Savile AD4 Ltd and Savile AD7 Ltd and Marlborough Trust Co. Ltd, Marlborough Nominees Ltd and Marlborough Secretaries Ltd and SPL Guernsey ICC Ltd
Royal Court
10th February 2016

JUDGMENT 3/2016

Application for strike out or summary judgment or in the alternative security for costs.

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

Between

(1) SAVILE AD4 LIMITED
(2) SAVILE AD7 LIMITED

Plaintiffs

-and-

(1) MARLBOROUGH TRUST COMPANY LIMITED
(2) MARLBOROUGH NOMINEES LIMITED
(3) MARLBOROUGH SECRETARIES LIMITED

Defendants

-and-

SPL GUERNSEY ICC LIMITED

Third Party

Defendants' Application for summary judgment/strike out/security for costs

Date of hearing: 21st December 2015

Judgment handed down: 10th February 2016

Before: Richard James McMahon, Esq., Deputy Bailiff

Counsel for the Defendants: **Advocate J J Barclay**
Counsel for the Plaintiffs: **Advocate P Richardson**

Cases, Texts & Legislation referred to:

The Royal Court Civil Rules, 2007
Perpetual Media Capital Limited v Enevoldsen and others (unreported, 26 June 2013), RCt; [2014] GLR 57, CA
Easyair Limited (t/a Openair) v Opal Telecom Limited [2009] EWHC 339 (Ch)
Credit Suisse Intl v Ramot Plan OOD [2010] EWHC 2757 (Comm)
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
Rawlinson & Hunter Trustees SA v ITG Limited (unreported, 11 November 2015)
Tchenguiz v Investec Trust (Guernsey) Limited (unreported, 26 June 2013)
Silver Falcon Enterprises Ltd v International Hellenic Operations Ltd (unreported, 19 and 20 October 1994)
The Civil Procedure Rules 1998 (*The White Book*)
Invescap Holdings Limited v Douglass (unreported, 30 July 2014)
The Companies (Guernsey) Law, 2008
The Companies (Guernsey) Law, 2008 (Amendment) Ordinance, 2008
John v Price Waterhouse [2002] 1 WLR 953
In re Anglo-Austrian Printing and Publishing Union (Isaacs' Case) [1892] 2 Ch 158
The Companies (Transitional Provisions) Regulations, 2008
Wankie Colliery Company Limited v Commission of Inland Revenue [1921] 3 KB 344
Stroud's Judicial Dictionary of Words and Phrases (8th ed.)
Re City Equitable Fire Insurance Company [1925] 1 Ch 407
L/M International Construction Inc v The Circle Ltd Partnership (1995) 49 ConLR 12
ICDL, GCC Foundation, F-Z LLC v The European Computer Driving Licence Foundation Limited [2012] IESC 55
Hollins v J. Davy Ltd [1963] 2 WLR 201
Weavering Macro Fixed Income Fund Limited v Peterson and Ekstrom (unreported, 12 February 2015)
Magloire t/a First Call Recruitment v Wright (unreported, 22 July 2005)
The Rules of the Supreme Court 1965
SPL Guernsey ICC Limited v Moore Stephens (unreported, 13 January 2014)
Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Contrale [1967] AC 361
Chitty on Contracts (32nd ed.)
Fairhead v Praxis Holdings Ltd (unreported, 17 March 2015)
Hniazdzilau v Vajgel [2015] EWHC 1582 (Ch)
Investec Trust (Guernsey) Limited v Glenalla Properties Limited (unreported, 10 March 2014)

Background

1. By an Application dated 19 June 2015, the Defendants, Marlborough Trust Company Limited, Marlborough Nominees Limited and Marlborough Secretaries Limited, seek the striking out of the Plaintiffs' Cause or alternatively that summary judgment be entered in their favour in respect of the Plaintiffs' claims, thereby bringing these proceedings to an end. That Application is resisted. In the alternative, if the action is to continue, the Defendants seek an order that the Plaintiffs provide security for costs, with the usual consequential orders relating to a stay and dismissal. The Plaintiffs accept that it is open to the Court to make such an order but invite the Court to exercise its discretion not to do so or to do so only on a more restricted basis than the full indemnity costs indicated.

2. The evidence in support of the Application is largely formal. There are three Affidavits on behalf of the Defendants and no evidence has been filed on behalf of the Plaintiffs.

3. The First Affidavit sworn by Francesca Bird on 19 June 2015 explains the procedural chronology to date. The Cause was placed *inscrite* on 19 April 2013. On 19 July 2013, the Defendants filed their Defences and Counterclaim and the action was placed *en preuve*. The Plaintiffs requested further information in respect of the Defences and Counterclaim on 8 August 2013 and a response was provided on 22 August 2013. The Plaintiffs' Replique and Defence to the Counterclaim was filed on 12 September 2013. On 5 June 2014, the Defendants made requests for further information and their third party claim was placed inscrite on 27 June 2014. Defences to that claim were filed on 14 November 2014. In the meantime, there had been a number of Consent Orders relating to the main action deferring

the case management conference. The Plaintiffs responded to the Defendants' requests for information on 14 November 2014. On 27 March 2015, the Defendants sought clarification of one of the Plaintiffs' responses. This was provided on 6 May 2015. The first set of directions for the preparation of the trial in this matter were given on 8 May 2015. This Application was then made, with the consequence that the timetable towards a trial has been re-set to follow later in 2016. In respect of the material supporting the application for security for costs, attention is drawn to the Plaintiffs' own case, which sets out their asset position and refers to the financial statements for 2010 showing their impecuniosity. The Plaintiffs' decision to file no evidence countering this means, as Advocate Paul Richardson confirmed on their behalves, that they are not suggesting that the Defendants could not satisfy the Court that one of the conditions for awarding security for costs has been satisfied. This Affidavit also complies with the requirements of rule 21 of the Royal Court Civil Rules, 2007.

4. Ms Bird's Second Affidavit, sworn on 31 July 2015 exhibits copies of the minutes of the first board meetings of each Plaintiff and documents associated with what had been discussed at each of those meetings. In respect of the First Plaintiff, the meeting took place on 18 October 2007 and, in respect of the Second Plaintiff, it took place on 26 November 2007. A structure diagram of the Defendants was also exhibited. Finally, there is a short Affidavit of Jasmin Semlitsch sworn on 19 November 2015 exhibiting a copy of a letter dated 7 March 2008 and the enclosure with it, which is a document referred to as "the Services Agreement".

5. Both of the Plaintiffs, Savile AD4 Limited and Savile AD7 Limited, are Guernsey companies. As shown in the minutes of the first meeting of the directors of each company, the Plaintiffs were both "*established for the purpose of purchasing properties in the UK*". The First and Second Defendants, who were the founders of both companies, agreed to become the first directors of both companies. They continued in these offices until July 2010. The directors appointed the Third Defendant as the Secretary of both of the Plaintiffs. The Third Defendant continued as the Secretary of both Plaintiffs until July 2010. These appointments gave rise to duties. Some of those duties are accepted by the Defendants as applying to them whereas others, particularly those alleged to derive from the appointment of the Defendants as Administrators, are denied. Indeed, the Defendants do not accept the basis on which the Plaintiffs allege they became Administrators, instead relying on the terms of the letter dated 7 March 2008 exhibited to Ms Semlitsch's Affidavit. Both Plaintiffs entered into a Property Investment Advisory Agreement with Arch Real Estate Limited ("AREL").

6. The claim brought by the First Plaintiff relates to the acquisition of 2 Creswick Road in London. This purchase completed on or around 6 February 2008. This property was subsequently sold on or around 20 October 2009 for £820,000 less than its cost. The First Plaintiff also incurred purchase costs of close to £150,000 and it is alleged that various payments aggregating to around £115,000 were made without proper authorisation. The total claim, therefore, is in excess of £1 million. It is alleged that the First and Second Defendants, as directors, failed properly to understand the investment proposed to them by AREL and/or failed properly to monitor or oversee the conduct of AREL in proposing that investment and/or failed to exercise reasonable care and skill in relation to their consideration of that investment. Alternatively, it is alleged that the First and Second Defendants failed when considering the appropriateness of the investment to give due consideration to adequate and material information. In the further alternative, it is alleged that the First and Second Defendants failed properly to monitor and oversee on an ongoing basis the investment made in this site and/or failed properly to monitor or oversee the conduct of AREL in relation to its investment proposals relating to the site and/or failed on an ongoing basis to exercise reasonable care and skill in relation to that investment. As against the Third Defendant, as Secretary, and against all three Defendants, as

Administrators, it is alleged that they failed properly to perform their respective functions in drawing relevant aspects of the investment in the site to the attention of the directors.

7. The claim of the Second Plaintiff relates to the acquisition of a property in Greenford in the London Borough of Ealing. The purchase completed on or around 27 May 2008. Whilst the particulars differ, the allegations made against the Defendants are in the same terms as in respect of the First Plaintiff's claim. The losses arising from these alleged breaches are claimed to be the difference between the purchase price for the site and its value in the company's accounts to 31 March 2012, the purchase costs, the operating losses for the years ending in 2009 to 2012 inclusive, the anticipated loss for the year ending in 2013 and repayment of some alleged unauthorised payments not already covered. The total aggregates to approximately £2.2 million.

8. In respect of the claims of the Plaintiffs, the Defendants have pleaded an *Exception de Fond* relying on Article 153 in the Articles of Association of each of the Plaintiffs (which is in identical form in both and which uses the same wording as the Article dealt with in *Perpetual Media Capital Limited v Enevoldsen and others* [2014] GLR 57). Article 153, headed "INDEMNITY" provides:

> "*The Directors Managing Directors managers agents Auditors Secretary and other officers or servants for the time being of the Company and the trustees (if any) for the time being acting in relation to any of the affairs of the Company and their respective heirs and executors shall be fully indemnified out of the assets and profits of the Company from and against all actions expenses and liabilities which they or their respective heirs or executors may incur by reason of any contract entered into or any act in or about the execution of their respective offices or trusts except such (if any) as they shall incur by or through their own wilful act neglect or default respectively and none of them shall be answerable for the acts receipts neglects or defaults of the others of them or for joining in any receipt for the sake of conformity or for any bankers or other person with whom any moneys or assets of the Company may be lodged or deposited for safe custody or for any bankers or other persons into whose hands any money or assets of the Company may come or for any defects in title of the Company to any property purchased or for any insufficiency or deficiency of or defect in title of the Company to any security upon which any moneys of the Company shall be placed out or invested or for any loss misfortune or damage resulting from any such cause as aforesaid or which may happen in or about the execution of their respective offices or trusts except the same shall happen by or through their own wilful act neglect or default.*"

In short, therefore, the Defendants argue that this provision governs their relationships with both Plaintiffs and so offers each of them a complete defence to the action.

9. The terms of the *Exception de Fond* pleaded are that:

> "*… if, which is denied, the Defendants or any of them, owed the duties alleged and/or breached their duties in the manner alleged by the Plaintiffs or at all that the Plaintiffs have as a consequence of any such alleged breach suffered any loss or damage, then by reason of Article 153 of the Articles:*
>
> *(a) the Defendants were and are not answerable for any loss or damage suffered by the Plaintiffs as a result of the investments made in or about the execution by the Defendants of their respective offices;*
>
> *(b) the Defendants and each of them are not answerable for the acts and defaults of each other; and*

(c) the Defendants are entitled to be fully indemnified out of the assets and profits of each of the Plaintiffs for any liability which they have incurred or may incur in the future (including any liability for interest and/or legal costs) as a result of the investments made or any act undertaken by the Defendants in or about the execution of their duty; and

(d) if, contrary to the Defences pleaded below, the Defendants, or any of them, are held to be liable to the Plaintiffs, the liability of the Plaintiffs is set-off pro tanto against any liability of the Defendants to the Plaintiffs, thereby extinguishing it. Accordingly the Plaintiffs' claim should be struck out on the grounds of circularity."

The law

10. Advocate Barclay, on behalf of the Defendants, and Advocate Richardson were agreed as to the legal tests that the Court applies to applications for summary judgment or for striking out in these circumstances. I can, therefore, summarise the position quite briefly.

Summary judgment

11. The ground for summary judgment in rule 19(2) of the 2007 Rules is that "*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 trial*". Both Advocates have referred to the summary of principles that I have cited regularly taken from the judgment of Lewison J (as he then was) in *Easyair Limited (t/a Openair) v Opal Telecom Limited* [2009] EWHC 339 (Ch) (at para. 15):

"*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."

Whether that is the most appropriate summary, or whether it should more properly be that of Hamblen J in *Credit Suisse Intl v Ramot Plan OOD* [2010] EWHC 2757 (Comm) (at para. 24) quoted by Beloff JA in *Musa Holdings Limited v Newmarket Holdings (Guernsey) Limited* [2013-14] GLR 445 (at para. 14), the relevant principles are well-established.

12. I have also found it helpful to remind myself of further guidance given by the House of Lords in *Three Rivers D.C. v Bank of England (No. 3)* [2003] 2 AC 1 (and to which I referred in *Rawlinson & Hunter Trustees SA v ITG Limited* (unreported, 11 November 2015)), because it puts into focus the proper approach to take on an Application such as this. In particular, because Advocate Barclay also referred to the "*bound to fail*" test to which I had referred in *Tchenguiz v Investec Trust (Guernsey) Limited* (unreported, 26 June 2013), the explanation offered by Lord Hope of Craighead (at para. 91) is helpful:

> "*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.*"

At para. 95, His Lordship added:

> "*…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.*"

The position was neatly summarised by Lord Hobhouse of Woodborough in para. 158, where he commented that "*The criterion which the judge has to apply under Part 24 is not one of probability; it is absence of reality.*" I consider that these principles can properly be applied to rule 19 of the 2007 Rules.

Strike out

13. Rule 52(2) of the 2007 Rules provides that:

> "*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 …*".

It is clear that there is a high threshold to satisfy before the Defendants' Application could be granted to strike out the Plaintiffs' Cause. 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*".

14. Advocate Barclay has referred to the commentary to The Civil Procedure Rules 1998, as amended (in *The White Book*), to which reference has been made in previous cases (eg, the *Tchenguiz* case (*supra*)), relating to the like grounds in rule 3.4(2). At para. 3.4.1, the explanation is given that:

> "*Grounds (a) and (b) cover statements of case which are unreasonably vague, incoherent, vexatious, scurrilous or obviously ill-founded and other cases which do not amount to a legally recognisable claim or defence.*"

At para. 3.4.2, in relation to ground (a):

> "*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 (Farah v British Airways, The Times, January 26, 2000, CA referring to Barrett v Enfield BC [1989] 3 W.L.R. 83, HL; [1999] 3 All E.R. 193). 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)).*"

At para. 3.4.3.6, in relation to ground (b) (as also quoted by me in *Invescap Holdings Limited v Douglass* (unreported, 30 July 2014)):

> "*The court may strike out, as an abuse of the court's process, particulars of claim which are so badly drafted that they fail to reveal to the defendant, or to the court, the case the defendant can expect to meet at trial. However, proof of bad drafting is not, by itself, sufficient. The court should not strike out the particulars of claim without first giving the claimant an opportunity to amend (see in In Soo Kim v Youg [2011] EWHC 1781 (Ch). Strike out may be appropriate where a court is satisfied that the claimants have made it clear that they have no intention of trying to amend to put forward a coherently pleaded and intelligible claim (Spencer v Barclays Bank Plc, unreported, October 30, 2009 (ChD), LTL 30/10/09) or where, following amendment, and the provision of further information, the claim remains vague and incoherent (Towler v Wills [2010] EWHC 1209 (Comm)).*"

15. The hearing bundle contained considerably more authorities than those to which I have just referred. There is no need for Counsel to be exhaustive in the authorities drawn to the Court's attention where the additional materials do not elucidate further the principles to be applied. Applications for summary judgment and striking out are sufficiently commonplace that it will suffice to refer to the leading Guernsey cases only from which to establish the test to apply and, if the issue is in any way out of the ordinary, anything else from other jurisdictions that can properly be regarded as particularly helpful. Overburdening the Court with unnecessary material is counter-productive and serves only to increase the costs being incurred by the parties. In future, I commend a more realistic approach to what should usually be straightforward applications.

Impact of *Perpetual Media*

16. As I have already noted, judicial consideration as to the effect of a provision in the same terms as Article 153 was given in the *Perpetual Media* case, where the Court of Appeal endorsed the view I had taken about the incorporation of the Article into the appointment of the directors of the company in that case, but differed from me in relation to the effect of section 157 of the Companies (Guernsey) Law, 2008 under the transitional arrangements when that provision was commenced. It is necessary, therefore, to have close regard to what is set out in the judgment of Beloff JA in order to ascertain what parts of that decision bind this Court in the present case.

17. By way of background, I had described the breadth of coverage of the provision (ie, Article 153) at para. 11 of my judgment in that case (unreported, 26 June 2013) in the following terms, which were approved by the Court of Appeal at para. 26 of its judgment:

> "*The Article falls into three parts. The opening words explain who can benefit from what follows. The next part provides that those persons "shall be fully indemnified", albeit not in respect of any expenses or liability incurred "by or through their own wilful act neglect or default". This part amounts to an indemnity provision attaching to such of their personal defauls as are covered. The final part provides that "none*

of them shall be answerable" for the defaults of the others, once again subject to an exception for those occurring "by or through their own wilful act neglect or default". Because they are "not answerable", this is treated as an exemption provision."

18. The first issue for determination was whether the directors were able to benefit from this Article. Section 20(3) of the 2008 Law (as inserted by section 3 of the Companies (Guernsey) Law, 2008 (Amendment) Ordinance, 2008) provides:

> "*Subject to the provisions of this Law, the memorandum and articles of a company are, from the time of incorporation, binding on the company and its members in all respects as if the memorandum and articles –*
>
> *(a) were comprised in an agreement duly executed by the company and each member, and*
>
> *(b) contained covenants on the part of the company and each member to observe all provisions thereof.*"

Having analysed *John v Price Waterhouse* [2002] 1 WLR 953 and *In re Anglo-Austrian Printing and Publishing Union (Isaacs' Case)* [1892] 2 Ch 158, the Court of Appeal ruled (at para. 35) that:

> "*In short there is a presumption, albeit rebuttable, the directors take up office on the terms in the company's articles. The presumption may be rebutted in circumstances such as obtained in Telecommunication Ltd v Wilmbury Limited (2002) B CC 958 which concerned a director with "total lack of experience or knowledge as to commercial matters" [31], which would not be a description appropriate to the four Directors.*"

It is necessary, therefore, for the Defendants to establish that they can also benefit from Article 153 in this or in some other way. As in the *Perpetual Media* case, the position of the Third Defendant, as the Company Secretary, is arguably easier than the positions of the First and Second Defendants as directors.

19. The second issue in the *Perpetual Media* case was whether the exemption and/or indemnity was void pursuant to section 157 of the 2008 Law or whether it remained valid by virtue of reg. 10 of the Companies (Transitional Provisions) Regulations, 2008.

20. Section 157 provides:

> "*(1) Any provision that purports to exempt a director of a company (to any extent) from any liability that would otherwise attach to him in connection with any negligence, default, breach of duty or breach of trust in relation to the company is void.*
>
> *(2) Any provision by which a company directly or indirectly provides an indemnity (to any extent) for a director of the company, or an associated company, against any liability attaching to him in connection with any negligence, default, breach of duty or breach of trust in relation to the company of which he is a director is void, except as permitted by section 158 or 159.*
>
> *(3) This section applies to any provision, whether contained in a company's memorandum or articles or in any contract with the company or otherwise.*"

The 2008 Law was commenced with effect from 1 July 2008. However, reg. 10 of the 2008 Transitional Regulations provides:

> "*(1) Section 157(1) and (2) of the new Law does not apply to an exemption from liability or indemnity provided before the date of commencement of the new Law until the 1st January, 2010.*
>
> *(2) Accordingly –*
>
> *(a) the validity and enforceability of any such exemption from liability or indemnity shall continue to be governed, until the 31st December, 2009, by the provisions of the 1994 Law and the other relevant principles of law in force immediately prior to the date of commencement of the new Law, and*
>
> *(b) any such exemption from liability or indemnity –*
>
> *(i) shall, after that date, be deemed to be void only to the extent necessary to ensure compliance with section 157(1) or (2), as the case may be, and*
>
> *(ii) subject to that, may be read as if it were lawful to the fullest extent permitted by the new Law.*"

21. The Court of Appeal explained why they preferred the contentions of the appellant in that case to those of the respondent, ie, those which I had originally accepted, in para. 47:

> "*(1) the ordinary and natural meaning of "provides" is that something is given by someone to someone else (e.g. the phrase "provision of goods facilities or services to the public" in anti-discrimination legislation);*
>
> *(2) an indemnity cannot be provided to a director by a company until he actually enjoys the benefit thereof. It can be offered to him by the company; but until he accepts it, it is not provided to him: (see mutatis mutandis the analysis of Bowen LJ in Isaac's case); an offer of provision is not the same as provision itself.*
>
> *(3) Section 157(2) and (3) are indissolubly linked. Provision of an indemnity can be either via the medium of a company's articles or by a contract, free standing of those articles, (see Section 157(3)).*
>
> *(4) Advocate Swan argued that since it is common ground that articles per se do not confer benefits on a director, it followed that "provision" in the statutory context meant only that an indemnity was set out in the articles. In my view "provision" in Section 157 (3) must bear the same meaning whether applying to the articles or to an independent contract i.e. that the director enjoys the benefit thereof (see (2) above). The purpose of Section 157 (3) read as a coherent whole is clear (see (3) above). There are two routes by which a director can enjoy the benefit of an indemnity: the reference to articles and contract embraces both, but in each it is a sine qua non that the director has accepted the benefit, not merely been offered it;*
>
> *(5) Advocate Swan was, on analysis, blowing hot and cold; relying on contractual rights of the Directors in relation to Issue 1.1 but disclaiming them in Issue 1.2.*"

The contentions on behalf of the appellant included (as recorded at para. 45(i)) that if an exemption or indemnity is provided to a director before 1 July 2008 it will continue to provide protection until 1 January 2010, but will not do so thereafter.

Issues identified

22. The Defendants have identified four main issues to be resolved in relation to their *Exception de Fond*. They are:

    (1) Did the Defendants take up office as directors and secretary of the Plaintiffs on terms in the Plaintiffs' respective Articles of Association such that Article 153 formed part of their contract with the Plaintiffs and/or was a term on which they held office as directors?
    (2) Was Article 153 void from 1 July 2008 by virtue of section 157 of the 2008 Law or did the Defendants continue to enjoy the benefit of the indemnity and exemption provisions therein up until 1 January 2010 by virtue of reg. 10 of the Transitional Regulations?
    (3) Do the allegations in the Plaintiffs' claim, taken at their highest, mean that the Defendants:
        (a) are excluded from relying upon Article 153 by reason of mere "negligence" or "default"; or
        (b) are otherwise capable of breach of the articles in the absence of wilful misconduct?
    (4) Have the Plaintiffs:
        (a) properly particularised their allegation(s) of "wilful act(s)" at paragraph 4.d.ii.1 of the Replique or ought this allegation be struck out as embarrassing; and/or
        (b) properly pleaded anywhere in the facts and matters alleged in the Cause or Replique allegations capable of amounting to "wilful act(s)"

    such that the Defendants are excluded from relying upon Article 153?

23. In response, the Plaintiffs submit that there is a dispute between the parties as to whether Article 153 has been incorporated into any contract between them, which cannot be resolved at this stage of the proceedings. However, if that argument is rejected, there are various other issues of construction, including but not limited to the third and fourth issues identified on behalf of the Defendants, that demonstrate that the Plaintiffs have a real prospect of succeeding. As Advocate Richardson points out, the Plaintiffs only have to demonstrate that any one of their submissions meets the required test for the Defendants' Application to be dismissed. The Defendants join issue with each of the bases on which the Plaintiffs seek to resist the Application.

Incorporation of Article 153

24. The Defendants rely on the approach taken in the *Perpetual Media* case (*supra*) to suggest that it is fanciful that the Defendants are unable to invoke Article 153. The Plaintiffs, however, contend that they are able to rebut the presumption that exists because they have pleaded that they were engaged on the terms of a document that is separate from the Articles of Association (see the denial at para. 4(a) of the Replique). This shows that there is a dispute on the facts and that, in itself, is sufficient to defeat the Defendants' Application because this is something that can only be resolved following a trial.

25. Advocate Richardson argues that the Defendants' own Skeleton Argument impliedly accepts that the terms of the Articles do not per se bind the Defendants (see para. 36):

> "*There are very limited circumstances in which it may be necessary to have a trial as to the issue of whether or not a company officer can claim the benefit of a provision like Article 153, which is an entirely standard provision. On the limited authorities which suggest that such a trial may at times be necessary, the circumstances*

requiring one are limited to situations in which it is not apparent whether or not the officer knew of the provision and he has a "total lack of experience or knowledge as to commercial matters" such that "he may have been ignorant of their existence": Globalink Telecommunication Ltd v Wilmbury Ltd [2002] 1 BCLC 145 at [31], or where the officers had separate contracts with the company which may have governed analogous issues such that the incorporation of the Article was not wholly certain: John v Price Waterhouse [2002] 1 WLR 953 at [32] – [34]."

Although the Defendants proceed to argue that neither of these limited circumstances pertains in the present case, Advocate Richardson submits that it is the Defendants' pleaded case that seeks to suggest there were separate contracts of engagement.

26. Paragraph 7 of Les Defenses and Counterclaim refers to an agreement that the First Defendant had with Arch Guernsey ICC Limited to provide services under what is referred to as the Services Agreement, which was, according to para. 9, confirmed and evidenced in writing by the letter of 7 March 2008 exhibited to Ms Semlitsch's Affidavit. This agreement was expressly subject to the First Defendant's standard terms and conditions. Amongst the terms proposed (numbered 4)), which the Defendants say were accepted and so applied by extension to both of the Plaintiffs, the First Defendant (and by extension the other Defendants) would "*not be liable for loss or adverse consequences sustained by the Structures arising out of any action, failure to act, error of judgment or oversight whilst carrying out the Service, save where we have not carried out our duties in good faith and there has been an element of fraud, wilful misconduct or gross negligence on our part.*" Clause 10 of the First Defendant's Terms and Conditions of Business (Exculpation and Indemnity) also provides:

> "*10.1 None of the Service Provider, the Appointees or the Employees shall be held liable for any failure or delay in the performance of its obligations in connection with the Services arising out of or in connection with circumstances beyond its reasonable control (including, without limitation, acts of God, civil or military disturbances, outbreaks of war, acts of terrorism, natural disaster, act of government or any other authority, accidents, labour disputes or any power, telecommunications or computer failure).*
>
> *10.2 The Client undertakes at all times to hold the Service Provider, the Appointees or the Employees harmless and to indemnify them to the greatest extent permitted by law against all actions, suits, proceedings, claims, demands, costs, expenses and liabilities whatsoever which may arise from the provision of the Services by the Service Provider, the Appointees or the Employees, other than liabilities arising from the fraud, wilful default or gross negligence of the Service Provider, the Appointees or the Employees.*
>
> *10.3 The provisions of this Clause are without prejudice to any other limitation of liability or indemnity given in favour of the Service Provider, the Appointees or the Employees and shall remain in full force and effect notwithstanding termination of the Agreement.*"

There are definitions set out in clause 1.1 that clarify what this provision means. "Service Provider" means the First Defendant "*or such other person or organisation that provides the Services to the Client*" and "Appointees" means "*all persons provided by the Service Provider to act as a director or other officer, trustee, manager, signatory or shareholder of any Managed Entity*". A "Managed Entity" is "*any body corporate, partnership, trust, association or other person in respect of which Services are provided*" and "Services" are "*all services carried out or performed for or on behalf of, of in connection with (whether before or after its establishment), any Managed Entity by the Service Provider or any Appointee or Employee*

(including, without limitation, the provision of trustees, directors and shareholders and the administration of such Managed Entity)". Schedule 1 to the letter lists the Structures involved (in excess of 20 companies, of which two of them are the Plaintiffs) and Schedule 2 lists the Services as being a registered office in Guernsey, company directors, company secretary and nominee shareholders. Schedule 3 provides that the set-up costs of a Guernsey company were to be £1,000 and the annual company administration fee, including the provision of a registered office, registered agent, company secretary and nominee shareholders, directors and all compliance work required to maintain a company in good standing, was to be £2,100.

27. From the material placed before me, I am satisfied that Article 153 forms part of the relationship between each Plaintiff and the Defendants and so reject the submissions of Advocate Richardson. Insofar as the letter of 7 March 2008 evidences the relationship between the parties, clause 10.3 makes provision for other limitations of liability or indemnity to remain in full force and effect. In the *Perpetual Media* case, Beloff JA considered that Guernsey law should follow the approach described by Bowen LJ in *Isaac's Case* (at page 167):

> "*What is the effect of the signature of the articles of association by this gentleman? At all events, as soon as he acts as a director of the company, and places himself in the position for which the articles provide, these articles show the terms of the implied contract which thereupon arises between himself and the company. That is the effect of these articles – they amount to an offer put forward by the company to persons intending to become directors of the terms on which the directors are to act. It is perfectly true that the offer is contained in the articles, which are not drawn up as between the company and its directors, but nevertheless the company puts forward the terms of the articles as the terms by which it will be bound; and the director by becoming and acting as director of the company accepts that position.*"

In that way, I am satisfied that it would be fanciful at best for the Defendants to argue that Article 153 did not operate as part of the relationship of the First and Second Defendants as directors of each of the Plaintiffs. In my judgment, this is not an issue that requires resolution at trial because it is a question of construction of the documents comprising that relationship. Even if the Defendants can properly point to the standard Terms and Conditions of Business and/or the content of the letter of 7 March 2008, the chronology is such that the First and Second Defendants were the directors of both Plaintiffs from the outset and can properly, in my view, be taken to have accepted office on the basis of the Articles from the date of their appointment. The fact that both of those entities were the founding members of each Plaintiff lends support to that conclusion. As far as I am concerned, it is an inevitable conclusion from the way the First Defendant agreed to establish the corporate structure which included both Plaintiffs, that the Marlborough Group was doing so in the light of its standard Articles of Association for use each time and that the two corporate directors (or more particularly the directing minds behind them) knew full well the basis on which those appointments were offered and accepted. There is support for that conclusion in the wording used in clause 10.3 of the standard Terms and Conditions of Business.

28. I have formed a similar view in relation to the Third Defendant. As part of the Marlborough Group, its appointment as Secretary to each Plaintiff was made at the first meeting of both companies. Given the express inclusion of "*Secretary*" in Article 153, I am satisfied that this appointment was also offered and accepted on the basis that the benefit of Article 153 would be conferred on each Plaintiff's Secretary. Aside from the Defendants' submissions

about the way in which the Services Agreement operated, there is nothing to suggest differently. Having rejected the submission that the terms of the Services Agreement might prevail and that a trial is needed to resolve that issue, I reach the same conclusion as in respect of the other Defendants that Article 153 can properly be invoked by the Third Defendant.

29. My conclusion on the first of the issue identified, therefore, is that Article 153 formed part of the terms on which each of the Defendants took office in 2007. It continued to operate in their favour thereafter.

Effect of section 157

30. The second issue relates to whether or not Article 153 must be treated as void pursuant to section 157 of the 2008 Law, as claimed at para. 4(c) of the Replique. (This has no bearing on the position of the Third Defendant, relating only to the First and Second Defendants as directors of each Plaintiff.) As I have mentioned, the clear inference from the judgment of the Court of Appeal in the *Perpetual Media* case is that a director in office before the 2008 Law was commenced continues to enjoy the benefit of an exemption or indemnification provision during the 18-month transitional period. This is because the company had already provided it (in the sense of having offered appointment on terms including Article 153) which had been accepted.

31. Despite that, Advocate Richardson has made various submissions suggesting that section 157 of the 2008 Law applies to the present case. He notes that the transitional period has long since passed. The consequence is that it is no longer open to the Defendants to seek to invoke a provision that has been regarded as being obsolete (relying on the explanation offered at para. 48 in the *Perpetual Media* case by Beloff JA). Further, the proper reading of the Court of Appeal's judgment is that what I had said at paragraphs 44-46 of my judgment about the operative date for relying on the article no longer remains good law. For example, at para. 46 I concluded that:

> "*The effect of that provision is that the indemnity is given to whoever is found to be liable, but in respect of what happened at the time the person was, in this instance, a director. Whilst it is obvious that reliance on the indemnity given is not triggered until a liability is established, that liability looks backwards to the time of the actions or omissions in question and, because of the inclusion of the words "may incur", I take the view that this provision is giving a prospective indemnity to each director "for the time being". Accordingly, because the time of the alleged breaches was before 31 December 2009, having found that the indemnity provided to the First to Fourth Defendants was not void, I further find that they can rely on it now.*"

32. In my judgment there is no merit in the Plaintiffs' contentions. It is clear to me that the Court of Appeal drew a distinction between a director appointed after 1 July 2008 (but before the end of the transitional period 18 months later), who would be deprived of the traditional immunity (as explained at para. 51 of its judgment), but who might still obtain relief pursuant to section 522 of the 2008 Law, and those appointed before 1 July 2008. Beloff JA referred (at para. 50) to there being "*good reason for the legislation to differentiate between directors who had taken up office on the basis of an exemption or indemnity and might accordingly be thought deserving of a period of grace during which they (and the Company) could adjust in terms of insurance or otherwise to the new regime, and those who, eyes-open, accepted such office when the New Law was not only on the statute book, but in effect.*" In my opinion, this approach clarifies that the Court of Appeal recognised that the combination of section 157 of the Law and reg. 10 of the Transitional Regulations combined to offer those in office at the commencement of the Law a period of grace. I am satisfied,

therefore, that the First and Second Defendants continued to enjoy the benefit of Article 153 under the terms of reg. 10 until the end of 2009 and that it is not a benefit that can only be invoked up until that time. Section 157 of the Law makes such a provision void in its operation after that date but does not also mean that invoking it after that date in respect of something that occurred when it was still operative is impermissible. This construction of the legislative framework would have lacked certainty. Had the proceedings against a director been commenced, as here, later than 1 January 2010, on the Plaintiffs' argument the benefit of a provision like Article 153 would depend on timing. In my view, that cannot be right. Accordingly, I reject this further attempt by the Plaintiffs to defeat the Application.

Construction of Article 153

For the time being

33. In reaching that conclusion, I have also taken into account a further submission of Advocate Richardson about how to construe Article 153. He submits that the key words in it are "*for the time being*", noting that there is no dispute between the parties that the Defendants ceased to hold office as directors and the Secretary in 2010. In those circumstances, none of the Defendants is "*for the time being*" a current holder of office and so Article 153 cannot be invoked by any of them. In making that submission, he highlights that there is no definition in the Articles of the phrase "*for the time being*", but that "*At any time*" is defined as "*At any time or times and includes for the time being and from time to time*". Because of that definition, it follows that the phrase "*for the time being*" is to be construed distinctly from "*from time to time*" and that both of those phases are necessarily narrower than "*at any time*".

34. In the absence of any definition in the Articles, Advocate Richardson has referred to *Wankie Colliery Company Limited v Commission of Inland Revenue* [1921] 3 KB 344 and the following passage in the judgment of Lord Sterndale MR (at page 354):

> "*When the sub-section says that the duty may be assessed on "any person for the time being owning or carrying on the trade or business" does "for the time being" mean the time of the assessment or does it mean the time of the accounting period? Looking at it simply as a matter of ordinary language, there can in my view be no question about it. … To put the other construction which Rowlatt J. has put upon them is to interpret "for the time being" as meaning for a long time past, and that is not the ordinary meaning of the words "for the time being." …If the words are ambiguous and are fairly capable of two different meanings, one of which will or may work an injustice, and the other will not or may not work an injustice, then the latter is to be preferred. But if the words are plain then the Court has no right to put an unnatural interpretation upon them simply because the putting of the natural interpretation upon them might work an injustice. It is said that the fact that an injustice might otherwise be produced – it is said would be produced, but I do not think that is correct – is a reason for adopting the interpretation which was adopted by Rowlatt J.*"

The provision in question in that case was section 45(2) of the Finance (No. 2) Act 1915, pursuant to which an "*excess profits duty*" could be assessed on a person so described. The majority view in the English Court of Appeal was to construe "*for the time being*" as meaning the person with responsibility at the time the assessment was raised, and by whom the duty was then payable, rather than looking back to a time when some other person may have had responsibility at the time when the charge arose, even if no longer involved with the trade or

business. It was put succinctly by Younger LJ (at page 373) that "*the whole result merely is that the Legislature has provided that there be normally assessed to the duty in each case the owner of the business in being or its last owner, leaving it to him, if by contract with his predecessor he is so entitled, to recover the duty from that predecessor, and if he is not so entitled, leaving him to bear it himself*."

35. In the context of a taxing statute, I can understand why the English Court of Appeal concluded that the words "*for the time being*" should mean the person at the time of raising the assessment (although the first instance decision of Rowlatt J and the dissenting judgment of Atkin LJ also have some force). However, I am not persuaded that this interpretation necessarily has to be given to the words in Article 153 of the Plaintiffs' Articles of Association. This is because it would be nonsensical for a company to give an exemption and/or indemnity only to its officers currently in office (or even those last in office) if they were not the persons being pursued for wrongdoing and to whom any such exemption or indemnity needed to be effective.

36. I take a similar view in relation to the extract from *Stroud's Judicial Dictionary of Words and Phrases* (8th ed.) to which Advocate Richardson has also referred:

> "*The phrase "for the time being" may, according to its context, mean the time present, or denote a single period of time; but its general sense is that of time indefinite, and refers to an indefinite state of facts which will arise in the future, and which may (and probably will) vary from time to time …*
> *Where rights are to be enforced by, or penalties are to be paid to, officers (whether parochial or otherwise) "for the time being", that connotes officers who are such when the action is commenced, not those who were such when the right arose or the penalty was incurred …*".

For Article 153 to have utility for the benefit of those mentioned therein, the only logical construction is to make it operate for the benefit of the persons holding office at the time when the exemption and/or indemnity needs to be applied. Because office holders do change over the course of time, the natural meaning to give the words in the context in which they are used, in my opinion, is to construe the provision in the way I did in the *Perpetual Media* case and that is how I still choose to construe it now. As the Defendants submit, there is support for that conclusion because of the inclusion in Article 153 of the reference to such office-holders' "*respective heirs and executors*", thereby demonstrating that the provision is not limited only to those actually in office when a claim is eventually made. Nothing in the Court of Appeal's judgment indicates that this is the wrong construction to give to those words. Whilst Advocate Richardson is correct to point out that this construction of the phrase was not advanced before me in that previous case (and I infer that it did not feature in the arguments before the Court of Appeal), this is a question of construction that can properly be resolved on a summary judgment (or strike out) application, and I have no hesitation in rejecting Advocate Richardson's submissions on this point. There is no real prospect of the Plaintiffs succeeding with this argument relating to the meaning to be given to Article 153. Further, it is not an issue that needs to be resolved following a trial because I am satisfied the parties have been afforded ample opportunity to deal with it at this issue hearing.

Wilful act neglect or default

37. Another question of construction raised by Advocate Richardson concerns the phrase "*their own wilful act neglect or default*", which appears in two places in Article 153. The Plaintiffs contend that "*wilful*" only qualifies "*act*", so that Article 153 is of no assistance to the Defendants if the Plaintiffs can show any of "*wilful act*", "*neglect*" or "*default*", as set out in

para. 4(d)(ii) of the Replique (and for present purposes the Plaintiffs argue that there is a real prospect of them being able to do so). The Defendants argue that "*wilful*" qualifies each of the three words that follow. The Plaintiffs' alternative position is that the behaviour of the Defendants is capable, in any event, of amounting to any or all of wilful act, wilful neglect or wilful default.

38. Advocate Barclay refers to *Re City Equitable Fire Insurance Company* [1925] 1 Ch 407 as offering assistance as to the proper construction of this phrase. In that case, the article in question conferring an indemnity contained the phrase "*by or through their own wilful neglect or default respectively*". Romer J stated (at page 434):

> "*… the difficulty is not so much in ascertaining the meaning of the adjective "wilful," as in ascertaining precisely what is the noun to which the adjective is to be applied. An act, or an omission to do an act, is wilful where the person of whom we are speaking knows what he is doing and intends to do what he is doing. But if that act or omission amounts to a breach of his duty, and therefore to negligence, is the person guilty of wilful negligence? In my opinion that question must be answered in the negative unless he knows that he is committing, and intends to commit, a breach of duty, or is recklessly careless in the sense of not caring whether his act or omission is or is not a breach of duty.*"

His Lordship approached the question raised by these words in the article as requiring him to ascertain "*first, whether in any of the matters charged against them the respondents have been guilty of negligence, and secondly whether any such negligence was wilful, negligence and default meaning for all practical purposes one and the same thing*" (see page 442). The Court of Appeal followed the same approach (see, eg, at page 516).

39. The positioning of "*wilful*" preceding the other words rather than only one or more of the later words means that the problems experienced in *L/M International Construction Inc v The Circle Ltd Partnership* (1995) 49 ConLR 12 do not apply. In that case, the wording was "*default or wilful neglect*" and the trial judge read them as if "*wilful*" qualified both words, but the Court of Appeal disagreed. Had the parties intended to cover "*wilful neglect or default*", the existence of long-established authority starting with *Re City Equitable Fire Insurance Co Ltd* (*supra*) showed that they only needed to use that form of words. They did not, and so Millett LJ explained (at page 34):

> "*The word 'default' is a word of the widest import. It means a failure to act or to abstain from acting as one should. … The word 'default' thus ordinarily covers both acts of commission and acts of omission, in contradistinction to 'neglect' which covers acts of omission only. There is, therefore, a degree of tautology in the expression 'default or neglect' since omissions are included under both descriptions. In the normal case it is not necessary to decide whether the word 'neglect' is mere surplusage or whether its presence restricts the meaning of the word 'default' to acts of commission. But the presence of the word 'wilful' before 'neglect' makes all the difference. The expression 'wilful neglect' makes it clear that mere oversights and accidental omissions are not included. It can have no other meaning. Its presence must restrict the meaning of the word 'default' to acts of commission, not because there would otherwise be a tautology, but because there would otherwise be a self-contradiction.*
>
> *In my judgment, therefore, the expression 'default or wilful neglect' should be construed as meaning 'acts or wilful omissions'. So construed, the clause has two objects: to limit the liability of the managers to liability for their own acts or defaults*

> *or the acts or defaults of their agents; and to limit their liability for neglect to liability for wilful neglect.*"

40. Advocate Richardson has instead concentrated on the term "*wilful act*", suggesting that it is simply an act done deliberately and referring to *ICDL, GCC Foundation, F-Z LLC v The European Computer Driving Licence Foundation Limited* [2012] IESC 55. The Supreme Court of Ireland concluded that (at para. 128):

> "*It emerges from these authorities that it suffices for an act to be wilful that it is done deliberately. It is not necessary that it be committed with the intention to injure or that the person committing it knows that it is unlawful.*"

Advocate Richardson pointed out that the submissions on behalf of the Defendants failed to offer any definition of the term "*wilful act*".

41. In respect of the parties' dispute as to the proper construction of Article 153, Advocate Richardson also relies on the application of the *contra proferentem* principle, which is conveniently summarised in *Hollins v J. Davy Ltd* [1963] 2 WLR 201, 204: "*all exemption clauses are construed contra proferentem so that if there were here two reasonable constructions of a word or phrase, then the construction least favourable to the defendants will be adopted.*"

42. I am not persuaded that the meaning to be given to the phrase "*their own wilful act neglect or default*" in Article 153 can only be resolved at trial. It seems to me that this is the type of short point of construction that is amenable to resolution on an application for summary judgment. For present purposes, I incline to the view that "*wilful*" qualifies all three of the words that follow. This is, in my view, the natural meaning of the phrase and is also consistent with the situations in which the exemption or indemnity ordinarily provided to officers and others is lost. The phrase covers acts of commission as well as omission, but the inclusion of "*wilful*" in respect of both types requires it to be deliberate or intentional and not merely something that follows a mere oversight or is accidental.

Inadequate particularisation

43. Whilst the meaning to be afforded to Article 153 is not a reason for dismissing the Defendants' Application, the Plaintiffs' argument that the Defendants have failed to establish that they have no real prospect of success in establishing wilfulness calls for closer scrutiny. The Defendants claim that the Plaintiffs have failed adequately to plead behaviour that amounts to wilful misconduct and that the Plaintiffs have further declined, when invited to do so, to rectify this defect in their case. The consequence that follows, so the Defendants submit, is that the relevant sub-paragraph in the Replique should be struck out and so there is no real prospect of the claim succeeding because Article 153 offers a complete answer to the claim.

44. Advocate Barclay draws heavily on the approach set out in *Weavering Macro Fixed Income Fund Limited v Peterson and Ekstrom* (unreported, 12 February 2015). Following his review of the authorities, the President of the Court of Appeal of the Cayman Islands, Sir John Chadwick, held (at para. 95):

> "*… that in order to establish "wilful neglect or default" for the purposes of defeating the protection given to directors under an article in the terms of Article 182 of the Company's Articles of Association, it is necessary (at least under the first limb of Mr Justice Romer's test in the City Equitable case) for the Company to prove to the satisfaction of the court that the director made a deliberate and conscious decision to act or to fail to act in knowing breach of duty: negligence, however gross, is not enough. As Sir Robin Auld put it in Spread Trustee Company Limited v Hutcheson*

> *[2011] UKPC 13, wilful neglect and default is "the antithesis of negligence or an inadvertent falling short of a duty to take reasonable care".*"

The President was further of the opinion (see para. 117) that:

> "*… it is necessary to satisfy the court that the director appreciated (at the least) that his or her conduct might be a breach of duty and made a conscious decision that, nevertheless, he or she would do (or omit to do) the act complained of without regard to the consequences; and that if the evidence does not establish that the defendant at least suspected that his conduct might constitute a breach of duty, it is not appropriate to characterise his breach of duty as "wilful neglect or default" whether under the first or the second limb of the City Equitable test. To hold otherwise would, in my view, be to fail to give full meaning to the requirement that the "neglect or default" relied upon must be "wilful".*"

45. In the light of this approach, Advocate Barclay points out that the Plaintiffs' pleaded case does not identify any specific duty that has been breached wilfully and that there has been a failure to particularise properly any specific deliberate and conscious or recklessly careless acts done in the knowledge that they involved a breach of such duties or in appreciation that such acts at least might involve a breach of duty. As such, the case pleaded against the Defendants is obviously ill-founded and demonstrates that it has no real prospect of success. He suggests that guidance as to what must be included in a pleading can be obtained from Practice Direction 16 in the *Civil Procedure Rules*, para. 8.2 of which states that:

> "*The claimant must specifically set out the following matters in his particulars of claim where he wishes to rely on them in support of his claim:*
>
> *(1) any allegation of fraud, …*
>
> *(7) details of wilful default …*".

In making that submission, he relies on the approach described in *Magloire t/a First Call Recruitment v Wright* (unreported, 22 July 2005) in which the Court took guidance from the authorities on what was then Order 18, r. 12 of the Rules of the Supreme Court 1965 as to the determination of "*whether the particulars given were sufficient to provide the defendants with adequate details so as to enable them to prepare their defences*".

46. This issue about the adequacy of the Plaintiffs' pleaded case has been raised by the Defendants on two occasions. The Plaintiffs' response to request 72 (relating to para. 4(d)(ii) of the Replique) of the Defendants' Request for Further Information in respect of the Plaintiffs' Claim, which was made on 5 June 2014, was:

> "*The Plaintiffs' position is that by virtue of those matters set out at paragraphs 4.a. to 4.c, of the Replique, it is not necessary for them to show that the behaviour of the defendants amounted to any of the behaviours that are expressly set out in Article 153. In any event, the breaches set out in paragraphs 29-32 and 51-54 of the Cause are collectively and individually capable of amounting to any or all of the following on the part of the individuals or parties referred to in those paragraphs and notwithstanding the Plaintiffs position set out above, should the Plaintiffs need to show any of these behaviours they need show only one of them:*
>
> *a. a wilful act;*
>
> *b. neglect; or*
>
> *c. default.*"

In a response provided on 6 May 2015 to a further Request for Information made by way of a letter dated 27 March 2015 alleging that response 72 was deficient, the Plaintiffs rejected the Defendants' contention that an allegation that the Defendants' behaviour amounted to "*wilful act neglect or default*" was tantamount to alleging fraud and so required full

particularisation and repeated the Plaintiffs' contention that the paragraphs of the Cause already mentioned sufficed, drawing particular attention to the content of para. 31. The Defendants therefore invite the Court to draw the inference that the Plaintiffs have no basis on which to allege that there has been wilful, conscious wrongdoing on the part of the Defendants.

47. Advocate Richardson stands by the responses previously given on behalf of the Plaintiffs on this question and further points out that, even if the guidance in Practice Direction 16 were to be adopted, there is no reference in it to "*wilful act*" (nor indeed to "*wilful default*") so the submission of the Defendants lacks any basis on which to assert that the Plaintiffs have failed to plead an essential element of the cause of action alleged. He also suggests that the Defendants have acknowledged that if the Court were to find that wilfulness has been adequately pleaded, the case is not a suitable one for striking out or summary judgment, referring to *SPL Guernsey ICC Limited v Moore Stephens* (unreported, 13 January 2014, at para. 30):

> "*The Plaintiffs' Cause is not pleaded as explicitly as it might otherwise be. That in itself is not a ground on which to award summary judgment against the nine Plaintiffs concerned. I could only do so if satisfied that there is, on the pleading as it stands, no real prospect of each of those Plaintiffs succeeding in its claim against the Defendant. If put on the alternative basis of striking out the claims brought by them, I would need to be satisfied that each of those claims is "bound to fail". … However one looks at it, the hurdle that the Defendant has to surmount to succeed on its Application is a high one and, in my judgment, it has failed to do so.*"

Advocate Richardson also notes that the Defendants' entitlement to the particulars they allege must be supplied has not yet been established. There has been no Court order for the requests made to be answered. He suggests, therefore, that moving directly to this Application to dismiss the Plaintiffs' claim is premature and that the Defendants' proper remedy at this stage should have been to seek an order directing a response to any further request for particulars they wish to have.

48. As I said at para. 29 in the *SPL* case, pleading points of this type seldom find favour with the Court. Unlike the Civil Procedure Rules, the 2007 Rules are much less prescriptive as to what must be pleaded. Rules 10(2) provides:

> "*The cause shall contain*
>
> *(a) a statement of the material facts on which the plaintiff relies for his claim but not the evidence by which those facts are to be proved, and*
>
> *(b) a statement of the relief sought (including, where damages are claimed, particulars of the amount thereof so far as reasonably possible).*"

The references in rule 16 to exceptions, niances and prétentions in Defences show that the art of pleading in Guernsey has distinct elements from that in England and Wales. I am not minded to import wholesale into the practice of pleading in Guernsey the English procedural law requirements dictating what must be included in a pleading. This is an area where what might be regarded as gaps in Guernsey procedure cannot simply be filled by reading across from *The White Book*. In the absence of express provision through domestic rules and/or practice directions, I prefer to leave it more open-ended as to whether a pleading adequately meets the requirements of our Rules.

49. That said, I accept the submission of Advocate Barclay that the Plaintiffs' pleaded case does not expressly state which, if any, of the allegations made against the Defendants takes them outside the benefit they would otherwise have deriving from Article 153. Equally, however, I have to recognise that the hurdle the Defendants have to surmount here is a high one and I

am prepared to accept that the case against the Defendants, taken at its highest on the basis of the allegations made in the Cause, both in relation to the facts pleaded and the breaches alleged, is one that could potentially be advanced on a basis that corporate entities acting as company officers were wilful, whether by commission or omission. It would be preferable for the pleaded case to descend into greater detail than it does, if only to address the criticisms that have been levelled at it on behalf of the Defendants, and I would encourage Advocate Richardson to consider whether there is merit in doing so voluntarily now rather than awaiting an application for an order for particulars. However, in my judgment, the position is not that the Plaintiffs have no real prospect of succeeding on the claim on the basis that the exemption or indemnity provided by Article 153 is bound to be found to apply because there remains more than a fanciful prospect that the Plaintiffs will establish on the evidence to be adduced at trial the wilfulness required.

50. For this reason, I have reached the conclusion that the Defendants' Application for summary judgment or for striking out falls to be dismissed. There is, of course, a distinction between dismissing an application for summary judgment and positively asserting that the Plaintiffs have a good case. In concluding that the Defendants have failed to discharge the burden they have of establishing that the Plaintiffs have no real prospect of succeeding on their claim on this narrow basis, I am doing so because, as Advocate Richardson points out, the Plaintiffs only have to show sufficient cause to defeat the Defendants' Application. I have not considered the probability of the claim succeeding; I have focused, as required, on reality. Moreover, I am persuaded that Advocate Barclay's criticisms of the pleaded case attempt to obscure the fact that the impression I have formed of the case the Defendants have to answer is sufficiently clear to me and so should also be to them (and could become even clearer if more particulars are provided about how the Defendants' reliance on Article 153 is to be defeated), so that it would be wrong to shut the Plaintiffs out at this stage from pursuing their claims.

Fundamental breach

51. Having decided that the primary relief sought by the Defendants fails, I can deal briefly with the final aspect of the Plaintiffs' contentions on the issue of the Defendants losing the protection of Article 153 as a result of their breaches of their contracts with the Plaintiffs. Had this been the only basis on which I was invited to dismiss the Application, I would have declined to do so. The submission of Advocate Richardson invokes the doctrine of breach of a fundamental term, or a fundamental breach, referring in particular to *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Contrale* [1967] AC 361. In the speech of Lord Upjohn (at page 427D), it was stated that:

> "*… where there is breach of a fundamental term the law has taken an even firmer line for there is a strong, though rebuttable, presumption that in inserting a clause of exclusion or limitation in their contract the parties are not contemplating breaches of fundamental terms and such clauses do not apply to relieve a party from the consequences of such a breach even where the contract continues in force. This result has been achieved by a robust use of a well-known canon of construction, that wide words which taken in isolation would bear one meaning must be so construed as to give business efficacy to the contract and the presumed intention of the parties, upon the footing that both parties are intending to carry out the contract fundamentally.*"

Earlier in his speech, Lord Upjohn had also explained (at page 421G):

> "*… there is no magic in the words "fundamental breach"; this expression is no more than a convenient shorthand expression for saying that a particular breach or breaches of contract by one party is or are such as to go to the root of the contract which entitles the other party to treat such breach or breaches as a repudiation of the whole contract. Whether such breach or breaches do constitute a fundamental breach depends on the construction of the contract and on all the facts and circumstances of the case.*"

52. In response, Advocate Barclay suggests that the law in England and Wales has moved on since the *Suisse Atlantique* case, as shown in the Conclusion on the issue of fundamental breach provided in *Chitty on Contracts* (32nd ed., at para. 15-027):

> "*It is clear that there is now no rule of law by which exemption clauses are rendered ineffective in the face of a "fundamental breach" or the breach of a "fundamental term". In the Photo Production case, Lord Diplock stated that, if the expression "fundamental breach" is to be retained, it should, in the interests of clarity, be confined to the ordinary case of a breach of which the consequences are such as to entitle the innocent party to elect to put an end to all the primary obligations of both parties remaining unperformed. No express reference was made by him to the expression "fundamental term", but the inference is that there exists no category of terms which can be said to be in any sense "fundamental" other than conditions. On this basis, it is submitted that there is no presumption that, in inserting a clause of limitation to exclusion into their contract, the parties are not contemplating its application to a fundamental breach or the breach of a fundamental term. The question is in all cases whether the clause, on its true construction, extends to cover the obligation or liability which it is sought to exclude or restrict.*"

In these circumstances, Advocate Barclay points out that the very essence of Article 153 is that it should apply where the Defendants have breached their duties to the Plaintiffs, contractual or otherwise, and that it applies to all and any such breaches save only where the concluding proviso is itself applicable.

53. I do not find that Advocate Richardson's submission has merit and would not have been persuaded that the Plaintiffs have a real prospect of succeeding in resisting the application of Article 153 on the ground that the Defendants have breached their agreements with the Plaintiffs in such a manner that they lose what would otherwise be a benefit to them. I take the view that this submission is based on a false legal premise. Looking at the terms under which the Defendants agreed to take office, as I have already explained, they enjoy the benefit of Article 153, subject to where they lose it through proof that there was some wilful act, neglect or default on their part. Although I will leave the question open, because I am not obliged to answer it, I would be minded to accept the contention that Article 153 should be construed in the context of the relationship between the Defendants and each Plaintiff in such a way that it is generally available to each of the Defendants save where its protection is expressly lost. The Defendants would not be deprived of the benefit of Article 153 simply because they have breached their contracts with the Plaintiffs in the manner suggested, nor would this be something that could only be addressed at trial.

Conclusion on summary judgment/strike out

54. The Defendants have come within a whisker of satisfying me that their *Exception de Fond* should be accepted and the claims against them dismissed. The similarities with the position in the *Perpetual Media* case (*supra*) initially led me to think that, because the Transitional Regulations problems there did not apply here, Article 153 must offer the Defendants a complete defence. It seemed that Advocate Richardson had raised a number of ingenious,

but ultimately flawed, reasons why the Application should be dismissed. However, upon careful and closer analysis, I have concluded that one of those submissions has merit and it is for that reason only that I have concluded that there should not be summary judgment, or the striking out of the entire Cause, resulting from the *Exception.*

55. For the purposes of this Application, I am satisfied that Article 153 forms part of the terms on which the Defendants, the two directors and the company secretary of both Plaintiffs, took office in 2007. I am also satisfied that section 157 of the Companies Law did not make Article 153 void in respect of the First and Second Defendants until 1 January 2010, meaning that both of them can in principle rely upon the protection afforded to them by it in this case. The Third Defendant is in a better position anyway because it is not affected by section 157. Because I am satisfied that Article 153 can be relied upon by the First and Second Defendants as directors, I do not need to consider whether they can also rely upon it in some other capacity. Because they are issues of construction, I reject the Plaintiffs' submissions that the contractual relationship requires a trial to resolve them, that the words "*for the time being*" mean that former office holders such as the Defendants are precluded from relying on Article 153 and that "*wilful*" only qualifies the word "*act*". I would also not be minded to dismiss the Application on the basis of Advocate Richardson's fundamental breach argument. However, the one element on which the Plaintiffs have been able to resist the Application is that I have not been persuaded that they have no real prospect of succeeding on the issue of whether the protection of Article 153 might be found to be lost because of each Defendant's "*wilful act neglect or default*". In my judgment, the position is not sufficiently obvious from the material placed before me that the Plaintiffs' position lacks conviction. In my opinion, the Plaintiffs' case in this regard has just about been put adequately on the facts and allegations on the face of their pleadings, albeit that there is clearly scope to provide more detail. Indeed, there may be more to these allegations than meets the eye and I have not been persuaded that the Plaintiffs should be deprived as a result of this Application of their opportunity to take their case to trial.

56. For these reasons, paragraphs 1 and 2 of the Application of 19 June 2015 are dismissed.

Security for costs

57. Turning to the final element of the Application, again there was agreement about the legal principles to apply. Rule 82 of the 2007 Rules gives the Court a wide discretion when considering whether to order security for a party's costs. To assist it in reaching a decision that is "*just*", the Court regularly has regard to the gateway conditions set out in Part 25 of the Civil Procedure Rules. The Defendants rely on condition (c) ("*the claimant is a company or other body … and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so*"). I have previously elaborated on what needs to be shown in relation to this condition (eg, *Fairhead v Praxis Holdings Ltd* (unreported, 17 March 2015)), but I do not need to repeat those principles here because Advocate Richardson has accepted that the Plaintiffs' financial position is such that the Court is able to find that condition (c) has been proved by the Defendants. The issues I have to resolve, therefore, are whether to decline to exercise the Court's discretion in respect of ordering security for costs or, if I am minded to make such an order, the amount of and the timing at which the security to be ordered is to be provided.

58. The principal reason advanced by Advocate Richardson as to why no security should be ordered is that of the delay in making this Application. The proceedings were commenced in 2013. The impecuniosity of each Plaintiff was apparent from the outset. The First Plaintiff's only asset, 2 Creswick Road, was sold in 2009. The value of the Second Plaintiff's asset, the Greenford site, is such that its liabilities are greater than its assets and it has been making losses for years. Delay is a factor to bear in mind, as explained recently in *Hniazdzilau v Vajgel* [2015] EWHC 1582 (Ch) (at para. 28):

> "*Delay in making the application is one of the circumstances to which the court will have regard when exercising its discretion to order security. The court may refuse to order security where delay has deprived the claimant of the time to collect the security, or led the claimant to act to his detriment or may cause hardship in the future costs of the action. The court may deprive a tardy applicant of security for some or all of his past costs or restrict the security to future costs (see CPR 25.12.6). The question of delay must be assessed at [the] moment when the application is made, although of course the court must take into account the impact of an order at the time it is made. That is because, as the Court of Appeal said in Prince Radu of Hoheruzollern v Houston [2006] EWCA Civ 1575 (cited at White Book p. 823-4), the order for security for costs comes with a sanction which gives a claimant a choice whether to put up security and go on or to withdraw his claim; that choice is meant to be a proper choice, and the claimant is to have a generous time with which to comply with it. As Waller LJ pointed out (at [18]), the making of an order for security for costs is not intended to be a weapon whereby a defendant can obtained a speedy summary judgment without a trial.*"

Advocate Richardson has confirmed that he cannot advance the case that making an order for security would somehow stifle the Plaintiffs' claims. In any event, there is, of course, no such evidence on this issue, which would be required if such an assertion were to be made.

59. Advocate Barclay counters any suggestion that there has been sufficient delay to warrant depriving the Defendants of the order for security for costs they would otherwise be likely to obtain by pointing out that the pleadings had only recently been completed when the Application was made and that the steps in preparing for a trial involving disclosure and witness statements are still to be undertaken, when significant costs will be incurred.

60. I am satisfied that this is an appropriate case in which to make an order for security for costs. The approach of the Plaintiffs has been to provide no further information about their financial positions. I regard that as being tantamount to an acknowledgement, accepted by Advocate Richardson, that the grounds for making an order for security have been satisfied by the Defendants. I appreciate that the Application could have been made at an earlier stage of the proceedings. However, given the way in which security has been sought as an alternative to the claim being dismissed pursuant to the *Exception de Fond*, I think that the delay in this case has not unduly prejudiced the Plaintiffs and should not now be relied upon to avoid having to lodge security (or choose not to do so and so forfeit the right to pursue the Action). Accordingly, whilst I will continue to bear in mind that the Application has come closer to trial than to the commencement of the proceedings, I do not consider that the delay factor points away from making some order for security.

61. A schedule of estimated costs has been exhibited to Ms Bird's First Affidavit. The total sum sought on the indemnity basis is a little over £500,000. The indemnity basis has been used rather than the standard recoverable basis because of the terms of Article 153 of the Articles of Association. Given that the success or failure of the Action will depend in part on whether this provision applies, I am satisfied that using the indemnity basis is appropriate. In those circumstances, the discount that I consider it is usually appropriate to apply to reflect what might be disallowed on a taxation is significantly lower than the 30% or so that I frequently apply to recoverable costs, adopting the approach outlined by McNeill JA in *Investec Trust (Guernsey) Limited v Glenalla Properties Limited* (unreported, 10 March 2014).

62. Looking at the schedule, I note that in excess of £200,000 has already been billed. No explanation has been offered as to why so many hours have been required to get the proceedings to the current position. Just over £100,000 is estimated to be needed to cover handling this Application, disclosure and witness statements. In round terms, the final

preparation for trial and attending at what is estimated to be a two-week trial is expected to cost a little over £160,000. The other costs relate to disbursements. By comparison to some estimated bills of costs, this one appears to be commendably modest, although I have also noted the inclination to include two Advocates in some instances, eg, in the run-up to and at trial, where the reasonableness of doing so has not been explained. The schedule also contains an estimate for two Advocates to attend the hearing of the present Application, whereas what actually happened was that Advocate Barclay appeared alone. As a result of these matters, the total amount of security I will order is lower than the estimated amounts.

63. Advocate Richardson urged the Court to making any order for security to be by way of staged payments rather than a single requirement to lodge the entirety now. In the context of this case, I am persuaded that this is an approach that will be the most just outcome. It enables the Plaintiffs to review as matters develop whether they wish to provide each tranche so ordered or to abandon their claims.

64. Given the timetable to which the parties are currently working, the first tranche by way of security for costs will reflect costs already incurred and also those to be incurred in undertaking disclosure and the preparation of witness statements. I have adopted a broadbrush approach to how much this first tranche should be. Because of the absence of explanation about the costs already billed at the time of Ms Bird's Affidavit, including Counsel's fees, I have applied a higher discount than I might otherwise have done and have reached the total figure of £215,000. Assuming the Action proceeds thereafter, there will be a second tranche payable when the Plaintiffs apply for further directions, including the fixing of a trial date, following the exchange of witness statements and this will be in the sum of £85,000, very broadly reflecting the estimated costs of one Advocate appearing, plus a little extra for assistance.

65. I will order that the first tranche of £215,000 must be lodged with the Greffe within 21 days of the handing down of this judgment. Because there has been no suggestion that one Plaintiff might elect to withdraw it claim whilst the other Plaintiff proceeds, this amount is payable in respect of both Plaintiffs jointly. In the meantime, pursuant to rule 82(2)(a) of the 2007 Rules, the Plaintiffs' proceedings are stayed until the security is given. In the event that the security is not provided in accordance with this order, the proceedings will stand dismissed pursuant to rule 82(2)(b). If one of the Plaintiffs only chooses to provide the security ordered, I will re-visit the terms of this order and will potentially make some adjustment to reflect the fact that the security is in respect of the costs that might be ordered against that party. For this reason, I will add liberty to apply on two days' notice.

66. In respect of the second tranche, if applicable, that must be lodged on behalf of the Plaintiffs with the Greffe at or even shortly before the time of applying for future directions, even if that is by way of a further Consent Order. Again, if that security is not provided, the Plaintiffs' proceedings will be stayed and, if this aspect of the order is not complied with within 14 days thereafter, the proceedings will also stand dismissed.

67. To this extent, para. 3 of the Application of 19 June 2015 is granted.

Costs

68. Although para. 5 of the Application seeks the Defendants' costs on the indemnity basis, I will reserve the costs and await further developments, including seeing whether the stay being imposed is lifted through the provision of the first tranche of security ordered.

