Tranquility Holdings Ltd v Invista Real Estate Investment Management (CI) Ltd.
Court of Appeal
4th March, 2016

JUDGMENT 8/2016

In relation to the refusal of permission for an extension of time in which to appeal

4th March 2016

Before: **Sir Michael Birt**

Between: **Tranquility Holdings Limited** **Applicant**
-and-

Invista Real Estate Investment Management (CI) Limited **Respondent**

Advocate M Newman for the Applicant
Advocate PTR Ferbrache for the Respondent

BIRT, JA

1. I have before me two applications by Tranquility Holdings Limited ("the Plaintiff"). The first ("the Extension application") is for an extension of time in which to appeal against the decision of the Bailiff on 13 August 2015 to enter summary judgment under Rule 19 of the Royal Court Civil Rules 2007 ("the 2007 Rules") in respect of the whole of the Plaintiff's claim and also to strike out the claim under Rule 52(2) of the 2007 Rules. The second ("the Leave application") is for leave to appeal against that decision of the Bailiff. The Leave application is required because an application for summary judgment or to strike out is an interlocutory matter for the purposes of Article 15(e) of the Court of Appeal (Guernsey) Law 1961, so that leave to appeal is required either from the Royal Court or from the Court of Appeal.

2. The parties have filed written skeleton arguments in respect of both applications and I have considered the matter on the papers.

Background

3. I gratefully adopt with minor modifications the summary of the background as contained in the Bailiff's judgment. The Respondent, to whom I shall refer as "the Defendant", was the manager of Invista Property Portfolio Fund ("the Fund"), an open-ended unit trust established in Guernsey and regulated by the Guernsey Financial Services Commission. The Fund invested in the United Kingdom commercial property market as a fund-of-funds offering returns through both capital

growth and income by reference to the capital value and rental income of the underlying commercial properties. The Fund performed well until 2007 when the market for commercial properties suffered a downturn. The annual report and financial statements for the year to 1 February 2008 show that the net assets attributable to unitholders as at 31 January 2007 were nearly £114 million but had fallen to a little over £80 million one year later. Initially, subscriptions for units exceeded redemption requests but the tide turned in 2007 such that the number of units across all classes fell from about £86 million to £70 million. The unit value of 'B' class units (the most numerous in issue) fell in the same period from 138.17 pence per unit to 125.52 pence per unit.

4. The level of redemption requests in late 2007 placed such a strain on the liquidity of the Fund that the Defendant as manager took the decision on 24 December 2007 to suspend dealings. Although the suspension was lifted in 2010, it was resolved to wind up the Fund in 2011. In the Cause, it is asserted that the Plaintiff, which had initially invested £2.35 million in the Fund, submitted a written application for redemption on 18th January 2008 (after dealings had been suspended) when it applied to redeem units to the value of €1 million "*once the suspension was lifted*". In April 2007 the Plaintiff's holding of units was valued at £2,961,796.60 but after redemption or distributions in the winding up, it has ultimately received a total sum of £1,264,398. It also claims to have lost a further £374,426.16 by reason of unfavourable currency exchange movements between the euro and sterling. The claim is for the difference between the value of its investment as at 30 April 2007 and the amount eventually received plus the currency loss, making a total claim of £2,071,824.76. The Plaintiff is beneficially owned by Mr Patrick Kenny. He and his wife are the sole directors of the Plaintiff, although the fact that Mrs Kenny is also a director only became known in November 2015; before that the impression had been given that Mr Kenny was the sole director.

5. The Plaintiff instituted the proceedings against the Defendant in April 2013. The Cause was subsequently amended in April 2014. The Plaintiff seeks to recover its loss from the Defendant as manager of the Fund by way of damages for breaches of fiduciary duty and duty of care owed to unitholders, principally on the ground that the Defendant offered preferential treatment to a number of larger investors in the provision of information to them and the preferential handling of their redemption requests (prior to the suspension of dealing) in a manner that was prejudicial to unitholders generally and thereby caused the liquidity problem that led to the allegedly avoidable decision to suspend dealings in the Fund on 24 December 2007. Alternatively, the Plaintiff seeks an order for equitable compensation, or an account, or restoration of the Fund, together with interest and costs. The Defendant denies the existence of the duties alleged as a matter of law and/or denies that any duties that existed are enforceable by an investor (contending that they could be enforced only by the Trustee of the Fund) and/or denies that, as a matter of fact, there were any breaches of duty, and/or contends that the Plaintiff's claim cannot succeed as a matter of causation.

6. The Defendant subsequently applied for summary judgment, alternatively that the claim should be struck out. That is the matter which came before the Bailiff. In broad terms, the Defendant based its application on the following grounds (e.g. paras 53 and 77 of the Bailiff's judgment):-

    (i) As a matter of law, the Defendant did not owe the pleaded duties to the Plaintiff as a unitholder.

    (ii) As a matter of fact, the Defendant was not in breach of any of the pleaded duties.

    (iii) Even if the Defendant had breached any of its duties, the Plaintiff had no standing to bring a claim as a unitholder in respect of any such breach; such claim could only be brought by the Trustee.

(iv) The Plaintiff could not succeed as a matter of causation i.e. it could not show that 'but for' the alleged breaches of duty by the Defendant, it would not have suffered its losses.

7. The Defendant filed four affidavits by Mr Wayne Bulpitt, a director of the Defendant, in support of the application and the Plaintiff filed an affidavit by Mr Patrick Kenny, the beneficial owner of the Plaintiff. All of the documents which were before the Bailiff have been made available to me and I have therefore been able to consider them.

The Bailiff's judgment

8. The Bailiff reminded himself of the appropriate test for summary judgment and for striking out. It is not suggested that he was mistaken in any way in relation to these tests.

9. He summarised the allegations in the Cause concerning the management of the Fund in the latter half of 2007. This related to the way in which the Defendant had handled applications for redemptions from six specified unitholders in that period, which followed on the significant downturn in the value of commercial property in September 2007 as a result of the credit crunch which hit markets in August 2007. In particular, it was said that the Defendant had wrongly agreed to redemptions by those unitholders on less than the notice period required in the Trust Instrument.

10. Redemptions and subscriptions for Units could only take place on 'Dealing Days' as defined in the Trust Instrument. These were monthly. The provisions for redemption in the Trust Instrument essentially had the following effect:-

(i) Where the value of the units to be redeemed was less than £500,000 or less than 1% of the net asset value of the Fund, the written request had to be sent to the Defendant as manager no later than five business days prior to the relevant Dealing Day (or such earlier or later day as the Manager shall from time to time determine).

(ii) If the value to be redeemed was greater than either of those amounts, the written request had to be received no later than three months before the relevant Dealing Day (or such earlier or later day as the Manager shall from time to time determine).

(iii) Where the value of the units to be redeemed was greater than 10% of the net asset value, the unitholder 'may' request that the units be redeemed on the first Dealing Day to occur after six months has elapsed from submitting the request 'or such shorter period as may be agreed between the unitholder and the Manager'.

(iv) Where the value of redemptions on any Dealing Day exceeded 5% of the net asset value of the Fund, 'the Manager may limit the value of redemptions'.

(v) The Trust Instrument defined the redemption price of a unit as being the unit value less an allowance to cover the costs and expenses in relation to the redemption (as determined by the Manager in its absolute discretion). No such allowance (a 'redemption charge') had historically been charged on redemption but on 16 November 2007, the Defendant wrote to unitholders to say that thereafter a charge of 3% would be applied to all redemption requests.

11. The essence of the Plaintiff's case was that, if the Defendant had taken steps to insist strictly on the time limits for the redemptions, to impose a 5% limit on redemptions on any one Dealing Day and to impose a redemption charge earlier than it did, it would not have been necessary to

suspend dealing in December 2007, so that the Plaintiff's loss would have been avoided because it could have redeemed its units on the April 2008 Dealing Day.

12. Mr Bulpitt, in his fourth affidavit, undertook an exercise which assumed that these steps were taken (save in respect of the redemption of the units belonging to one unitholder called the Charities Property Fund ("CPF"), a substantial unitholder) and concluded that at best it would simply have led to the suspension taking place immediately after the January 2008 Dealing Day rather than in December 2007. This would not have assisted the Plaintiff as it had only submitted its redemption request in January 2008 which would therefore fall to be activated in April 2008. By then redemptions would have been suspended in any event.

13. I note in passing that it is very hard to understand the pleaded claim that any loss should be calculated by reference to the value of the Plaintiff's holding of units as at April 2007. Given that the Plaintiff did not apply to redeem its units until January 2008 (so that redemption could not take place prior to the April 2008 Dealing Day), one would have thought that the measure of its loss would be the difference between the value of its holding in April 2008 and the amount which it eventually received. It is not clear that the value of the holding as at April 2007 has any relevance. However, that is beside the point and does not fall for consideration.

14. The Bailiff considered first the causation issue (ie item (iv) of paragraph 6 above). He said that for this purpose he would assume that the Defendant had allowed the redemption of units earlier than it should have done and that it could have imposed restrictions and additional redemption charges as alleged by the Plaintiff. He further said that he would ignore the analysis carried out by Mr Bulpitt (referred to at paragraph 12 above) on the basis that it amounted to opinion evidence and Mr Bulpitt was not an independent expert.

15. He then referred (at paras 62-66) to the level of subscriptions and redemptions as shown from contemporaneous documents such as investment reports and interim reports and accounts. He said that these showed that historically the level of subscriptions had considerably exceeded the level of redemptions but that there had been a drying up of subscriptions from the middle of 2007 onwards coupled with a substantial number of requests for redemption. Traditionally redemptions had been funded out of subscriptions but this change in position imposed great stress on the liquidity of the Fund. So, for example, as at 31 July 2007 there were 88,500,000 units in issue whereas six months later on 31 January 2008, the number of units had declined to 70,000,000. He pointed out that the evidence showed that for the three months July – September 2007, subscriptions were about £6.2 million and redemptions were a little less than £16 million (or about £8.3 million excluding CPF) whilst further redemptions to the value of £4.5 million had been held over. He then referred to the fact that even on the Plaintiff's own case, the redemption requests submitted in the latter part of 2007 by the six investors particularised in the Cause would have been processed on or before April 2008. Because of the lack of subscriptions, such redemptions could only have been met through the realisation of investments which had declined in value. In summary, the Bailiff held that the Plaintiff had not shown that it had a realistic prospect of establishing not only that the decision to suspend dealings in December would have been avoided but that the Fund would have been able to continue to redeem units until the Plaintiff's units could have been redeemed in April 2008.

16. As to (i) and (iii) at paragraph 6 above, having considered the judgment of Herbert, Commissioner in the Jersey case of Barclays Wealth Trustees Jersey Limited v Equity Trust (Jersey) Limited [2014] JRC 102D, the Bailiff considered that it was arguable that the manager of a unit trust such as the Fund owed a duty directly to unitholders as alleged by the Plaintiff and it would be wrong to strike out a claim where the full facts had not been established in relation to a novel point of law which could have significant implications for unit trusts.

17. Finally, he considered (ii) of para 6 above. He pointed out that the Cause was pleaded on the basis that the Manager had no discretion to vary the various time limits for redemption set out in

the Trust Instrument whereas it was in fact clear that the Manager had considerable discretion as to the timing of the handling of redemption requests. The affidavit evidence from the Defendant showed that the Defendant was aware of its powers and discretions in this respect and had purported to act within the scope of those powers and discretions. Thus, in order to succeed with its claim, the Plaintiff would have to prove, not that the Defendant failed to observe the time periods referred to in the Trust Instrument, but that, in deciding whether or not to abbreviate or lengthen those periods, the Defendant was acting in breach of its powers. That was not how the Plaintiff had pleaded its case. Furthermore the Plaintiff had not produced any expert evidence to rebut Mr Bulpitt's factual evidence. He held that if the Plaintiff's failure to plead its case properly were the only ground for granting summary judgment or striking out the claim, he would have had to consider whether to allow the Plaintiff leave to amend. He concluded that he would probably have refused to do so on the basis that the Plaintiff had already had every opportunity to amend and had indeed amended its claim and also on the basis that the amendment would be a radical alteration to the case.

The test for summary judgment

18. Rule 19(2) of the 2007 Rules provides that:-

"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, or

(b) the defendant has no real prospect of successfully defending the claim or issue,

and there is no other compelling reason why the claim or issue should be disposed of at a trial."

19. As the Bailiff said, the correct approach has been helpfully summarised by McMahon, Deputy Bailiff at paragraphs 34 and 35 of his judgment in Invescap Holdings Limited v Douglass (unreported, 30 July 2014) which were set out at paragraph 45 of the Bailiff's judgment. In summary, the Court must consider whether a plaintiff has a 'realistic' as opposed to a 'fanciful' prospect of success. A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable. As the Court of Appeal made clear in Musa Holdings Limited v Newmarket Holdings (Guernsey) Limited [2014] GLR 41 the new test makes it easier to obtain summary judgment than was previously the case. Thus at para 17 of his judgment (when considering whether to give summary judgment for a plaintiff), Beloff JA said this:-

"17. In my view it is clear that the present test is designed to create a higher hurdle than the previous test for a defendant who seeks to defend a claim for summary judgment both in England and (materially) in Guernsey. To show that there is a (or some) defence is obviously easier to establish than a defence with a real prospect of success. The jurisprudence contrasts real with fanciful."

This observation is of course equally applicable in reverse where it is a defendant who is applying for summary judgment.

20. There were two applications before the Bailiff, namely one for summary judgment and one for striking out. I propose to confine consideration to that for summary judgment. If the Defendant cannot succeed on that, it will not succeed on the striking out, where the threshold is somewhat higher.

21. In relation to an application for summary judgment, I should add that, where the applicant for summary judgment adduces credible evidence in support of his application, the respondent becomes subject to an evidential burden to show some real prospect of success. Although given in the context of the rules concerning summary judgment of the Jersey Royal Court, which are modelled on the former Order 14 of the Rules of the Supreme Court in England, the observations

of the Jersey Court of Appeal in Amy v Amy 2011 JLR 603 at para 28 seem to me to be equally applicable to an application for summary judgment under the 2007 Rules. Thus Nugee JA on behalf of the Jersey Court of Appeal said that, in the context of an application for summary judgment on behalf of a plaintiff, it was for the defendant to satisfy the court that there was an issue which ought to be tried and that this in general required evidence on behalf of the defendant rather than just an assertion or the production of a pleading. He said that it was also well established that the defendant's affidavit should be specific enough to enable the court to see that there was a real issue to be tried. He referred with approval to para 14/4/5 of the 1999 edition of the White Book which states:-

"The defendant's affidavit must 'condescend upon particulars', and should, as far as possible, deal specifically with the plaintiff's claim and affidavit, and state clearly and concisely what the defence is, and what facts are relied on to support it".

He referred also to the statement later in the same passage of the White Book to the effect:-

"Indeed, in all cases, sufficient facts and particulars must be given to show that there is a triable issue."

22. In my judgment, the requirement for an affidavit to 'condescend upon particulars' is equally applicable to the affidavit of a plaintiff in response to an application by a defendant for summary judgment under Rule 19 of the 2007 Rules.

Test for extending time for appeal

23. I propose to consider the Extension application first. This is because the mere fact that leave to appeal would be granted does not mean that the time for appealing will necessarily be extended; otherwise the time limits for appealing would effectively be set at nought where there is an arguable appeal. However, I have taken into account all the submissions in relation to the Leave application when considering the merits of any proposed appeal for the purposes of deciding whether to grant the Extension application.

24. The test for extending time for appeal was laid down in Gaudion v Weardale Limited (1997) 24 GLA 83 and endorsed recently by the Court of Appeal in Le Huray v Law Officers of the Crown [Court of Appeal, unreported, 14 October 2014] where McNeill JA said this at para 8:-

"In Gaudion v Weardale Limited … Gloster JA, in giving the judgment of this court, indicated (page 93) that, in deciding whether to exercise its discretion to extend time for lodging a notice of appeal the Court had to consider (a) whether there was a sufficiently arguable appeal, (b) the explanation given for the failure to lodge the notice in due time and any subsequent delay, (c) any prejudice as a result of late service and consequent delay in hearing the appeal and (d) any other relevant factors. The ultimate decision is, of course, a matter within the discretion of the court."

25. Advocate Newman also referred me to the position in Jersey as laid down in Pitman v Jersey Evening Post Limited 2013(2) JLR 293 where Beloff JA held that, when considering whether to exercise its discretion to grant an extension of time, the Court of Appeal would normally take the following factors into account; (a) the length of the delay; (b) the reasons for the delay; (c) the chances of the appeal succeeding if time for appealing is extended; and (d) the degree of prejudice to the potential respondent if the application is granted. He went on to say that where the delay in serving notice of appeal is short and there is an acceptable excuse for it, an extension of time will not be refused on the basis of the merits of the intended appeal unless the appeal is hopeless.

26. It seems to me that, although expressed differently, the test in the two jurisdictions is effectively the same.

27. Advocate Newman submitted that the approach of the Court to applications for an extension of time in which to appeal should be changed. He referred to the fact that, unlike when Gaudion was decided, the 2007 Rules contain the overriding objective in similar terms to that of the Civil Procedure Rules (CPR) in England and Wales. In that latter jurisdiction, the approach to extending time for appealing (which was previously the same as in this jurisdiction) had changed. Thus in R (Hysaj) v Secretary of State for the Home Department [2014] EWCA Civ 1633, the English Court of Appeal confirmed that it was by now well established that an application to extend the time for appealing was analogous to an application under CPR Rule 3.9 for relief from sanctions. This is because there was the sanction of not being allowed to bring the appeal if relief for a failure to appeal in time was not granted. It followed that applications for extensions of time to file appeals had to be determined using the established principles governing applications for relief from sanctions. These are set out in Mitchell v Newsgroup Newspapers Limited [2013] EWCA Civ 1537 as elaborated and explained in Denton v TH White Limited [2014] EWCA Civ 906. The principles derived from Mitchell as amplified in Denton comprise three stages as follows (see in particular para 24 of Denton):-

    (i) The court should identify and assess the seriousness and significance of the 'failure to comply with any rule, practice direction or court order'. If the breach is neither serious nor significant the court is unlikely to need to spend much time on the second and third stages.

    (ii) The court should then consider why the default occurred.

    (iii) Finally the court should evaluate all the circumstances of the case so as to enable the court to deal justly with the application including in particular the need (a) for litigation to be conducted efficiently and at proportionate cost; and (b) to enforce compliance with rules, practice directions and orders.

28. In concluding that these principles should also be applied to applications for extension of time for appeals, the court in Hysaj said this at para 46:-

    "If applications for extensions of time are allowed to develop into disputes about the merits of the substantive appeal, they will occupy a great deal of time and lead to the parties' incurring substantial costs. In most cases the merits of the appeal will have little to do with whether it is appropriate to grant an extension of time. Only in those cases where the court can see without much investigation that the grounds of appeal are either very strong or very weak will the merits have a significant part to play when it comes to balancing the various factors that have to be considered at stage three of the process. In most cases the court should decline to embark on an investigation of the merits and firmly discourage argument directed to them. Here too a robust exercise of the jurisdiction in relation to costs is appropriate in order to discourage those who would otherwise seek to impress the court with the strength of their cases."

29. Advocate Newman argued that this was a preferable approach to that hitherto followed in this jurisdiction and would lead to shorter less expensive hearings on applications to extend the time for appealing.

30. I see the force of that argument and arguably there is much to be said for the new approach in England and Wales. But I conclude that it would be wrong for me to depart from the current jurisprudence for two reasons:-

    (i) I am sitting as a single judge whereas the current approach has been laid down by the plenary court on more than one occasion.

    (ii) I am considering this case on the papers and have therefore not had the benefit of adversarial oral argument in relation to the merits of the current English approach as compared with the current approach in this jurisdiction.

31. Accordingly, I shall consider this application in accordance with the principles established in Gaudion.

Application to the facts

Issue (b) (as listed in Le Huray as set out at paragraph 24 above) – explanation for the delay

(i) The medical evidence

32. It was not suggested in Gaudion that there was any need to consider the four issues in any particular order and I note that in Le Huray, the Court considered issues (b) and (c) first. I propose to consider issue (b) first, namely the explanation given for the failure to lodge the appeal in time.

33. The judgment in this case was issued on 13 August. Notice of appeal should therefore have been filed by 13 September. It was not in fact filed until 4 December 2015 together with the applications presently before me. The delay is therefore a period of just under three months when the time for appealing is one month. That is a significant delay.

34. The explanation for the failure to appeal within the time limit is to be found in Mr Kenny's third affidavit dated 4 December 2015. In it he explains that, although his wife has been the other director of the Plaintiff since 2011, she was only ever intended to be a short term appointment to the board but owing to an oversight she was not replaced. He says that she was not aware until very recently that she was still a director of the Plaintiff. She is a housewife and a mother of their children and knows very little about business in general. She has never had anything other than a basic understanding of the current action or of the facts and matters underlying it. It had never been considered necessary in the past for her to take an active role in relation to the litigation.

35. He states that in January 2015, he suffered a serious accident whilst out riding his bicycle. When cycling over some railway lines he slipped on a patch of ice and fell, suffering a number of injuries including a broken femur, which meant that he could not move. Whilst he was unable to move the barriers that prevent access to the crossing began to close. This was extremely traumatic for him as he was terrified that he would not be able to get off the train tracks before an approaching train reached him. Ultimately he was rescued by two passers-by and was taken to hospital by ambulance where he underwent major surgery. He says that the psychological effects of the accident have continued to affect him greatly and have led to a situation in which, under medical advice, he could not deal with the current litigation for many months. He has still not completely recovered from the trauma caused by his accident.

36. In support he has produced a number of medical reports. They are all addressed to '*to whom it may concern*' and are all brief. The first is from Dr Wall of Clontarf Hospital, Dublin dated 27 January 2015. It certifies that Mr Kenny underwent major surgery on 19th January and the remainder of the report is as follows:-

"His rehabilitation period will take six weeks and as such [he] will not be suitable to work during this period. Due to his inpatient stay, I feel his decision making ability is impaired currently due to the physical and mental stress he is experiencing at present."

37. The next report is dated 11th March 2015 from Dr Moore of the Borolmhe Medical Centre who provided a four line report confirming that he is "*physically very sore and weak and mentally very stressed. It would be medically advisable not to make any major decisions until he has recovered sufficiently.*"

38. On 1st May 2015 Dr Moore examined Mr Kenny again and produced a further four-line report. The relevant passage reads "*He has persistent pain following major surgery which he underwent*

on 19.1.15. He remains on strong pain-killers and is very stressed. It would be medically advisable not to make any major decisions for a further 8 weeks."

39. On 20th July, Dr Tan of the same practice produced a five line report confirming that Mr Kenny had persistent pain and remained on strong pain-killers and was very stressed. It said that he was to undergo further investigations and that it would be medically advisable not to make any decisions until his next appointment on 6th October.

40. In fact he saw Dr Moore again on 18th August 2015, just five days after the decision of the Bailiff was handed down. Dr Moore's report reads as follows:-

"He has persistent pain following major surgery … He remains on pain-killers. He is also suffering from ongoing severe anxiety and is taking quite a lot of medication for this. He is hypertensive and I [am] concerned about the effect of the anxiety on his blood pressure. It would be medically advisable not to make any major decisions until further notice so that his [anxiety?] can be dealt with." [the bracketed word is difficult to read in the copy of the report which has been provided]

The doctor went on to say that Mr Kenny had been referred to a psychologist. The report also listed the medication which Mr Kenny was being prescribed.

41. Nearly two months later, on 2nd October 2015, Mr Kenny attended Insight Psychology Services. Dr Ball, a chartered clinical psychologist, wrote a seven line report on 8th October which reads as follows:-

"This is to confirm that Mr Kenny attended the Borolmhe Medical Centre on 2nd October 2015 on the recommendation of Dr Moore due to on-going worry and anxiety. Throughout the session it was established that Patrick is experiencing significant anxiety, panic attacks and associated insomnia. The experience of same is impacting on his mental health and will require immediate intervention. Patrick is due to attend the clinic on a weekly basis starting 12th October 2015 to address same, it is recommended that Patrick minimises stress and that any major decisions are postponed at this time."

42. The final two reports are dated 13th and 15th November 2015 respectively. The report dated 13th November is from Dr Moore who saw Mr Kenny that day. It confirmed that he still had persistent pain and was on pain-killers although the pain had improved. He was also suffering from ongoing severe anxiety with sleeping problems, panic attacks and hypertension. The doctor felt the anxiety was affecting his blood pressure. The doctor repeated that it would be medically advisable not to make any major decisions until further notice to allow treatment. Dr Moore confirmed that Mr Kenny had been referred to the psychologist Dr Ball and that she had recommended a course of therapy as his anxiety was having a significant impact on his daily life.

43. Finally, on 15th November Dr Ball wrote a further seven line report which was in very similar terms to her previous report and was as follows:-

"This is to confirm that Mr Kenny has been attending for psychological intervention in relation to significant ongoing anxiety and insomnia. In recent weeks Patrick's symptoms have exasperated. The experience of same is impacting on his mental health and Patrick will require ongoing psychological intervention. Mr Kenny is to attend the service on a weekly basis in order to access same. Patrick has been advised to minimise any potential stressors. Any decision making processes should be postponed until Patrick is at a point where he is able to make an informed decision."

(ii) Material events since the Bailiff's judgment

44. Although there is some suggestion in a letter from Appleby (who then acted for the Plaintiff) dated 8th September that the Plaintiff would wish to apply for an extension of time to appeal, no such application was in fact brought at that stage. Instead, by an application dated 3rd September, the Defendant lodged an application seeking its costs in respect of the proceedings on an indemnity basis.

45. This came before the Deputy Bailiff on 16th October. Advocate Cole of Appleby appeared for the Plaintiff although it is clear that the Court was informed that Mr Kenny was not well enough to give instructions. The outcome of that hearing was that the Deputy Bailiff ordered the Plaintiff to pay the costs of the proceedings and further ordered that the Plaintiff make an interim payment on account of such costs in the sum of £95,000 by 6th November. He adjourned the question of whether the costs should be on the recoverable or the indemnity basis to be heard by the Bailiff as the judge who had heard the summary judgment application. He also extended the time for the Plaintiff to file written submissions on that aspect until 6th November.

46. On 2nd November, Appleby e-mailed Mourant Ozannes (advocates for the Defendant) to say that Mr Kenny had now sufficiently recovered, to an extent where he was able to give instructions on behalf of the Plaintiff. The e-mail said that he was presently reviewing the current state of the proceedings, including the order of 16th October, in order to provide Appleby with appropriate instructions. The e-mail asked for an extension of two weeks for payment of the interim costs and for the submission of written contentions in relation to the outstanding costs application to be heard by the Bailiff. That was not agreed by the Defendant, with the result that a formal application for such extensions was filed by the Plaintiff on 4th November, together with an accompanying affidavit sworn by Mr Kenny in which he explained that since 2nd November, he had begun to feel sufficiently better such that he felt that he could begin to take decisions in relation to the Plaintiff. It was this affidavit which disclosed for the first time that Mrs Kenny had been a director of the Plaintiff since 2011.

47. The matter came before the Deputy Bailiff on 6th November. The Deputy Bailiff dismissed the application for an extension of time for interim payment but extended the time for filing written contentions to 20th November.

48. As already referred to, the Extension application and the Leave application were filed on 4th December together with the accompanying affidavit of the same date from Mr Kenny. On the same date the Defendant filed an application seeking an 'unless' order to the effect that, unless the Plaintiff paid the interim costs of £95,000 by 23rd December, it should be debarred from the proceedings. That came before the Deputy Bailiff on 11th December who declined to grant the unless order. I should add that at that hearing, Mr Kenny represented the Plaintiff. I am informed that he told the Deputy Bailiff that the Plaintiff had no assets of its own (apart from its holding in the Fund) and so could not meet the interim payment. Since then, the Plaintiff has instructed the firm of Ogier in place of Appleby and Advocate Newman of that firm has acted for the Plaintiff in connection with the two present applications.

49. The Extension application and the Leave application were subsequently referred to me. I gave directions for the filing of skeleton arguments but unfortunately there was some misunderstanding and skeleton arguments were initially filed only in respect of the Extension application. I was anxious to ensure that I was fully aware of the arguments on the merits of any proposed appeal and accordingly I directed the filing of skeleton arguments on the Leave application as well. That has now taken place and, as indicated earlier, I have considered all the material before me on the papers.

(iii) Discussion

50. In his affidavit of 4th December, having recounted the history of his illness since the accident in January 2015, Mr Kenny states that, as a result of small but significant improvements in his

health, he has now reached a point at which he feels he can once again provide instructions on behalf of the Plaintiff in relation to the current proceedings. He points out that in taking such steps he is acting against the advice of his medical professionals, who as recently as 13th and 15th November 2015 recommended that he continue to avoid stress and the making of any major decisions. He also points out that Mrs Kenny was not aware until very recently that she was still a director of the Plaintiff. Furthermore she is a housewife and mother of their children. She has never had anything more than a basic understanding of the matters underlying the current proceedings.

51. Advocate Newman submits that the medical evidence shows that there was a valid reason for the failure to appeal in time. Mr Kenny was the sole director who was in a position to give instructions because of his knowledge of the case. The medical evidence showed that he was medically unfit to properly consider or deal with the impact of the Bailiff's judgment or to provide instructions in relation to an appeal. It was only following attendance with the psychologist that he began to feel better and felt that he was in a position to make decisions once more in relation to the litigation.

52. The starting point is that where medical evidence is relied upon to show that a party is not fit to play his or her part in litigation, the evidence must be suitably detailed and specific so that the Court can be confident of placing reliance upon it. I would endorse the observations of Norris J in Levy v Ellis-Carr [2012] EWHC 63 (Ch) where at paragraph 36 he said this:-

"*... But I will consider that additional evidence. In my judgment it falls far short of the medical evidence required to demonstrate that the party is unable to attend a hearing and participate in the trial. Such evidence should identify the medical attendant and give details of his familiarity with the party's medical condition (detailing all recent consultations), should identify with particularity what the patient's condition is and the features of that condition which (in the medical attendant's opinion) prevent participation in the trial process, should provide a reasoned prognosis and should give the court some confidence that what is being expressed is an independent opinion after a proper examination. It is being tendered as expert evidence. The court can then consider what weight to attach to that opinion, and what arrangements might be made (short of an adjournment) to accommodate a party's difficulties. No judge is bound to accept expert evidence; even a proper medical report falls to be considered simply as part of the material as a whole (including the previous conduct of the case). The letter on which the appellant relies is wholly inadequate.*"

53. That observation was made in the context of the failure of a party to attend and participate at trial, but the principles are equally applicable to lesser participation, such as giving instructions on whether to appeal.

54. In my judgment, the explanation given on behalf of the Plaintiff for failing to appeal in time does not amount to a satisfactory excuse. I would summarise my reasons for reaching this conclusion as follows:-

    (i) Each of the medical reports is extremely brief and written in very general terms, being addressed '*to whom it may concern*' and writing simply in general terms of it not being medically advisable for Mr Kenny to take any major decisions. It is not clear what that means in the context of this case. The reports do not say that he cannot take such decisions or what the effect might be if he were to do so.

    (ii) The decision here was whether to appeal. It was in effect a yes or no decision which would no doubt depend upon the advice given by his advocates as to the prospects of appeal. There is no suggestion that any of the doctors or psychologists were specifically asked whether he was fit enough to take a yes or no decision of this sort and none of them opines upon it. In my judgment it is nowhere near sufficient for a

medical practitioner simply to say that a major decision is not '*medically advisable*' without consideration of the particular decision which the party needs to take.

(iii) In short, the reports are nowhere near the level of detail and particularity envisaged in the judgment of Norris J to which I have just referred.

(iv) The danger of relying on such general and unspecific reports is shown by the fact that the two most recent reports – those of 13th and 15th November – contain the same advice as previously. Indeed, the report of 15th November states that Mr Kenny's symptoms have got worse ('exasperated') in recent weeks; yet he has since 2nd November been taking decisions in relation to this litigation without apparent ill effect.

(v) If he has been able since 2nd November to take decisions in this litigation despite the medical evidence that it is undesirable, what is there to show that the position has not been the same since 13th August? There is nothing in the medical reports to suggest any improvement in his condition as between August and November. In other words, his ability to swear affidavits and give instructions in relation to applying to vary the orders made by the Deputy Bailiff as well as in relation to these two applications despite the medical evidence that it is undesirable that he should do so, means that there is a complete absence of medical evidence to show that he was unable so to act between 13th August and 2nd November.

(vi) Even if, contrary to the above, it is assumed that he was not capable of deciding whether to appeal until 2nd November, the Plaintiff did not in fact make the Leave application and the Extension application until 4th December. This is more than the one month allowed for an appeal. Thus, even though the Plaintiff was already well out of time, it failed to make the applications promptly once its main director was capable of giving instructions.

(vii) As already indicated, this was not a question of Mr Kenny having to appear in court to participate and to give evidence. All that was required was that he should give instructions to his advocates on whether to appeal. They could then take it forward and the arguments would be legal ones with little input required from the lay client. The medical evidence is insufficient to show that Mr Kenny was not capable of taking such a decision or that it was so undesirable that it would have adversely affected his health to do so.

55. In summary, I conclude that the Plaintiff has failed to provide an adequate explanation which explains and justifies its failure to appeal in time.

Issue (c) – Prejudice

56. Advocate Newman argues that there is no material prejudice to the Defendant other than a modest delay whilst any appeal is heard. However, in my judgment, the prejudice goes wider than that.

57. The Fund was wound up in November 2011 and an interim distribution was made in May 2012. Following the institution of the present proceedings by the Plaintiff, no further distributions have been made. The Trustee has informed unitholders that is not appropriate to make any further distributions whilst the litigation is continuing.

58. I am told that, following the Bailiff's judgment in August 2015 and the expiry of the time for appealing, the Trustee and the Defendant (as Manager) issued a further communication to unitholders (including the Plaintiff) on 20th November 2015. In that communication they said that

they hoped and expected that, since the claim had now concluded, the Trustee and the Defendant could attend to the completion of the winding up of the Fund and potentially make an interim distribution to unitholders. The service of the Extension application and the Leave application some two weeks later has brought the winding up of the Fund once more to a halt. It follows that unitholders are being kept out of their money and that the Fund continues to incur legal and administrative costs while it continues in existence. In my judgment therefore there would be a material prejudice to unitholders if the Extension application were to be granted.

Issue (a) – Is the appeal sufficiently arguable?

59. I propose to consider first the 'causation' aspect of the Bailiff's decision as this lay at the heart of his judgment.

60. The grounds of appeal put forward by the Plaintiff in the draft notice of appeal are fourfold. I would summarise them as follows:-

Ground 1

The Bailiff wrongly gave summary judgment because he:-

(i) failed to have any or sufficient regard to the extent to which the Plaintiff intended to apply to rely upon expert evidence;

(ii) failed to take any or sufficient account of the evidence that could reasonably be expected to be available at trial in support of the Plaintiff's claim;

(iii) placed excessive reliance on Mr Bulpitt's affidavit evidence in reaching his decision having noted that Mr Bulpitt's affidavit included evidence that was properly the preserve of expert evidence; and

(iv) placed excessive reliance on 'factual' conclusions drawn by Mr Bulpitt in his affidavit and/or drawn in contemporaneous documents prepared by the Defendant despite the absence of any independent or expert evidence having been adduced to support the Defendant's case.

Ground 2

The Bailiff wrongly placed excessive reliance on the case of a Pantelli Associates Limited v Corporate City Developments Number Two Limited [2010] EWHC 3189, which is not binding on the Royal Court and in any event does not establish an immutable rule requiring expert evidence to support allegations of professional negligence and/or breach of fiduciary duty.

Ground 3

The Bailiff erred in law in holding that the Amended Cause should not survive in circumstances where the Plaintiff's case raised novel and complex questions of law concerning unit trusts and the network of legal duties between the parties in relation to which there were no decided cases in the Guernsey courts. He ought to have found that the Plaintiff's claim addressed areas of developing jurisprudence and therefore ought to be determined after trial on the basis of actual findings of fact.

Ground 4

The Bailiff wrongly exercised his discretion in failing to take sufficient account of the extent to which alleged defects in the Amended Cause may have been cured by amendment and should have afforded the Plaintiff the opportunity to amend before ordering summary judgment.

Ground 1

61. In elaboration of ground 1, Advocate Newman submitted as follows:–

(i) The Bailiff was wrong to find that the Plaintiff did not have a realistic prospect of establishing that, if the Defendant had taken the measures suggested by the Plaintiff, suspension in dealings could have been avoided long enough for the Plaintiff to redeem its units in April 2008. In coming to this conclusion, the Bailiff had made determinations of fact which, it was submitted, were not open to him. For example, in paragraph 70 of the judgment, the Bailiff said:-

"The evidence also suggests that the drop in the level of subscriptions that occurred after the credit crunch would have continued. Thus redemption requests would have had to be met largely through the realisation of investments which, as is shown in the minutes attached to Mr Bulpitt's second affidavit and in the exhibited documents, would have been achievable only at prices lower than the published values for those investments and would have been subject to delays. There is no evidence to the contrary.

Advocate Newman submitted that the Bailiff was not in a position to make a proper determination as to whether the level of subscriptions that occurred after the credit crunch would have continued without the assistance of experts in the field.

(ii) Similarly, the Bailiff should not have relied upon the evidence of Mr Bulpitt that redemption requests '*would have had to be met largely through the realisation of investments*' and '*have been achievable only at prices lower than the published values for those investments and would have been subject to delays'*. These too were matters for expert evidence.

(iii) The Bailiff also concluded at paragraph 71 that '*it was easier, more efficient and cost-effective to service redemptions form (sic) cash than by realising investments'.* It was submitted that there was no evidence as to what was the best course of action rather than the easiest course of action. For example, redemptions might have been made by way of in specie transfer or other means. There was no indication that the Bailiff considered alternatives such as the power of the Trustee to borrow, issue loan notes and guarantees etc.

(iv) In summary, the Plaintiff had made it clear that it intended to make an application pursuant to Rule 10(1) of the Evidence in Civil Proceedings (Guernsey and Alderney) Rules 2011 to rely on expert evidence but the Defendant had issued the summary judgment application before the Plaintiff could make that application. The Bailiff should have borne in mind two of the principles listed by the Deputy Bailiff in Invescap at para 45 as follows:–

"(v) However, in reaching its conclusions 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…

(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…"

(v) Nowhere in the judgment did the Bailiff address the Plaintiff's argument that it intended to apply to rely upon expert evidence. The Bailiff therefore failed to take account of the fact that such evidence '*could reasonably be expected to include evidence*' that

(a) the drop in the level of subscriptions that occurred after 'the credit crunch' would not have continued;

(b) redemption requests would not have had to be met largely through the realisation of investments; and/or

(c) the realisation of investments (or certain investments) would not have been achievable only at prices lower than the published values for those investments and would not have been subject to delays. [original emphasis]

This was particularly so, submitted Advocate Newman, where Mr Bulpitt had conceded in his fifth affidavit that he had made certain errors in his figures in the fourth affidavit

62. The difficulty with these submissions is that there was simply no evidence put before the Bailiff to contradict the evidence put forward by the Defendant on this aspect. As stated above, a plaintiff needs to put forward evidence to show that he has a realistic prospect of success if he is successfully to oppose a defendant's application for summary judgment (see paras 20 - 21 above). To like effect is the decision of the Jersey Court of Appeal in Trant v Attorney General 2007 JLR 231. That was an application to strike out the claim on the grounds of the Court's inherent jurisdiction or that it was frivolous or vexatious or an abuse of process. Beloff JA had this to say about the need for a plaintiff to produce evidence to oppose such an application:-

"*28. The appellants had ample opportunity to put in evidence in rebuttal of Det. Sgt. Gay's affidavit and the exhibits but chose not to do so before the Royal Court nor, in the light of the Royal Court's expressed concerns, did they seek to do so before us.*

29. This is not an application brought solely under the rules of court asserting that there is no cause of action, when (as we accept) no evidence would be admissible and the pleaded allegations would be assumed to be true. We are entitled to take into account the state of the evidence when considering whether to strike out under the court's inherent jurisdiction or on the basis that the claim is frivolous or vexatious or an abuse of process….

30. Where evidence (even in affidavit form) is admissible, it should be considered in its totality … If only one side has adduced evidence, unless it is manifestly implausible, a court will have little, if any, choice but to accept it. If a party chooses not to adduce evidence when able to do so (especially when faced with a case to meet), his decision not to do so permits adverse inferences to be drawn …

31. The Royal Court did not identify in what way (if at all) the evidence adduced by the Attorney General fell short of answering the allegation that he obtained the appellants' witness statements by misrepresentation. Had the Royal Court thought that such evidence was itself deficient as an answer, the appellants would not have been, as the Royal Court put it … 'well advised to put in evidence dealing with these key aspects of the claim…'; they would certainly not have needed to

do so. The Royal Court indeed drew attention to aspects of the evidence which suggested that some of the allegations in the Order of Justice could not be correct … .

32. We consider that the 'clear error' in the Royal Court's analysis was, at the end of the process, not to evaluate the state of the evidence as it stood, but rather to speculate that the appellant <u>might</u> be able to adduce evidence at trial to sustain their (so far, wholly unsupported) allegations. Despite Mr Sinel's forceful assault on the Attorney General's evidence, I consider there is no basis on <u>what is before us</u> to conclude that the appellants' claim that they were misled into provision of the confidential information would succeed." [original emphasis]

63. If this is the position in relation to a strike-out application, it must be *a fortiori* on an application for summary judgment where evidence is always produced and relied upon.

64. I accept that the comments of Beloff JA must be read alongside the comments of the Deputy Bailiff referred to at para 61(iv) above but the two are in my judgment not inconsistent. The Deputy Bailiff was not suggesting that the Court should speculate as to what might be available. He was referring to a situation where there was some evidence to show a realistic prospect of success and making clear that the Court could take into account in support of that '*evidence that can reasonably be expected to be available at trial*'. That is very different from a situation where there is no evidence before the Court on the summary judgment application to show a realistic prospect and where all that is said is that there <u>might</u> be some evidence in support in due course.

65. In my judgment, the Bailiff was fully entitled to come to the conclusions which he did on causation (as set out at paragraphs 61 – 75 of his judgment), on the basis of the evidence put forward in Mr Bulpitt's affidavits (excluding what the Bailiff considered as opinion evidence).

66. Indeed, I am respectfully of the view that the Bailiff was perhaps unduly cautious in excluding consideration of the evidence of Mr Bulpitt summarised at paragraph 12 above on the ground that it was opinion evidence. I must confess that I do not so regard it. Mr Bulpitt gave factual evidence as to the levels and values of subscriptions and of redemption applications during the relevant period in the latter part of 2007. He then applied the strict timescales and other provisions of the Trust Instrument together with a redemption charge and a limitation on redemptions over 5% to those figures in order to come up with what the cash balances would have been on certain Dealing Days. This seems to me essentially to be a mathematical exercise applying certain fixed criteria to known facts. It is not something which requires a specialist expertise nor is it an expertise that the Court does not possess.

67. It follows in my judgment that the evidence produced by the Defendant was in fact stronger than allowed for by the Bailiff, who excluded this aspect of Mr Bulpitt's evidence.

68. The difficulty for the Plaintiff is that the evidence upon which it relied to defend the application for summary judgment, namely Mr Kenny's affidavit, simply did not engage with the issue of causation. Thus Mr Kenny said at paragraph 38 of his affidavit as follows:-

> "*Tranquility still intends to apply to the Court for leave to instruct an expert who can properly assess the position that would have arisen had the Defendant adopted a more prudent approach to the processing of redemptions in mid-to-late 2007. <u>Without such leave, Tranquility is not in a position to counter what Mr Bulpitt says in his affidavit</u>. But I anticipate, as Mr Bulpitt has identified at paragraph 46 of his affidavit, that an expert with access to the underlying information <u>may</u> legitimately arrive at a different outcome to that proposed on behalf of the defendant.*" [emphasis added]

69. Mr Kenny's affidavit concentrated more on his contention that, by allowing certain unitholders to redeem early, the Defendant had enabled them to benefit from a more advantageous unit price

than they would otherwise have done (eg paras 31.1, 31.5, 31.7 and 31.8 of his affidavit) and that this was to the detriment of other unitholders (para 31.4).

70. As the Bailiff correctly pointed out at paragraph 61 of his judgment, whilst it is correct that, where the value of the underlying assets is falling, a unitholder who redeems early receives a greater sum than if he redeems later, this is not at the expense of the remaining unitholders.

71. A simple example will suffice to show this. Let us assume a fund worth £100 with a unitholder holding 10% of the fund who wishes to redeem. On redemption he will receive £10, leaving the remaining unitholders with assets worth £90. Let us then assume a fall of 10% in the value of the assets by the next dealing day. The remaining unitholders will now have assets worth £81. Conversely, if one supposes that the redeeming unitholder had not redeemed previously but now wished to do so, with a 10% fall in value, the fund would have fallen in value from £100 to £90. His 10% holding would therefore result in his receiving £9. That would still leave £81 for the remaining unitholders. Thus, although the redeeming unitholder would have received £1 more by redeeming a month earlier, this has not affected the value of the units retained by the remaining unitholders.

72. In my judgment, it is not sufficient for a party seeking to defend an application for summary judgment to say simply that he intends to obtain expert evidence and that he hopes that such evidence will support his case. That is in reality the position here. There is nothing in the evidence put forward on behalf of the Plaintiff to lead one to conclude that it can reasonably be expected that an expert will disagree with the defence evidence and conclude that, if the redemptions in the latter part of 2007 had been dealt with as the Plaintiff suggests, the Fund would not have had to suspend dealings by April 2008. On the evidence before the Bailiff (and before me), it would be a matter of complete speculation as to whether an expert would come to such a conclusion. For the reasons set out in the cases referred to earlier, that is insufficient to resist an application for summary judgment.

Ground 2

73. The second ground relied upon by the Plaintiff is that the Bailiff placed excessive reliance on the case of Pantelli (supra).

74. The Bailiff did indeed refer to Pantelli in the context of the submissions put forward on behalf of the Defendant. Thus at paragraphs 56 and 57 of his judgment he stated:-

"56. *Mr Shepherd cited the judgment of Coulson J in Pantelli Associates Limited v Corporate City Developments Number Two Limited [2010] EWHC 3189 as authority for the contention that, in the present case, the Plaintiff should have obtained expert evidence prior to issuing the claim and that its failure to do so was fatal. In Pantelli, the Defendant's counterclaim was struck out for failure to comply with a previous 'unless' order requiring the provision of proper particulars of allegations of professional negligence on the part of the claimant. Coulson J added that there was a second reason why the counterclaim should be struck out, namely the failure to obtain expert evidence in support thereof. At paragraph 16 he said:-*

> *'Not only is it simply not good enough to turn a positive contractual allegation into an allegation of professional negligence by adding the words 'failing to' to the obligation, but it is wholly inappropriate to do so in circumstances where there is no expert input to allow [the counter-claimant] to make such an allegation in the first place.'*

57. The decision was summarised in the headnote:-

> *'The amended pleadings were additionally inadequate in that they were unaccompanied by any supporting expert report or evidence. Subject to certain exceptions, such as allegations of*

negligence by solicitors where courts and legal advisers could be expected to understand the standards involved, it was now a requirement that any allegation of professional negligence be supported by a statement of expert opinion, since otherwise the professional concerned would be unaware of the case that had to be met.'"

75. As Advocate Newman concedes, the Bailiff made no further reference to Pantelli. However, Advocate Newman submits that, although he made no further express reference to the case, the Bailiff did place excessive reliance on it in that he refers later to the fact that the Plaintiff had not yet adduced any expert evidence in relation to the question of breach of duty, most notably in paragraph 100 of the judgment which read:-

"*100. The allegations concerning the processing of redemption requests in the period leading up to the decision to suspend dealings in the Fund are fundamental to the Plaintiff's claim. The evidence adduced by the Defendant in support of the present Application, largely in the Affidavits sworn by Mr Bulpitt and the exhibits thereto, demonstrates that the Defendant was aware of its powers and purported to act within the scope of the terms of the Trust Instrument. In order to succeed with its claim, the Plaintiff would have to prove not that the Defendant failed to observe the fixed time periods cited above but that in deciding whether or not to abbreviate or lengthen those periods it was acting in breach of its powers. That is not how the Plaintiff has pleaded its case but even if it had done so, it would have required expert evidence to rebut Mr Bulpitt's factual evidence and it has not produced any expert evidence."*

76. As can be seen not only from the terms of that paragraph itself but from where it is situated in the judgment, the Bailiff is there dealing with the question of whether the Plaintiff had a realistic claim in respect of breach of duty. It was clear that the Plaintiff's Cause had completely misconstrued the Trust Instrument in that it assumed that the various time limits for redemptions were fixed, whereas in fact, as stated earlier, there was discretion on the part of the Manager to abbreviate or lengthen those periods. The factual evidence from Mr Bulpitt showed that the Defendant was aware of the time limits and of its discretion and had chosen to exercise its discretion to abbreviate time limits in certain cases. If the Plaintiff wished to show that the Defendant had acted negligently or in breach of duty in its decision to shorten those periods, it would indeed require expert evidence to rebut Mr Bulpitt's factual evidence that the Defendant had in fact considered its powers and exercised them reasonably. Accordingly, even in the context of a breach of duty, I see nothing wrong with the Bailiff's observation in paragraph 100.

77. However, the real answer to Advocate Newman's submission on the aspect of the case with which I am presently dealing is that the Bailiff said nothing about the absence of expert evidence in relation to the issue of causation. The sole reference to the lack of evidence by the Plaintiff on this aspect is at paragraph 70 of his judgment where, having recorded the evidence adduced by Mr Bulpitt and contained in contemporaneous documents, he concluded that if dealings had not been suspended, it was reasonable to assume that further applications for redemptions would have been received; that the drop in the level of subscriptions that occurred after the credit crunch would have continued; that the redemption requests would have had to be met largely through the realisation of investments; and that such realisation would have been achievable only at prices lower than the published values for those investments and would have been subject to delays. He then pointed out "*there is no evidence to the contrary*".

78. That was an entirely accurate observation and indeed it is similar to the observation which I have already made. The Bailiff was entitled to reach the conclusions which he did on the basis of the evidence of Mr Bulpitt and there is no suggestion there of the Bailiff placing undue weight on the case of Pantelli. In summary, there is in my judgment nothing in this second ground.

Ground 3

79. The third ground relied upon is that the Bailiff was wrong to hold that the Amended Cause should not survive in circumstances where the Plaintiff's case raised novel and complex questions of law concerning unit trusts and the network of legal duties between the parties. It is contended that the Bailiff ought to have found that the Plaintiff's claim was in an area of developing jurisprudence such that it ought to be determined after trial on the basis of actual findings of fact. Advocate Newman further submits that the issues of causation and breach of duty should not have been considered separately and that one could not sensibly consider the question of causation until after questions relating to breach of duty had been determined.

80. I do not think that this point is arguable in relation to causation. The alleged breaches of duty related to the decisions of the Defendant to allow redemptions earlier than in accordance with the strict time limits, the failure to impose restrictions on redemption and the failure to impose redemption charges. For the purposes of considering causation, the Bailiff (and Mr Bulpitt in his evidence) proceeded on the assumption that these were indeed breaches of duty and had occurred. The question was whether, even assuming these breaches of duty, the Plaintiff had a realistic prospect of showing that these breaches had caused it loss. In my judgment, this issue was not linked to the novel and complex issues as to the relationship between the Trustee, the Manager and the unitholders and whether the Manager owed duties to the unitholders. It was assumed in favour of the Plaintiff that the Defendant as Manager did owe such duties. I do not therefore consider that the Plaintiff has an arguable case in respect of this third ground.

Ground 4

81. A fourth ground relied upon is that the Bailiff was wrong in his decision not to allow the Plaintiff an opportunity to amend the Amended Cause before granting summary judgment.

82. In relation to the issue of causation the Bailiff said at paragraph 73:-

"*I have considered whether the defects in the Cause could be remedied by amendment but I am satisfied they could not. I have formed that view without having regard to the fact that the Plaintiff has already amended the pleadings and has said it does not want to amend again but I have taken account of the fact that it has received substantial disclosure from the Defendant."*

83. Advocate Newman then refers to paragraphs 96 to 102 of the Bailiff's judgment, but these were concerned with the issue of breach of duty and the failure (as already discussed) to acknowledge in the Amended Cause that the Defendant had a discretion to abbreviate or lengthen the various time limits.

84. In relation to the issue of causation – which is the only issue I am dealing with at present – Advocate Newman has not suggested any form of amendment which would cure the problem and I can think of none. The nature of the pleaded breach of duties is clear and the sole issue for consideration is whether the Plaintiff has a realistic prospect of showing that, but for these breaches, it would not have suffered the claimed loss. It is therefore a question of evidence, not of pleading. There is no defect in the pleading in this respect; what is lacking from the Plaintiff's point of view is any evidence to show that it has a realistic prospect of success on the issue of causation. I therefore consider that this fourth ground does not assist the Plaintiff.

85. For these reasons I do not consider that the Plaintiff has a reasonable prospect of success in appealing the Bailiff's decision on the issue of causation.

86. In the circumstance, I do not think it necessary to address the other aspects of the Bailiff's decision.

Issue (d) – Any other relevant factors

87. The only other possibly relevant factor which has been drawn to my attention is that the Plaintiff has failed to comply with the order of the Deputy Bailiff that it make an interim payment of £95,000 on account of the costs order made against it. Whilst it may be the case that the Plaintiff itself has no assets other than its holding of units in the Fund and cannot therefore pay this sum, the fact remains that it has been funded by someone, such that it has been able to instruct Appleby throughout these proceedings and, since the beginning of the year has instructed Ogier in connection with this application to appeal. In circumstances where the Plaintiff is inviting the Court to exercise a discretion in its favour despite its failure to comply with the timescale for appeals, the Court is entitled to have regard to the fact that the Plaintiff is choosing to fund its own legal fees so as to continue the battle but is refusing to pay what it has been ordered to pay the Defendant.

88. Having said that, I consider this to be a lesser factor as compared with issues (a), (b) and (c).

Conclusion

89. For the reasons given, I find that there is no satisfactory explanation which justifies the failure to comply with the time for appealing, that prejudice would be caused to unitholders if an extension of time were granted, that there is no reasonable prospect of a successful appeal on the issue of causation and that the Plaintiff is in default of a court order for payment of costs despite its apparent ability to continue funding its own lawyers. Putting all these matters together and bearing in mind that, as stated by Gloster JA in Gaudion, it is a matter of discretion as to whether an extension of time should be granted, I conclude that it would not be in the interests of justice to extend the time for appealing and I therefore dismiss the Extension application.

90. Had I acceded to Advocate Newman's submission and applied the Hysaj approach summarised at paragraph 27 above, I would have come to the same conclusion. Taking the three issues listed there, I consider the delay in this case (namely just under three months when the time for appealing is one month) to be serious; secondly, for the reasons set out at paragraphs 50 – 55 above, I do not consider that there is an explanation which justifies the default; and thirdly, taking into account all the circumstances of the case as discussed in this judgment including in particular the need for litigation to be conducted efficiently and at proportionate cost and the need to enforce compliance with the Rules of the Royal Court, I conclude that it would not be in the interests of justice to extend the time for appealing.

91. In the circumstances, it is not necessary to consider the Leave application but, as will be apparent from my reasoning above, had I done so, I would also have rejected that application.