Rawlinson & Hunter and ITG Limited & Bayeux Limited
Royal Court
11th November 2015

JUDGMENT 52/2015

Plaintiff's application for breach of duty.
Defendant's application for plaintiff's case to be struck out or in the alternative for summary judgement to be entered in their favour.

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

Between: **RAWLINSON & HUNTER TRUSTEES S.A.**

Plaintiff

-and-

(1) ITG LIMITED

(2) BAYEUX LIMITED

Defendants

Hearing dates: **20th to 22nd April 2015**

Judgment handed down: **11th November 2015**

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

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

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

Cases, legislation and materials referred to:

The Royal Court Civil Rules, 2007
Investec Trust (Guernsey) Limited v Glenalla Properties Limited (unreported, 10 August 2015)
Easyair Limited (t/a Openair) v Opal Telecom Limited [2009] EWHC 339 (Ch)
Musa Holdings Limited v Newmarket Holdings (Guernsey) Limited [2013-14] GLR 445
Three Rivers D.C. v Bank of England (No. 3) [2003] 2 AC 1
Credit Suisse Intl v Ramot Plan OOD [2010] EWHC 2757 (Comm)
Tchenguiz v Investec Trust (Guernsey) Limited (unreported, 26 June 2013)
Wessedah Foundation v Barings (Guernsey) Limited [2005-06] GLR 141
Silver Falcon Enterprises Ltd v International Hellenic Operations Ltd (unreported, 19 and 20 October 1994)
IFS Investments Limited v Manor Park (Guernsey) Limited [2003-04] GLR 308
The Civil Procedure Rules (the *White Book*)
Barrow v Bankside Agency Ltd [1996] 1 WLR 257
Johnson v Gore Wood & Co [2002] 2 AC 1
Stuart v Goldberg Linde [2008] 1 WLR 823
Aldi Stores Ltd v WSP Group plc [2008] 1 WLR 748

Dexter v Vlieland-Boddy [2003] EWCA Civ 14
Sun Life Assurance Co of Canada v Lincoln National Life Insurance Co [2004] EWCA Civ 1660
Express Newspapers plc v News (UK) Ltd [1990] 1 WLR 1320
United Australia Ltd v Barclays Bank Ltd [1940] AC 1
Bradford & Bingley Building Society v Seddon [1999] 1 WLR 1482
Binks v Securicor Omega Express Ltd [2003] 1 WLR 2557
Secretary of State for Trade and Industry v Bairstow [2004] Ch 1
Arthur J S Hall & Co v Simons [2002] 1 AC 615
Brown v Innovatorone [2011] EWHC 3221 (Comm)

Introduction

1. The Plaintiff tabled its Cause on 28 June 2013. The proceedings are brought in the Plaintiff's capacity as the present trustee of the Tchenguiz Discretionary Trust ("the TDT"), established by a declaration of trust dated 26 March 2007 under, and governed in all respects by, the laws of Jersey. The Defendants are the former trustees of the TDT. The Cause seeks to recover losses to the TDT allegedly arising from the Defendants' breaches of duty. The relief pleaded is in two parts: £264 million relates to alleged breaches of duty in the investment of the TDT assets and £127 million relates to alleged breaches of duty in respect of the conduct of litigation in proceedings in the High Court of Justice in England and Wales referred to as "the Somerfield Litigation". Defences were tabled on 27 September 2013 and the action was placed en preuve. The Defendants requested further and better particulars of the Plaintiff's Cause on 26 January 2015, which were provided by the Plaintiff on 23 February 2015. These documents form the parties' pleaded cases.

2. On 28 August 2014, the Defendants' application for security for costs dated 27 September 2013 was heard, along with the Plaintiff's application for the action to be stayed to await the outcome of other proceedings in which the parties are involved. In an ex tempore judgment, the Court dismissed the application for a stay and ordered that the Plaintiff must provide security for the Defendants' costs in tranches. That order has been complied with.

3. By an Application dated 31 December 2014, the Defendants seek orders that the Plaintiff's Cause (or such parts of it as the Court thinks fit) be struck out as it discloses no reasonable grounds for bringing the action and/or it is an abuse of the Court's process. In the alternative, the Defendants apply for summary judgment to be entered in their favour. The evidence in support of this Application is contained in the Second Affidavit of Luis Gonzalez sworn on 26 January 2015. Although this Affidavit was only 11 paragraphs long, it exhibited a considerable number of documents contained in 14 separate files. Because this Affidavit did not meet the formal requirements of rule 21 of the Royal Court Civil Rules, 2007, a brief Third Affidavit was sworn by Mr Gonzalez during the course of the hearing on 21 April 2015. The evidence in response on behalf of the Plaintiff is contained in an Affidavit of Nicole Martin sworn on 12 February 2015. It states little more than to exhibit a letter of advice from Advocate Wessels to the First Defendant dated 4 August 2008.

4. Advocate Wessels has appeared on behalf of the Defendants and Advocate Swan on behalf of the Plaintiff. Given the amount of material put before the Court, their written and oral submissions were models of clarity, for which I thank them.

5. At the conclusion of the hearing on 22 April 2015, I reserved judgment. Although Counsel suggested that the outcome of appeal proceedings in which the parties were involved was not directly relevant to the resolution of this Application, they also believed that the handing down of the Court of Appeal's judgment was likely to occur shortly thereafter. In the event, the Court of Appeal's judgment was only handed down on 10 August 2015, during this Court's vacation period. The delay in handing down this judgment, however, is principally a consequence of other pressures of work and the time it has taken to assimilate the documentation exhibited to the Second Affidavit of Mr Gonzalez, although it has also been helpful to read the Court of Appeal's decision.

Background

6. In order to put the present proceedings into context, it is necessary to have regard to the separate action commenced by the Defendants (as Plaintiffs) against four companies incorporated in the British Virgin Islands, all of which were by that time in liquidation, and to which the Plaintiff was joined as the Fifth Defendant. That action (*Investec Trust (Guernsey) Limited v Glenalla Properties Limited*) was tried before Lieutenant Bailiff Sir John Chadwick in June 2012. Judgment was delivered on 6 December 2013. Certain aspects of that decision were appealed by the parties to the present action. The recent judgment of the Court of Appeal of 10 August 2015 followed two earlier judgments of 27 June and 29 October 2014. All of those judgments set out the pertinent facts of that action and I do not propose to repeat them extensively in this decision but to confine myself largely to reciting the summaries given by the Court of Appeal in its August 2015 judgment. That action has been referred to by the Advocates as "Guernsey 1" (with the present action being styled "Guernsey 3") and, for ease of reference, I propose to adopt that labelling.

7. The TDT was constituted in 2007 because Victor Tchenguiz desired to have separate sub-trusts established for each of his two sons, Robert and Vincent. £5,000 to establish the TDT was appointed from the Tchenguiz Family Trust ("the TFT"), which had been declared in 1988 under the laws of the British Virgin Islands. At paragraphs 8 to 14 of its judgment, the Court of Appeal set out that:

> "*8. Until about 24 August 2007, the principal funds destined for the TDT continued to be held in the TFT. However a number of transactions or arrangements were made between 20 and 24 August leading up to the completion of transfers. First, on or about 20 August 2007 the first named plaintiff (as, at that date, sole trustee of the TFT) entered into a loan agreement for the borrowing of monies from Kaupthing Bank hf ("Kaupthing"). The Lender's level of commitment was potentially £100 million. Those identified as Borrowers included the first named plaintiff, the second named of the BVI companies ("Thorson"), two other companies namely Heatherville Limited ("Heatherville") and Violet Capital Group Limited ("Violet"), together with any subsidiary of the first named plaintiff in which it owned more than 75 per cent of the ordinary voting shares and which became a Borrower. Clause 11.1 of the agreement provided that each Borrower irrevocably and unconditionally jointly and severally guaranteed to the Lender punctual payment by each other Borrower of all that Borrower's obligations in relation to the facility or sums drawn under the facility. The agreement was to be governed by and construed in accordance with the laws of England. On 21 August 2007 the second named plaintiff became a trustee of the TDT.*
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> *9. On 24 August 2007 the first named plaintiff, as sole trustee of the TFT, made an appointment of assets to the TDT. Included within those assets were the share capital in thirty British Virgin Islands companies including Thorson and the first named of the BVI companies ("Glenalla"). Also included were loans owed to the TFT by thirty four specified companies.*
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> *10. The following lie at the heart of this litigation. By individual Deeds of Novation each dated 24 August 2007 which were entered into between, on the one hand, the first named plaintiff as trustee of the TFT and, on the other hand, the former trustees as trustees of the TDT, together with respectively Glenalla and Thorson, the former trustees assumed liability for monies owed by the TFT to each of Glenalla and Thorson under certain arrangements or loans. By a further Deed of Novation dated 24 August 2007 between the first named plaintiff as trustee of the TFT, the former trustees and Kaupthing, the former trustees received the beneficial ownership of shares in British Virgin Islands' companies each of which, apart from one, had been included in the list of companies identified in the deed of appointment of 24 August 2007. The former trustees also assumed the liabilities under the loan agreement of 20 August 2007 between the TFT and Kaupthing.*

11. Later in 2007, through a document described as a "Framework Agreement" and dated 19 December 2007 between the former trustees as trustees of the TDT, Kaupthing and certain other companies, an existing corporate structure was altered through the interposition of two companies, namely the third named of the BVI companies ("Eliza") and the fourth named of the BVI companies ("Oscatello"), between the TDT and other companies in which underlying assets were held (the "Oscatello Arrangement"). By an overdraft loan agreement of the same date, further funds were made available to Oscatello by Kaupthing for the stated purpose of refinancing certain current debt listed in a Schedule. Among other matters, the Schedule included an amount of £39,366,791 said to be due from the first named plaintiff on a loan account number 5962 as at 19 December 2007.

12. On 20 December 2007, Eliza received £150 million in accordance with the Framework Agreement and on receipt transferred the sum to Oscatello by way of an interest free loan. On 21 December 2007, Oscatello used that sum, together with certain other monies, to make payments amounting in aggregate to £293,984,107.10 in making a payment under the Framework Agreement, making payment of a "structuring fee" to Kaupthing, making certain "collateral" payments to other companies, and making five payments to Kaupthing apparently in repayment of loans owed to Kaupthing. One of the loans specifically identified was loan number 5962.

13. In August 2009, Glenalla and Thorson were placed in liquidation and in April 2010 the joint liquidators wrote demanding payment of the outstanding loans said to be due from the trustees of the TDT. Oscatello was placed in liquidation in February 2010 and in the same month a winding up order was made in the British Virgin Islands for Eliza. In April 2010, the joint liquidators wrote to the former trustees demanding payment of outstanding loans said to be due to those companies.

14. In July 2010 the former trustees were replaced as trustees of the TDT by the present trustee."

8. The issues in Guernsey 1 were summarised by the Lieutenant Bailiff in paragraphs 7 to 10 of his judgment (as also set out in paragraph 15 of the Court of Appeal's recent judgment), in which he referred to the Defendants in the present action as "the former trustees" and the Plaintiff as "the present trustee":

"*7. In these proceedings the former trustees seek the Court's determination of the questions whether they did become liable – and, if so, on what terms – (i) for monies said to be due to Glenalla, (ii) for monies said to be due to Thorson and (iii) for monies said to be due to Eliza or Oscatello. Further, the former trustees seek, against the BVI companies, declarations (i) that, pursuant to Article 32(1)(a) of the Trusts (Jersey) Law 1984 (as amended), they have no personal liability in respect of the monies said to be due and that the claims of the BVI companies extend only to the trust property of the TDT or, in the alternative, (ii) that, in the events which happened, they are only liable as trustees (and not personally), so that the BVI companies can enforce any obligations against them only to the extent that they continue to hold assets of the TDT available to satisfy those demands. The former trustees seek, against the present trustee, a declaration that they have a right of indemnity against the trust assets of the TDT (whether or not such assets may now be vested in the former trustees) such that they may (i) retain those of the assets now vested in them until the final determination of their liability for the monies claimed, (ii) realise the assets of the TDT in order to meet any liability they may be found to have to meet the claims of the BVI companies and (iii) "exonerate themselves from any [such] liability . . . directly from the trust assets of the TDT".*

8. By counterclaim in the action brought against them by the former trustees, the BVI companies seek a declaration that the monies claimed are due under "valid, binding and repayable loan agreements"; and judgments against the former trustees (i) in the sum of £62,742,571.00 "due under the Glenalla loan", (ii) in the sum of £80,541,936.00 "due under the Thorson loan" and (iii) in the sum of £39,386,354.80 "due under the Oscatello loan, alternatively the Eliza loan". In the alternative the BVI companies seek against the former trustees an account of all sums due to them.

9. By its counterclaim in the action brought by the former trustees the present trustee seeks, against the former trustees, declarations that the BVI companies have no claims to monies due; and that, in any event, the former trustees are not entitled to "any indemnity out of or any right of exoneration from or any lien over" the TDT assets in respect of any demands for payment made by the BVI companies. Further, the present trustee seeks an order requiring the former trustees to take all such steps as may be necessary to vest title to the assets of the TDT in the present trustee; and an account against the former trustees on the basis of wilful default.

10. The present trustee served its defence and counterclaim in the proceedings brought against it by the former trustees on 17 August 2011. On the same day the present trustee served a third party claim against the BVI companies seeking declarations in the same (or substantially the same) terms as those sought in its counterclaim against the former trustees."

9. In the course of his judgment, the Lieutenant Bailiff also identified a number of distinct issues that he had to resolve (see paragraphs 53, 64, 83 and 85 of his judgment):

"*(1) Whether, immediately after 24 August 2007, the former trustees (or TDT) were subject to binding obligations in respect of the Glenalla loan and the Thorson loan.*

(2) Whether, immediately after the transfers of funds on 12 December 2007, the former trustees (or TDT) were subject to binding obligations in respect of the Oscatello loan.

(3) Whether the former trustees (or TDT) remained subject to such binding obligations (if any) notwithstanding the July 2008 book entries, the October 2008 book entries and the March 2009 assignment.

(4) Whether the former trustees have a claim against Eliza in the sum of approximately £151 million which is an asset of the TDT. …

(5) (A) Whether the former trustees are entitled to rely (as against the BVI Companies) on article 32 of the Trusts (Jersey) Law 1984 (as amended) in these proceedings; and, if (or to the extent that) the former trustees are not so entitled, (B) whether it was a term of the legal obligations (if any) assumed or undertaken by the former trustees in respect of the Glenalla loan, the Thorson land and/or the Oscatello loan that they were not personally liable. …

(6) (A) Whether, on the basis of any of the matters alleged to constitute unreasonable or improper conduct (if established) and, if so, which of those matters ("the relevant matters"), it would be open to the Court, as a matter of law, to hold that the liabilities (if any) incurred by the former trustees in relation to the Glenalla loan, the Thorson loan and the Oscatello loan were not liabilities "reasonably incurred in connection with the TDT" for the purposes of article 26(2) of the Trusts (Jersey) Law 1984; and, if so, (B) whether any of the relevant matters (and, if so which) did constitute

unreasonable conduct on the part of the former trustees so as to deprive them of the right to rely on article 26(2) of the 1984 Law. …

(7) Whether, in the respects alleged in paragraphs 70 to 76 of the present trustee's defence, the former trustees acted in breach of trust, amounting to wilful default or gross negligence."

10. In respect of that last issue, at paragraph 84 of his judgment, the Lieutenant Bailiff explained that:

"*In paragraph 83 of its Counterclaim the present trustee avers that, by reason of the matters set out in paragraphs 70 to 76 of the Defence the former trustees acted in breach of trust "which amounted to wilful default and/or gross negligence". It is said that, in conducting the affairs of the TDT in the manner set out in those paragraphs, the former trustees (a) failed to exercise their powers with the diligence to be expected of a prudent business man, with remunerated expertise in trust administration and to the best of their ability and skill; and/or failed to preserve the value of the TDT trust property or enhance its value; and failed to exercise their powers only in the interests of the beneficiaries. At paragraphs 84 and 85 it is said that, by reason of their breaches of trust, the former trustees are liable to account on the basis of wilful default: alternatively, as liable to pay compensation for all loss suffered by the TDT trust estate. Declarations are sought to that effect under heads (5) and (7) of the relief claimed.*"

The relevant paragraphs of the Amended Defence and Counterclaim of the Fifth Defendant (ie, the present Plaintiff) are:

"*<u>Creation and Acceptance of the Accounting Entries</u>*

70. ITGL as trustee of the TFT acted unreasonably and/or improperly in making the Accounting Entries which, purported to show multiple obligations where no such obligations actually existed, were unnecessary, and were not made as a result of any legal, tax or accounting advice and/or in creating such obligations if and insofar as they existed.

71. The Former Trustees acted unreasonably and/or improperly in accepting that multiple loan obligations were created by virtue of the upstreaming and downstreaming involved in the Accounting Entries and/or in creating such obligations if and insofar as they existed, and in accepting a novation of such notional, or if it be the case, real obligations in August 2007. The Accounting Entries should simply have been replaced by a direct loan obligation by the company which actually received the funds to the company which actually transferred them before the transfer of assets from the TFT to the TDT.

72. If, which is denied, the Accounting Entries created or evidenced actual loan obligations, the Former Trustees acted unreasonably and/or improperly in failing to novate such loan obligations so that they became direct obligations by the company which actually received the funds to the company which actually transferred them after the transfer of assets from the TFT to the TDT.

<u>Failing to extinguish any liability on or shortly after the creation of the Oscatello Structure</u>

73. Further or alternatively, if the Accounting Entries were legally binding loan agreements under which the trustees of the TFT were liable and which were properly transferred to the Former Trustees as trustees of the TDT, then the Former Trustees acted unreasonably and/or improperly in failing to

extinguish such liabilities on or shortly after the creation of the Oscatello Structure.

74. R&H relies upon the following facts and matters:

(a) The purpose of creating the Oscatello Structure was to ring-fence the TDT's core investments as security for further lending by Kaupthing.

(b) The Former Trustees and Kaupthing knew that Kaupthing's further lending to the Oscatello Structure was intended to be non-recourse to the rest of the TDT assets.

(c) The Former Trustees were concerned to ensure that Kaupthing should not be able to enforce its loan against any assets outside the Oscatello Structure.

(d) ITGL personnel realised that there was a risk to the TDT assets outside the Oscatello Structure if the purported liabilities recorded by the Accounting Entries were not extinguished or transferred to the Oscatello Structure. Further, it was the usual practice in the TFT and the TDT for the Accounting Entries to follow the shareholding where a shareholding was transferred.

(e) Accordingly, a Trustee acting properly and exercising reasonable care, skill and diligence would have taken steps to preserve the rest of the TDT assets by extinguishing any purported liability under the Accounting Entries or by transferring such liabilities to the Oscatello Structure.

(f) The Former Trustees however took no steps in this regard on the creation of the Oscatello Structure or shortly thereafter. In particular, the Former Trustees failed to amend the accounting or ledger entries, failed to pass any resolutions novating the purported liabilities, and/or failed to execute any written agreements novating the purported liabilities.

(g) Had the Former Trustees sought Kaupthing's consent to the restructuring of the Accounting Entries (if such consent was needed), R&H believes that Kaupthing would have provided such consent. However, although the Former Trustees instructed their English lawyers, Kirkland & Ellis, to raise the matter of these Accounting Entries with Kaupthing's lawyers, Linklaters, which Kirkland & Ellis did, the Former Trustees failed to progress matters when no response was received from Linklaters or Kaupthing.

(h) The Former Trustees warranted, in the Framework Agreement, that the list of assets and liabilities given to Kaupthing, which list did not show any purported loans to the BVI Companies, was accurate yet failed to take the steps necessary, or any steps, to render the list accurate (by the extinction of the Accounting Entries and their replacement with documents showing a loan by the company which transferred the funds to the company to which the funds were transferred).

(i) The July 2008 Entries and the October 2008 Entries and/or the March 2009 Transaction ought to have been carried out promptly on or shortly after the creation of the Oscatello Structure.

<u>Failure to render valid the July 2008 Entries, October 2008 Entries or the March 2009 Transaction</u>

75. Further or alternatively, if contrary to its pleaded case above, any of the July 2008 Entries and/or the October 2008 Entries and/or the March 2009 Transaction or any of them were invalid, then the Former Trustees acted unreasonably and/or improperly in failing to do more to render them valid.

76. R&H relies upon the following facts and matters:

(a) Between July 2008 and March 2009, the Former Trustees took deliberate steps to relieve themselves of the purported liabilities arising from the Accounting Entries.

(b) As the purported liabilities involved very large sums of money, it was the duty of the Former Trustees to the beneficiaries to exercise reasonable care, skill and diligence to make their transactions effective and to observe all necessary formalities, such as preparing and causing to be properly executed deeds of extinction, extinguishing the purported upstreaming and downstreaming loans, and preparing and causing to be properly executed deeds of loan confirming or creating the loan obligation directly between the transferor company and the transferee company.

(c) The formalities were not onerous or expensive or otherwise difficult to achieve."

This part of the current Plaintiffs' claim in the earlier action was described in detail by the Lieutenant Bailiff in paragraphs 235 to 239 of his judgment. It was also summarised by the Court of Appeal at para. 69 of its judgment of 10 August 2015 and subjected to more detailed analysis in Appendix 1 thereto, all of which has been taken into account as a means of acquiring a fuller understanding of what Guernsey 1 involved.

11. There is only one mention (at para. 150) of R20 Limited ("R20") in the Court of Appeal's recent judgment. R20 is a company of which the chairman is Robert Tchenguiz. There is, however, more set out in the Lieutenant Bailiff's judgment about R20. He refers to the company's role at paragraphs 88 to 92 of his judgment:

"88. *R20 Limited ("R20") was incorporated in 2002 by Robert Tchenguiz. In his witness statement dated 30 March 2012 he described it as "a private investment firm specialising in a range of alternative investment strategies including private equity, public equity and structured finance and real estate." At all material times Robert Tchenguiz was a director and the chairman of the board of directors. Timothy John Smalley became a director of R20 on 1 March 2004.*

89. In her witness statement dated 30 March 2012 Mrs Bleasdale explained that R20 had been the investment advisers to ITGL (in its capacity as trustee of the TFT) in relation to the assets notionally allocated to the Robert side; and that that arrangement had been in place for some time. The arrangement continued when assets were transferred to the TDT. ON 5 October 2007 it was set out in a written agreement ("the Consultancy Agreement") made between the former trustees and R20.

90. Recital (B) to the Consultancy Agreement records that, pursuant to paragraph 7 of the first schedule to the declaration of trust dated 26 March 2007, under which the TDT was established, and since 24 August 2007, the trustees had employed R20 as investment adviser in respect of the whole of the TDT trust fund ("the Trust") to perform the services more particularly described in clause 1.1.4 of the agreement. Clause 1.1.4 defined "Services" to mean "the duties and functions normally undertaken by professional consultants or advisers of investment opportunities including (but not restricted to) the duties set out in the Schedule hereto". The duties set out in

> *the Schedule to the Consultancy Agreement included the following: (i) the identification of new business opportunities within the United Kingdom, where the expected return is primarily one of capital growth; (ii) the monitoring of assets liabilities or other interests of the Trust and the reporting of the same to the trustees; (iii) appointment and liaising with professional in respect of advising on the suitability of investments both prior to any recommendation being made to the trustees, and any follow up advice required; (iv) the negotiation and facilitation of arranging finance/refinance, as necessary; (v) maintenance of loan account and cash account records, where appropriate; (vi) production of accounts of entities both onshore and offshore owned by the trustees; and (vii) the provision of directors to the boards of those UK companies comprised within the trust structure.*

91. Mrs Bleasdale explained that, although "the Consultancy Agreement was certainly something which made us feel more comfortable", it did not reflect any change in the relationship between the former trustees and R20. She said that R20 was at the centre of practically every significant action taken in the TDT structure, including (i) making investment recommendations, (ii) negotiating and drafting documents and (iii) monitoring the various CFD (contract for differences) accounts. In relation to the third of those activities, she said this:

> *"… R20 had online access to view all the CFD accounts in the names of companies in the TDT structure. We would only withdraw money from those accounts if R20 recommended we should do so, as they would already have discussed what would be drawn down with the broker on behalf of the trustee(s). We relied on R20 to assess the cash position and advise us when and where cash could be moved."*

92. She went on to say that ITGL had three main points of contact at R20 – Tim Smalley, Aaron Brown and Mark Grunnell – all of whom reported to Robert Tchenguiz. She described her relationship with R20 as "good in general"; but "very far from being perfect". She said this (witness statement, paragraphs 31 and 32):

> *"31. … Most of all, R20 were not forthcoming in providing information. Although the monthly meetings [which had been set up on her initiative in February 2007, as described in paragraph 29 of the witness statement] were not established out of any particular concern, I nevertheless took the view that I should go to R20 to obtain the information myself, because it was very much the case with R20 that you would not receive anything if you did not persistently ask for it. As time passed, R20 would get a bit better at giving us information, but I still felt they were holding information back, even after the Consultancy Agreement was in place.*
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> *32. R20 also did not always seem to appreciate the need to keep the Former Trustees fully informed about their activities. I got the feeling that sometimes things could happen which we did not know about and would not know about unless R20 needed us to do something which they could not …"".*

Aside from that description of its role, there are only a handful of passing references in the judgment to R20 (eg, paragraphs 124 and 141).

12. There had been more detailed reference to R20's role set out in the Reply and Defences to Counterclaim of the Fifth Defendant filed on behalf of the Defendants. For example, the Consultancy Agreement of 5 October 2007 was referred to and its terms set out in some detail in para. 43. It was asserted at para. 95 that:

> "*At all relevant times during the negotiation and implementation of the restructuring which led to the creation of the Oscatello Structure, the Former Trustees reasonably relied on the skill and care of R20 in negotiating, advising upon, and recommending that the Former Trustees enter into, the Framework Agreement and associated documentation. R20 was responsible, pursuant to the term of the Consultancy Agreement set out at paragraph 43.2.7 above, for the maintenance of loan account records within the TDT structure.*"

Further, in para. 148, the Defendants relied on Article 25(3) of the 1984 Jersey Law *inter alia* in relation to the appointment of R20 as investment adviser.

13. At paragraph 16 of the Court of Appeal's recent judgment, the findings of the Lieutenant Bailiff are summarised as follows:

> "*In his judgment, the Lieutenant Bailiff found that the former trustees were liable under binding obligations in respect of loans to the first, second and fourth defendants (and which were referred to by him in his Conclusions at paragraph 253 of the judgment as "the Glenalla loan", "the Thorson loan" and "the Oscatello Arrangement"). In respect of the former trustees' claim to a right of indemnity, the Lieutenant Bailiff held that the former trustees were not entitled to rely as against the BVI companies on Article 32 of the Trusts (Jersey) Law 1984 as amended (respectively "Article 32" and "the Jersey Law") and thereby to limit their liability to the extent of trust funds and, separately, that it was not a term of the legal obligations assumed or undertaken by the former trustees in respect of the loans that they were not personally liable. He also held that the conduct of the former trustees did not constitute unreasonable or improper conduct or wilful default and that the liabilities incurred by them were liabilities "reasonably incurred in connection with the TDT" for the purposes of Article 26(2) of the Jersey Law.*"

14. Turning more specifically to the findings on the seventh issue, having made findings that the former trustees had not been negligent (i) in relation to the creation of the Glenalla Loan or the Thorson loan (para. 244), or (ii) in accepting liabilities in relation to those loans under the deeds of novation of 24 August 2007 (see para. 245), or (iii) in requesting in December 2007, or acquiescing in, the payment by Oscatello of their indebtedness to Kaupthing Bank hf ("Kaupthing") under the August 2007 loan facility (the Oscatello loan) (para. 246), the Lieutenant Bailiff added (at para. 247):

> "*Nor am I satisfied that, even if negligent, the former trustees were grossly negligent in failing to … deal with the "loan problem" – meaning their liabilities in relation to the Glenalla Loan and the Thorson Loan – when entering into the framework agreement. Recognition that there might be a future problem (in that assets of the TDT which were outside the Oscatello structure would or might be exposed to claims by Kaupthing if the former trustees remained indebted to companies within that structure) emerged (if at all) at a later stage during the negotiation of the framework agreement. In that respect it may be said that the former trustees fell short of the high standards which, rightly, are to be expected of professional trustees – in that they should have recognised the potential problem earlier – but their failure in that respect cannot, in my view, be described as amounting to a serious and flagrant degree of negligence. By the time the potential problem was recognised, it was, in my view, too late to do anything about it before the execution of the framework agreement. I am satisfied on the evidence given at trial (and on the documents) that, by December 2007, there was an urgent need to have the framework agreement in place; and that it would have been unreasonable, and unacceptable to the other parties involved, for the former trustees to hold up the execution of that agreement while they sought to deal with the loans problem.*"

The findings are also summarised by the Court of Appeal at paragraphs 83 to 86 of its judgment.

15. As part of its appeal, the current Plaintiff complained of the delay between the end of the trial and the giving of judgment. It sought a re-trial. Noting that "*The existence of delay does not by itself provide a reason to quash the decision explained in the judgment*" and that "*an appeal court must still identify an error or potential error on the part of the judge at first instance and which is apparent from the terms of his judgment*" (see para. 40), the Court of Appeal descended into a detailed analysis of the Lieutenant Bailiff's findings and concluded that the Plaintiff's appeal in this regard failed. As matters currently stand and subject to any further appeal, therefore, there is no order for a re-trial in Guernsey 1.

16. The breaches of duty in the investment of the TDT assets pleaded in the present case are set out in full in the Appendix to this judgment. The Responses given to the Defendants' Request for Further and Better Particulars of the Plaintiff's Cause must also be borne in mind, the bulk of which relate to these alleged breaches of duty. They offer more detail about the way in which the Plaintiff's case is being put. Response 15 (in respect of paragraph 16(b) of the Cause) states "*The Plaintiff does not rely in these proceedings on the allegations made in the proceedings with Court File No. 1462/2010*" and Response 19 (in respect of paragraph 16(c)) explicitly denies placing any reliance on the matters set out in paragraph 74 of its Defences and Counterclaim in that action.

17. The Plaintiff has also previously made an application dated 8 August 2011 by which it sought, and subsequently obtained, orders requiring the Defendants to deliver up to it the files and electronic files relating to the administration of the TDT in three categories, which were the Defendants' electronic files relating to the TDT, the files of their former English solicitors relating to the Somerfield Litigation, and trust documentation held by their Guernsey Advocates. In support of that application, the Plaintiff indicated that it needed access to this documentation so as to identify those relevant to the purported loan arrangements, which were the subject of Guernsey 1 "*but also in relation to the actions of the Former Trustees more generally*". As a result of the orders made, between October 2011 and January 2012, the Defendants provided to the Plaintiff in excess of 90,000 documents, equating to approximately 800 lever arch files.

18. The second aspect of the Plaintiff's Cause relates to the Somerfield Litigation. These events pre-date Guernsey 1. The Defendants decided to settle proceedings arising from the sale of the former supermarket chain, Somerfield, on 14 June 2010, being the eve of the trial in the High Court of Justice in England and Wales. Along with other investors, the TFT had acquired an interest in Somerfield in January 2006. The TFT invested £141 million. This investment was held indirectly through a company known as Tazamia Limited ("Tazamia"). In August 2007, the TFT appointed the shares of Tazamia to the TDT. In the spring of 2008, an offer was made to purchase Somerfield. Although R20 would not recommend that this offer to buy be accepted by the Defendants, the other investors were keen to sell. The Plaintiff's case referred to there being an agreement reached at a meeting held at Scott's restaurant in London on 7 April 2008 (and so referred to as "the Scott's Agreement"), the terms of which included that if R20 made a recommendation to accept the offer to buy, the proceeds of sale would be received directly from Tazamia Limited and outside the Oscatello Structure. In the light of a recommendation from R20, the Defendants did not, as they could have done, veto the sale. When Kaupthing collapsed, the Defendants and R20 wanted to protect the £127 million representing the TDT's share of the sale proceeds ("the Somerfield Proceeds") and so entered into a series of transactions to ring-fence this amount. Proceedings were commenced in the British Virgin Islands by Kaupthing to set aside these transactions. The Defendants counterclaimed in those proceedings on the basis of the Scott's Agreement. In February 2009, Isis Investments Limited ("Isis") commenced proceedings in England and Wales against the Defendants, Oscatello and Kaupthing for alleged breaches of the Framework Agreement of 19 December 2007. The Defendants made a counterclaim against Isis and Kaupthing that they were entitled to retain the proceeds of sale on the basis of the Scott's Agreement.

19. At para. 45 of the Cause, the Plaintiff avers that either the Somerfield Litigation could have been settled on better terms that permitted the TDT to retain all or some of the Somerfield Proceeds or that the TDT's prospects of success at trial would have been better and it might

have succeeded at trial on the pleaded issues. The breaches that are said to give rise to either of these outcomes are pleaded at paragraphs 40 and 41 of the Cause:

> "*40. The Defendants, in breach of their duties to preserve and enhance the value of the trust fund and/or to act with due diligence as prudent persons and/or to act in the interests of the beneficiaries only, acted grossly negligently and/or in wilful default in their conduct of the Somerfield Litigation in the following respects:*
>
> *(a) The Defendants' pleadings did not advance any claim that the Scott's Agreement was valid and binding on both the Defendants on the one hand and Kaupthing and Isis on the other.*
>
> *(b) Further or alternatively, the Defendants did not advance any case based on restitution or unjust enrichment of Kaupthing nor did that advance or give consideration to any other basis for defending the claims made by Kaupthing and Isis and/or defending the transactions carried out in or about November 2008.*
>
> *(c) Despite agreeing to a tight procedural timetable, the Defendants did not commence disclosure until January 2010.*
>
> *(d) Further, the Defendants made no effort from the outset of the BVI proceedings or the Somerfield Litigation to secure R20's documents that might be relevant to the issues in those proceedings. Unfortunately, in proceedings between Mr Vivian Imerman and Mr Robert Tchenguiz and Mr Vincent Tchenguiz, R20's computer back-up tapes were seized pursuant to orders of the High Court in March 2009. However, no steps were taken by the Defendants (either by themselves or by instructing R20) to obtain any variation of the orders in those proceedings to permit R20's documents to be made available to the Defendants for the purposes of the Somerfield Litigation.*
>
> *(e) The deadline for exchange of witness statements was 10 April 2010 (later extended to 14 April 2010), but preparation of witness statements did not begin until one month before i.e. on 11 March 2010.*
>
> *(f) Two key witnesses, Mr Robert Tchenguiz and Mr Aaron Brown, were interviewed only on Sunday 21 March 2010. However, no witness statement were drafted let alone exchanged in compliance with the deadline of 14 April 2010, and the Defendants were accordingly in breach of the court order for directions.*
>
> *(g) No chronological bundles of documents to assist with the preparation of witness statements were produced.*
>
> *(h) In or about March 2010, Quinn Emanuel confirmed to Aaron Brown that the prospects of success on the validity of the Scott's Agreement were just short of 50/50. Even in March 2010, Quinn Emanuel's view was that the Defendants had overall a 40% chance of success.*
>
> *(i) Nevertheless, the Defendants wanted to settle the Somerfield Litigation and were reluctant to litigate the case to trial. However, they were in a weak negotiation position in initiating settlement discussions before they exchanged witness statements to advance their factual case and while they were in default of the order for directions. However, the Defendants did not make efforts to finalise the witness statements.*

> *(j) First drafts of their witness statements were only circulated to the witnesses on Thursday 6 May 2010 i.e. well after the deadline for exchange of witness statement. An "Unless Order" was made against the Defendant [sic] requiring them to exchange witness statements by 21 May 2010.*
>
> *(k) The Defendants made a very late application to adjourn the trial which was unsuccessful.*
>
> *(l) Witness statements were rushed and, although eventually exchanged, this was only on 21 May 2010.*
>
> *41. Further, the Defendants were in a position of conflict between their personal interests and their duties in relation to the Somerfield Litigation:*
>
> *(a) Kaupthing had alleged in the Somerfield Litigation that the Defendants had acted fraudulently in carrying out the transactions in or about November 2008 in attempting to undermine Kaupthing's security. If established, the Defendants would have been personally liable to Kaupthing in carrying out such transactions and would not have been entitled to any indemnity from the TDT assets for any such liability. Therefore the Defendants' personal interest to preserve their right of indemnity from the TDT assets and avoid a public trial on allegations of fraud and to settle the litigation by giving up the Somerfield Proceeds conflicted with its duty to preserve the Somerfield Proceeds for the TDT pursuant to the Scott's Agreement.*
>
> *(b) By May 2010, claims had been threatened against them by the liquidators of 4 companies: Glenalla Properties Limited, Thorson Investments Limited, Eliza Limited, and Oscatello (collectively the "**BVI Companies**") for repayment of alleged inter-company loans of £183 million. These claims are the subject of proceedings in this Court in Court File No. 1462/2010. It is the Plaintiff's case that the Defendants were in breach of trust in relation to the alleged inter-company loan. The Defendants' personal interest was for as little as possible to be recovered by the TDT in the Somerfield Litigation, because the smaller the size of the TDT trust fund the lower the Defendants' liability to the BVI Companies on the alleged inter-company loans. However, the Defendants' duty was to ensure that the TDT retained as much as possible of the Somerfield Proceeds.*"

20. The Defendants, however, refer to other legal advice they received in relation to their position in the Somerfield Litigation. On 20 April 2010, Stephen Auld QC provided a detailed advice. This followed an unsuccessful mediation, prior to which the Defendants had believed that achieving a satisfactory settlement might be possible. That opinion was expressly subject to receiving advice on the BVI law implications of the Scott's Agreement. This was given to the Defendants on 28 April 2010. Because Oscatello, through its liquidators, could collapse the structure underlying it, Oscatello could gain control of Tazamia to prevent any transfer of the Somerfield Proceeds or challenge any such transaction, if already made. Moreover, such a transfer would be a breach of the directors' fiduciary duties and liable to be set aside. This advice was shared with Herbert Smith LLP, the solicitors acting for the Protector of the TDT, who was an officer of the Plaintiff. On 21 May 2010, Quinn Emanuel forwarded to Herbert Smith Mr Auld's responses to questions the latter firm had raised, in which Mr Auld confirmed his view that the prospects of any successful recovery of the Somerfield Proceeds were less than 10%. Mr Auld further noted that the explanation given in the witness statement of Mr Sigurdsson, who was to give evidence for Kaupthing rather than on behalf of the Defendants, was convincing, again pointing away from the Scott's Agreement being binding as between R20 and Kaupthing. If that evidence were believed, it would be fatal to the Defendants' case. A meeting with Mr Auld took place on 24 May 2010 and was followed by further written advice dated 3 June 2010. He revised his view about the likelihood of

establishing the Defendants' case based on the Scott's Agreement down to being not any higher than 20% and confirmed that the overall merits of the case were by then less than 10%.

21. By the terms of the settlement reached on 14 June 2010, the claims were withdrawn, with no order for costs being made. The transactions to ring-fence the Somerfield Proceeds were unwound. As a result, the Somerfield Proceeds were applied in accordance with the Framework Agreement.

The Defendants' case

22. Against that background, Advocate Wessels has summarised the Defendants' case as follows:

    (a) there is an abuse of process for the Plaintiff to bring the majority of its claims because they should have been raised in Guernsey 1 and, in respect of para. 21 of the Cause, what is alleged amounts to an impermissible collateral attack on the decision in Guernsey 1;
    (b) the Cause discloses no reasonable grounds for bringing the claims at paragraphs 19 and 21 of the Cause and the claim in respect of the Somerfield Litigation or, in the alternative, each of those aspects of the Cause is amenable to summary judgment being entered in their favour.

    It became apparent at the hearing that the primary case on behalf of the Defendants in respect of the Somerfield Litigation claim is that there should be summary judgment in favour of them, although Advocate Wessels also wished to pursue the alternative basis of a strike out if that failed.

The law

23. Before dealing with the various ways in which the Defendants put their case, I will first set out the applicable legal principles. Those relating to summary judgment are comparatively well-established, whereas the approach to take to striking out a claim, or a part thereof, for abuse of process, which is clearly less common in this jurisdiction, requires looking at the position elsewhere.

    Summary judgment

24. An application for summary judgment under Part IV of the Royal Court Civil Rules, 2007 must meet the two-stage test in rule 19(2):

    > "*The grounds of the application for summary judgment shall be that-*
    >
    > *(a) the plaintiff has no real prospect of succeeding on the claim or issue, …*
    >
    > *and there is no other compelling reason why the claim or issue should be disposed of at a trial.*"

25. There is no difference between Counsel as to the proper approach to take. Both have referred to the summary given by Lewison J (as he then was) in *Easyair Limited (t/a Openair) v Opal Telecom Limited* [2009] EWHC 339 (Ch) (at para. 15), to which I have regularly referred when deciding applications for summary judgment:

    > "*i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 2 All ER 91;*
    >
    > *ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8]*
    >
    > *iii) In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman*
    >
    > *iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual*

assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10]

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63;

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that it is determined the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725."

26. I remain of the view that this summary offers helpful guidance to this Court on the approach to take to application for summary judgment under Part IV of the 2007 Rules. The only gloss I would now add is to refer to the Court of Appeal's decision in *Musa Holdings Limited v Newmarket Holdings (Guernsey) Limited* [2013-14] GLR 445, if only because the approach and analysis offered by Beloff JA in that case settles, as far as this Court is concerned, what falls to be considered. At para. 13 of his judgment, Beloff JA quoted from the speech of Lord Hope of Craighead in *Three Rivers D.C. v Bank of England (No. 3)* [2003] 2 AC 1. Because of the way the Defendants' case is put in the alternative, advancing both striking out the Cause and summary judgment, I will refer to the whole of para. 91 rather than just the passage quoted by Beloff JA:

> "*The difference between a test which asks the question "is the claim bound to fail?" and one which asks "does the claim have a real prospect of success?" is not easy to determine. In Swain v Hillman at p 4 Lord Woolf explained that the reason for the contrast in language between rule 3.4 and rule 24.2 is that under rule 3.4, unlike rule 24.2, the court generally is only concerned with the statement of case which it is alleged discloses no reasonable grounds for bringing or defending the claim. In Monsanto plc v Tilly, The Times, 30 November 1999; Court of Appeal (Civil Division) Transcript No 1924 of 1999; Stuart Smith LJ said that rule 24.2 gives somewhat wider scope for dismissing an action or defence. In Taylor v Midland Bank Trust Co Ltd he said that, particularly in the light of the CPR, the court should*

> *look to see what will happen at the trial and that, if the case is so weak that it had no reasonable prospect of success, it should be stopped before great expense is incurred.*"

Having referred to the way in which regard must be had to the overriding objective of dealing with cases justly and after posing the question as to what the scope of the inquiry into whether the claim has no real prospect of succeeding at trial should be, Lord Hope continued (at para. 95):

> "*…it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be to take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf said in Swain v Hillman, at p 95, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all.*"

27. Beloff JA also cited (at para. 14) the summary given by Hamblen J in *Credit Suisse Intl v Ramot Plan OOD* [2010] EWHC 2757 (Comm) (at para. 24):

> "*In the context of the present application, in which Credit Suisse seeks summary judgment on disputed issues of fact, the following principles are of particular relevance:*
>
> *(1) A real prospect of success means a prospect which is more than fanciful or merely arguable. As Potter, L.J. stated in ED&F Man Liquid Products Ltd. v. Patel [2003] EWCA Civ 472; [2003] C.P. Rep. 5 at [8], 'the defence sought to be argued must carry some degree of conviction … [and be] … better than merely arguable.'*
>
> *(2) Whilst a summary judgment application is not an opportunity to conduct a mini-trial that does not mean that the court has to accept without question the Defendant's evidence. As stated by Potter, L.J. in the ED&F Man case at 10:*
>
> > *'In some cases it may be clear that there is no substance in factual assertions made, particularly if contradicted by contemporaneous documents. If so, issues which are dependent upon those assertions may be susceptible of disposal at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable …'*
>
> *(3) The less complex an issue, the easier it is likely to be for the court to take the view that the basis for it is without substance and determine it on a summary basis …*
>
> *(4) The court should be wary of trying issues of fact on evidence where the facts are apparently credible and are to be set against the facts advanced by the other side. As stated in the White Book at para. 24.2.5:*
>
> > *'If the applicant for summary judgment adduces credible evidence in support of his application, the Respondent becomes subject to an evidential burden of proving some real prospect of success or some other reason for trial. The standard of proof required of the Respondent is not high. It suffices merely to rebut the Applicant's statement of belief. The language of r.24.2 ("no real prospect … no other reason …") indicates that, in determining the question, the court must apply a negative test … However, the proper disposal of an issue under Pt. 24 does not involve the judge in conducting a mini-trial (Swain v. Hillman [2001] 1 All E.R.*

> *91). Therefore, the court hearing a Pt. 24 application should be wary of trying issues of fact on evidence where the facts are apparently credible and are to be set against the facts being advanced by the other side. Choosing between them is the function of the trial judge, not the judge on an interim application, unless there is some inherent improbability in what is being asserted or some extraneous evidence which would contradict it (Fashion Gossip Ltd. v. Esprit Telecoms UK Ltd. [2001] EWCA Civ 235, C.A.; cf. Day v. RAC Motoring Services Ltd. [1999] 1 All E.R. 1007, per Ward, L.J. at 1013 propounding the adoption of a negative test on applications to set aside default judgment). When deciding whether the Respondent has some real prospect of success the court should not apply the standard which would be applicable at the trial, namely the balance of probabilities on the evidence presented; on an application for summary judgment the court should also consider the evidence that could reasonably be expected to be available at trial (Royal Brompton Hospital NHS Trust v. Hammond (No. 5), [2001] EWCA Civ 550, C.A.).'*
>
> *(5) The Court's jurisdiction to grant summary judgment should be exercised so as to give effect to the overriding objective. In appropriate cases, summary determination saves expense, achieves expedition and avoids the court's resources being used up to no purpose …*"

28. These passages highlight the importance of having proper regard to the overriding objective, which is found in rule 1 of the 2007 Rules. They expand upon the basic principle that when the Court determines an application for summary judgment it must refrain from conducting a mini-trial. In the present case, however, this is arguably of less relevance because there is so little evidence to consider. The parties have not sought to explain the areas where their witnesses may differ in evidence at trial. Instead, their approach has been to refer to the material that has been generated in other proceedings, including before courts outside this jurisdiction, and to invite me to consider what these documents will inevitably lead to. I can, however, also consider what evidence could reasonably be expected to be available at trial.

29. Advocate Swan has also drawn attention to a passage in the speech of Lord Hobhouse of Woodborough in the *Three Rivers* case (*supra*, at para. 158, which I similarly quote in full):

> "*The important words are "no real prospect of succeeding". It requires the judge to undertake an exercise of judgment. He must decide whether to exercise the power to decide the case without a trial and give a summary judgment. It is a 'discretionary' power, ie one where the choice whether to exercise the power lies within the jurisdiction of the judge. Secondly, he must carry out the necessary exercise of assessing the prospects of success of the relevant party. If he concludes that there is "no real prospect", he may decide the case accordingly. I stress this aspect because in the course of argument counsel referred to the relevant judgment of Clarke J as if he had made "findings" of fact. He did not do so. Under RSC O.14 as under CPR Part 24, the judge is making an assessment not conducting a trial or fact-finding exercise. Whilst it must be remembered that the wood is composed of trees some of which may need to be looked at individually, it is the assessment of the whole that is called for. A measure of analysis may be necessary but the 'bottom line' is what ultimately matters.*"

In the same paragraph, His Lordship added the reminder that "*The criterion which the judge has to apply under Part 24 is not one of probability; it is absence of reality.*"

Strike out

30. Rule 52 of the 2007 Rules provides:

> "*The Court may strike out a pleading if it appears to the Court-*
>
> *(a) that the pleading discloses no reasonable grounds for bringing … an action,*

> *(b) that the pleading is an abuse of the Court's process or is otherwise likely to obstruct the just disposal of the proceedings …*".

By virtue of para. (1) of the rule, "*reference to a pleading includes reference to part of a pleading*".

31. In relation to sub-para. (a), as I explained in *Tchenguiz v Investec Trust (Guernsey) Limited* (unreported, 26 June 2013), by reference to *Wessedah Foundation v Barings (Guernsey) Limited* [2005-06] GLR 141, "*It is only in plain and obvious cases that recourse should be had to the summary process under this rule*". Further, as the Court of Appeal stated in *Silver Falcon Enterprises Ltd v International Hellenic Operations Ltd* (unreported, 19 and 20 October 1994), the Defendants are required to demonstrate that the claims made by the Plaintiff are "*unarguable*". I have, therefore, found it useful in relation to this Application, as in earlier decisions, to consider whether the Plaintiff's case, in whole or in part, is "*bound to fail*", recognising that this creates a high threshold to be satisfied by a party wishing to strike out a pleading. In doing so, the Court is required to consider only the allegations made in the pleadings and identify whether a cause of action with some chance of success exists (see, eg, the analysis in *IFS Investments Limited v Manor Park (Guernsey) Limited* [2003-04] GLR 308 (at paragraphs 19-33)). In doing so, I have also reminded myself of the principles set out in the commentary to the equivalent power to strike out cases contained in the *Civil Procedure Rules* of England and Wales (see para. 3.4.2 of the *White Book*):

> "*Paragraph 1.4 of the Practice Direction (Striking Out a Statement of Case), para.3APD.1, gives examples of cases where the court may conclude that particulars of claims disclose no reasonable grounds for bringing the claim: those claims which set out no facts indicating what the claim is about; those claims which are incoherent and make no sense; and those claims which contain a coherent set of facts but those facts even if true, do not disclose any legally recognisable claim against the defendant. …*
>
> *Statements of case which are suitable for striking out on ground (a) include those which raise an unwinnable case where continuance of the proceedings is without any possible benefit to the respondent and would waste court resources on both sides (Harris v Bolt Burdon [2000] L.T.L., February 2, 2000, CA). A claim or defence may be struck out as not being a valid claim or defence as a matter of law (Price Meats Ltd v Barclays Bank Plc [2000] 2 All E.R. (Comm) 346, Ch D). However, it is not appropriate to strike out a claim in an area of developing jurisprudence, since, in such areas, decisions as to novel points of law should be based on actual findings of fact (Farrah v British Airways, The Times, January 26, 2000, CA referring to Barrett v Enfield BC [1989] 3 W.L.R. 83, HL; [1999] 3 All E.R. 193). A statement of case is not suitable for striking out if it raises a serious live issue of fact which can only be properly determined by hearing oral evidence (Bridgeman v McAlpine-Brown January 19, 2000, unrep., CA). An application to strike out should not be granted unless the court is certain that the claim is bound to fail (Hughes v Colin Richards & Co [2004] EWCA Civ 266; [2004] P.N.L.R. 35, CA (relevant area of law subject to some uncertainty and developing, and it was highly desirable that the facts should be found so that any further development of the law should be on the basis of actual and not hypothetical facts)).*
>
> *Where a statement of case is found to be defective, the court should consider whether that defect might be cured by amendment and, if it might be, the court should refrain from striking it out without first giving the party concerned an opportunity to amend (In Soo-Kim v Youg [2011] EWHC 1781 (QB)).*"

32. In relation to sub-para. (b), I was not referred to any previous Guernsey authority on the principles to apply. Instead, Counsel have relied on the approach in England and Wales as established by a series of cases under the equivalent power in the *Civil Procedure Rules*. Because of the identical wording, I am content to adopt those principles as being appropriate as a matter of Guernsey law.

33. At para. 3.4.3 of the *White Book*, sub-para. (b) is explained generally as follows:

> "*Although the term "abuse of the court's process" is not defined in the rules or practice direction, it has been explained in another context as "using that process for a purpose or in a way significantly different from its ordinary and proper use" (Attorney General v Barker [2001] 1 F.L.R. 759, DC, per Lord Bingham of Cornhill, Lord Chief Justice). The categories of abuse of process are many and are not closed. … The court has power to strike out a prima facie valid claim where there is an abuse of process. However there has to be an abuse, and striking out has to be supportive of the overriding objective. It does not follow from this that in all cases of abuse the correct response is to strike out the claim. The striking out of a valid claim should be the last option. If the abuse can be addressed by a less draconian course, it should be …*".

34. The type of abuse alleged by the Defendants is primarily that described in *Barrow v Bankside Agency Ltd* [1996] 1 WLR 257 (at page 260A):

> "*The rule in Henderson v. Henderson (1843) 3 Hare 100 is very well known. It requires the parties, when a matter becomes the subject of litigation between them in a court of competent jurisdiction, to bring their whole case before the court so that all aspects of it may be finally decided (subject, of course, to any appeal) once and for all. In the absence of special circumstances, the parties cannot return to the court to advance arguments, claims or defences which they could have put forward for decision on the first occasion but failed to raise. The rule is not based on the doctrine of res judicata in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on for ever and that a defendant should not be oppressed by successive suits when one would do.*"

The Advocates are agreed that the relevant principles to be applied to this type of abuse are those derived from *Johnson v Gore Wood & Co* [2002] 2 AC 1 and *Stuart v Goldberg Linde* [2008] 1 WLR 823. Both cases involved claims against firms of solicitors.

35. In the first of those cases, Lord Bingham of Cornhill explained (at page 31):

> "*But Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus*

> *while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice.*"

36. That passage was cited by Lloyd LJ at para. 22 of his judgment in *Stuart v Goldberg Linde*. It was immediately followed in para. 23 by a passage from the speech of Lord Millett (at page 59 of the *Johnson* case), which also appears to be relevant to how rule 52(2)(b) should be applied:

> "*It is one thing to refuse to allow a party to relitigate a question which has already been decided; it is quite another to deny him the opportunity of litigating for the first time a question which has not previously been adjudicated upon. This latter (though not the former) is prima facie a denial of a citizen's right of access to the court conferred by the common law and guaranteed by article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1953). While, therefore, the doctrine of res judicata in all its branches may properly be regarded as a rule of substantive law, applicable in all save exceptional circumstances, the doctrine now under consideration can be no more than a procedural rule based on the need to protect the process of the court from abuse and the defendant from oppression. In Brisbane City Council v Attorney General for Queensland [1979] AC 411, 425 Lord Wilberforce, giving the advice of the Judicial Committee of the Privy Council, explained that the true basis of the rule in Henderson v Henderson 3 Hare 100 is abuse of process and observed that it "ought only to be applied when the facts are such as to amount to an abuse: otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation". There is, therefore, only one question to be considered in the present case: whether it may be oppressive or otherwise an abuse of the process of the court for Mr Johnstone to bring his own proceedings against the firm when he could have brought them as part of or at the same time as the company's action. This question must be determined as at the time when Mr Johnson brought the present proceedings and in the light of everything that had then happened. There is, of course, no doubt that Mr Johnson could have brought his action as part of or at the same time as the company's action. But it does not at all follow that he should have done so or that his failure to do so renders the present action oppressive to the firm or an abuse of the process of the court. As May LJ observed in Manson v Vooght [1999] BPRI 376, 387, it may in a particular case be sensible to advance claims separately. In so far as the so-called rule in Henderson v Henderson suggests that there is a presumption against the bringing of successive actions, I consider that it is a distortion of the true position. The burden should always rest upon the defendant to establish that it is oppressive or an abuse of process for him to be subjected to the second action.*"

37. There are, in my view, further passages from the judgments in *Stuart v Goldberg Linde* to which Counsel have referred directly or indirectly which help to establish further all the principles to apply. At para. 24 Lloyd LJ said:

> "*The court's power to strike a claim out is discretionary, but it does not seem to me that on an application to strike out a claim based on the proposition that the proceedings are an abuse of the process of the court, on the principle of Johnson v Good Wood & Co [2002] 2 AC 1, the case is likely to turn on the exercise of a discretion, at any rate if the court decides in favour of the application. Either the proceedings are an abuse of the process, or they are not. It could not be right to strike the case out, on this ground, unless the court is satisfied that the claim is an abuse of proces [sic], and if the court were so satisfied, it would be only in very*

> *unusual circumstances that it would not strike the claim out. In Hunter v Chief Constable of the West Midlands Police [1982] AC 529, 536 Lord Diplock spoke of the court's inherent power to prevent misuse of its procedure and of the court's "duty (I disavow the word discretion) to exercise this salutary power". I note that Longmore LJ has expressed the same view, agreeing with Thomas LJ, in Aldi Stores Ltd v WSP Group plc [2008] 1 WLR, para 38.*"

As regards delay, at para. 58, His Lordship did not consider it to be relevant because timing issues will either be met by a defence under the Limitation Act 1980 or an equitable defence such as laches. Accordingly, providing the second claim is brought in time, the issue of delay does not affect whether it is an abuse. Turning to the question of failing to use reasonable diligence, His Lordship stated (at para. 59):

> "*As for the relevance of a claimant's failure to use what the court might consider to be reasonable diligence in finding out facts relevant to whether he has a possible claim, it may be that this could possibly be relevant to the inquiry described by Lord Bingham, depending on the circumstances. On the other hand, it does not seem to me that there can be a general principle that a potential claimant is under a duty to exercise reasonable diligence, not yet having brought proceedings asserting a particular claim, to find out the facts relevant to whether he has or may have such a claim. Moreover, I do not see how it can be relevant at all that the claimant may have failed to use reasonable diligence in attending to his own interests at the time of the transaction or the events giving rise to the claims asserted.*"

38. The question of the relevance of the merits of the second claim was dealt with by Lloyd LJ at para. 57 of his judgment, which also touches on the relationship with an application for summary judgment:

> "*Given Lord Bingham's emphasis [2002] AC 1,31 on the need for the court to avoid adopting "too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court", it is necessary to proceed with care in relation to a contention that some aspect of a particular case must be disregarded as irrelevant in principle. However, it seems to me that it would at most only be in an extreme case (either way) that the merits, in the sense of prospects of success, of the second proceedings can be relevant to deciding whether bringing them separately is an abuse of process. If the case can be shown to be cast-iron, so that judgment could be obtained for the claimant under CPR Pt 24, this might perhaps outweigh factors suggesting that the case ought to have been brought as part of the earlier proceedings. If, on the other hand, the case is hopeless, then it may be capable of being struck out for that reason in any event. But if, as here, the prospects of success are uncertain but the case is not suitable for summary judgment for either party under CPR Pt 24, then it seems to me that it is inappropriate to attempt to weigh the prospects of success in the balance in deciding whether it is an abuse of the process to bring the claim in later proceedings, rather than as part of the earlier proceedings. In my judgment, when Lord Bingham spoke of a "broad, merits-based approach", the merits he had in mind were not the substantive merits or otherwise of the actual claim, but those relevant to the question whether the claimant could or should have brought his claim as part of the earlier proceedings. A defendant may feel harassed by having brought against him what appears to be a weak claim, but that factor should not count in this context. Whether the claim appears to be weak or strong, it is the fact of it bring brought as a second claim, where the issue could have been raised as part of or together with the first claim, that may constitute the abuse.*"

39. Sir Anthony Clarke MR (as he then was) offered further guidance (at para. 96):

> "*For my part, I do not think that parties should keep future claims secret merely because a second claim might involve other issues. The proper course is for parties to put their cards on the table so that no one is taken by surprise and the appropriate*

course in case management terms can be considered by the judge. In particular parties should not keep quiet in the hope of improving their position in respect of a claim arising out of similar facts or evidence in the future. Nor should they do so simply because a second claim may involve other complex issues. On the contrary they should come clean so that the court can decide whether one or more trials is required and when. The time for such a decision to be taken is before there is a trial of any of the issues. In this way the underlying approach of the Civil Procedure Rules, namely that of co-operation between the parties, robust case management and disposing of cases, including particular issues, justly can be forwarded and not frustrated."

40. In making these comments, the Master of the Rolls was endorsing what Thomas LJ (as he then was) had stated in *Aldi Stores Ltd v WSP Group plc* [2008] 1 WLR 748 (at paragraphs 29 to 31) about how to deal with matters in the future. In the same judgment, at para. 6, the principles derived by Clarke LJ (as he then was) from the *Johnson* case and summarised in *Dexter v Vlieland-Boddy* [2003] EWCA Civ 14 were cited with approval:

"*49. ... (i) Where A has brought an action against B, a later action against B or C may be struck out where the second action is an abuse of process. (ii) A later action against B is much more likely to be held to be an abuse of process than a later action against C. (iii) The burden of establishing abuse of process is on B or C as the case may be. (iv) It is wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. (v) The question in every case is whether, applying a broad merits based approach, A's conduct is in all the circumstances an abuse of process. (vi) The court will rarely find that the later action is an abuse of process unless the later action involves unjust harassment or oppression of B or C.*

50. Proposition (ii) above seems to me to be of importance because it is one thing to say that A should bring all his claims against B in one action, whereas it is quite another thing to say that he should bring all his claims against B and C (let alone against B, C, D, E, F and G) in one action. There may be many entirely legitimate reasons for a claimant deciding to bring an action against B first and, only later (and if necessary) against others.

51. Those reasons include, for example, the cost of proceeding against more than one defendant, especially where B is apparently solvent and the case against B seems stronger than against others. More defendants mean more lawyers, more time and more expense. This is especially so in large commercial disputes. It by no means follows that either the public interest in efficiency and economy in litigation or the interests of the parties, including in particular the interests of C, D and E, is or are best served by one action against them all.

52. It seems to me that the courts should be astute to ensure that it is only in a case where C can establish oppression or an abuse of process that a later action against C should be struck out. I could not help wondering whether the defendants in this case would have given their lawyers the same instructions on the question whether they should have sued in the first action if they had been asked before that action began as they have given now that a later action has been begun.

53. It is clear from the speeches of both Lord Bingham and Lord Millett that all depends on the circumstances of the particular case and that the court should adopt a broad merits based approach, but it is likely that the most important question in any case will be whether C, D, E or any other new defendant in a later action can persuade the court that the action against him is oppressive. It seems to me to be likely to be a rare case in which he will succeed in doing so."

41. In the *Aldi* case, Thomas LJ also commented on the public interest factors to be borne in mind (at paragraphs 24 and 25):

> "*24 ... the public interest extends not only to finality and preventing a party being vexed twice, but also to economy and efficiency in litigation. The judge considered that the decision of Aldi not to bring its claims against WSP and Aspinwall in the original action was an abuse or misuse of the process of the TCC. I do not see how the mere fact that this action may require a trial and hence take up judicial time (which could have been saved if Aldi had exercised its right to bring an action in a different way) can make the action impermissible. If an action can be properly brought, it is the duty of the state to provide the necessary resources; the litigant cannot be denied the right to bring a claim (for which he in any event pays under the system which operates in England and Wales) on the basis that he could have acted differently and so made more efficient use of the court's resources. Although the judge was self evidently right in saying that it was the duty of the TCC to achieve the just and cost effective disposal of litigation and that this served the interests of the business community, he was wrong to find that the action brought by Aldi flew in the face of that policy. As I seek to explain at paras 29-31 below, the problems that have arisen in this case should have been dealt with through case management.*
>
> *25 Furthermore, there is a real public interest in allowing parties a measure of freedom to chose [sic] whom them sue in a complex commercial matter and not to give encouragement to bringing a single set of proceedings against a wide range of defendants or to complicate proceedings by cross-claims against parties to the proceedings. That freedom can and should be restricted by appropriate case management.*"

At para. 39, Longmore LJ added that "*however desirable it may be, from the point of view of the court, that all possible actions arising from the same state of facts should be brought at the same time, it can be a recipe for complex and unwieldy litigation. The interests of the court are, of course, relevant but the judge [2007] BLR 113, para 76 appears to have regarded those interests as almost the most important factor in the equation. This does not seem to me to be right in a case where the parties could have brought the matter before the court at a time between June 2003 and the settlement of the B&Q and Grantchester actions in January 2004 but chose not to do so, no doubt for their own good commercial reasons.*"

42. I have quoted as extensively from these cases as I have because, in the absence of any Guernsey authority, it seems to me to be helpful to set out in some detail the sources of the principles that I consider are appropriate to apply in the present case (and in any future case brought under rule 52(2)(b)). Those principles are:

    (a) the burden of establishing that there is an abuse of process rests of the party alleging it;

    (b) the question in every case is whether, applying a broad, merits-based approach, the party's conduct in bringing the second action is in all the circumstances misusing or abusing the process of the Court;

    (c) the merits involved are not the substantive merits or otherwise of the actual claim, but those relevant to the question whether the party in question could or should have brought his claim as part of the earlier proceedings;

    (d) this question falls to be determined as at the time when the Plaintiff brought the present proceedings and in the light of everything that had then happened;

    (e) however, just because a matter could have been raised in earlier proceedings does not automatically mean it should have been;

(f) repetition of text from the pleaded case in the earlier proceedings does not necessarily demonstrate that the claims in the second action should have been included in the earlier action, but rather any overlap between the two actions must be assessed by the substance of the respective claims and not by a literal comparison of the pleadings;

(g) provided the second action is within time, delay is not in and of itself relevant to the question of whether there is abuse;

(h) depending on the circumstances of the case, it may be relevant to consider whether, through the use of reasonable diligence, any facts that were not known at the time of the earlier proceedings could reasonably have been ascertained and deployed in that earlier action;

(i) a party should not keep future claims secret merely because a second claim might involve additional, possibly complex, issues, but rather should (certainly in future cases) put their cards on the table so to facilitate proper case management and so that no one is taken by surprise;

(j) in reaching a decision, the Court must take into account the public interest in finality in litigation and preventing a party being vexed twice, as well as economy and efficiency in litigation, whilst recognising that a party should have a measure of freedom, especially in complex commercial matters, to choose whom they sue in which case, which should be addressed through appropriate case management;

(k) it is more likely that a second action against a party to the earlier case will be struck out than a second action against a different party;

(l) the Court will rarely find that the second action is an abuse of process unless it involves unjust harassment or oppression of the party alleging abuse;

(m) the decision as to whether the proceedings constitute an abuse of process is not a discretionary one because either the second set of proceedings is an abuse of process or it is not (although if found to be an abuse, in an exceptional case, it is possible to exercise the Court's discretion not to strike it out).

43. There are additional principles that apply to the alleged inconsistencies between the Plaintiff's case in Guernsey 1 and its case in the present proceedings that are said to demonstrate the abuse for which the Defendants contend. Advocate Wessels submits that the fundamental premise in Guernsey 1 was that the core investments of the TDT were to be protected by the Framework Agreement, whereas the fundamental premise of the current action is that the core investments should have been realised and the Framework Agreement not entered into. Such a contradiction falls foul of the principle summarised by Longmore LJ in *Sun Life Assurance Co of Canada v Lincoln National Life Insurance Co* [2004] EWCA Civ 1660 (at para. 83): "*In litigation it is possible to make inconsistent cases in the same proceedings; doing so later, in different proceedings, may come under the head of abuse of process.*"

44. That bare assertion must, however, be put into context. In *Express Newspapers plc v News (UK) Ltd* [1990] 1 WLR 1320, two newspaper groups made claims in what were effectively mirror forms, the second of which was described as involving "*a plain element of tit for tat*". Summary judgment had been entered on the first in time and was sought in the second for the reason that there having been no defence to the first claim, there could be no defence to the second. Sir Nicholas Browne-Wilkinson V-C stated (at page 1329F):

> "*There is a principle of law of general application that it is not possible to blow hot and cold in the attitude that you adopt. A man cannot adopt two inconsistent attitudes towards another: he must elect between them and, having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance.*"

The principle of election had been spelt out in *United Australia Ltd v Barclays Bank Ltd* [1940] AC 1 (at page 30) by Lord Atkin:

> "*... if a man is entitled to one of two inconsistent rights it is fitting that when with full knowledge he has done an unequivocal act showing that he has chosen the one he cannot afterwards pursue the other, which after the first choice is by reason of the inconsistency no longer his to choose. Instances are the right of a principal dealing with an agent for an undisclosed principal to choose the liability of the agent or the principal; the right of a landlord where forfeiture of a lease has been committed to exact the forfeiture or to treat the former tenant as still tenant and the like. To those cases the statement of Lord Blackburn in Scarf v. Jardine [(1882) 7 App Cas 345, 360] applies "where a man has an option to choose one or other of two inconsistent things when once he has made his election it cannot be retracted." In a later passage [page 361] Lord Blackburn speaks of a man choosing between two remedies: but it is plain that he is speaking of remedies in respect of the inconsistent things as stated above. The case was one where the plaintiff had a right of recourse against two former partners, or against two new partners: but obviously not against both. Lord Blackburn quotes Dumpor's case [(1601) 4 Co Rep 119] which was a plain case of inconsistent rights, the question of waiver of a forfeiture. I therefore think that on a question of alternative remedies no question of election arises until one or other claim has been brought to judgment. Up to that stage the plaintiff may pursue both remedies together: but he can take judgment only for the one, and his cause of action on both will then be merged in the one.*"

45. The problems raised through the principle of election and the obtaining of a judgment that might be regarded as inconsistent with allegations being made in a later case were addressed in *Bradford & Bingley Building Society v Seddon* [1999] 1 WLR 1482 by Auld LJ (at page 1498C):

> "*The question then is whether the obtaining of that judgment arguably inconsistent with some, but not all, of the allegations now made is an abuse of process in the circumstances. In my view, there is nothing inherently abusive of process about making inconsistent or merely new allegations possibly resulting in different outcomes in different actions (though this may be affected by Part 22 of the new Civil Procedure Rules (S.I. 1998 No. 31332 (L.17)), under which a party must swear to the truth of his pleading). It depends upon the circumstances, often whether some additional element is present. Election is a possible element rendering a second claim an abuse. But, in my view, to do so it should have been of such a nature that the two claims are mutually exclusive or impossible in law, as in Scarf v. Jardine, 7 App.Cas. 345, or of a formal or otherwise positive nature, as in Morris v. Wentworth-Stanley [1999] 2 W.L.R. 470, or the failure to pursue a pleaded claim in an earlier action, as in M.C.C. Proceeds Inc. v. Lehman Brothers International (Europe) [1998] 4 All E.R. 675. Otherwise every inadvertent inconsistency as to the party sued or the nature of claim made would be an abusive election.*"

46. In *Binks v Securicor Omega Express Ltd* [2003] 1 WLR 2557, Maurice Kay J addressed the concern raised by Auld LJ and explained (at para. 8) how the requirement of Part 22 of the Civil Procedure Rules on statements of truth impacts on the ability to advance alternative cases (albeit that the 2007 Rules do not replicate the statement of truth provisions applying in England and Wales):

> "*In my judgment [Part 22] does not in all cases prevent a party from submitting or amending a pleading which includes an allegation which he is not putting forward as the truth, provided that there is an evidential basis for it. If it is in the form of an amendment then, as I have said, it may be appropriate for the court to permit it without requiring a statement of truth. Moreover, I do not consider it objectionable in principle for a claimant to advance an alternative case based on material put forward by his opponent. In such circumstances it may be possible for him to append a statement of truth, suitably drafted, making it clear that whilst his primary case is not an assertion of truth of his opponent's account, if the court finds that to be the truth, he will seek to rely upon it as an alternative basis for liability.*"

In doing so, His Lordship was recognising that a party can plead his own version of the facts but seek alternative relief in the event that the Court believes the evidence of the other party.

47. I am satisfied that these principles, offering particular examples of how an inconsistent case being advanced in a second action might be regarded as abusive are principles that can properly be taken into account in Guernsey.

48. In respect of para. 21 of the Plaintiff's Cause, which Advocate Wessels submits amounts to a collateral attack on the Lieutenant Bailiff's decision in Guernsey 1, the principles derived from the judgment of Sir Andrew Morritt V-C in *Secretary of State for Trade and Industry v Bairstow* [2004] Ch 1 (and summarised at para. 38) are agreed to be applicable:

> "*(a) A collateral attack on an earlier decision of a court of competent jurisdiction may be but is not necessarily an abuse of the process of the court. (b) If the earlier decision is that of a court exercising criminal jurisdiction then, because of the terms of sections 11 to 13 of the Civil Evidence Act 1968, the conviction will be conclusive in the case of later defamation proceedings but will constitute prima facie evidence only in the case of other civil proceedings. … (c) If the earlier decision is that of a court exercising a civil jurisdiction then it is binding on the parties to that action and their privies in any later civil proceedings. (d) If the parties to the later civil proceedings were not parties to or privies to those who were parties to the earlier proceedings then it will only be an abuse of process of the court to challenge the factual findings and conclusions of the judge or jury in the earlier action if (i) it would be manifestly unfair to a party to the later proceedings that the same issues should be relitigated or (ii) to permit such relitigation would bring the administration of justice into disrepute.*"

49. The decision which it is said is being attacked collaterally is not, of course, a criminal decision, but a previous civil one and one to which the present parties were all privy. To that extent, principles (b) and (d) are not engaged. Accordingly, the summary in para. 3.4.3.3 of the *White Book* that it is "*important to consider (1) the nature and extent of the earlier judgment; (2) the nature and basis of the claim made in the later proceedings; and (3) the grounds relied on to justify the collateral challenge*" is arguably more helpful. This is really just a particular species of abuse of process (as noted by Lord Hobhouse in *Arthur J S Hall & Co v Simons* [2002] 1 AC 615, 743). It is a further example of the type of case in which the Court should act so as to prevent a party relitigating something that has already been determined.

Discussion

50. Advocate Wessels has suggested that the breaches of duty in the investment of the TDT assets can be sub-divided into three distinct limbs. He suggests that paragraphs 15 to 18 and paragraph 20 together raise a claim in relation to the investment strategy of the TDT and the investment decisions taken by the Defendants from August 2007 onwards, in particular referring to the restructuring with the TDT structure to Kaupthing in December 2007. In respect of paragraph 19 of the Cause, this makes a claim in relation to the books and records kept by the Defendants as trustees of the TDT, and in particular the provisions by them of information relating to the trust to liquidators of companies held as direct or indirect subsidiaries of the TDT. Paragraph 21 of the Cause makes a claim in relation to the commencement and prosecution of the Guernsey 1 proceedings. The Somerfield Litigation element of the Court is the fourth aspect of the Plaintiff's claims.

51. Advocate Swan, however, submits that this summary mischaracterises the Plaintiff's claim and fails to take into account the Responses to the Request for Further and Better Particulars of the Plaintiff's Cause. Although he has acknowledged that it is sensible to sub-divide the allegations relating to the TDT assets, he has explained the Plaintiff's case as follows. Paragraph 15 claims that the Defendants were improperly over-reliant on R20. This will involve considering the terms of the contract under which the Defendants engaged R20 as adviser to the TDT, which was to focus on new business opportunities. Despite the advice given to the Defendants on 4 August 2008, which was exhibited to Ms Martin's Affidavit, it is the Plaintiff's case that the Defendants invested in hazardous or speculative investments or

investments which were a gamble. The Responses, and in particular Response 5, demonstrate that there are matters involved in considering these allegations that were not examined or considered in Guernsey 1. Paragraph 16 contains the claim that the Defendants failed to monitor the TDT assets from time to time and failed to diversify them or consider diversifying them. This requires looking at what was happening over a longer period of time than the focus of Guernsey 1. Paragraph 17 claims that the Defendants permitted the TDT to enter into high risk investments and pursue aggressive investment strategies without preserving sufficient assets for the minor beneficiaries, retaining sufficient liquid reserves to hedge against collapsing markets, which occurred from late 2007, obtaining investment advice from other advisers, or obtaining sufficient information on the investments proposed to enable them to form their own views about whether or not to follow the recommendations. It alleges that the Defendants placed too much reliance on R20. These are matters that were not considered in Guernsey 1. Paragraphs 18 and 20 are specific to claims about the Defendants failing to have proper regard to the position of Kaupthing, exposing the TDT's assets to the potential risk of Kaupthing's failure or insolvency, and failing to monitor Kaupthing's financial position so as to be in a position to respond appropriately, all of which falls outside what was in issue in Guernsey 1. Similarly, paragraph 19, which alleges that the Defendants failed to ensure that the books and records of the TDT were kept confidential and separate from other books and records they held and failed to record matters in writing when they should have, are said to be discrete issues that were not the subject of the proceedings in Guernsey 1. In relation to paragraph 21, Advocate Swan makes three particular points on behalf of the Plaintiff, to which I will return in more detail in due course.

52. Because rule 52 enables the Court to strike out any part of the pleading, I propose to look at the Plaintiff's claims separately. Each of paragraphs 16 to 21 begin with the words "*Further or alternatively*". I am satisfied, therefore, that it would be permissible to strike out just one paragraph (or to enter summary judgment in respect of it) if that were the only paragraph that meets the respective test to which I have referred. Indeed, given the use of sub-paragraphs in all of these paragraphs other than paragraph 20, I take the view that the effect of a strike out could even be confined to part of a paragraph. However, before turning to the claims made by the Plaintiff alleging breaches of duty in the investment of the TDT assets, I will consider the Somerfield Litigation claims, dealing initially with the Defendants' primary case that they are entitled to summary judgment in respect of that part of the Cause. I do so because, as Lloyd LJ indicated in *Stuart v Goldberg Linde* (*supra*), if the claim is hopeless, as Advocate Wessels suggests it is, it falls to be struck out, or leads to a summary judgment in the Defendants' favour. It appears to me to be more logical to consider whether a claim is flawed substantively before turning to whether, even if it has sufficient merit to be pursued, it is flawed procedurally.

The Somerfield Litigation: summary judgment

53. Advocate Wessels has emphasised the importance of looking at what the Plaintiff alleges constitutes a breach of trust in settling the Somerfield Litigation in the light of the assertion that better terms could have been achieved, enabling the Defendants to have retained some or all of the Somerfield Proceeds or that, if the breaches alleged had not occurred, the Defendants' prospect of success would have been better and it might even have succeeded at trial (as set out in para. 45 of the Cause). In the light of the advice received from Mr Auld, he submits it is inherently improbable that either of these propositions can be established. Further, the Plaintiff has failed even to attempt to demonstrate what the Defendants could have done differently and how such a different approach could have, or would have, improved the terms of settlement or the prospects of success.

54. More particularly, though, Advocate Wessels submits that the essential question to answer is what the Plaintiff says the Defendants could and should have done differently and how that would (or possibly could) have resulted in either improved settlement terms or a greater prospect of success at trial. Advancing a mere assertion without any basis for challenging the advice given is insufficient. Moreover, none of the allegations in paragraphs 40 and 41 of the Cause is sustainable and could not, in any event, be gross negligence.

55. The position of the Plaintiff is that its case is not confined to the advice of Counsel but goes wider. It alleges that the Defendants are liable for the chaotic and grossly negligent way in which the case before the High Court of Justice was prepared and conducted. This was touched on in Mr Auld's own advice to the Defendants. The Plaintiff alleges that the prospects of success assessed by Mr Auld were inevitably affected by the Defendants' mishandling of the litigation. Accordingly, the references to the earlier advice are relevant because they offer a better reflection of what could have been the position had the handling of the litigation not been so poor.

56. It has, therefore, been necessary to consider the evolution of the advice given to the Defendants carefully. Before doing so, I questioned in my own mind whether this meant that I was conducting some form of impermissible mini-trial. This was one of the considerations summarised in the ***Easyair*** case (*supra*) on which Advocate Swan relied. However, I am satisfied that I am not. This is an exercise in considering what it set out in documents. It does not involve weighing in the balance different evidence contained in Affidavits, but even then it is permissible to grant summary judgment on disputed issues of fact (see, eg, the ***Credit Suisse*** case (*supra*)). Whilst it is not a perfect analogy, construing documents is something that is quite commonplace in summary judgment applications. If the documents permit only one conclusion, it can be factored into the test for summary judgment. Equally, however, if the documents leave open the possibility of different conclusions, this may well point away from granting the summary judgment application.

57. Although Mr Auld refers to earlier advice tendered by Quinn Emanuel, the first advice in time that I have seen, relating to the proceedings in the British Virgin Islands, was taken by the Defendants at a conference with Leading Counsel on 13 January 2009. An attendance note prepared by Quinn Emanuel within a week of the consultation as approved by Ian Glick QC records that Counsel's view was that "*The Somerfield claim is clearly arguable and TDT should pursue it (subject to tax position)*". It also sets out that "*the broad tactical objective, at least from a settlement perspective, must be to put in a tight Defence and Counterclaim, with a targeted claim, which would prevent Kaupthing from receiving all of the Somerfield proceeds*" and that creating an obstacle by way of protracted substantive litigation to the receivers/liquidators getting payments as soon as they possibly can should be the strategy to adopt. Advice was given that the draft pleadings under review should be tailored accordingly

58. Updated advice was given by Quinn Emanuel in a comprehensive review of matters dated 30 June 2009. Isis had by then commenced its proceedings in the English High Court. They note that the speedy settlement of the BVI proceedings initially contemplated by R20 had not materialised, but rather that Kaupthing was pursuing its claims resolutely. Further, Kaupthing by then controlled the BVI Companies (Glenalla, Thorson and Oscatello) and had amended its pleadings and filed further evidence. As a consequence of these developments, the summary of the advice (at para. 4.1) was that "*On balance, the BVI counterclaim is more likely than not to fail at trial and, in any event is more likely not to be held to be an unsecured claim.*" They continued:

> "*4.3 Further, in terms of settlement prior to trial, disclosure in the BVI proceedings is likely to undermine significantly the Trustees' case, as it will become clear that the trustees knew nothing of the Scott's Agreement (pleaded in the Counterclaim) and arguably that Robbie Tchenguiz regarded his arrangements with Hreidar as nothing more than "gentlemen's agreements". It is also likely that no one on Kaupthing's side other than Hreidar knew about the Scott's Agreement. Kaupthing has already indicated that there is nothing in its documents that evidences the Scott's Agreement. There is therefore a real imperative to settle the proceedings before disclosure is given. ...*
>
> *4.5 Accordingly, steps should now be taken to explore settlement of the BVI Proceedings with Kaupthing. The timing of any such approach needs to be carefully considered and, for the reasons set out below, it is important that*

any settlement discussions seek to include a resolution of the inter company loan position."

59. Next in the sequence is a Joint Note of Advice dated 2 March 2010, which was prepared by Macfarlanes, Ozannes, Quinn Emanuel and Mr Auld as legal advisers to the Defendants. It refers to the intended application to this Court in what became Guernsey 1 and sets out that:

> "*1. The Trustees are entitled, and would be well advised, to continue with the English Proceedings until such time that the Trustees reach a conclusion that there is no reasonable prospect of reaching a commercially satisfactory resolution of those proceedings, whether at trial or by way of settlement. …*
>
> *2. Taking the worst case scenario, if the advice on the merits concludes that the Trustees' chances of success at trial are negligible, a settlement whereby the English Proceedings are discontinued without any order as to costs, may, from the Trustees' point of view, be a commercially successful outcome. If the Trustees are likely to lose at trial, they will be exposed to a liability in respect of Kaupthing's and Isis' costs, which can be expected to be in excess of £5 million. We consider this to be a conservative estimate, and the actual costs incurred by the opposing parties may be even higher.*
>
> *3. We are currently of the view that there are good reasons to continue to take all necessary steps in the English Proceedings with a view to preparing this matter for trial, which is fixed in June 2010. If Leading Counsel concludes that there are good prospects of the Trustees succeeding at trial, the Trustees should, of course, seek to ensure that those prospects are being preserved. If, on the other hand, Leading Counsel concludes that the prospects of success at trial are very slim, the Trustees would still be well advised to advance their case as positively as possible, at least until the earlier of the Trustees being otherwise directed by the Royal Court of Guernsey, or until the mediation scheduled for 23 March 2010, or until such time that the Trustees conclude that there is no longer any real prospect of reaching a negotiated settlement with Kaupthing and Isis and that the Trustees need to take a unilateral decision to discontinue the English Proceedings. By taking the steps required in the English Proceedings, the Trustees would be protecting their position prior to and during settlement negotiations, and thus preserving or increasing their chances of reaching a commercially satisfactory settlement.*"

Para. 5 of the Advice set out the urgent procedural steps that were required to be taken in the proceedings before the High Court in order to comply with the procedural timetable.

60. Following the unsuccessful mediation, Mr Auld finalised his advice to the Defendants on 20 April 2010. It is this advice and what followed to which the Defendants have drawn the most attention. Mr Auld gave his assessment as being that the Defendants did not have a better than 30% chance of persuading the Court that the terms of the Scott's Agreement for which they argued would be found to exist and that, even if established, the realistic prospects of them ever receiving any money were less than 10%. That opinion was expressly made subject to receiving advice on the BVI law implications of the Scott's Agreement. He explained as part of the context of his advice that "*although the Trustees have always considered that they would not be successful at the trial of the English proceedings, they hoped by prosecuting their claims to achieve a satisfactory settlement in particular at a mediation*", but it had been unsuccessful so the Trustees needed to reassess their strategy.

61. Mr Auld dealt with the procedural position at that time in the High Court proceedings as follows:

> "*6.2 As matters stand, the complex and convoluted pleadings have been completed subject possibly to some further procedural skirmishing in relation to Kaupthing's requests for information from the Trustees. Some disclosure and inspection has taken place on the part of all three parties. The Trustees have*

not yet been able to disclose R20's documents because of problems with a third party. Since most of the substantive involvement in the underlying transactions and arrangements was conducted by R20, this is a serious omission from the relevant disclosure documents. This in itself makes impossible the finalisation of the Trustees' witness statement.

6.3 Witness statements were due to be exchanged this week. Kaupthing claimed that they are in a position to do so. It appears that Isis are not. Certainly, the Trustees' witness statements are nowhere near complete. …

6.4 In reality, the Trustees are in a very difficult procedural position. Given the expedited nature of the timetable, the apparently straightforward case of Kaupthing and the agreed directions, it is highly unlikely that the Court will adjourn the trial. In order to prepare properly for the trial, there is a huge amount of work to do in relation to both documents and witness statements. …

6.7 As things stand and unless the proposed applications in Guernsey have some separate relevance to or effect upon the English proceedings, the Trustees must either settle these claims or prepare the case for trial. …

6.10 In a case which principally concerns an oral agreement, it is obviously far from satisfactory that this advice is being completed in these circumstances. Although the case gives rise to issues of law, the most important aspect from the Trustees' point of view and indeed that of the Court is to identify, in as much detail as possible, the full factual context for the Scott's Agreement, precisely what was agreed and what (if any) terms should be implied as a matter of business efficacy/necessity, or on the basis of the more recent authorities, construction/interpretation."

62. When dealing with the possibility of seeking to adjourn the trial listed for June 2010 in section 15 of his Advice, Mr Auld took the view that the Defendants' problem was that they had not complied with the timetable fixed, and would not be able to do so for a while, in part because of the difficulties in obtaining documents from R20. A more promising argument could be mounted if it were related to the progress of Guernsey 1, but he had been informed that this would not really help because of the time it would take to resolve those proceedings. Mr Auld considered that seeking an adjournment and being refused would put the Defendants "*in an impossibly weak position in terms of negotiating any sort of settlement*". He expected they would have no choice but to withdraw and pay their opponent's costs, possibly on an indemnity basis.

63. The advice on BVI law was given to the Defendants by Harneys in a note dated 29 April 2010. Because Oscatello, through its liquidators, could collapse the structure underlying it, Oscatello could gain control of Tazamia to prevent any transfer of the Somerfield Proceeds or challenge any such transaction, if already made. Moreover, such a transfer would be a breach of the directors' fiduciary duties and liable to be set aside. This advice was shared with Herbert Smith LLP, the solicitors acting for the Protector of the TDT, who was the managing director of the Plaintiff.

64. On 21 May 2010, Quinn Emanuel forwarded to Herbert Smith Mr Auld's responses to questions the latter firm had raised on behalf of the Protector, Mr Hillier, in which Mr Auld confirmed his view, having seen the advice on BVI law, that the prospects of any successful recovery of the Somerfield Proceeds were less than 10%. The revised assessment flowed, at least in part, from Oscatello having gone into liquidation. Mr Auld further noted that the explanation given in the witness statement of Mr Sigurdsson, who was to give evidence for Kaupthing rather than on behalf of the Defendants, was convincing, again pointing away from the Scott's Agreement being binding as between R20 and Kaupthing. If that evidence were believed, it would be fatal to the Defendants' case.

65. A meeting with Mr Auld took place on 24 May 2010. It was followed by his further written advice dated 3 June 2010. He deals with two documents that had come to light during the course of preparing witness statements and which he had not seen previously. He noted that they provided further support for the view he had expressed previously as to the merits of the claims based on the alleged Scott's Agreement. In relation to the witness statements that had been served on behalf of the Defendants, he advised (at para. 3.1) that "*Any hope that the merits would be improved by the service of these witness statements, particularly those of Mr. Tchenguiz and Mr. Brown, was not justified.*" He revised his view about the likelihood of establishing the Defendants' case based on the Scott's Agreement down to being not any higher than 20%. This was a consequence of having seen Mr Sigurdsson's witness statement. Because it had always been recognised that the merits would be affected by how convincing that evidence turned out to be, this was something that had to await sight of the evidence. He also confirmed that the overall merits of the case were by then less than 10%. His conclusion was:

> "*In the circumstances, there is no realistic possibility in my view of TDT succeeding at trial in relation to the Scott's Agreement claim. Consistent with my previous Advice, both in writing and orally, TDT should now take urgent steps to settle this case with Kaupthing. The likely result at trial is that TDT will lose and be ordered to pay costs, probably on an indemnity basis … It is a matter for the Trustees themselves as to whether further continuation of these proceedings is a proper use of Trust monies. However, in my view, it is not.*
>
> *If it is not possible to reach a settlement on the best terms available with Kaupthing, TDT should give urgent consideration to serving a Notice of Discontinuance in relation to its Counterclaim.*"

66. Also on 3 June 2010, Quinn Emanuel provided to the Defendants a summary of the advices received. In their view, "*continuing with the Counterclaim in both England and in the BVI no longer serves any practical purpose, and may well expose the Trustees to an order for indemnity costs if the Counterclaim is pursued to trial*".

67. In relation to these advices, Advocate Wessels has concentrated on the advice on the prospects of success and how that must be factored in to the tactic adopted by the Defendants. The Defendants' tactic in the Somerfield Litigation was always to introduce the claim based on the Scott's Agreement into the proceedings "*with a view to creating a position where an acceptable negotiated settlement of the dispute in relation to the Somerfield Proceeds might be reached*" (Auld Advice, 20 April 2010, para. 7.5). In his submission, the poor prospects outlined by Mr Auld demonstrate that the Plaintiff has no real prospect of establishing that the Somerfield Litigation could have been conducted in any other way.

68. Advocate Swan, however, has concentrated on the shortcomings in the preparation of the Defendants' case which led to this situation. His simple submission is that "*what cannot be answered on a summary judgment application and on the documentary material currently before the Court, is whether the [Defendants'] prospects of success at trial and/or their prospects of securing a better settlement would have been improved had [they] properly prepared the case for trial.*" He points out that the Court has none of the material from which to assess the question of the prospects of success had the case been properly prepared before it and offers as examples that the documents of R20 are not before the Court, that the witness statements of Mr Tchenguiz and Mr Brown were prepared without the benefit of the chronological bundle of documents Counsel suggested should have been available and that the answers to the questions posed on behalf of the Protector do not reveal when and in what depth the Defendants considered these points and what action they took as a result. He suggests that the enquiry at the trial of the present action would have to consider what the position of the Defendants could have been had the failings pleaded not occurred. In doing so, Advocate Swan has acknowledged that the case the Plaintiff can advance is limited to one based on loss of chance. As such, he has also recognised that the Cause as currently pleaded would need to be modified through amendment. The loss claimed would be lower than the full amount of the Somerfield Proceeds. However, in reply, Advocate Wessels submits that

the Plaintiff's failure to challenge the advice given by Mr Auld shows that the Somerfield Proceeds were incapable of being retained in the TDT and that these are questions of law that have nothing to do with the conduct itself of the Somerfield Litigation.

69. It is necessary, in my view, to look closely and carefully at the allegations made in paragraphs 40 and 41 of the Plaintiff's Cause to see whether there is a real, as opposed to fanciful, prospect of the Plaintiff's allegation, even if confined to being a loss of chance case, being successful.

70. Paragraph 40(a) and (b) alleges that the Defendants' pleading was defective. Both of these issues were covered in Mr Auld's responses to the questions posed on behalf of the Protector by Herbert Smith. In the light of the responses indicating that these matters were considered but rejected, Advocate Wessels submits that the Plaintiff will be unable to establish that the Defendants have acted grossly negligently. Paragraph 40(c) and (d) concern disclosure of documents. In circumstances where it is apparent that nothing was written down in relation to the Scott's Agreement, which was the central plank of the Defendants' Counterclaim, and where disclosure was eventually given and Mr Auld has concluded that there was no supporting evidence pointing towards what was discussed at Scott's Restaurant becoming a legally binding and effective contract, Advocate Wessels again submits that there is no substance to the argument that these allegations could be found to be gross negligence. Paragraph 40(e), (f), (g), (i), (j) and (l) all refer to the preparation of witness statements. Advocate Wessels points out that Mr Auld, who was briefed to appear at the trial, did not consider that the delay in producing the statements or what was said in them affected his view of the merits of the Defendants' Counterclaim. Instead, it was more to do with having sight of the evidence to be adduced on behalf of Kaupthing that resulted in the prospects of success reducing from what was already a fairly bleak outlook. Again, Advocate Wessels questions how the pleaded case can support a real prospect of establishing gross negligence or wilful default. Finally, para. 40(k) refers to the application to adjourn the trial. This was made at the behest of the Protector for reasons I will turn to shortly rather than being a concession on the part of the Defendants that they were not ready for trial.

71. In respect of these matters, Advocate Wessels queries what relevance any of them have to what could or could not have been achieved through negotiation or through taking the case to trial. Instead, he suggests that these are complaints without any substance, which potentially explains why the Plaintiff has failed to offer any suggestion as to what could have been done better so as to make either of those differences, because the merits of the claim, and so the negotiating position the Defendants could adopt, were dictated by the legal realities as identified in Mr Auld's advice. Those legal realities would be no different were there to be a trial and so the hopelessness of the claim warrants summary judgment being granted.

72. The allegations that there were conflicts of interest for the Defendants were aired in evidence in Mr Hillier's witness statement signed on 21 May 2010. This statement was made in support of the application for an adjournment of the proceedings in the Somerfield Litigation to which I have just referred. At para. 11, Mr Hillier explained that:

> "*The Existing Trustees are in an untenable position in conducting these proceedings due to a conflict of interest. This is because, as explained further below, it is in their personal interests if the trust recovers as little as possible in these proceedings whereas, clearly, it is in the interests of the trust to recover as much as possible from these proceedings.*"

He then proceeded to set out at para. 13 the details of how this conflict arose by reference to the Guernsey 1 proceedings, ending with the comments that: "*Any amount secured by the Existing Trustees from the present litigation would of course be an asset of the trust. Any such proceeds would (subject to the value of the trust assets as a whole) be vulnerable to the Alleged Loans [to the BVI Companies]. In other words, the more that the Existing Trustee secures in the present proceedings, the more that they may be liable for to the beneficiaries in any claim against them by the new trustees (if the loans are found ultimately to exist).*" Mr Hillier also covered how he had lost confidence in the Defendant's management of the TDT's affairs, which was why he was exercising his power as Protector to replace them and

recommend to the new trustees that they consider commencing proceedings against the Defendants for breach of trust. Those new trustees would represent the interests of the beneficiaries rather than the Defendants having to represent both those interests and their own personal interests. He added (at para. 19) that he was "*very troubled by the approach taken by the Existing Trustees to the present proceedings and [was] very concerned that the Existing Trustees are not handling these proceedings properly*".

73. Advocate Wessels submits that the existence or not of a conflict of interest, which is denied in any event by the Defendants, is of no consequence where the Somerfield Litigation was settled in reliance on clear and emphatic advice from Leading Counsel. Advocate Swan made no further comments about para. 41 of the Cause. He has not sought to explain how the Defendants could have managed the alleged conflict any differently so as to achieve a better outcome.

74. It surprises me that the Plaintiff has chosen not to put more before the Court by way of showing cause against the summary judgment element of the Application, as permitted by rule 23 of the 2007 Rules. The Defendants' position has been clearly identified by reference to the advices given to them. As I have set out, the position at the outset was that there was an arguable case rather than a strong one but, with the passing of time and new developments, the prospects of success in the Somerfield Litigation worsened. The procedural steps that the Plaintiff has pleaded in para. 40 of its Cause must, I think, be viewed against the Defendants' strategy to try to secure as good a settlement as they could. It seems that, whilst aiming to keep the case alive so that judgment was not entered against them, no doubt with costs, they were intent on positioning themselves to that end. Accordingly, I regard one of the key events in the preparation towards the trial as being the mediation in March 2010. I note that the deadline for exchanging witness statements was originally only April 2010. This mediation was, therefore, to be conducted without the benefit of witness statements. It is apparent from looking at the series of advices given to the Defendants that the Defendants had placed great store in the prospect of achieving a commercially acceptable settlement at that time. One of the problems was that, with Oscatello going into liquidation a month earlier, their position had been adversely affected. This became much clearer when Mr Auld gave his advice after the mediation. The Defendants' strategy had to be re-thought. There has been no explanation from the Plaintiff as to why it says that the Defendants' strategy up to that time or after it was flawed. I regard all of these factors as having a direct impact on whether any of the allegations made by the Plaintiff has a real prospect of success.

75. It is clear from the advice before the mediation that the Defendants were seeking to negotiate the best possible terms. In those circumstances, I am satisfied that para. 40(a) and (b) contain allegations that have no real prospect of success. The state of the Defendant's pleading is irrelevant for this purpose. It would not, in my judgment, have assisted to overload the Counterclaim. I am confident that the other parties to the proceedings would have seen through that in the same way that Mr Auld's May 2010 responses show that the issues were considered but rejected.

76. Once the mediation failed, the landscape for negotiation changed. Whilst it is true that the Defendants faced an Unless Order, there was eventually compliance with the High Court's orders, so the position of the Defendants was not prejudiced in the meantime. I treat the fact that the terms of settlement reflected those that had been raised previously as being appropriate if the advice on the merits was as bleak as it became to be significant. It suggests strongly that the legal team assisting the Defendants achieved a respectable outcome and one that was within the parameters of being reasonable rather than negligent, and certainly not grossly negligent. In reaching that conclusion I am echoing some of the findings in Guernsey 1 of the Lieutenant Bailiff. It is, in my view, important to remember that the Plaintiff is required to prove a serious and flagrant breach of trust. Given that the Defendants were entitled to take and rely on the advice of their lawyers, I am quite satisfied that there is no real prospect of the Plaintiff succeeding on its claim in respect of the Somerfield Litigation.

77. In many respects, I am left with the impression that the Plaintiff is, like Mr Micawber, waiting for something to turn up. Quite what that will be is unclear to me because the Plaintiff has

failed to offer any explanation. Instead, there is little more than a suggestion that there are areas in relation to the way the Defendants' case in the Somerfield Litigation was conducted that need to be looked at more closely. However, I have not been persuaded by Advocate Swan that there is any substance in such an approach. I struggle to see how the alleged failings of the Defendants pleaded will be capable of being demonstrated to have a real or substantial chance, as opposed to a speculative one, of having caused any loss to the TDT. In these circumstances, I consider that the Defendants have discharged their burden of showing that any prospects of success on the Somerfield Litigation claim in the second part of the Plaintiff's Cause are no more than fanciful.

78. The second limb of the test is whether there is any other compelling reason why this aspect of the claim should be disposed of at a trial. Each case coming before the Court on an application for summary judgment has to be determined in the light of its own facts and by having regard to all the relevant material put before the Court in support of, and in opposition, to such an application. As I have already commented, there is a dearth of material put forward on behalf of the Plaintiff to show cause against this aspect of the Defendants' Application. In that situation, I am rather left to consider matters from the overall impression of the Plaintiff's claim and the general principle that the Court necessarily needs to exercise a degree of caution before concluding summarily that a claim cannot be pursued. I have asked myself whether there is something more to the case than obviously meets the eye.

79. In this regard, I take the view that it is easier for the Court to consider a claim such as this based on allegations of procedural shortcomings, even if they relate to the way a case should have been conducted before a court in another jurisdiction, because I believe I can make a realistic assessment of the merits or otherwise of what is alleged. There is a degree of overlap here with the assessment of whether there is a real, as opposed to fanciful, prospect of success, but I believe this shades into the second aspect of considering whether there is some other compelling reason for letting a claim found to have no real prospect of success be pursued. However, whichever way I look at the Somerfield Litigation claim from first principles, I can identify no compelling reason for permitting it to proceed. Even working on the basis that the claim would be amended to make it a tighter claim as a loss of chance case only, there is nothing outside of the consideration of the prospects of success that points towards such an outcome. In the absence of any hint from the Plaintiff in its evidence as to why, if the Court found that rule 19(2)(a) is satisfied, the Court should still dismiss the Application for summary judgment, of my own motion I have been unable to unearth such a reason.

80. Finally, although rule 19(2) leaves the Court with a discretion as to whether or not to grant summary judgment, I can see no reason not to do so. My conclusion, therefore, is that the Defendants have succeeded on their Application for summary judgment in their favour in respect of the Somerfield Litigation claim as it is found in paragraphs 24 to 47 of the Cause.

Abuse of process

81. The Defendants' allegation in respect of the bulk of the remainder of the Plaintiff's Cause is that these are matters that should have been raised in the Guernsey 1 proceedings and so constitute an abuse of the Court's process. This allegation also extends to the Somerfield Litigation claim, so I will address what I would have done about that claim had I not decided to enter summary judgment in respect of it.

82. The need for caution before striking out a claim as an abuse has been emphasised in England and Wales (see, eg, ***Bradford & Bingley Building Society v Seddon*** (*supra*, at page 1496) and I see every reason why a similar degree of caution should be exercised by this Court under rule 52(2)(b) of the 2007 Rules. Shutting a party out from its claim without a full hearing of its merits and demerits should only be done after the most careful consideration.

83. Advocate Wessels has criticised the Plaintiff in respect of the absence of evidence from it as to why the claims in the present action have been brought separately from Guernsey 1. In my view, it is less important for the Plaintiff to have adduced evidence on this issue than it has been in respect of its opposition to the summary judgment element of the Application. The

evidence adduced on behalf of the Defendants, particularly through the exhibits to the Second Affidavit of Mr Gonzalez is compendious. The inclusion of so much that was before the Court in Guernsey 1 is commendable in some respects to enable a complete picture to be formed, but it has also entailed me in submerging myself into matters that have already been decided by the Lieutenant Bailiff and reviewed by the Court of Appeal. Nothing in my approach is intended to go behind what has already been found and decided by those Courts. I have quoted quite extensively from the pleadings and the judgments because it has been stressed by Counsel that it is necessary to have an in-depth understanding of the Guernsey 1 case to be able to appreciate whether the present action is an abuse of process. With the benefit of hindsight, it may have been of more assistance had there been some shorter summary of the scope of Guernsey 1, with an indication of what parts of that summary are agreed and areas where there are divergences between the parties, from which to work. Advocate Swan suggests that if the Defendants' case on strike out is so plain and obvious, it begs the question as to why so much material was needed and why the written and oral submissions were so long. Although I consider that it is wrong to over-simplify the position in that way, I have some sympathy with it. The Bailiff added a postscript to his judgment in *Tranquillity Holdings Limited v Invista Real Estate Investment Management (CI) Limited* (unreported, 13 August 2015), which I echo in respect of this case.

84. I take as my starting point the fact that there have been proceedings between the Plaintiff and the Defendants before this Court relating to the TDT in which it was possible for the present allegations to be included. Because this is not a case in which another party would have needed to be joined to those earlier proceedings, the likelihood of finding there has been an abuse increases. The next issue for me to consider is the extent of the alleged overlap between the two actions.

85. Advocate Wessels submits that the Framework Agreement was at the heart of Guernsey 1 and will be central to this action as well. Advocate Swan suggests that Guernsey 1 focused on the loan agreements with the BVI Companies, which are outside the areas of consideration in the present case. Advocate Wessels submits that the level of overlap between the facts pleaded in support of the paragraphs of the Plaintiff's Cause dealing with the investment allegations and what was covered, particularly in relation to issue (7), in Guernsey 1 is considerable and that, in the absence of good reason, these allegations should have been brought within Guernsey 1 rather than left until afterwards. In doing so, he has drawn attention to the estimate that Advocate Swan gave to the Lieutenant Bailiff on 6 December 2013 when the costs applications were dealt with that the issues on which the Plaintiff lost occupied no less than 70% of the trial and the finding of the Lieutenant Bailiff apportioning the costs payable by the Defendants and the Plaintiff respectively to the BVI Companies 40:60 up to 5 October 2011 and 10:90 thereafter, albeit that this was an overall assessment rather than only by reference to the matters that can be treated as the overlap between the two sets of proceedings. Further, in general, the approach of the Plaintiff is an abusive one because it has been vexing the Defendants on a number of fronts with litigation and satellite litigation, which is a tactic that the Court should not tolerate. In that regard, although I will not mention the details, I am aware, and have taken into account, that there have been proceedings relating to the TDT in a number of jurisdictions, including a claim issued in the English High Court on 3 April 2013 (the so-called NS1 proceedings), from which it is clear that the trust and its present and former trustees are not exactly unused to litigating in respect of the TDT's affairs.

86. Paragraph 15 of the Cause alleges that the Defendants placed too much reliance on R20 as the investment adviser and asset manager to the TDT. The reliance of the Defendants on R20 was raised in their Defence to Counterclaim in Guernsey 1. From a review of the skeleton arguments and the transcript of the proceedings in Guernsey 1, it is clear that this element of the case was further developed and that witnesses who spoke on behalf of R20, eg, Mr Brown and Mr Smalley, gave evidence. Had the allegations in para. 15 been included in Guernsey 1, those witnesses would have been able to be questioned about them without potentially needing to attend a second trial. However, it is also apparent that the Defendants' assertion about their reliance on R20 was not addressed in the Lieutenant Bailiff's judgment to an extent that would now demonstrate the overlap for which Advocate Wessels argues. The facts relating to the allegations about R20 appear to go wider than what was at stake in Guernsey 1.

It will involve looking at the terms of the Consultancy Agreement in more detail than was the case in Guernsey 1. Whereas the references to R20 in Guernsey 1 seem to me to have been comparatively peripheral to the core issues, para. 15 of the Cause puts this as the first basis on which the Plaintiff claims to be entitled to relief from the Defendants. As such, I think that the extent of any overlap is quite minimal.

87. Paragraph 16 contains the claim that the Defendants failed to monitor the TDT assets from time to time and failed to diversify them or consider diversifying them. This paragraph does plead as fact some of the matters that were at the core of the Guernsey 1 case. However, the events referred to in para. 16 cover a longer period of time than was relevant for Guernsey 1. Advocate Wessels submits that this does not matter because what could and should have been done against the background of the financial pressures being experienced across the TDT was considered in detail in Guernsey 1, which means that the relevant underlying facts in Guernsey 1 have gone beyond just the restructuring by the Framework Agreement. I accept that the extent of any overlap is higher than in respect of para. 15.

88. Paragraph 17 also alleges that the Defendants placed too much reliance on R20. This is in the context that the Plaintiff is alleging that the Defendants permitted the TDT to enter into high risk investments and pursue aggressive investment strategies. Again, although there will inevitably be a degree of overlap between what needs to be dealt with in relation to this paragraph and what has already been covered in Guernsey 1, the new allegations go further. The focus of them is that the Defendants acted in breach of trust because of the effect of their failures to preserve sufficient assets for the minor beneficiaries or retain sufficient liquid reserves to hedge against collapsing markets, which is not something that appears to have been considered in Guernsey 1. There is more overlap than in respect of para. 15 but arguably less than para. 16.

89. Paragraphs 18 and 20 of the Cause contain specific allegations relating to Kaupthing. It is fair to acknowledge that the development of the relationship with Kaupthing was a key element of Guernsey 1 as it related to the Framework Agreement. These new paragraphs amount to more targeted allegations about the Defendants' alleged failures to diversify the asset base of the TDT and as regards their monitoring of the financial position of Kaupthing so as to be ready to react should that have become necessary. These were matters that were raised on behalf of the Defendants during the course of Guernsey 1. Accordingly, Advocate Wessels suggests that they should have been raised formally as allegations then rather than being deferred into these separate proceedings. Advocate Swan disagrees because these were matters that went beyond the issues being considered in Guernsey 1. There is, however, some degree of overlap, in my view, but it is also apparent that not everything that could now be said about Kaupthing was aired in Guernsey 1, ie, the overlap is not complete.

90. Paragraph 19 makes allegations about the poor manner in which the Defendants maintained records and other documents and how these were misused. Although these matters were not at the heart of Guernsey 1, by reference to the Plaintiff's written submissions, I accept that the Plaintiff had articulated its view that the Defendants' record-keeping "*was appalling*". There is, therefore, some degree of overlap with what has already been covered, which is acknowledged by Advocate Swan, although he adds that the issues pleaded at sub-paragraphs (c) to (f) were not decided by the Lieutenant Bailiff because they had not been pleaded and none of the evidence dealt with them.

91. On the question of overlap, I am satisfied that there are some areas of what will be in issue in these proceedings that have previously been addressed in some form in Guernsey 1. I do not, however, accept the submission of Advocate Wessels that the degree of overlap is as great or as significant as he suggests it is. In that regard, I prefer the analysis offered by Advocate Swan. The claims being made now are different from those made by the parties in Guernsey 1. I am further satisfied, as shown by para. 9 of the Lieutenant Bailiff's judgment, that Guernsey 1 was fundamentally about the loans, whereas the existence of those loans is now part of the canvas on which the allegations the Plaintiff wishes to pursue are to be painted. In my judgment, the extent of the overlap is still sufficient for me to find that the allegations in

the present action potentially could have been raised in Guernsey 1, but that does not mean that they should have been, which is the crucial consideration.

92. A further issue as to whether these allegations could have been raised in Guernsey 1 turns on what the Plaintiff did after receiving documents from the Defendants as a result of its successful application dated 8 August 2011 for delivery up of the files required by it. Advocate Wessels refers to what the Lieutenant Bailiff had to say at para. 14 of a judgment he delivered on 17 October 2013 on an application by the Plaintiff for leave to adduce further evidence from Robert Clifford and to have him recalled for further cross-examination in Guernsey 1, which was rejected:

> "*... the draft witness statement was in the possession of those advising the Present Trustee for some considerable time prior to the trial in June 2012. It was amongst the documents which were disclosed and produced in electronic form, pursuant to the order which I made in November 2011, it appears not later than January 2012. The reason why it was not put to Mr Clifford in the course of cross-examination must be that a deliberate choice was made: a choice either not to read the documents that were produced pursuant to my order or a choice, having read those documents, that the first draft statement would not be used. The likelihood is that the choice was not to read those documents at a time prior to the trial: that seems to be consistent with paragraph 18(a) of the second affidavit, dated 16 October 2013, sworn by Gary Richard Milner-Moore, a partner of Herbert Smith Freehills LLP, the London solicitors to the Present Trustee. He explained in that paragraph that the documents arrived at a busy time; that the Present Trustee and its advisers were then heavily engaged in preparing for trial; that they devoted its time and resources to that task; and that, only recently, in connection with other litigation, did they decide to read the disclosed documents and so identify the existence of the first draft witness statement. Having made the choice not to read documents obtained as a result of my delivery up order – or having made the choice not to use those documents at trial – it seems to me far too late now, in October 2013, to seek the recall of Mr Clifford for further cross-examination.*"

Advocate Wessels has also relied on what Mr Milner-Moore stated at para. 18(c) of his Affidavit sworn on 16 October 2013:

> "*Following the trial in these proceedings R&H considered that it would be in a better position to assess and formulate any potential claims against the Former Trustees following receipt of the judgment. Judgment in these proceedings would have a direct bearing on any assessment of the formulation and economic worth of any such claims. R&H anticipated that judgment would be received shortly following the trial and therefore aimed to defer any full review of the documents delivered-up until this time.*"

93. In the light of that material, building on the findings made by the Lieutenant Bailiff, Advocate Wessels submits that the Plaintiff's approach appears to have been to burden the Defendants with its application for documents dated 8 August 2011, which was distinct from and separate to the disclosure exercise needing to be undertaken in Guernsey 1, but in parallel to it, raising suspicions about the Defendants' conduct through the making of that application and then not to use the material to formulate any claims at that time but deliberately defer that step until afterwards. Then, having finally got around to reading the material, to formulate claims only once Guernsey 1 was over and then only to do so before judgment was given because it had been delayed longer than expected supports the conclusion that there was a choice about how to run matters rather than the Plaintiff's hands being tied. That combination of factors is, Advocate Wessels suggests, plainly abusive.

94. In that regard, Advocate Swan has endeavoured to explain that the Plaintiff has faced funding difficulties in respect of its pursuit of the various proceedings with which it has been involved. At the time of Guernsey 1, these problems were further complicated by the Serious Fraud Office investigation into Robert Tchenguiz. As a result of these factors, because the Plaintiff did not have its own resources to use for these purposes, the Plaintiff was forced to

put on the back burner its consideration of the documents and the investigation of the claims it had indicated it was duty-bound to consider. This was something that had already been put into evidence before the Court in opposition to the Defendants' application for security for costs. The Court should not now penalise a party for not having the resources adequate to pursue claims in the past when those resources became available later and when the claims were not out of time when the second proceedings were commenced. In short, what the Plaintiff has done has been to prioritise its efforts appropriately, which does not support the Defendants' contention that it has acted abusively. Moreover, it is legitimate in complex litigation to handle matters in a sequential manner like this.

95. The response to that suggestion from Advocate Wessels is that the evidence about the absence of funding has been shown historically not to have been credible. History has shown that, when pushed into doing so, funding has been made available to the Plaintiff from sources associated with Robert Tchenguiz. Had the Plaintiff felt it necessary to require funding, it is a reasonable inference that it would have been supplied. Instead, the implication is that the Plaintiff was deliberately deferring considering what steps it might take whilst awaiting the outcome of Guernsey 1. This was a tactical decision which can now be said to amount to an abuse of process.

96. I share the concerns that have been expressed by the Lieutenant Bailiff about the choice that has been made by the Plaintiff and its advisory team as to how to deal with the documents obtained pursuant to the order made following its application dated 8 August 2011. There seems to have been little point in making that application at the time it was made if the Plaintiff had not intended to make use of the documents quicker than turned out to be the case. I can understand that, in the minds of those controlling the Defendants, having been required to supply material outside the context of Guernsey 1 for the express reason that the Plaintiff wished to consider carefully whether steps should be taken to hold the Defendants to account for their performance as trustees more generally, there was an expectation that these matters would at least be ventilated in the context of the Guernsey 1 proceedings. When they were not, the Defendants can perhaps be forgiven for thinking that they would hear nothing further about these other allegations. More importantly, although I appreciate that the Plaintiff had to seek funding from elsewhere because it did not have control of the assets of the TDT, I am satisfied that, had the request for funding been put on the basis that it was essential to review the documents at that time, rather than choose to defer that exercise, the resources to do so would have been made available to it. In summary, therefore, the funding position does not affect my conclusion that the Plaintiff could have brought the claims in the present proceedings in Guernsey 1.

97. Because of the explanation given in making the application dated 8 August 2011, I do not regard the Plaintiff's action as involving it keeping claims up its sleeve. Although it may not have spelt out explicitly what it had in mind, and what is now pleaded, this is not, in my view, the type of case where it can be said that what has now happened comes as a complete surprise to the Defendants. The level of overlap to which I have referred supports that view. Further, in relation to the Somerfield Litigation claim, and in particular the allegations that the Defendants had conflicts of interest as set out in para. 41 of the Cause, I note that these had been raised in Mr Hiller's witness statement signed on 21 May 2010, which was used to seek a late adjournment of the trial. I am, therefore, satisfied that the Plaintiff had not remained silent in the manner referred to by the Master of the Rolls in *Stuart v Goldberg Linde* (*supra*).

98. The next consideration is Advocate Wessels' criticism of the Plaintiff failing to raise the likelihood of further claims being made within the Guernsey 1 proceedings so as to permit the Court to engage in active case management. It is quite clear from the English authorities to which I have referred, especially para. 30 of the *Aldi* case (*supra*) ("*for the future, if a similar issues arises in complex commercial multi-party litigation, it must be referred to the court seised of the proceedings. It is plainly not only in the interest of the parties, but also in the public interest and in the interest of the efficient use of court resources that this is done. There can be no excuse for failure to do so in the future.*"), that if these proceedings were being conducted in the High Court the failure of the Plaintiff to raise with the Lieutenant Bailiff its wish to bring further claims against the Defendants would pose considerable

problems for it now in seeking to resist the striking out of its subsequent proceedings. Of course, as a matter of Guernsey law, there is no such existing guidance on which the Defendants can rely. Accordingly, I cannot, in my view, be as critical of the Plaintiff as an English judge inevitably would be. However, I cannot overlook that Advocates in this jurisdiction often have regard to principles deriving from the Civil Procedure Rules, especially where there is as yet no domestic law jurisprudence on the issue. Further, I am conscious that the parties to this action have teams of lawyers who include their English solicitors. The multi-jurisdictional aspect of the litigation in which the parties have involved themselves cannot be ignored. All of this points towards the parties' lawyers, including Advocate Swan, who has overall conduct of the litigation on behalf of the Plaintiff in Guernsey, being conversant with the English case law on striking out for abuse of process, even if there are no Guernsey cases acknowledging that the guidance is applicable. For the avoidance of doubt in future cases, I wish to make it quite clear that these principles form part of Guernsey law. In relation to the present case, I find that the Plaintiff should have been more forthcoming with the Defendants and the Court and at least raised the possibility of bringing into Guernsey 1 some or all of the claims now being made. In doing so, the Plaintiff would have been complying with its obligation under rule 1(4) of the 2007 Rules "*to help the Court to further the overriding objective*". The fact that it did not is something that I consider tips the balance towards the conclusion that there has been an abuse of process, but it is not a complete answer to the question of whether the claims, or any of them, should have been brought in Guernsey 1.

99. In order to resolve that issue, I take the view that I have to analyse whether the position would have been different from what has since happened if, at the very least, the prospect of these further claims had been aired in Guernsey 1. To an extent, this involves speculating as to what would have happened had the Lieutenant Bailiff properly been seized of the claims now being pursued by the Plaintiff against the Defendant. Although I could speculate as to what the Lieutenant Bailiff would have done, just as Advocate Swan has done through submitting that it would be fanciful to suggest that he would have been disposed to add additional claims against the Defendants at the very late stage at which that could have been done, the best I can do is to consider how I would probably have reacted if faced with the position of having to decide whether to delay the trial fixed for June 2012 to admit the additional claims or to proceed.

100. Case management in Guernsey, rightly or wrongly, does not appear to me to be conducted in quite the same robust way as it is in England and Wales. In saying that, I have to shoulder most of the burden for what might be perceived to be a failure to give full effect to the terms of the 2007 Rules, which make similar provision to the Civil Procedure Rules. Although the number of Advocates who appear regularly in the Court in civil matters continues to grow, the Guernsey Bar is still quite a small group of professionals and the impact that follows when a number of the senior practitioners are all involved in a complex and lengthy matter, eg, on the scheduling of other matters in which any of them is involved, is obvious from the Court's experience. Unlike in larger jurisdictions, such as England and Wales, there are fewer Advocates to whom parties can turn to take their cases if their Advocate of choice is unavailable. Further, there seems to me to be a reluctance among the Advocates to want any of their colleagues to handle cases in which they regard themselves as being personally instructed. There continues to be, as there was before the 2007 Rules entered into force, a good number of occasions where the Advocates agree on behalf of the parties what the case management steps should be without those stages being driven by the Court. Timetables are then modified by agreement between the Advocates to which the Court almost always acquiesces. In those circumstances, the scope for the Court actively managing cases is tempered by the practices continuing to be adopted at the Bar. This is rather more passive case management than the Rules suggests should be the norm. None of those comments is intended to be critical about how proceedings continue to be conducted, but they are the stark realities against which case management of proceedings operates. As such, the cultural change across the legal profession that I understand was intended to be brought about in England and Wales by the Civil Procedure Rules, and which reading the various judgments shows has, to a certain extent at least, been achieved, has not been replicated to the same degree in Guernsey. However, there is also considerable flexibility in the Guernsey approach.

Although the full-time judiciary is small in number, and larger cases, such as Guernsey 1, have traditionally had to be allocated to a Lieutenant Bailiff, getting before a judge is generally comparatively straightforward. In the absence of agreement between the parties' Advocates as to what the directions should be, raising the matter before any of the judges, whether the trial judge or another judge, is possible and is the course of action that should be followed. Moreover, vacating trial dates and re-arranging the Court's business is probably more straightforward in Guernsey than in larger jurisdictions because of the flexibility to which I have just referred.

101. With that in mind, I agree with Advocate Wessels that the proper process ought to have been to have addressed the issue of further claims against the Defendants before the trial in Guernsey 1. It would then have been the function of the Court to hear the representations of all the parties convened in Guernsey 1 on the different options and decide how to deal with the whole case justly. It should not have been the unilateral choice of the Plaintiff as to how to conduct its claims.

102. I expressly reject Advocate Swan's submission that when the Lieutenant Bailiff determined the application of 8 August 2011 for the delivery up of materials he must have realised that other proceedings were being contemplated and so could have directed at that time that they must be brought within the Guernsey 1 action, but chose not to do so. In my judgment, that involves imputing too much to him by way of active case management. The documents were sought so that the Plaintiff could consider what claims, if any, to bring. In my view, it would have been premature to give a direction as suggested by Advocate Swan at that time. To have done so might even have been construed as inviting the Plaintiff to identify claims to bring within Guernsey 1, rather than simply leaving to it the responsibility for reviewing the documents and then deciding how to proceed. The Plaintiff cannot lay the blame for its failure to raise these matters in Guernsey 1 on the Court.

103. I also reject the suggestion from Advocate Swan that because the Plaintiff had been joined to Guernsey 1 as the Fifth Defendant and was raising matters in that capacity against the Defendants by way of counterclaim that they should somehow be treated differently. Rule 30 of the 2007 Rules treats a counterclaim as a cross-claim. It can have a life independent of the action in respect of which the counterclaim is made. It must, therefore, be correct to view the position of the Plaintiff as the counterclaimant in no different way from a plaintiff commencing two sets of proceedings.

104. Had the claims now pleaded in the Plaintiff's Cause been proposed to have been added to the relief it was seeking against the Defendants in Guernsey 1, I think it is unlikely that there would have been an order vacating the Guernsey 1 trial listed for hearing in June 2012 and that the position would have essentially been as it now is. My reasons for reaching that conclusion are as follows. I take the view that the BVI Companies would not have wished to have these claims heard at the same time as the proceedings dealing with the loans to them. No one has offered any accurate estimate of how long the trial before the Lieutenant Bailiff would have become had there been a single trial, but it seems to me not to be unreasonable to expect the trial to have doubled in length. This would have had no bearing on the resolution of the issues between the BVI Companies and the other parties. Guernsey 1 started life with the Defendants applying for directions. This was solely in the context of the loans and so a reasonably narrow issue. It would, in my view, have been transformed into quite a different trial if the allegations now raised by the Plaintiff had also been included. In those circumstances, had I been faced with what to do in the spring of 2012, I strongly suspect that I would have ordered the trial in Guernsey 1 to have proceeded as planned and delayed the additional claims for another day, thereby avoiding the BVI Companies being involved in matters that were of no interest to them. In saying that, I have considered the guidance offered by Hamblen J in *Brown v Innovatorone* [2011] EWHC 3221 (Comm) in support of permitting amendments even if the trial dates may be jeopardised, to which Advocate Wessels has referred. That judgment makes it clear that it is "*a question of striking a fair balance and that is a fact-dependent exercise*" (para. 49). I also note that what was involved was described as being "*these limited number of new allegations*". The position in the present

case, though, seems to involve more extensive amendment by the Plaintiff and so is capable of being distinguished, to the extent that resort needs to be had to such a principle.

105. In any event, Advocate Wessels, very fairly and quite properly, acknowledged that the Somerfield Litigation claim in the Cause could have been severed from the remainder (and for these purposes, I am disregarding para. 21 of the Cause, to which I will turn shortly). As soon as it becomes apparent that the whole of the case of the Plaintiffs against the Defendants might be managed through separate trials, the strength of the argument that the failure to raise this at the time is an abuse reduces. Had I been the judge sitting in the spring of 2012, I would have needed to decide whether the other allegations sat more sensibly in the trial involving the BVI Companies and their loans or in the wider allegations made by the Plaintiff that the Defendants had acted in breach of trust, ie, to be coupled with the Somerfield Litigation claim. In that regard, I have noted Advocate Swan's submission that the relief sought in Guernsey 1 differs from the relief now being sought. Previously, the Plaintiff's primary case was that the Defendants should not be entitled to rely on their indemnity over the assets of the TDT, with the alternative case being that they provide an account requiring them to pay into the trust fund before they could indemnify themselves. The relief now sought against them is compensation for breach of trust.

106. In my opinion, this issue is very finely balanced. If I could have been persuaded that there would only have been a short delay in re-listing the trial dates and that the length of the trial would not have increased by very much at all, I would probably have concluded that the only aspect to sever was the Somerfield Litigation claim. However, if I had recognised that it would delay the trial involving the BVI Companies and result in them having to waste time sitting through too many days of evidence and argument that had no relevance to their participation in the trial, I would probably have concluded that it was most sensible to proceed as planned and leave the new claims to be commenced in separate proceedings, as has been the case. The Defendants, through Advocate Wessels, have not provided a clear picture as to what the pros and cons of this case management aspect would have been at the time they would have been under consideration and, because the Defendants bear the burden of establishing the abuse of process on which they rely, that is why I have concluded, on balance, that I would have been more likely to have decided that the additional claims the Plaintiff wished to raise should not be included in Guernsey 1 but dealt with separately. In some respects, this is the result of the overall impression I have formed as to the most effective way to manage the claims. Splitting the trial broadly as the Plaintiff has done by the way it has pursued its claims separately against the Defendants "feels" the right way to have dealt with them.

107. This means that the Plaintiff's failure to raise the additional claims before the Guernsey 1 trial and allow them to be case managed at that time is not a factor that indicates that claims should have been made in Guernsey 1. Whilst in future the Court should be involved in reaching these decisions through proper case management, in the present case I am just satisfied that the failure to raise these matters back in 2012 has not affected the way in which the case would have been managed. I would also have borne in mind who the witnesses for each part of the action would have been and the inevitability that some witnesses would be required to give evidence twice, but that inconvenience to them has to be balanced against the inconvenience to the BVI Companies as parties and I would have concluded that fairness to the parties prevailed over fairness to witnesses. It might be different if it had been explained in credible evidence that the witnesses were prepared to attend voluntarily only once, bearing in mind that few of them could be summonsed to do so, and the consequences of that happening.

108. The final matter to consider in respect of the alleged abuse of process is the Defendants' submissions on the inconsistency of the Plaintiff's positions between Guernsey 1 and the current action. Advocate Wessels' argument is that in Guernsey 1 the Plaintiff contended that the Defendants should have followed the advice of R20 and Robert Tchenguiz, but failed to do so properly and so failed to ensure that the assets in the Oscatello Structure were ring-fenced from other assets in the TDT, whereas now the pleaded case contends that the Defendants should have refused to follow the advice of R20 and Robert Tchenguiz and should

have caused the immediate realisation of the investment from August 2007 onwards. This is shown most clearly by the Plaintiff responding "yes" to the request "*Does the Plaintiff contend that the Defendants ought to have refused to enter into the Framework Agreement?*" (Response 17 of the Plaintiff's Response to the Defendants' Request for Further and Better Particulars of the Plaintiff's Cause), which he described as constituting a *volte face*. He submits that the Plaintiff's wish to advance an inconsistent case now is a further factor demonstrating that there is an abuse. He relies on the principles of common law election set out earlier.

109. In response, Advocate Swan submits that the position of the Plaintiff is not covered by the doctrine of election. Had the claims been made in a single action, it would be permissible to run alternative arguments dependent on the findings of the Court on the primary case. He suggests that it is important to look at the mischief behind the rule, which is that a party should not be permitted to advance different cases in different proceedings and succeed on both. That is plainly not the case for the Plaintiff. The argument put forward in Guernsey 1 has been found to be unsuccessful. The intention in the present action is to advance the alternative basis of presenting the Plaintiff's case about the execution of the Framework Agreement. It may be successful, but the Plaintiff's failure in Guernsey 1 does not mean it is now prevented from pursuing the alternative case.

110. I agree with Advocate Swan's analysis. In my judgment, the position of the Plaintiff is not one where the common law principle of election, as set out in the ***United Australia*** case (*supra*) and explained in the ***Express Newspapers*** case (*supra*), applies. Had all the claims been made in a single set of proceedings, the Plaintiff would have been able to pursue its alternative positions, but could only have asked to take judgment on one of them. Putting to one side all the other arguments made that to pursue the claims now is an abuse, I do not regard the submissions on inconsistency as being more than another aspect of the factor that I have just dealt with in respect of case management. Because the Plaintiff has chosen to bring these claims after the conclusion of Guernsey 1, it looks as though they are trying to have two bites at the cherry in a way that offends against the principle. However, if one stands back and considers what would have happened had the Plaintiff sought to amend its case in Guernsey 1, I am not persuaded that the Defendants could have objected to the alternative ways in which the case is to be put. If there are findings that have been made that now cause the Plaintiff some problems, those are matters that may be dealt with by way of raising estoppels. The Defendants' position on their Application is not to rely on the doctrines of *res judicata* (in the narrow sense) or issue estoppel, whilst at the same time reserving their position on the latter in the future. In those circumstances, I have not proceeded to consider whether any such estoppels would affect my decision. Instead, all I have done is to consider whether the inconsistent case amounts to a factor showing that there is the abuse alleged and I have concluded that it is not.

111. In summary, therefore, as I have explained, the Defendants have produced adequate material to show that the claims in the present action could have been raised in Guernsey 1, or at the least the prospect of them being added to the action, by an appropriate application. There is also evidence showing the existence of some factors pointing towards the conclusion that the claims should have been raised at that time, but there is other evidence pointing away from that conclusion. I have reminded myself that this is not a situation where the Court is exercising a discretion, but rather deciding whether the Defendants have established the abuse alleged or not. I have been in two minds as to whether the Defendants have persuaded me that the Plaintiff's approach now is an abusive one. I believe that the arguments are very finely balanced. I have, however, concluded that the Defendants have not satisfied me that what has happened meets the tests I have applied. Each decision on an application pursuant to rule 52(2)(b) is very fact-specific. On the particular facts of the present case, I am just about persuaded that the outcome would be broadly the same as it now is, namely that the trial in Guernsey 1 would have proceeded in June 2012 and the additional claims, whether actually in a pleaded form or through intimation, would have been case managed into a separate trial process.

112. I should add one minor qualification to that general conclusion. Had I not already decided to enter summary judgment in favour of the Defendants in respect of the Somerfield Claim, I would have needed to re-consider whether the allegations at paragraphs 40 and 41 of the Cause should now be dealt with differently from the other claims made in the Cause. Although it is possible that I would simply have acceded to the suggestion that the Somerfield Litigation claim could be severed, I am slightly troubled by the inclusion of para. 41 raising the alleged conflicts of interest of the Defendants because this has been shown to have exercised Mr Hiller's mind as long ago as 2010 when it was the basis for the failed application to adjourn the trial in the High Court. I mention this point solely because, had I needed to determine the issue, I might have looked very carefully at para. 41 of the Cause in isolation to decide whether this allegation falls the other side of the line and amounts to an abuse. Whilst expressly leaving open that question, it is possible that I would have concluded that the Plaintiff's introduction of this alternative basis of alleging breach of duty at such a late stage, especially where this allegation was not, in my view, as dependent on the Plaintiff having the time and resources to review the material disclosed as the remainder of the claim appears to have been, was indeed abusive.

Collateral attack

113. The Plaintiff's allegations in para. 21 of its Cause could not, of course, have been raised in the Guernsey 1 proceedings, but are challenged by the Defendants *inter alia* on the basis of amounting to a collateral attack on the Lieutenant Bailiff's decision, which has been recognised as constituting a possible form of abuse of process. The allegations made have been further explained by Advocate Swan as being first that, because the Defendants were hasty in commencing the Guernsey 1 proceedings, which led to their application being re-pleaded at a cost to the trust fund, there has been a failure to preserve the TDT assets. The second complaint is that the way the Defendants conducted their defence to the counterclaim instituted by the BVI Companies failed to assist with the arguments being deployed by the Plaintiff. The third element is that proceedings for relief sought in a related action, heard in private, led to the TDT becoming paralysed, with delays being introduced into the decision-making processes, resulting in losses of opportunity of entering into profitable investments.

114. Comparatively little was said about this element of the Application, both in the written submissions and orally. The Defendants' primary case is not predicated on this argument. However, it seems sensible for me to address it as a type of abuse of process claim immediately after outlining my decision on the ***Henderson***-type abuse advanced by Advocate Wessels generally.

115. The strongest point made on behalf of the Defendants is that the defences the Plaintiff alleges at para. 21(c) were run by the Plaintiff and rejected by the Lieutenant Bailiff. However, the way the allegation is pleaded is subtly different from mounting a challenge to those findings. Response 67 of the Plaintiff's Response to the Defendants' Request for Further and Better Particulars of the Plaintiff's Cause is:

> "*The Defendants should have advanced the argument that the inter-company loans had been novated to Oscatello from July 2008 onwards, that such novations had been agreed and intended by the companies and the Defendants, with the result that the BVI Companies had no claim against the Defendants. Further, in relation to the Oscatello liability, the Defendants should have advanced the defence that there was no restitutionary claim available to Oscatello and further that there was no loan agreement or other contractual liability between Oscatello and the Defendants.*"

As I understand the Plaintiff's case, it is being alleged that the Defendants should have aligned themselves to the case being mounted by the Plaintiff. This will involve consideration of whether different and additional material could then have been made available in evidence at the trial in Guernsey 1 that might have resulted in a different outcome. Whilst this is

getting perilously close to being the type of collateral attack to which reference was made in the ***Bairstow*** case (*supra*), it does not appear to be the relitigation of the same issue with a view to seeking to challenge the actual findings made. Those findings have resulted in a judgment in favour of the BVI companies. They also bind the Plaintiff and the Defendant. In the context of the present action, that decision cannot be affected by the Plaintiff seeking to test whether the trust fund has sustained losses as a result of the allegations pleaded at para. 21. The nature and extent of the allegations in para. 21 are not the same as in Guernsey 1. They will involve reviewing what would have happened had the Defendants acted differently in its conduct of those proceedings. Focusing solely on whether making these allegations amounts to an abuse of process, and so disregarding for a moment how they are pleaded and whether they have a real prospect of success, I am not persuaded that there is a collateral attack of the type covered in the authorities to which I referred earlier and so will not strike out para. 21 of the Cause on this basis. However, this conclusion is not strictly a necessary one for me to reach because of the way in which I have determined the Application in respect of para. 21 set out below.

Rule 52(2)(a): no reasonable grounds for claims

116. Having concluded that the Defendants have failed to persuade me that the first half of the Cause, or any particular part of it, should be struck out as an abuse of process, I consider next whether any of these claims is liable to be struck out as disclosing no reasonable grounds for bringing it pursuant to rule 52(2)(a) of the 2007 Rules. In doing so, I remind myself of the high threshold imposed on the Defendants of establishing that the claims made are "*unarguable*" or "*bound to fail*". The Defendants advance this ground only in respect of paragraphs 19 and 21 of the Cause and the Somerfield Litigation claim, which I will touch on briefly because, having given summary judgment in respect of it, no decision is strictly required.

117. In respect of para. 19, Advocate Wessels accurately points out that the Plaintiff has made no real attempt to relate these allegations to any particular loss but rather links it to the general loss pleaded at para. 23 of the Cause:

> "*By reason of the Defendants' breaches, there has been a loss in the value of the TDT trust fund which the Plaintiff estimates at £264 million or such other figure as the Court may find on an inquiry as to loss suffered.*"

This led to various requests for further and better particulars being raised. In respect of para. 19(a), Response 48 of the Plaintiff's Response to the Defendants' Request for Further and Better Particulars of the Plaintiff's Cause states:

> "*The loss from the said breach of trust was as follows:*
>
> *(a) The costs incurred by the Plaintiff in seeking delivery up of the books and records of the TDT from the defendants to the extent that it will not recover such costs from the Defendants in claim no. 1462/2010;*
>
> *(b) The time and costs incurred by the Plaintiff in going through all of the electronic documents and the paper files provided by the Defendants in order to ensure that (i) documents relating to other trusts and the Defendants' personal position were removed; and (ii) the documents relating to the TDT were complete; and*
>
> *(c) The time and costs incurred in trying to understand the operation of the TDT.*"

Response 51, in respect of para. 19(c) of the Cause and pending disclosure, states similarly to Response 48(a) that the consequential loss "*includes the irrecoverable costs arising from the application for injunction against the Joint Liquidators and/or the BVI Companies*". Response 54, in respect of para. 19(d), states:

"*The loss from the failure to record these dealings in writing were as follows:*

(a) The loss suffered when Kaupthing, contrary to its representations and assurances, closed out the TDT's positions on the M&B and Sainsbury's CFDs;

(b) The loss of the proceeds from the sale of Somerfield; and

(c) The costs and expenses incurred in relation to the Somerfield proceedings in the BVI and in England."

Response 58, in respect of para. 19(e) and also pending disclosure, relates the loss suffered to the fact that "*the TDT continued to borrow to meet margin calls in respect of these investments [ie, the M&B and Sainsbury's shares] in order to retain them. Had those representations not been made the TDT should and would have not retained those investments and would therefore not have had to increase its borrowings to the extent it did in order to meet the margin calls for such investments*". In respect of para. 19(f), the Plaintiff's Response 61 cross refers to its Responses 54 and 58.

118. Advocate Wessels submits that the case pleaded against the Defendants in para. 19 as supplemented by the Plaintiff's Responses (extending also to those which do not deal with the alleged losses) have not been adequately clarified in the time available since the Cause was first tabled and are futile. More specifically, he suggests that the losses mentioned in Response 48 are not recoverable by the Plaintiff in a breach of trust claim, but fall to be decided in the other proceedings to which they refer (and makes a similar point in respect of para. 19(c) and Response 51) and, in any event, the "*time and costs incurred in trying to understand the operation of the TDT*" are a feature of the appointment of a new trustee and are not a basis for seeking equitable compensation for breach of trust. In respect of para. 19(b), the alleged failure to know whether or not advice given to the Defendants had been paid for out of the TDT assets cannot conceivably result in the losses pleaded. Finally, in respect of para. 19(d)-(f), the losses are predicated on what would have happened if Kaupthing had apparently not made certain representations, which cannot flow from any breach by the Defendants to fail to record what happened.

119. The response of Advocate Swan is that the Responses to which I have just referred provide the particularisation of the heads of loss that can currently be given. He has explained that the Plaintiff's case is that, in the Guernsey 1 proceedings (and also by extension the Guernsey 2 proceedings), any costs that can be recovered will still not totally indemnify the Plaintiff, and so the TDT, for the costs that have been incurred. There will always be some shortfall in the costs position and the Plaintiff now seeks to recover such a difference in amount from the Defendants because it alleges that this follows from their breaches of trust. The Plaintiff's allegations about the need to go through the trust documentation to weed out items that should not have been there is something directly attributable to the poor state of the paperwork handed over to it on the change of trusteeship. The Plaintiff should not have to bear the burden of those costs and nor should the beneficiaries. In respect of para. 19(d)-(f), the losses alleged follow from the fact that the Plaintiff has been unable to hold Kaupthing to the bargains it is said were made where, if they had been properly recorded, the ambiguity that has existed would have been reduced or avoided. As such, this is not dependent on Kaupthing's actions but focuses squarely on the alleged breaches of the Defendants.

120. The reply from Advocate Wessels again analyses the Responses and argues that the losses being claimed remain obscure and that this obscurity has not been addressed by Advocate Swan in his submissions. In particular, he suggests that there is no causal link between Response 54(b) and (c) and the pleading at para. 19. Because this relates to the Scott's Agreement, even if the Plaintiff were to succeed on this allegation, it would not give rise to any entitlement to the Somerfield Proceeds or the costs and expenses in the English litigation, which would depend on alleging that those proceedings ought not to have been brought at all, which is not what is pleaded. The Defendants criticise para. 21 for its lack of coherence generally, with which I have some sympathy, but do not go so far as to say that the allegations

contained in it are unarguable or give rise to no claim that is recognisable in law because, if proved, there is potentially some amount of compensation that could be ordered to be paid.

121. I agree with Advocate Wessels, that the pleading at para. 19 of the Cause as supplemented by the Responses, both on loss and more generally, is opaque. The basic allegation is that there has been a breach of the Defendants' duties as trustees to preserve and enhance the value of the trust fund and/or to act with due diligence as prudent persons by keeping the TDT documentation confidential and separate and failing to ensure proper records were kept. The Defendants still have no clear idea as to what it is alleged their liability for these alleged breaches is. The figure in para. 23 of the Cause appears to be very wide of the mark and, even if it is regarded as a ceiling where further particulars might clarify what it is alleged is recoverable, there has been a reluctance on the part of the Plaintiff to be as helpful as it potentially might have been with its Responses.

122. Having regard to the particulars set out in sub-paragraphs (a) to (f), although there may well be some estoppels arising from the Lieutenant Bailiff's decision in Guernsey 1, I do not think that the opacity is such that I can rule that there is no cause of action here in circumstances where the Defendants have indicated that they do not advance any issue estoppel or *res judicata* argument in support of their Application. This is, in my view, an allegation where the Court should afford the Plaintiff the opportunity to remedy its pleaded case through amendment, rather than moving directly to the draconian remedy of striking out para. 19 of the Cause without further ado. Having said that, I have gone on to consider whether there is any part at all of para. 19 (as supplemented by the Responses to which I have referred) which falls the wrong side of this line and should be struck out now.

123. In that regard, I am especially troubled by the way Response 54 overlaps with what has been claimed under the Somerfield Litigation part of the Cause. Having decided that that aspect of the Plaintiff's claim is liable to being dismissed through summary judgment, it would, in my view, be inconsistent to permit the Plaintiff to pursue this aspect of its allegations indirectly through para. 19 of the Cause. However, the allegations in para. 19(d) and (f), to which Response 54 relates, are wider than just what was relevant to the Somerfield Litigation claim, with the consequence that I do not consider the solution to be as straightforward as ordering either or both of those sub-paragraphs (or just Response 54) to be struck out. I am confident that Advocate Swan will appreciate the distinction I am drawing and so take steps to remedy the Plaintiff's pleaded case so that it is sufficiently clear what para. 19 is claiming and how the alleged loss is to be calculated in a manner that Advocate Wessels and the Defendants are able to understand. For this reason, I will not strike out para. 19 of the Cause pursuant to rule 52(2)(a).

124. Turning to para. 21, Advocate Wessels similarly complains that the allegations made fail to articulate the loss sustained by the TDT. In respect of sub-paragraphs (a) and (b), Response 66 of the Plaintiff's Response to the Defendants' Request for Further and Better Particulars of the Plaintiff's Cause states:

> "*The losses suffered by the Plaintiff will be a matter for disclosure. Pending disclosure, the Plaintiff's identified losses include the additional costs incurred in the Declaratory Relief Application arising out of the manner in which it was commenced (which include the losses incurred as a result of the need to replead and revise the claim in summer 2011).*"

In respect of para. 21(d) and the allegations relating to the TDT being placed under Court-supervised administration, Response 69 states:

> "*The loss suffered by the TDT were the very considerable costs incurred in managing the TDT under Court supervision; in particular the very considerable costs incurred in respect of transactions that were brought before the Court. Such costs, if they have not already been charged to the TDT assets, will eventually be so charged. In addition, the Court supervision process effectively paralysed the TDT and therefore caused the loss of the opportunity to engage in other potentially profitable transactions. The Court supervision also slowed down the decision-making process,*

> *which led to delays, for example in relation to the Farnborough transaction, which caused significant losses.*"

125. I can see the force in the submission of Advocate Wessels that the costs in the Guernsey 1 proceedings are properly a matter for the Court in that case, rather than something to be resolved in these proceedings. If the Plaintiff wishes to argue that the Defendants should not have recourse to the TDT assets to pay themselves their costs in respect of those proceedings, as a matter of principle those arguments might more properly be addressed in the context of Guernsey 1. However, I understood Advocate Swan to have focused on the difference between what has been obtained by way of costs from others and what could have been obtained, as well as what has had to be paid to others, had different decisions been taken by the Defendants in the conduct of those proceedings. To that extent, I do not think that these sub-paragraphs are inevitably bound to fail where the opportunity to clarify the pleading of them could be offered.

126. In relation to para. 21(c), Advocate Wessels submits that this allegation is the crux of the complaint the Plaintiff now wishes to advance. This allegation about not pursuing certain defences to the counterclaim of the BVI Companies in Guernsey 1 also has to be viewed in the light of Response 67 to the Plaintiff's Response to the Defendants' Request for Further and Better Particulars of the Plaintiff's Cause:

> "*The Defendants should have advanced the argument that the inter-company loans had been novated to Oscatello from July 2008 onwards, that such novations had been agreed and intended by the companies and the Defendants, with the result that the BVI Companies had no claim against the Defendants. Further, in relation to the Oscatello liability, the Defendants should have advanced the defence that there was no restituionary claim available to Oscatello and further that there was no loan agreement or other contractual liability between Oscatello and the Defendants.*"

As Advocate Wessels suggests, there can only be a breach of trust if these defences were capable of being pursued by the Defendants with some prospect of them succeeding. Advocate Swan accepts that the Plaintiff, as the Fifth Defendant in the Guernsey 1 action, advanced these defences and the Lieutenant Bailiff rejected them. However, the Plaintiff wishes to argue that, had the Defendants assisted them, the outcome might have been different. In particular, they may have called as witnesses at the Guernsey 1 trial current or former employees who may have had relevant evidence to provide.

127. This appears to me to be highly speculative. The fact that the Lieutenant Bailiff rejected these arguments is significant. As he noted at para. 97 of his judgment, "*Neither the present trustee, nor the trust property, is bound by an admission made by the former trustees after they had ceased to be trustee*". Aside from the Response saying that the Defendants should have aligned themselves positively to the Plaintiff's case, the Plaintiff has not explained in its pleaded case what the Defendants could and should have done in this regard. However, I am not persuaded that para. 21(c) in itself discloses no reasonable cause of action warranting being struck out. This is another example where the loss in para. 23 does not seem to flow from this allegation, meaning that it would have been better to spell out the causal link to a more realistic level of loss (although I note that no request for further and better particulars was raised in respect of this sub-paragraph) but, because rule 52(2)(a) of the 2007 Rules involves looking at the pleaded case, I believe that this type of shortcoming could be dealt with by way of further amendment to the pleading.

128. Finally, in relation to para. 21(d), Response 68 of the Plaintiff's Response to the Defendants' Request for Further and Better Particulars of the Plaintiff's Cause concedes that "*The commencement of proceedings with Court File No. 1505/2010 did not per se constitute a breach of trust*". In the light of that, Advocate Wessels argues that it is not open to the Plaintiff now to recover in the present proceedings the costs resulting from the Guernsey 2 proceedings because, as with the costs of the Guernsey 1 action, the more appropriate forum to apply for costs orders is within those proceedings themselves. Further, the notion that commercial loss has been caused to an insolvent trust through the bringing of a directions

application is faintly absurd. Advocate Swan has not really elaborated in argument on the bare terms of the pleaded case.

129. Solely on the basis that these allegations of breach of trust are expressly linked to the other allegations in para. 21 about the Guernsey 1 proceedings, I have decided that I should not strike out para. 21(d) of the Cause pursuant to rule 52(2)(a). For the sake of consistency, this aspect of the Plaintiff's case should not, in my view, simply be struck out at this stage. However, of all the sub-paragraphs in para. 21, I consider that this one has come the closest to being struck out, but this is all immaterial given what I am about to say on the Defendants' alternative ground of seeking summary judgment.

130. My approach to the Somerfield Litigation claim, had I not entered summary judgment in favour of the Defendants in respect of it, would have been similar. I would not have struck out paragraphs 24 to 47 of the Cause because I would not have been satisfied that they disclosed no reasonable grounds for bringing that part of the Plaintiff's claim. As I indicated previously, the way the claim has been pleaded would have needed to be modified to concentrate only on the loss of chance aspect of the claim. On the basis of the pleading, though, I could not have been satisfied that this was a plain and obvious case resulting in the strike out sought in the alternative. That is why I have approached this element of the Cause on the basis of the Defendants' primary argument that it was amenable to summary judgment.

131. In summary, therefore, although there is a degree of similarity between an application for striking out and for summary judgment, the threshold for strike out is a particularly high one and I have concluded that none of the Plaintiff's Cause should be dealt with in this manner. In particular, although I quite understand why the Defendants have been critical about the case that has been pleaded to date, I am conscious that striking out a claim, or any part thereof, is a last resort and that if a party's pleading is curable though having the claims already made re-cast in an appropriate way, that is preferable to shutting them out entirely from pursuing their claims. Accordingly, I reject the part of the Defendants' Application that seeks an order pursuant to rule 52(2)(a) of the 2007 Rules.

Summary judgment: paragraphs 19 and 21

132. The alternative way in which the Defendants seek finality in respect of paragraphs 19 and 21 of the Cause is for summary judgment to be entered in respect of them. I have previously set out the test to apply and the way I approached it in relation to the Somerfield Litigation claim. In doing so, rather than looking at the pleaded case, I am required to consider the prospects of success. In that regard, I have borne in mind that what is alleged against the Defendants is that they have been guilty of gross negligence (requiring proof of a serious or flagrant degree of negligence, although not requiring proof of intentional or reckless fault) or wilful default. I have cautioned myself against conducting a mini-trial and recognise that this is not about making an assessment of the probability of these claims succeeding, but rather to consider the reality of what is alleged. I am also conscious that in considering the prospects of success, I have already decided in respect of rule 52(2)(a) of the 2007 Rules that these paragraphs have not been shown by the Defendants to disclose no reasonable grounds for bringing these elements of the action and that finding must be factored into any decision as to the prospects of success.

133. Although I have some concerns about the way the allegations in para. 19 of the Cause about the Defendants' record-keeping have been put, I have not been persuaded that the Plaintiff's prospects of success are only fanciful. The scope of the enquiry to be undertaken at trial is wider than had already been canvassed in the Guernsey 1 proceedings. Certain estoppels may be raised, which may narrow what is in issue, but I note that this paragraph pleads breaches of duty in respect of record-keeping which are of a type that I understand can be raised by a new trustee when taking over from a previous trustee. If there are specific instances that the Plaintiff wishes to advance now as examples supporting its allegations of such a breach, especially in respect of matters that have not already been aired, as I consider is the case, then I take the view that it would be wrong of me at this stage to enter summary judgment in favour of the Defendants in relation to this paragraph. I may have a provisional view as to difficulties that the Plaintiff is likely to face in establishing that there has been gross

negligence, but I find myself in the position of not having been provided with an indication of all the evidence on this Application that can reasonably be expected to be available at trial. The Plaintiff's case appears weak, rather than hopeless, but this may change when the full picture is ascertained at trial. In those circumstances, I recognise that a fuller investigation of the basis of the allegations in para. 19 than is possible now could affect the ultimate outcome. Further, I realise that the Defendants have failed in respect of the other allegations contained in paragraphs 15 to 18 and 20 of the Cause (which were only challenged by reference to *Henderson v Henderson* principles of abuse of process), with the consequence that there are matters that will be proceeding to trial. In my view, it is appropriate for me to be wary of determining the allegations in para. 19 summarily, especially where the Plaintiff has a relatively low hurdle to surmount to demonstrate that the claim is more than merely arguable. Accordingly, I decline to give summary judgment on para. 19.

134. The position in relation to para. 21 of the Cause, though, is different. The focus of this allegation is not about how the Defendants generally conducted themselves in respect of the administration of the TDT over a more extended period of time during their trusteeship but is very specific about the decision taken by them to institute proceedings before this Court. The basic allegation is that they should not have commenced the Guernsey 1 action at the time and in the manner that they did. From that decision, the Plaintiff alleges that various consequences flowed, which have caused the TDT to suffer loss, both in relation to the Guernsey 1 proceedings and the Guernsey 2 proceedings and how they have been conducted. Unlike para. 19, the scope of enquiry is, in my view, inevitably going to be much narrower than the other paragraphs in this part of the Cause. Moreover, I have been provided with a great deal of material from which to form a judgment on the prospects of this allegation succeeding. In particular, there are the judgments of the Lieutenant Bailiff and the Court of Appeal, which do not suggest that the Defendants' decision to commence Guernsey 1 was an error on the part of the Defendants.

135. The ability of trustees to make applications to the Court for directions is expressly conferred by section 68 of Trusts (Guernsey) Law, 2007 and is a familiar type of matter with which this Court deals. The allegation that the directions application in Guernsey 1 was brought "*hastily*" and so amounted to an invitation to the BVI companies to counterclaim seems to me to have no real prospect of success. Similarly, when coupled with an allegation that the Defendants should have advanced defences to that counterclaim that were actually advanced by the Plaintiff at the trial but rejected by the Lieutenant Bailiff confirms my view that none of the allegations in sub-paragraphs (a) to (c) has a real prospect of succeeding. I cannot conceive how these allegations can be shown by the Plaintiff to amount to gross negligence and the evidence filed on behalf of the Plaintiff in opposition to the Application does not, in my view, explain how this paragraph of the Cause would be progressed at trial. Indeed, the letter of advice dated 4 August 2008 exhibited to Ms Martin's Affidavit does not touch on any of these allegations. In effect, the Plaintiff has chosen not to show cause in respect of the summary judgment aspect of this part of the Application. As I have indicated previously, Advocate Swan's submissions in relation to this paragraph of the Cause are also not taking matters much further, if at all, than the pleaded case.

136. In some respects, albeit dealing with different subject-matter, I think I am better placed to determine para. 21 of the Cause summarily because of the similarities with the Somerfield Litigation claim. Both allegations involve this Court looking at the conduct of proceedings that have already taken place and with the benefit of seeing the material put to the courts in question. The prospects of success are, therefore, more readily ascertainable in those circumstances than in relation to a fresh allegation where consideration of the prospects is unaffected by what has already taken place and necessarily involves reaching a judgment on something that has not yet been considered by any court.

137. However one looks at the Guernsey 1 proceedings, (and for these purposes I regard the Guernsey 2 proceedings as being connected with those proceedings), it is quite clear that they have been fought strenuously by all parties, both at first instance and on appeal. The chronology of events is such that the Defendants' decision to institute the Guernsey 1 proceedings was not taken in isolation, but must, I think, be placed into the context of

everything going on at that time in respect of the TDT. My overall assessment of what was happening points firmly away from the Plaintiff being able to establish that the Defendants' decision to come to this Court in March 2010 was a hasty one. The material put before the Court in support of the Application satisfies me that the Defendants were carefully considering how to react to the situation in which they found themselves as trustees of the TDT. In the light of that credible evidence pointing away from their action being one hastily taken, the Plaintiff is required to explain why it is that its allegation that there was hastiness has some prospect of success. The paucity of evidence adduced by the Plaintiff speaks volumes. That is why I am not persuaded that there is any real prospect of the allegation in para. 21 of the Cause succeeding. In any event, Response 68 of the Plaintiff's Response to the Defendants' Request for Further and Better Particulars of the Plaintiff's Cause concedes that "*The commencement of proceedings with Court File No. 1505/2010 did not per se constitute a breach of trust*", thereby indicating that this decision is not being used as the basis for the allegation of breach of duty and that what took place in the Guernsey 2 proceedings is being advanced as consequential on the alleged breach of duty in commencing the Guernsey 1 proceedings.

138. Although I have rejected the Defendants' argument that para. 21 amounts to a collateral attack on the decisions in the Guernsey 1 action, it is important to have regard to the way in which the Lieutenant Bailiff dealt with the issues he had to resolve. I regard his decision as being supportive of my conclusion that the Plaintiff's attempt to complain about the institution and conduct of the Guernsey 1 action is without merit. Had the Lieutenant Bailiff identified that some criticism could be levelled at them, I am confident that he would have made it. Further, I do not find the proposition that the Plaintiff has a proper claim for "*the loss of the opportunity to engage in other potentially profitable transactions*" (Response see 69) an attractive one in circumstances where the Plaintiff has not explained how the causal link between the alleged breach and the claimed loss could be shown. With the Defendants having raised credible evidence that supports the entering of summary judgment, in the absence of Advocate Swan being able to put the Plaintiff's case in a way that demonstrates that there is a prospect of succeeding with this paragraph of the Cause, I have concluded that it is, as Advocate Wessels submits, devoid of merit.

139. I have asked myself whether there is some other compelling reason to permit para. 21 to proceed to be disposed of at trial. I have decided that there is no such reason. Indeed, in terms of managing the scope of any trial, I am satisfied that para. 21 would serve as a diversion from what needs to be explored rather than adding anything of substance. I foresee that it would be likely to involve raking over old ground, which I consider would be undesirable. Insofar as the Plaintiff has other allegations for breach of duty that I consider has the required real prospect of success, it would not be consistent with the overriding objective to permit what has the hallmarks of being a makeweight allegation at best and which would involve a disproportionate allocation of time and effort, and associated expense, to be deployed were it to remain in the Cause. Accordingly, there is, in my judgment, no compelling reason not to enter summary judgment in favour of the Defendants in respect of it.

140. In relation to the exercise of the Court's discretion under Part IV of the 2007 Rules, I see no reason at all why it would be inappropriate to give the summary judgment sought by the Plaintiffs in relation para. 21. This is, therefore, a specific part of the Plaintiff's Cause that can no longer be pursued.

Conclusion

141. The issues raised by the Defendants' Application are difficult ones. I am conscious of the delicate balancing act that has needed to be undertaken because the Application seeks to deny the Plaintiff the opportunity to pursue its action in its entirety or, in the alternative, in respect of the composite parts of it without there being any further enquiry into the merits of the claims. However, if those claims are without substance or are an abuse of the way this Court has indicated it expects parties to litigate before it, then it would be entirely proper to dismiss them at this early stage thereby avoiding unnecessary expense to the parties and without further valuable Court time being allocated to a hopeless case. During the course of my

deliberations, which have taken longer than I would ideally have liked (and for which I apologise to the parties), I have found myself changing my mind as I have read and re-read the materials placed before me and re-visited the submissions made by Counsel. This is indicative of how finely balanced the arguments are. Indeed, both sides have respectable arguments for and against the relief sought, which I have endeavoured to rehearse. Ultimately, my thinking has crystallised into the decisions I have set out.

142. For the reasons given, I have decided that the Somerfield Litigation claim (in paragraphs 24 to 47 of the Cause) has no real prospect of succeeding and there is no other compelling reason for that claim to be disposed of at trial. Accordingly, under Part IV of the 2007 Rules, I will enter judgment in favour of the Defendants on that aspect of the Cause. Had I not decided that claim in that manner, I would not have been minded to strike it out as an abuse of process, save possibly in relation to the discrete allegation in para. 41, although expressly leaving open whether that would have been the outcome, and I would not have struck this part of the claim out pursuant to rule 52(2)(a), but I would have directed that the Plaintiff needs to amend the Cause in such a way as to clarify the basis on which the loss alleged is being claimed and to quantify it differently.

143. In relation to the Defendants' contention that the whole of the Cause should be struck out as an abuse of the Court's process pursuant to rule 52(2)(b) of the 2007 Rules, I have rejected those arguments. Although there is a degree of overlap with the issues that have been determined in Guernsey 1 and I have found that the claims now being made could have been raised in those proceedings, I have concluded that this is not a case where they should have been raised in such a way that the later raising of them now constitutes an abuse of process. In doing so, I have drawn a distinction between the position in the present case and what can be expected in the future. In my judgment, it is appropriate to do so because striking out for abuse of process in a situation such as the present proceedings is not (so far as I am aware) something that has previously been argued before this Court and the approach to case management is perhaps not as well-developed as it appears to be in England and Wales. In those circumstances, I regard it as unfair to penalise the Plaintiff for not having raised its wish to expand its claims against the Defendants within the ambit of the Guernsey 1 proceedings, whilst at the same time taking the opportunity to clarify that that is what this Court will expect in any future case where a similar position is reached. In respect of para. 21, I have not been persuaded that this amounts to a collateral attack on the decision in Guernsey 1 and, in any event, do not regard the Plaintiff's inclusion of this allegation in these proceedings as an abuse of process.

144. In relation to the claim of breach of duty advanced in para. 19 of the Cause, I have rejected that Defendants' submissions that this paragraph should be struck out pursuant to rule 52(2)(a) of the 2007 Rules and also that it can be the subject of a summary judgment in their favour. In doing so, I have indicated that the Plaintiff must now take steps to plead this allegation in such a way that the ceiling of loss set out in para. 23 of the Cause is clarified. Given the likelihood that there are findings in the Lieutenant Bailiff's judgment in Guernsey 1 dealing with some aspects of this paragraph, the issues for determination in relation to this allegation should be narrowed still further. Looking at matters in the round, I take the view that this paragraph sits reasonably comfortably with the other paragraphs in the Cause (namely paragraphs 15 to 18 and 20) alleging breaches of duty, ie, as a further alternative to the primary allegations made, which can properly be tried in this action. The prospects of success may not be good, but that does not matter on the Application made by the Defendants.

145. Finally, in relation to para. 21, whilst I have not found that this allegation should be struck out pursuant to rule 52(2)(a), for the reasons given, I am satisfied that it has no real prospect of succeeding and there is no other compelling reason for that claim to be disposed of at trial and so enter summary judgment in respect of it in favour of the Defendants.

146. The consequence of these decisions is that the Plaintiff's action is permitted to proceed only in respect of the breaches of duty pleaded at paragraphs 15 to 20. Summary judgment is given in respect of paragraphs 21 and 24 to 47 and para. (2) of the prayer to the Defendants. In relation to the further conduct of the action, the Plaintiff should, if it so wishes, further

clarify para. 19 of the Cause. Thereafter, steps should be taken to set a date for a case management conference.

147. I am minded to reserve the costs of the Application. It has been successful in part only and so may not be a case where the costs should simply follow the event. If the parties are able to agree what the costs order should be, an appropriate Consent Order could be lodged. Equally, if either side wishes to seek a costs order now, application can be made to a mutually convenient Interlocutory Court.

148. I conclude by expressing my gratitude to Advocates Wessels and Swan (and to those supporting them) for the clear and helpful way in which the written and oral submissions relating to this Application have been presented.

Appendix: Extracts from Plaintiff's Cause

15. In breach of their duties to act with due diligence as prudent persons, the Defendants:
    (a) followed or accepted without full and proper question or full and proper enquiry the investments or transactions recommended by R20;
    (b) did not obtain or attempt to obtain full or proper details of the investments or transactions recommended by R20;
    (c) did not understand or take sufficient steps to understand the investments or transactions recommended by R20; and
    (d) did not consider properly or at all whether any particular investment or transaction recommended by R20 was in the interests of all the beneficiaries of the TDT.

16. Further or alternatively, in breach of their duties to preserve and enhance the value of the trust fund and/or to act with due diligence as prudent persons, the Defendants failed to monitor the TDT portfolio of assets from time to time, or to diversify them or to consider diversifying them from time to time. The Plaintiff relies on the following:
    (a) The assets appointed to the TDT from the TFT comprised shares in companies whose assets were investments in financial institutions, retail industry, commercial property, and restaurant and bar businesses.
    (b) Also in August 2007, a short term loan of £100 million from Kaupthing to the TFT trustees was novated to the Defendants. In accepting a novation of this loan, the Defendants were in breach of trust because such a loan should have been non-recourse to the TDT trustees i.e. the Defendants should not have accepted liability for repayment of the £100 million loan. By accepting liability for the repayment of the loan, the Defendants thereby exposed all the TDT assets to recourse by Kaupthing through the Defendants' lien over those trust assets, even though Kaupthing had not bargained for any security over the TDT assets for the said loan.
    (c) In December 2007, pursuant to a Framework Agreement entered into between the Defendants, Kaupthing Bank hf ("**Kaupthing**"), Isis Investments Limited ("**Isis**") and certain other companies, various companies owned by the TDT and which held the core investments of the TDT were transferred into a corporate structure with a common ultimate parent company called Oscatello Investments Limited ("**Oscatello**"), which was itself ultimately owned by the TDT. The corporate structure was referred to as "the Oscatello Structure" and the restructuring as the [sic] "the Oscatello Restructuring". Under the Framework Agreement Kaupthing and Isis agreed to provide financing and in return Kaupthing was granted security over the shares of the companies in the Oscatello Structure.
    (d) After August 2007, the companies owned by the TDT acquired further shares, and further contracts for differences ("**CFDs**") in respect of shares, in J Sainsbury's plc, Mitchells & Butlers plc ("**M&B**") and Kaupthing. On the recommendation of R20, these investments were intended to be held as medium to long-term investment.
    (e) However, the Defendants did not consider from time to time, adequately or at all, whether to balance the TDT's portfolio of assets with short term investment.
    (f) Further, the Defendants did not consider from time to time, adequately or at all, whether to diversify the TDT's portfolio of assets away from the CFDs and/or shares in Sainsbury's or M&B or Kaupthing.
    (g) Further, the Defendants failed to consider from time to time, adequately or at all, whether the investment strategies recommended by R20 in 2007 were suitable after the credit crunch and the global economic downturn in 2008 and 2009.
    (h) Further, the Defendants failed to consider from time to time, adequately or at all, whether it was appropriate for the majority of the TDT's cash to be in the Oscatello Structure and to be utilised for meeting margin calls in respect of the CFDs.
    (i) Further, the Defendants did not consider from time to time, adequately or at all, whether it was in the interests of the TDT's beneficiaries to invest a significant proportion of its assets in the Oscatello Structure.
    (j) Further, the Defendants should have, but did not, consider from time to time, adequately or at all, whether to preserve sufficient assets for the benefit of the children and remoter issue of Mr Robert Tchenguiz and Ms Lisa Tchenguiz, and/or whether to segregate sufficient assets for such beneficiaries from other TDT assets

e.g. by appointing assets on separate trusts for them and/or not investing them in the same way as the rest of the TDT assets.

17. Further or alternatively, in breach of their duties to preserve and enhance the value of the trust fund and/or to act with due diligence as prudent persons the Defendants permitted the TDT to enter into high-risk investments and/or to pursue an aggressive investment strategy without preserving sufficient assets for the benefit of the minor beneficiaries and/or retaining sufficient liquid reserves to hedge against a downturn in the market and/or considering obtaining investment advice from other investments advisers. In particular:
    (a) In the period from 30 November 2007 to 19 December 2007, the net value of the assets transferred into the Oscatello Structure fell from £264 million to £91 million, the entire Oscatello loan facility granted by Kaupthing was drawn-down, and the TDT was in default of the security cover limits in the Framework Agreement. Therefore, by the time the Framework Agreement was entered into, the borrowing under it was financially riskier than when the deal was conceived.
    (b) Notwithstanding the decline in value of assets within the Oscatello Structure, the TDT continued to pursue a risky strategy of acquisition, in particular making further investments in M&B and Sainsbury CFDs and shares.
    (c) In 2008, even though the Oscatello Structure showed a negative equity position of £33 million, the TDT made the following risky investments: acquiring 28 million shares and CFDs in M&B for approximately £125 million; acquiring approximately 42 million CFDs in Sci Entertainment Group plc for approximately £15 million; and acquiring a £46 million sub-participation in Kaupthing's loan to Pumpster Property Holdings Ltd ("**Pumpster**") at a time when Pumpster was placed in administration.
    (d) The Defendants should not have made such investments without preserving or taking proper steps to preserve sufficient assets for benefit of the children and remoter issue of Mr Robert Tchenguiz and Ms Lisa Tchenguiz, whether for example by way of appointing assets for their benefit on separate trusts or segregating assets for their benefit from the other TDT assets or otherwise, and not investing them in the same way as the rest of the TDT assets.
    (e) Further or alternatively, the Defendants should have prevented any such investments without first preserving assets for benefit of the children and remoter issue of Mr Robert Tchenguiz and Ms Lisa Tchenguiz, but they took no or no adequate steps to prevent such investments.

18. Further or alternatively, in breach of their duties to preserve and enhance the value of the trust fund and/or to act with due diligence as prudent persons the Defendants failed to diversify the TDT's investments away from Kaupthing and/or failed to ensure that the TDT had a broader range of investment partners:
    (a) By concentrating, or permitting the concentration of TDT's investments with one financial institution, the Defendants exposed the TDT assets to the real risk that Kaupthing's failure or Kaupthing's insolvency would have a severe and adverse effect on the TDT's assets, and potentially expose the TDT to large losses. Further, and in any event, it was unreasonable for the TDT's investments to be so heavily financed by Kaupthing.
    (b) Following Kaupthing's insolvency in October 2008, the TDT's shareholding in Exista and in Kaupthing became worthless. Kaupthing enforced its security over the Oscatello Structure and the TDT thereby lost the majority of its assets.

19. Further or alternatively, in breach of their duties to preserve and enhance the value of the trust fund and/or to act with due diligence as prudent persons the Defendants failed to ensure that the books and records relating to the TDT were kept confidential and kept separate from the books and records relating to other trusts which they administered and from the Defendant's own documents, and they failed to ensure that proper books and records were kept of the transactions and investments entered into by the TDT and the companies which it owned. In particular:
    (a) The electronic books and records relating to the TDT were intermingled with the books and records relating to other clients of ITGL, as well as documents that belong to the Defendants personally.
    (b) The Defendants had obtained legal advice from Ozannes in Guernsey and Quinn Emanuel Urquhart & Sullivan UK LLP ("**Quinn Emanuel**") relating to their personal

position and capacity but paid for such advice from the TDT assets. Yet, because of the poor state of the TDT's books and records, the Defendants were initially unable to confirm to the Plaintiff whether or not such advice had been paid for out of the TDT assets.

(c) The Defendants wrongfully disclosed confidential documents and/or information belonging to, and relating to the affairs of, the TDT to third parties such as the liquidators of the BVI Companies (defined in paragraph 41(b) below).

(d) The Defendants failed to ensure that dealings between the TDT (conducted through R20) and Kaupthing (conducted by its then CEO Hreidar Sigurdsson) were recorded in writing, thereby exposing the TDT to the risk that any oral agreement or understanding might be disregarded and/or disputed.

(e) The investment strategies for joint ventures were also not recorded in writing. For example, the investment strategy regarding the M&B shares and Sainsbury's shares was that they were intended to be medium to long term investments to be held until the market conditions improved. Kaupthing's Mr Sigurdsson orally represented to R20 that Kaupthing would not sell or close out the TDT's positions on the M&B and Sainsbury's CFDs, and on this basis R20 recommended that the TDT enter into these transactions. However, these representations were not recorded in writing.

(f) There was a failure to ensure that oral understandings or oral variations to existing contractual agreements were recorded in writing. For example, the TDT entered into the Framework Agreement, even though the TDT was in default of the terms of the Oscatello Facility, on the basis of oral commitment by Kaupthing that Kaupthing would not sell the M&B shares or the Sainsbury's shares. This commitment amounted to an agreement not to exercise Kaupthing's security over the Oscatello Structure.

20. Further or alternatively, in breach of their duties to preserve and enhance the value of the trust fund and/or to act with due diligence as prudent persons the Defendants did not have an in-depth knowledge of the TDT's relationship with Kaupthing, and/or failed to monitor Kaupthing's financial position in 2008 and/or failed to have direct contact with Kaupthing when the TDT acquired Kaupthing's credit default swaps.

21. Further or alternatively, in breach of their duties to preserve the trust fund:

(a) The Defendant hastily brought proceedings in the Royal Court with Court File No. 1462/2010 in which they averred that certain alleged inter-company loans totalling £183 million and purportedly owed by them to the BVI Companies (defined in paragraph 41(b) below), if valid, were enforceable not against themselves but against the TDT assets.

(b) The Defendants, by commencing those proceedings, in effect invited the BVI Companies to counterclaim for payment of the alleged £183 million loans and, inevitably, the BVI Companies did counterclaim for payment of £183 million.

(c) The Defendants did not advance any defence to the counterclaim to preserve the trust fund but only defended their personal liability for the loans.

(d) Further, the claim and the counterclaim led to the trust fund being placed under court-supervised administration of the TDT such that decisions regarding the management of the trust assets could not be undertaken without significant delay and costs, or without involving the BVI Companies in the process. This led to paralysis of the administration and management of the TDT trust assets, and prevented the assets being invested in the interests of the beneficiaries.

