiff did not sum up to the Jurats in open court, but instead retired with them. She reminded the Jurats of their respective roles, namely that the Lieutenant-Bailiff is the sole judge of matters of law and procedure and the Jurats must follow her directions on such matters, but that the Jurats are the sole judges of questions of fact. She directed the Jurats that insofar as she might herself appear to express any views on the facts when guiding their deliberations, the Jurats should ignore these and form their own independent judgment. This judgment therefore sets out the law upon which the Lieutenant-Bailiff advised the Jurats in the course of their deliberations. Insofar as holdings of law are referred to below, they are the holdings of the Lieutenant-Bailiff. Where this judgment sets out findings of fact and reasons therefor, they are the findings and reasons of the Jurats. There has been no matter of disagreement between the Jurats which has required the Lieutenant-Bailiff to make a casting vote on a finding of fact.

The issue

39. The preliminary issue was defined in Paragraph 1 of the relevant Order as being

“the issue as to the Plaintiff's state of knowledge on or before 5 (alternatively 6) July 2010 of the matters he has pleaded in Paragraphs 18(5) and 21 (5) of his Cause dated July 2013, in order to determine whether such knowledge constituted “knowledge of the breach” of trust complained of in each case for the purpose of Section 76(2) of the Trusts (Guernsey Law) 2007, such that his claims in this regard are prescribed.”

40. The relevant assertions in the cause are as follows.

(1) Medina Trust

(i) By Recital C of this Trust Deed, it was stated that the “*primary purpose*” of the Trust
“is to provide Tilly with a home during her lifetime and all the care comfort safety support and resources in all respects that Tilly needs.”

(ii) By Clause 4(b) of the Deed, the Trustee (ie STCL) was directed

“during Tilly’s lifetime to pay or apply all or such part of the income and if necessary the capital of the Trust Fund as the Trustees shall determine for the benefit of Tilly to ensure the provision for her so far as possible of care comfort safety support and resources in all respects and to accumulate income not so paid or applied as accretions to the capital of the Trust Fund.”

Tilly is also to be permitted to

“occupy use and enjoy the Estate during her lifetime.”

(iii) Clause 5 of the Deed provides for the devolution of the Trust Fund after Tilly’s death.

(iv) By Clause 1 of the Second Schedule, the Trustees

“shall act with prudence but in the professed exercise of their powers of investment and management of the Trust Fund, the Trustees shall not be held liable for any loss to the Trust Fund arising from any investment or purchase made in good faith” .

As already mentioned, Mr Broadhead argues that the latter part of this clause does not apply, in the circumstances of this case, because that effect is invalidated by subs.ss 39(7) and (8) of the Trusts Law.

(v) By Clause 2 of the Second Schedule,

“Subject to their acting with prudence as referred to.... and subject the primary purpose of the Trust.... The Trustees shall adopt the investment policy which so far as practicable shall maximise income whilst preserving the capital value of the Trust Fund in terms of the purchasing power of sterling”.

41. Turning to the Cause, in Paragraph 17, the effect of the above terms is pleaded, with it being added that

“On the proper construction of the above phrase [sc. The obligation to preserve the capital value of the Trust in terms of the purchasing power of sterling] the Trustee was to seek to preserve the value of the capital of the Trust against inflation within the sterling currency area (including Guernsey and the United Kingdom) and, insofar as the assets were denominated in foreign currencies, against the exchange rate movements against sterling.”

42. By Paragraph 18, it is alleged that

“STCL’s approach to the investment of the Medina Trust’s assets breached the duty pleaded in Paragraph 17above and has been grossly negligent.”

There then follow “Particulars of Gross Negligence” which set out figures derived from the Trust accounts for 2001-8 as regards Tilly’s expenses, and as regards an aggregate reduction

in the “investable assets” of the Trust over this period, and showing a failure to maintain the capital of the Trust even in nominal terms, and even before a comparison with inflation levels exemplified by the States of Guernsey Retail Prices Index over the period.

43. Paragraph 18(5) then pleads that this “*material erosion*” of the capital value of the Medina Trust and the consequent negative impact on its income generating potential in real terms was the result of negligent management of the “*investable assets*” of the Trust. There then follow the five respects, identified in the formulated Preliminary Issue, as being the aspects of breach of trust complained of, namely:

- (a) “[STCL] failed at any time to take expert advice as to the most appropriate portfolio structure and asset selection for the Medina Trust’s investable assets
- (b) It failed to develop and or failed to implement any investment strategy or plan for the Medina Trust’s investable assets and failed to review the asset mix within the portfolio held by it either at all or at least with sufficient regularity (ie at least annually) and rigour and, further failed periodically (ie at least annually) to re-balance the portfolio periodically in line with any investment strategy or plan.
- (c) It received basic investment reports from investment managers of those parts of the Medina Trust’s trust fund STCL had invested in quoted investments but failed to analyse the returns reported to it by such managers against relevant benchmarks or competitor managers’ reported returns and sought no advice from those managers or anyone else as to appropriate future investment of the assets held with them.
- (d) It failed to review the performance of the investable assets held by it over time against the level of expenditure it was incurring to meet Tilly’s expenses together with disbursements it paid to third parties and its own remuneration. Had it done so, it would have been clear to it that its approach to investment was failing to maintain the capital value of the Medina Trust in terms of the purchasing power of sterling but was eroding its capital with the consequence that it was also eroding over time the likely income stream which could be produced from the Medina Trust, both endangering its ability to fund Tilly’s care in future years and decades and leading to likely further erosion of the Capital of the Medina Trust in terms of its purchasing power in sterling.
- (e) Its asset selection was materially over-weight in cash deposits, which were, moreover, held largely as short term deposits permitting instant or speedy access without any interest penalty with commensurately lower interest returns payable on them than was available on longer term deposits when such instant access was unnecessary and inappropriate given the anticipated levels of expenditure it was incurring”

44. It is then pleaded at subparagraph (f) that in September 2009,

“as a result of criticism directed at its approach to investment and pressure to redress the poor performance it had overseen historically”

STCL transferred management of the whole of the liquid portfolio to Ruffer LLP, who radically altered the composition of the portfolio (in particular, reducing “cash” holdings from 75.1% to 8.4% of “*investable assets*” within 6 months) and achieving a hugely improved overall annual investment return. It is further pleaded at (g) that the matters complained of constituted a failure to achieve the level of return which a prudent and reasonable trustee would have achieved consistently with the terms of the Trust Instrument.

(B) L gitime Trust.

45. With regard to the L gitime Trust and the claim against Messrs Pollock and Allez, the pleading, at Paragraph 20, is merely of the Trustee’s basic duty to act with the skill and care of a reasonable and prudent professional trustee. The complaints of alleged “gross negligence” then pleaded at Paragraph 21 take a similar form to those above, although in this instance the complaint of “material erosion” in the capital of the Fund after payment of such part of Tilly’s expenses as were paid out of it over the relevant period of 2000 – 2008, are only as to reduction in its value in real terms (ie after taking into account inflation) rather than also in nominal terms.
46. The matters of criticism and complaint particularised at Paragraph 21(5) (a) to (e) are expressed in exactly the same terms as those set out in paragraph 18 (5) (a) to (e) with regard to the Medina Trust. The consequences of the move to Ruffer LLP in September 2009 in terms of change of asset allocation and improved return are of similar nature, but (of course) different actual figures, eg, the cash holdings here were pleaded to have reduced from 34.8% to 2.2% in 6 months.
47. The five shortcomings which the Plaintiff has therefore identified as being in breach of trust, in each case over the entire material period from 2000 or 2001 to 2008, and in respect of both trusts, can be concisely labelled as
- (a) failure to take advice
 - (b) failure to develop, implement or review any investment strategy
 - (c) failure to analyse or review the returns from invested funds
 - (d) failure to review investment performance against expense requirements, having regard to need to maintain capital and an income stream; and
 - (e) holding excessive amounts in cash and liquid (low income) deposits unnecessarily.

These are called the “Listed Complaints” for convenience.

The law

General

48. The preliminary issue concerns

“whether the state of Mr Broadhead’s knowledge of the matters pleaded in Paragraphs 18 (5) (a) – (e) and 21 (5) (a) to (e) of the Cause on or before 6th July 2010 constituted “knowledge of the breach [of trust]” within the meaning of s 76(2) of the Trusts (Guernsey) Law 2007”

49. The Defendants’ Advocates identified this as raising three core sub-issues, from which Plaintiff’s Advocate did not appear to dissent, namely:
- a. What is meant by “knowledge” and in particular what are the requirements for actual knowledge and constructive knowledge?
 - b. In the light of (a) what knowledge does a Plaintiff need to have (and about what) for the purposes of s 76(2)(a)? and
 - c. Applying the above, whether or not on the facts of this case the Plaintiff can prove that he first had such “knowledge of the breach”, for the purposes of s 76, only within three years prior to bringing his claim?

The first two sub-issues are issues of law, concerning the interpretation of s 76(2); the third is an issue of fact.

50. As to (a), it is in common ground that relevant “knowledge” encompasses both actual knowledge (ie knowledge which the Plaintiff actually had) and constructive knowledge (ie knowledge which the Plaintiff may not in fact have had, but which, on the facts, he could have acquired with reasonable diligence, and is therefore, in law, deemed to have had.) The remainder of sub-issue (a) and sub-issue (b) together raise the questions:

(i) what strength of conviction or belief is indicated by the word “knowledge” for this purpose? and also

(ii) knowledge of what? ie at what level of detail?

These are distinct concepts as a matter of analysis, but they are both aspects of the general concept of the *sufficiency* of any suggested “knowledge” (sc. “of the breach”) for the purpose of s 76 (2), into which they both feed. It is with regard to the implied standards or tests in respect of these two aspects, and in particular the latter, that the parties differ in this case.

51. As a starting point, it is again common ground between the parties that the only Guernsey authority touching on the interpretation of s 76(2)(a) is the decision of Collas B. in in *Jefcoate v Spread Trustee Company and others* [2013] (Royal Court Judgment 11/2013), although the parties each then use this case to support different arguments.

52. At [84], the Bailiff found that the concept of “knowledge of the breach” of trust connotes “*a discoverability element*”. Both parties acknowledge, therefore, that this concept applies within the test of what is relevant knowledge for the purpose of s 76 (2), but they disagree as to the implications or extent of this. The Bailiff also commented in [84] that

“the same expression [sc “knowledge”] is to be found in section 5(4) of The Law Reform (Tort) [sic] Guernsey Law 1979 where the legislation helpfully provides guidance as to what facts the Plaintiff may have known.”

Plaintiff’s submissions

53. Advocate Hay, relying on the reference to “*a discoverability element*”, and the Bailiff’s approval of a concession of counsel that the date of acquisition of “knowledge of the breach” for the purpose of s 76 would coincide with the cessation of operation of any “*empêchement d’agir*” which encumbered him, argues that this suggests that the acquisition of relevant knowledge is the other side of the coin from the principle of *empêchement*. This was described in *Yaddehige v Credit Suisse* [2007 – 8] GLR 282, as being where it was

“.. practically impossible for [the Plaintiff] to discover the facts needed to support the cause of action or the existence of the cause of action itself”.

He argues, therefore, that this supports the formulation of the test of such relevant “knowledge of the breach” in s 76 as being that time does not start to run until the Plaintiff has either “*actual knowledge of the facts which are material to enable the cause of action to be proved orcould, with reasonable diligence have discovered them*”. (This second limb of course acknowledges the place of constructive knowledge under s 76(2), which the parties agree upon, as already mentioned.)

54. Advocate Hay argued that no assistance was gained from s 5(4) of the *Tort Law 1979*, as mentioned above; the Bailiff did not appear to place any particular reliance on it in *Jefcoate*, and this was right because the context – actions for personal injury – was very different. No inferences can therefore fairly be drawn from the more elaborate provisions of s5 of the *Tort Law* by analogy. Advocate Hay argued, for similar reasons, that authorities from other jurisdictions, and in particular English cases, on which the Defendants placed great weight, are of little or no assistance, and certainly should not inhibit the court’s interpretation of s 76(2). Those authorities were concerned with the interpretation of different statutes,

operating in the context of different jurisdictions and different legal frameworks, and mainly on different kinds of case.

55. Advocate Hay advanced his argument, therefore, based, effectively, solely on the words of the *Trust Law* itself, and he had two main, but interrelated, strands to his argument. The first related to the issue of the strength of “knowledge” required by s 76(2), and was that it should be interpreted as requiring quite a high degree of “sureness”, and therefore at quite a high level of detail of the nature of the particular matters of complaint. The second related to the issue “knowledge of what?” and was to the effect that what was required here was the relevant degree of knowledge of facts amounting to “gross negligence”, because that was what Mr Broadhead’s claim was for.
56. With regard to the first, more general argument, Advocate Hay submitted that “knowledge of the breach” in s.76(2), obviously meant “knowledge of the facts which constitute the breach”. In opening he submitted that this was to be interpreted as knowledge of “*all of the facts which are material to be proved to entitle the plaintiff to succeed*”. Subsequently, he modified this to “*knowledge of [all] the material facts which constitute the breach*”.
57. Advocate Hay submitted that requiring a reasonably high level of detailed knowledge, as contrasted with general suspicion, arose from the particular context of s 76, namely dealing with trust relationships. The section was concerned with time running in the context of a pre-existing relationship between parties, and in fact one of trust. This would mean both that the potential plaintiff will not have the ready ability to discover the material facts necessary to found a claim, because they are likely to be peculiarly within the knowledge of the other party, the trustee, and second, that the policy of the law would be to avoid encouraging the commencement of proceedings between such parties. If the level of “knowledge” were set too low, it would have the effect of causing proceedings to have to be launched precipitately and at too early a stage, when they might otherwise have been avoided.
58. Advocate Hay’s central submission, however, was that whatever the strength of knowledge required, “knowledge of the breach” must, in this instance at least, mean sufficient knowledge of facts amounting to *gross* negligence. This was because the nature of Mr Broadhead’s claim was a claim for a grossly negligent breach of trust; it was therefore necessary that he should have knowledge of such a breach, before time would begin to run.
59. Advocate Hay submitted that this analysis derived support, by analogy, from the description of the effect of *empêchement* in *Yaddehige* set out above, with its reference to knowledge of “*the facts needed to support the cause of action or the existence of the cause of action itself.*” This meant, he submitted, having knowledge that one had a “viable” cause of action. By “viable” he meant “a cause of action for which there was a remedy”, and not a non-viable one for which there was no remedy, or one which was liable to be struck out. He submitted that it would be absurd and unfair if time started to run against a person only because he had knowledge of facts which would not provide him with a sustainable action. He submitted, therefore, that the test in this case could only be that time would start to run against Mr Broadhead when he had knowledge of facts which amounted to “*gross*” negligence, because he could only ultimately succeed if he could prove “*gross* negligence”.
60. In support of the argument that one could, and in the present context should, distinguish between mere negligence and “*gross*” negligence as breaches of trust and/or causes of action, he referred to *Freeman v Ansbacher Trustees (Jersey) Limited* [2009] JLR1 with its approval of the dictum of Park J in *Hoechst UK v Inland Revenue Commissioners* [2004] STC 1486 that a cause of action is “*a set of facts which entitles the claimant to relief*” (emphasis added). He also referred to *Viscount of the Royal Court of Jersey v Shelton* [1986] 1 WLR 985, at 991 where, in a case which concerned the effect of an exoneration clause in a company’s Articles of Association in favour of company directors provided they had acted in good faith, the Privy Council stated (at 991F) that “*A company has no cause of action against a director in respect of a matter against which the company has agreed to indemnify him.*”

61. Advocate Hay accepted, in answer to questions from the bench, that the degree of knowledge which would start time running against a potential plaintiff did not have to amount to knowledge that one had an absolutely solid claim, but only to knowledge of facts which one could reasonably see could give rise to the relevant claim. He affirmed his submission as being that, in this case, such a “relevant claim” was one in “gross” negligence, and not one in “mere” negligence, because that was the claim which Mr Broadhead would have to perceive, and then make, in order to pursue a viable cause of action.
62. Advocate Hay’s further submission, in relation to the logically subsequent issue of fact was, of course, that whatever the appropriate test (but more obviously, of course, if his formulation of the test were correct), the relevant state of knowledge was not acquired by Mr Broadhead until after 6th July 2010. He submitted that it only accrued as a result of obtaining the admission made in November 2011 that no investment advice had been taken by the Trustees, and the revelations gained from production of the further documents in January and March 2012, which showed what had *not* been done in terms of the Listed Complaints. He submitted that the matters complained of as the Listed Complaints are properly characterised as “flagrant” breaches of duty, in terms of “complete” failure to consider and implement any investment strategy, monitor and review performance, rebalance the portfolios as necessary and take expert advice, the breaches of trust in which regards were only revealed at that time. He repeated therefore, that in relation to this issue of law, it is only those particular facts which constitute the gross negligence claim, that it is by reference to this claim that Mr Broadhead’s state of knowledge is to be tested, and that consequently Mr Broadhead would not and did not have the necessary “knowledge of the breach” until he had sufficient knowledge of those facts.

Defendants’ submissions

63. As a general point, the Defendants emphasise that the effect of the Plaintiff’s acquiring the relevant knowledge under s 76(2) is not that he is immediately time-barred from pursuing a cause of action, but only that the “starting gun” is fired, for the running of a period of time during which he must bring his action, or lose his right to do so. The Plaintiff therefore has three years from the time when he acquires the relevant degree of knowledge in which to commence proceedings. Viewed in that context, they say that it is apparent that the degree of knowledge required is not outright knowledge that a cause of action (still less a “viable” cause of action) must exist, but only knowledge that there is such a sufficient likelihood of this, that the Plaintiff ought reasonably to get on with making relevant further enquiries, or taking necessary advice, so as to be in a position, within three years, to launch proceedings *if* he is going to do so. S 76(2) must therefore be construed with that background in mind; it does not have (they argue) a particularly draconian effect.
64. Following on from the common ground mentioned above, the Defendants observe that the legal issue between the Plaintiff and the Defendants is really what, in fact, constitutes “knowledge”, both as regards the qualities of “knowledge” and the matters of which such “knowledge” has to be shown. They submit that insofar as the Plaintiff contends that the test is knowledge of “*all of the facts which are material to be proved to entitle the plaintiff to succeed*” that is incorrect and states the test too highly, and that insofar as it has become “*knowledge of facts amounting to gross negligence*” that also states the matter too highly and is contrary to what is meant, and can only be meant, by “the breach”.
65. The Defendants submitted that any attempt to import the concepts of the customary doctrine of *empêchement* into the interpretation of s 76 (2) even by analogy, is mistaken. The concepts are separate (one being customary law and one being statutory) and are not to be confused or conflated. The rules laid down by the *Trusts Law* were intended by the States to apply according to their own independent terms, and thus effectively oust the application of the doctrine of *empêchement* in any event.

66. They also part from Advocate Hay by arguing that the Bailiff's reference in *Jefcoate* (above) to the *Tort Law*, and in particular to s 5(4), can be taken as judicial recognition that it is appropriate to have regard to any assistance which can be derived from statutory enactments having a similar purpose. The heading of s 5 of the *Tort Law*, ("Time limit for personal injuries"), shows this similar intended purpose, and the mechanism used is a knowledge-based test, similar in both s 5 of the *Tort Law* and s 76 of the *Trusts Law*. By extension, any legal authorities indicating an approach to construing provisions with a similar purpose, even in other jurisdictions, can (they submit) provide persuasive assistance to the Guernsey court. The word "knowledge" is, they submit, an ordinary English word, not intrinsically a term of art, and is not being used in any context suggesting that it carries a specialist meaning. Consequently, the way in which this word, or related words such "know", have been interpreted in similar statutory contexts in jurisdictions with which Guernsey has legal affinity can provide useful guidance to the court, in the absence of Guernsey law directly on the point.
67. Whilst acknowledging that English authorities are not binding but merely persuasive in Guernsey, they submit that highly persuasive authority as to the appropriate test for what is meant by "knowledge of the breach" in s 76 (2) is to be found in the decision of the House of Lords in the case of *Haward v Fawcetts (a Firm)* [2006] 1 WLR 682, with regard to the meaning of "... the knowledge required for bringing an action for damages in respect of the relevant damage....." in s. 14A (5) of the English *Limitation Act 1980*.
68. This is the section which extends the time limit under the English rules as to limitation of actions for negligence actions where facts relevant to the cause of action are not known at the date of accrual. In English law, a cause of action in negligence arises when the damage occurs in fact, regardless of whether the Claimant is aware of this. Section 14A remedies the injustice which might otherwise result, by providing a potential extension of the time limit where the Claimant is unaware of the damage, or of his right to bring an action, until three years after he first acquires the applicable knowledge of those matters: see s 14A (4)(b) and 14A (5). The section also elaborates on what is meant by "*the knowledge required for bringing an action....*" in subsections (6) – (8). It does so in terms and concepts similar to those used in Section 5 (6)-(8) of the Guernsey *Torts Law*.
69. *Haward's case* was a claim for negligent advice from a firm of accountants as regards the business prospects of a company which the claimant was proposing to invest in, and which he did in December 1994. The company performed badly, and, after investing more funds, the plaintiff took advice investigating the company's losses, and brought an action for breach of contract and negligence against the defendants in December 2001. The defendants pleaded that the claim was statute-barred, and the claimant invoked Section 14A of the *Limitation Act 1980*, claiming that the earliest date on which he had had the requisite "*knowledge required for bringing an action for damages*" had only been in 1999, and thus within three years of the issue of proceedings in December 2001.
70. A preliminary issue on this point was taken ultimately to the House of Lords, who found in favour of the Defendants. The relevant date was December 1998. It was held that although the Claimant did not know until later than this that the partner in Fawcetts had not investigated facts sufficiently before giving his flawed advice, that knowledge was not a requisite of "*the knowledge required for bringing an action*". He had known all the material facts as they occurred, ie the giving of the advice, the subsequent inconsistently poor performance of the business and the causal connection between the advice, investment in reliance on it and thus the damage he had allegedly suffered. The Defendants submit that the parallel of these outline facts with the present case, and the arguments made, is striking.
71. From dicta in this case, the Defendants argue that the following propositions can be distilled.

- a. It is for the Plaintiff to prove that he did not have the requisite knowledge required to start time running until a date within 3 years prior to his commencing these proceedings (Lord Nicholls at [23]);
 - b. For this purposes, the relevant knowledge is not the knowledge which is required in order to plead a fully particularised pleading (Lord Nicholls at [10]). Any such argument was comprehensively rejected by Lord Walker at [79] and [80] and by Lord Mance at [119]. It is not necessary, therefore, that he should know “how and why” the Defendants failed in their duty (Lord Walker at [79]-80);
 - c. What is required is **knowledge which renders it reasonable for the Plaintiff to begin to investigate whether it is possible that there has been the relevant wrong to him** (there negligent breach of contract; here negligent breach of trust) (Lord Nicholls at [20]; Lord Brown at [90]); [emphasis added, as this is the central point];
 - d. That degree of knowledge is simply knowledge of the facts relevant to the “gist”, or the “essence”, or the “substance”, or the “thrust” of the claim, or disclosing a “*real possibility that his damage may have been caused by some flaw or inadequacy...*”. That bar is thus set at a relatively high level of generality (or a low level of detail), namely at the level where the Plaintiff thinks that the Defendants may not have “done their job properly” or may have “slipped up” (Lord Nicholls at [20] and [24] ; Lord Brown at [90] and Lord Mance at [128]);
 - e. The Plaintiff need not know the legal consequences of the facts of which he is aware, so that he need not know whether they do amount to negligence (or here breach of trust) (Lord Scott at [51]);
 - f. The Plaintiff need not know whether or not he has a “worthwhile” cause of action (Lord Nicholls at [12]);
72. In their skeleton argument, the Defendants cited many other English authorities, with *dicta* to similar effect. These included *Ministry of Defence v AB and others* [2012] UKSC 9, in which Lord Wilson at [11] rejected the proposition that the plaintiff lacks the requisite knowledge until such time as he has the evidence with which to substantiate his belief in court, and Lord Walker at [57] observed that whilst it does not necessarily follow that a plaintiff has the necessary degree of knowledge by the date when he first takes legal advice, such an inference may well be justified in fact.
73. The Defendants submit that the principles above are of general application to knowledge-based tests of when time begins to run, and that there is no principled basis for drawing any distinction in the “context” of a claim for breach of trust which Advocate Hay advanced, so as to apply any different approach to the concept of “knowledge of the breach” from that demonstrated in all these other similar situations.
74. They further submit that Advocate Hay’s characterisation of the “cause of action” or the “breach of trust” as being one in “gross negligence” rather than “mere negligence” is both illegitimate and misconceived. They rely on *Spread Trustee Co Ltd v Hutcheson* [2012] 2 AC 194 at [117] where it is stated that:

“The terms “negligence” and “gross negligence” differ only in the degree or seriousness of the want of due care they describe”,

and point out that in *Freeman v Ansbacher Trustees (Jersey) Limited* (above) at [62]-[64] the Jersey Court applied this principle, permitting the plaintiff to amend her cause to insert the

word “gross” before “negligence” after the prescription period, precisely because this amendment did not introduce any new or different cause of action from that already pleaded.

75. They further submit that Advocate Hay’s argument that the degree of knowledge must be of a “viable” cause of action, in the sense of one not liable to be struck out, or being capable of surmounting an exoneration clause, is met by the clear principle that the necessary degree of knowledge is not that the plaintiff should have a “worthwhile” cause of action (see proposition (f) above).

Decision on law

76. Having considered the very full skeleton arguments and the helpful submissions, both oral and written, from the parties’ Advocates, the Lieutenant Bailiff has come to the conclusion that the submissions of the Defendants’ advocates as to the legal tests in this case are to be preferred.
77. Each party accepts that the relevant “knowledge” for the purpose of s 76(2) can be actual or constructive. In this particular case, it is Mr Broadhead’s actual rather than his constructive, knowledge which is in issue (although in the context of the question “knowledge of what?” in this situation, this actual knowledge begins to look very similar to a form of constructive knowledge, as will appear.)
78. Second, each party accepts that the relevant “knowledge” is neither as low as the level of mere suspicion that there may have been the relevant breach of trust as one possibility, nor as high as certainty that there has been. What is involved is a test higher than the first, but lower than the second, and the question is where the “bar” is intended to be set.
79. Third, this decision is to be made against the background that its effect is simply to start time running, or “fire the starting gun” as the metaphor came to be used in the trial. It must, therefore by implication, be the degree of knowledge which is sufficient to make it reasonable to expect that the Plaintiff will be able to decide whether or not he will institute proceedings, at all, within a further three years, after making any such further enquiries, taking any such further advice, or gathering any such further evidence, as may be reasonably necessary for him to take that decision. Viewed in this context, the reasonableness of setting the bar at a sufficiently “low” level to encourage claims to be pursued with proper dispatch, and debaring dilatory ones, is apparent.
80. With regard to where that bar is then to be set, the concept of “knowledge of the breach [of trust]” involves the use of ordinary English words and normal common sense concepts. In a similar context to that of the *Trusts Law*, - by which is meant: the context of imposing time limits based on a person’s knowledge of a situation requiring him to act - s 5 of the *Tort Law* proceeds on a similar basis. It does, in the Lieutenant-Bailiff’s judgment, provide some assistance as to how this issue should be approached. S. 5(6) lays down guidance as to the material facts for the purpose of the Plaintiff’s relevant “knowledge”. These are knowledge (i) of a “significant” injury (as to which a working test is given in s. 5(7)), (ii) of its being wholly or partly attributable to the act or omission alleged to be the negligence (etc), (iii) of the identity of the perpetrator and proposed defendant, or (iv) of the facts rendering the proposed defendant apparently responsible for negligence by some other person. This is “knowledge” at a generally broad level. It is some indication of the kind of level of knowledge which is envisaged by the terms of s 76 (2) of the *Trusts Law*.
81. “Knowledge of the breach” in s. 76 cannot be intended to require the degree of knowledge which one might gain after the process of disclosure of documents in the case itself has been gone through. This is because that process is plainly regarded as a process which normally takes place *after* the commencement of an action, and it is no bar to the commencing of an action that the plaintiff may not yet have all the knowledge which that process would impart. It is both common, and permissible for a plaintiff to bring a case in negligence and to plead

that “the best particulars which the plaintiff can provide before disclosure [sc of documents] are.....”.

82. Lastly, the concepts in question do not appear to be particularly peculiar to Guernsey Law, nor to owe their origin to customary law, but involve the construction of a Guernsey statute. In that context, the Lieutenant-Bailiff accepts the proposition that decisions on similarly worded legislation enacted for similar purposes in other jurisdictions such as Jersey, or English or Scots law, provide useful and persuasive guidance as to the appropriate construction of such similar wording in the *Trusts Law* of Guernsey. In this regard, the Lieutenant-Bailiff finds the review and exposition of principle in *Haward v Fawcetts* (above) to be particularly useful and persuasive. This is not least because of the degree of similarity of both the nature of the claim and the arguments apparently advanced as to why Mr Haward’s state of knowledge should not be held to cross the line (which their Lordships rejected), but also because of the careful reasoning of the judgments and the court’s consideration of the impact of the arguments advanced, as there noted.
83. As regards the Plaintiff’s argument that “knowledge of the breach” for present purposes must, in the context of this case, mean and require “knowledge of a breach of trust comprising gross negligence” the Lieutenant-Bailiff rejects this argument. First, the alleged breach of trust comprises failing to comply with the terms of the trust instrument and/or failing to exercise due skill and care in managing the affairs of the trust. Attaching the description “gross” to that conduct, rather than merely describing it as “negligent” does not create a different, new, or other “breach of trust”. The words of the Law refer to “knowledge of *the* breach”. They are also “knowledge of the breach” and not “knowledge of the cause of action”.
84. For similar reasons, the Lieutenant-Bailiff rejects the argument that the meaning of those words should be extended to mean “knowledge of a breach of trust which gives rise to a viable cause of action”. There is no warrant for reading those additional words into the statute. In addition, it would be remarkable if the operation of the Law depended on the chance (as is the consequence of Advocate Hay’s argument) whether a Trust instrument contained or did not contain the commonplace trustee exoneration clause.
85. As regards the authority *Viscount of the Royal Court of Jersey vs Shelton* (above) cited by the Plaintiff for the proposition that the existence of an effective exculpation clause in a company’s articles of association meant that there was no cause of action by the company against the director, and thus, by parity of reasoning, there is no cause of action here of which the Plaintiff could have knowledge until he also has knowledge of facts which invalidate the exculpation clause, the Lieutenant-Bailiff finds that authority of no assistance. The issue in *Shelton* was not the running of time, but whether the Plaintiff could maintain a claim, and the language used by the court was appropriate to express a decision on that context. The context may also, on analysis, have been rather different from the present one, as it apparently involved an “indemnity” clause. In any event, however, as already observed, the wording in issue in this case is “knowledge of the breach” and not “knowledge of the cause of action”. The Lieutenant-Bailiff would, if necessary, take the view that the exoneration clause in this case does not convert acts or omissions which would be a breach of trust into being no such breach, but is merely effective to remove any liability or to bar a remedy.

Directions on law

86. The Lieutenant-Bailiff therefore directed the Jurats that they should apply the following principles in in considering whether

“the Plaintiff’s state of knowledge on or before 5 (alternatively 6) July 2010 of the matters he has pleaded in Paragraphs 18(5) and 21 (5) of his Cause dated July 2013, ... constituted “knowledge of the breach” of trust complained of in each case for the purpose of Section 76(2) of the Trusts (Guernsey Law) 2007”

- (1) They should consider, and find, from the totality of the evidence, the state of the Plaintiff's knowledge up to, and at, the relevant date, of the matters alleged in Paragraphs 18 (5) (a) – (e) and 21 (5) (a) – (e). No distinction has been drawn in argument between the positions in respect of the two trusts, and the Jurats were therefore entitled to assume that the parties regarded them as the same.
- (2) On the arguments presented, and the facts of this case, the Jurats were only concerned with the actual knowledge of the Plaintiff, the issue of constructive knowledge not having been advanced as a separate or different argument.
- (3) It was for the Plaintiff to satisfy the Jurats that the state of his knowledge up to that date did not yet reach the level of the "bar", ie that which would engage the effect of s 76 (2).
- (4) Centrally, the degree of knowledge which would constitute the level of the "bar" was knowledge which would make it reasonable for Mr Broadhead to begin to investigate whether there had been a breach of trust such as that which he was now pleading. This concept has been variously described as knowledge of the "gist", the "substance", the "essence" or the "thrust" of such potential claim or complaint. Such knowledge would therefore include knowledge that loss had apparently been suffered, and that there was a real possibility (as contrasted with a mere suspicion or view that this was just one possibility) that such loss had been caused by the negligent acts or omissions of the Defendants as trustees, as ultimately alleged in the pleaded case. The Jurats would need to be satisfied by Mr Broadhead that the degree of his knowledge had not reached such a level before 6th July 2010.
- (5) The required degree of knowledge did not go so far as knowledge of such detail that a fully particularised claim could then have been formulated. Nor did it necessarily require knowledge of the "how" or the "why" of any relevant acts or omissions by the defendants. Nor did it require knowledge or belief that Mr Broadhead had a "worthwhile" case in terms of any level of likelihood of success.
- (6) The Jurats were concerned with the state of Mr Broadhead's knowledge up to the date of 6th July 2010. Subsequent events could not, therefore, alter that earlier state of knowledge. However, subsequent events might provide evidence throwing light on what that earlier state of knowledge had been. An obvious hypothetical example would be that a letter written by Mr Broadhead shortly after 6th July 2010 might well provide some evidence of what he must have known or thought on that earlier date, if there had been no apparent material change of circumstance in the interim. The Jurats were therefore entitled to take notice of the evidence of subsequent events in that way, if they found that to be helpful.
- (7) Whilst the Jurats would bear in mind the content of the Listed Complaints, the concept of "breach of trust" was the general one of "failing to act with skill and care" of which the Listed Complaints were suggested examples or "particulars". They should not, therefore, be treated as separate breaches of trust, but considered in aggregate. If the Jurats came to the view that they might reach different conclusions with regard to individual matters of the Listed Complaints, then they should seek further and more specific guidance from the Lieutenant Bailiff. (In the event, the Jurats did not find the need to do so.)

- (8) In reaching their conclusion as above, the Jurats should initially not concern themselves with the question whether any knowledge which they might find was sufficient to amount to the appropriate degree of knowledge (as above) of acts which could or should be characterised as “gross negligence”. However, in the light of the arguments that had been advanced, the Lieutenant-Bailiff would ask the Jurats to consider, if necessary and as a separate matter, whether their conclusion would have been different if they had been directed to consider the requisite level of knowledge in relation to a breach of trust amounting to “gross negligence” as contrasted with one merely amounting to “some negligence”.

Findings of the Jurats

87. With the directions above, the Jurats considered the evidence put before the court and the submissions of the Advocates with regard to the factual conclusions to be drawn. That evidence consisted of the documentary evidence in the bundles, and the written and oral evidence of three witnesses, Mr Broadhead, Mr van den Berg, an independent specialist investment manager instructed, for the purpose of this hearing, to consider the adequacy of the evidence of breach of trust available to Mr Broadhead by the relevant date of 6th July 2010, and Mr Le Hegerat of STCL. Mr Le Hegerat had not been involved in the matters of complaint in the case, and his evidence had been directed at introducing relevant documents and explaining, insofar as it might be in issue or be criticised, the conduct of STCL, in particular, at relevant times.
88. With regard to the witnesses, the Jurats considered that Mr Van Den Berg added nothing of value, as they were concerned with the knowledge of and available to Mr Broadhead at the relevant time.
89. Mr Le Hegerat was cross examined by Advocate Hay in connection with “stonewalling”, which he denied. The Jurats found Mr Le Hegerat’s evidence professional and believable although his answers were often short and he seemed disinclined to be totally forthcoming. He did give full responses, though, to questions about the information which had been provided, which in his view was enough to provide answers to Mr Broadhead’s questions and he reiterated this several times. He also referred to the full analysis of the portfolio which Mr Broadhead had received from Frank Moon in July 2009. He gave an explanation for his not providing the minutes and resolutions of the Trustees to Mr Broadhead before the hearing in November 2011 which the Jurats found satisfactory.
90. Mr Broadhead gave evidence for over a day. Whilst he remained mostly calm, it was obvious that he felt very aggrieved indeed at the performance of STCL and the other Defendants as Trustees and at the very significant loss of capital which he perceived had occurred as a result of their mis-management of the investable assets. The Jurats formed the view that he was a very articulate person, with knowledge of financial matters and an interest in investment strategies and investment managers. They were left in no real doubt that he was quite capable of analysing accounts and valuations and understanding the duties of trustees. His answers to questions put by all three Advocates were often long and elaborate, and at times appeared to avoid a direct answer. Whilst the Jurats did not conclude that Mr Broadhead was trying to avoid telling the truth, they did feel that this was perhaps because he was always considering, in the back of his mind, the possible wider implications of what he was saying as regards the main action. The Jurats felt that, on many occasions, he did, indeed disclose the level of knowledge which he was constantly building up throughout the period leading to his persuading the Trustees to place the investments with Ruffer LLP in July 2009 and to his approach 10 months later to Taylor Wessing.
91. Against that background, and putting the matter in simple terms, the Jurats understood the question for them to be the extent of the knowledge Mr Broadhead had of facts pointing to the negligent management of the Trusts by the Defendants, at the relevant date of 5th or 6th July

2010, in the five respects identified at Paragraph 47 above. These are, in summary, that STCL and likewise the Trustees of the Légitime Trust:-

- a. Failed to take expert advice as to the most appropriate portfolio structure and asset allocation for the trust's investable assets.
 - b. Failed to develop and/or failed to implement any investment strategy or plan for the trust's investable assets and failed to review the portfolio.
 - c. Failed to analyse the returns of the portfolios against relevant benchmarks.
 - d. Failed to review the performance of the investable assets against level of expenditure required to meet expenses.
 - e. Its asset selection was materially over-weight in cash/short term assets unnecessarily therefore earning lower returns.
92. The Jurats noted that on 19th May 2010 STCL provided a CD ROM with very considerable detailed accounting information to Mr Broadhead, including annual accounts for the Medina Trust for 2001 to 2008 and for the Légitime Trust for 2000 to 2008, along with portfolio valuations for all investment managers for those years and through to 2009. These were to be found in the documentary evidence. They consisted of over 1,300 pages of information showing exactly how the trusts had their investable assets invested, with whom, and how much they were yielding as well as full information on the running costs. The valuations were accompanied by letters from the investment managers covering market trends, asset allocation by asset class, currency and each individual investment.
93. Having considered this material, and the submissions made by both parties with regard to its impact and adequacy, the Jurats unanimously consider that this data gave sufficient information to Mr Broadhead to provide sufficient knowledge, to be gleaned from it, to support any claim in respect of the matters at (a) to (e) above. Jurat Jones would in fact go further and say there would, in his assessment, be very little more information that could be provided to assist with these claims.
94. The Jurats have therefore concluded that, on any measure, Mr Broadhead had, at least from that date, albeit only 46 days before the relevant date, "knowledge of the breach" within the tests set out to them by the Lieutenant Bailiff.
95. It is true that the detailed information of the Trustee review of investment performance was not provided to Mr Broadhead until March 2011, after the relevant date. However, in the view of the Jurats, this was a minor factor compared with all the detailed financial information which Mr Broadhead already had, and which provided whatever he, or anyone whom he might consult, needed for a sufficient analysis of investment performance or expenses.
96. Further, the provision of the documents on the CD in May 2010 came after considerable pressure by Mr Broadhead. His clearly held suspicions of mis-management by STCL and the other defendants, and that something was "amiss", which went back to mid-2009.
97. The "Briefing note" made by Mr Broadhead dated 9th August 2009 was, in the view of the Jurats, very revealing of Mr Broadhead's knowledge and concerns at that time. In it he sets out the background to the Trust and the care for Tilly which needs to be funded. He provides considerable detail of the structure and investment powers of the trusts and how the Trustees have operated. Even from the figures he had available at that stage he analyses the investment returns, concluding that the investments were over-weight in cash, and confirming that he had challenged STCL (formerly Fortis) about the cash deposits. His final conclusions compare

the actual return he has calculated against Ruffer's historic performance, which in itself indicates that he was able to extract sufficient information to produce a meaningful schedule himself, in the form of "Chart 2".

98. The Jurats also find that the level of detail contained in the letter from Mr Broadhead to Mr Schreiber dated 8th April 2010, and the tone of that letter, indicate that he had by then more than even a "gist" of knowledge of these matters. Moreover, it asks for "reparation" under a number of heads, showing that he was at least thinking conceptually in terms of some form of claim.
99. Even earlier, at the time of the Briefing Note, the correspondence from Mr Broadhead's brother Nigel dated 24th August 2009 uses clear language of attack proposed to be addressed to STCL. Mr Broadhead responds "All true I'm afraid", once again, demonstrating that thoughts along these lines were brought home to him.
100. There is then an email exchange with Advocate Peter Harwood starting on 25th August 2009 which clearly envisages the possibility of litigation. A draft letter sent at this time by Mr Broadhead to his brother talks about dereliction of trusteeship, overall failure of trusteeship and failure to abide by terms of the trust deed. The Jurats are therefore satisfied that Mr Broadhead must have felt he had knowledge, even then, to lead him to this opinion, if he were to confront Mr Schreiber.
101. Whilst Mr Broadhead suggests that the response which he received from Advocate Harwood was sufficiently discouraging as to mean that he did not have appropriate "knowledge" of a breach of trust up to that time as a result, it is clear from his own evidence, and his actions, that this did not deter him from making further investigations. He actually did so, resulting ultimately in production of the CD ROM referred to above, which, as indicated, gave him clear knowledge of the potential thrust of the present claim made against the Defendants, before 5th/6th July 2010, and therefore within the relevant time period.
102. The above are not the only material indications of Mr Broadhead's knowledge in the evidence, but they are the most salient. These matters have led the Jurats to conclude that Mr Broadhead had a very high level of knowledge relating to the matters raised in (a) to (e) above before the relevant date, and that the additional information in the few pages that were relevant, obtained after the Consent Hearing in November 2011 were really peripheral to that earlier information.
103. The Jurats therefore find that Mr Broadhead's state of knowledge at the relevant date of 5th/6th July 2010 did amount to "knowledge of the breaches" of which he complained in his cause, launched on 5th or 6th July 2013.
104. The Jurats also confirm that their conclusion would be the same even if it were necessary that the relevant "breaches of trust" of which Mr Broadhead had to have appropriate knowledge also had to be sufficiently serious as to be capable of being classified as "gross negligence" rather than merely "negligence".

Result

105. The result of this application, therefore, is that the court will determine the preliminary issue in favour of the Defendants, and declare that the Plaintiff's cause of action in respect of these alleged breaches of trust of both the Medina Trust and the L gitime Trust are time-barred by s 76(2) of the *Trusts Law*.

106. The Lieutenant-Bailiff therefore proposes to strike out the cause in respect of these claims accordingly. She would also propose to order the Plaintiff to pay the Defendants' costs of this application and of the action, subject to any representations in this regard which are made to the court within one week of receipt of this judgment.