Cross appeals against a strike out.

IN THE COURT OF APPEAL OF GUERNSEY
(Civil Division Appeal No. 503/504)

(On appeal from the Royal Court of Guernsey Ordinary Division)

4th October 2016

Before: **James McNeill QC, President**
Clare Montgomery QC
Jonathan Crow QC

(1) Rawlinson & Hunter Trustees SA

Plaintiff and Appellant

and

(1) Investec Trust (Guernsey) Limited
(2) Bayeux Trustees Limited

Defendants and Appellants

Advocate N Robison for the Plaintiff
Advocate J E Roland for the Defendants

JUDGMENT OF THE COURT

McNeill, JA

Introduction

1. Each of the parties to this action brings an appeal in respect of part of the decision of the learned Deputy Bailiff (McMahon), the reasons for which were set down in the judgment dated 11 November 2015, leave to appeal having been granted on 18 February 2016.

2. The present Cause brought by the plaintiff ("the Cause") contains, among other matters, two distinct elements, in respect of each of which the defendants have challenged the appropriateness of the plaintiff being allowed to continue with the Cause. One element, referred to as the "Somerfield Claim" seeks compensation in respect of alleged failures on the part of the defendants in prosecuting earlier litigation ("the Somerfield proceedings"). The plaintiff appeals the determination of the learned Deputy Bailiff on that issue, contending that he was wrong to hold that the plaintiff's claim had no real prospect of success. The other element comprises allegations that investment decisions were not properly and unreasonably taken and that the defendants had acted in breach of trust amounting to wilful default or gross negligence. The appeal is taken by the defendants in respect of the refusal to find the plaintiff in abuse of process for seeking to raise in the Cause allegations which were so closely connected to those made by the present plaintiff in earlier Guernsey litigation ("Guernsey 1").

Background

3. The principal elements of the background to this litigation can be stated shortly. The Cause is presented in respect of certain issues arising during the administration of a trust. The plaintiff is the present trustee of that trust, having been appointed in July 2010. During the relevant period, between August 2007 and July 2010, the defendants were the trustees.

4. The trust in question is the Tchenguiz Discretionary Trust ("the TDT"). It was established in March 2007 under the laws of Jersey and, in all relevant respects, is governed by the law of that jurisdiction. The source of the trust estate held by the trustees for the time being of the TDT was the Tchenguiz Family Trust ("the TFT"), a trust constituted in 1988 under the laws of the British Virgin Islands. The TFT had been established by Victor Tchenguiz in order to make provision, essentially, for his sons Robert and Vincent. The TDT was established in order to sub-divide the trust assets, with the primary beneficiaries of the TDT being Robert and his family.

5. The arrangements by means of which assets and liabilities were transferred from the TFT to the TDT were complex. They involved a corporate structure, part of which has been referred to as the "BVI companies": companies incorporated in the British Virgin Islands, which were subsequently placed in liquidation. At about the time that the trusteeship of the defendants was brought to an end, and the plaintiff appointed in their stead, disputes arose regarding past trust administration, and litigation ensued. The present defendants brought an action (Guernsey 1) seeking certain declarators and, among other matters, the present plaintiff was joined as a fifth defendant and presented a counterclaim against the present defendants. The BVI companies, by then in liquidation, also participated as defendants and counterclaimers. That action, under the name *Investec Trust (Guernsey) Limited v Glenalla Properties Limited and Others*, proceeded to trial. Judgment was delivered in December 2013, certain aspects were appealed and, following detailed case management, this court held a number of separate hearings in respect of which a number of separate judgments have been issued. Included in the litigation was a declaration sought by the present plaintiff that the present defendants were not entitled to any indemnity out of the TDT assets in respect of certain demands for payment made against them by the BVI companies arising out of the arrangements entered into in 2007 as part of the transfer of assets. One issue before the court in Guernsey 1 was whether certain acts or omissions on the part of the present defendants when trustees constituted unreasonable conduct and whether they had acted in breach of trust amounting to wilful default or gross negligence.

The Defendants' Appeal

6. Before the learned Deputy Bailiff the defendants argued that it was an abuse of process for the plaintiff to bring the majority of its claims as set out in the Cause because they should have been raised in Guernsey 1.

7. In dealing with the law on this application, the learned Deputy Bailiff referred to Rule 52 of the Royal Court Civil Rules, 2007 which provides:

> *"The Court may strike out a pleading if it appears to the Court –*
>
> *(a) that the pleading discloses no reasonable grounds for bringing or defending 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,…."*

8. In a detailed consideration of the issues arising under sub paragraph (a) the learned Deputy Bailiff identified that a defendant would have to demonstrate that the claims made by the plaintiff were unarguable or bound to fail. This assessment required the court to consider only the allegations made in the pleadings and to identify whether a cause of action with some chance of success existed: paragraph 31 of the judgment below.

9. As to sub paragraph (b) and the legal principles to be applied in respect of an application for a pleading to be struck out on the basis that it is an abuse of the court's process, the parties had been agreed before the learned Deputy Bailiff (and continue to be agreed) that, whilst there is no previous guidance in Guernsey authority, reliance may be placed upon the approach in England and Wales by reason of the identical wording of Rule 3.4(b) of the Civil Procedure Rules in that jurisdiction. The learned Deputy Bailiff therefore considered the following authorities from England and Wales: the *White Book* at paragraph 3.4.3(b); *Barrow v Bankside Agency Limited* [1996] 1 WLR 257; *Johnson v Gore Wood & Co* [2002] 2 AC 1; *Stuart v Goldberg Linde* [2008] 1 WLR 823; and *Aldi Stores Limited v WSP Group plc* [2008] 1 WLR 748.

10. From consideration of that authority the learned Deputy Bailiff, at paragraph 42, summarised the salient legal principles governing the question of whether a pleading constituted an abuse of process through having been capable of being pursued in earlier proceedings. This was set out in terms, which the parties accept as correct and which, broadly, in our judgment, this court should be prepared to approve. Those principles are now set out with slight changes, which do not affect their sense, and with the principal authority for each proposition added for ease of reference.

> 1. The burden of establishing that there is an abuse of process rests on the party alleging it: *Johnson v Gore Wood & Co*, page 31 (Lord Bingham of Cornhill), page 59 (Lord Millett).
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> 2. The question in every case is whether, applying a broad, merits-based approach, the party's conduct in bringing the second action is in all the circumstances misusing or abusing the process of the court: Johnson v Gore Wood & Co, page 31 (Lord Bingham of Cornhill).
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> 3. The merits involved are not the substantive merits or otherwise of the second claim, but those relevant to the question whether the party in question could and should have brought his claim as part of the earlier proceedings: Stuart v Goldberg Linde, at paragraph 57 (Lloyd LJ).

4. The question falls to be determined as at the time when the plaintiff brings the later proceedings and in the light of everything that has happened by then: Johnson v Gore Wood & Co, page 59 (Lord Millett).

5. It would be wrong to hold, simply because a matter could have been raised in earlier proceedings, that it should have been, thus rendering the raising of it in later proceedings necessarily abusive: Johnson v Gore Wood & Co, page 31 (Lord Bingham of Cornhill).

6. Repetition of text from the pleaded case in the earlier proceedings does not necessarily demonstrate that the claim in the second action should have been included in the earlier action, but any overlap between the two actions must be assessed by reference to the substance of the respective claims: Stuart v Goldberg Linde, paragraph 47 (Lloyd LJ).

7. Provided the second action is within time, delay is not in and of itself relevant to the question of abuse: Stuart v Goldberg Linde, paragraph 58 (Lloyd LJ).

8. Depending on the circumstances of the case, it may be relevant to consider whether, through the use of reasonable diligence, any facts which were not known at the time of the earlier proceedings could reasonably have been ascertained and deployed in that earlier action: Stuart v Goldberg Linde, paragraph 59 (Lloyd LJ).

9. A party should not keep additional claims secret merely because they might involve additional, possibly complex, issues, but should put its cards on the table so as to facilitate proper case management and so that no one is taken by surprise: Stuart v Goldberg Linde, paragraph 96 (Sir Anthony Clarke MR).

10. In reaching its decision, the court must take into account the public interest in finality in litigation and in preventing a party being vexed twice, as well as economy and efficiency in litigation. But there had to be some acceptance that a party should have a measure of freedom, especially in complex commercial matters, to choose who to sue in which action, in the knowledge that some matters would be controlled through appropriate case management: Aldi Stores Limited v WSP Group plc, paragraphs 24 and 25 (Thomas LJ), paragraph 39 (Longmore LJ), and paragraph 6 (quoting Clarke LJ in Dexter Limited v Vlieland-Boddy [2003] EWCA Civ 14 paragraph 49).

11. It is more likely that a second action against a party to the earlier case will be struck out than a later action against a different party, it being generally important that A should bring all of his claims against B in one action: Dexter v Vlieland-Boddy, paragraphs 49 and 50 (Clarke LJ).

12. The court will rarely find that the second action is an abuse of process unless it involves unjust harassment or oppression of the party alleging abuse: Dexter v Vlieland-Boddy, paragraph 49 (Clarke LJ).

13. The decision as to whether the proceedings constitute an abuse of process is not a discretionary one: either the second set of proceedings is an abuse of process or it is not (although even if found to be an abuse it may be possible, in an exceptional case, that a court might exercise its discretion not to strike it out): Stuart v Goldberg Linde, paragraph 24 (Lloyd LJ).

The Defendants' Grounds

11. The defendants present three grounds of appeal.

12. The first is that the learned Deputy Bailiff erred in law in his assessment of whether the claims at paragraphs 15-20 of the Cause should have been brought within Guernsey 1 (and,

so, are an abuse of process) in that he failed to take into account the nature, extent and importance of the factual overlap, took into account irrelevant considerations and failed to take into account, or to take adequate account of, relevant considerations. In particular, the defendants submit that, whilst the analysis and conclusions of the Deputy Bailiff were to a great extent correct, he understated the nature and extent of the factual overlap, thereby failing to appreciate the position of the other parties in Guernsey 1, erred in reaching a view that a less robust approach to case management would be taken in Guernsey than in England and Wales and erred in failing to take adequate account of the conduct of the plaintiffs.

13. The second ground is that the learned Deputy Bailiff erred in law in apparently moderating the application of the principle derived from *Henderson v Henderson* (1843) 3 Hare 100 upon the basis that the principle was not an established part of the law of Guernsey.

14. The third ground is that the learned Deputy Bailiff erred in finding that the common law doctrine of election did not apply in relation to the plaintiff's allegations concerning what has been referred to as the "Framework Agreement".

The Test on Appeal

15. Before this court, the parties were not quite at one as to the precise approach to be adopted in deciding whether or not to interfere with the decision of a first instance judge on an issue as to abuse of process. On behalf of the plaintiff, emphasis was laid upon the respect to be accorded to decisions requiring to be made by the balancing of factors; whereas the defendants emphasised that the nature of the assessment did not put a first instance judge in a better position than an appellate court. In the submissions for the defendants, the issue was said to be whether the decision below was right as a pure question of law, no exercise of discretion being involved.

16. Each party, however, referred to the views of Thomas LJ (as he then was) in *Aldi Stores Limited v WSP Group plc*, in which the learned judge expressed himself in the following terms:

> "16. In considering the approach to be taken by this court to the decision of the judge, it was rightly accepted … that the decision to be made is not the exercise of a discretion; … It was a decision involving the assessment of a large number of factors to which there can, in such a case, only be one correct answer to whether there is or is not an abuse of process. None the less an appellate court will be reluctant to interfere with the decision of the judge where the decision rests upon balancing such a number of factors; see the discussion in *Assicurazioni Generali SpA v Arab Insurance Group (Practice Note)* [2003] 1 WLR 577 and the cases cited in that decision and *Mersey Care NHS Trust v Ackroyd (No. 2)* [2007] HRLR 580, para 35. The types of case where a judge has to balance factors are very varied and the judgments of the courts as to the tests to be applied are expressed in different terms. However it is sufficient for the purposes of this appeal to state that an appellate court will be reluctant to interfere with the decision of the judge in the judgment he reaches on abuse of process by the balance of the factors; it will generally only interfere where the judge has taken into account immaterial factors, omitted to take account of material factors, erred in principle or come to a conclusion that was impermissible or not open to him. In this case, I consider that the judge, despite the weight that must be accorded his view given his great experience in this type of litigation and the conspicuous success with which he has managed the TCC, reached a decision which was impermissible by taking into account factors which he should not have done and omitting factors which he should have taken into account." (The judge in question was Jackson J, as he then was.)

17. In our view the approach set out by Thomas LJ should be adopted in this jurisdiction. In doing so it seems appropriate to draw attention to the precise approach suggested – albeit it is an approach familiar to appellate courts reviewing decisions in other branches of civil law – as did Sedley LJ and Sir Anthony Clarke MR in *Stuart v Goldberg Linde* [2008] 1 WLR 823 at paragraphs 76 and 81. Indeed, it may be especially important to remark on the emphasis because the court in *Aldi Stores* did interfere with the determination of a distinguished first instance judge. The emphasis is that an appeal court should be reluctant, but not be precluded, from interfering with the decision of the first instance judge on an abuse of process application where the only complaint is an inappropriate balancing of factors: it might, simply, be wrong. That said, it is clear that an appellate court may more readily interfere where immaterial factors have been taken into account, where material factors have been omitted, where there has been error in principle or where the conclusion was either impermissible or not open to the judge. We respectfully agree that this approach allows the correct balance, in a matter of this nature, between the functions of each of the two levels of court. The defendants are correct to emphasise that the first instance decision is not a discretionary exercise and that, there having been no oral evidence, the first instance judge is not, thereby, in a better position than the appellate court. On the other hand, it is often – but not always – the case that the court of first instance would have been addressed at greater length by parties and, as was the case in *Aldi Stores*, would have been presided over by a judge with a greater depth of relevant current experience in case management than may be so in the appellate court. For these reasons, and perhaps others, the approach suggested by Thomas LJ appears to strike an appropriate balance.

The Reasoning Below

18. In beginning to address this part of his reasoning, the learned Deputy Bailiff noted at paragraph 83 that, as it had been stressed to him by both Counsel, because it was necessary to have an in-depth understanding of the Guernsey 1 case, he had immersed himself in the pleadings and judgments without seeking to go behind what had already been found and decided by the learned Lieutenant Bailiff (Sir John Chadwick PC) and reviewed by this court. On the other hand, he observed that it might have been of more assistance to him had there been some shorter summary of the scope of Guernsey 1 with indications of areas of agreement and divergence.

19. As to the defendant's first ground of complaint before him, he commenced by indicating, at paragraph 84, that, as Guernsey 1 comprised proceedings between the present parties relating to the TDT and in which it was possible for the present allegations to have been included, the likelihood of a finding that there had been an abuse had increased.

20. Having reached that introductory view, the learned Deputy Bailiff then proceeded to consider the extent of the alleged overlap between the two actions and, upon analysis, reached the view, at paragraph 91, that, whilst there were some areas of the present issues which had previously been addressed in some form in Guernsey 1, the degree of overlap was neither as great nor as significant as suggested on behalf of the defendants. He held that the present claims were different from those made in Guernsey 1: Guernsey 1 was fundamentally about various inter-company loans arising out of the transfer of assets, whereas the existence of those loans was now part of the canvas on which the allegations which the plaintiff wished to pursue were to be painted. Even so, the extent of the overlap was still sufficient for him to find that the allegations in the present action potentially could have been raised in Guernsey 1; but that this finding, crucially, did not mean, in his view, that they should have been.

21. The learned Deputy Bailiff reached this first conclusion upon the following, more detailed, basis. First, as to paragraph 15 of the Cause: he considered that this alleged that the

defendants had placed too much reliance on an investment adviser and asset manager to the TDT (referred to as "R20"). Whilst this reliance by the defendants had been raised as part of the plaintiff's counterclaim in Guernsey 1, the references appeared to the Deputy Bailiff to have been comparatively peripheral whereas paragraph 15 of the Cause put this matter as the first basis upon which the plaintiff claims relief.

22. Second, as to paragraph 16: this appeared to him to claim that the defendants had failed to monitor the TDT assets from time to time and failed in a duty to consider diversification. Here the learned Deputy Bailiff considered that the extent of any overlap was higher than in respect of paragraph 15. Whilst the learned Deputy Bailiff did not expand on that view, by reference to the competing arguments which he identified it must be assumed that he did not consider the overlap to be of particularly high significance in the context in which he was addressing it.

23. Third, as to paragraph 17: this, again, he viewed as seeking relief by reason of the defendants placing too much reliance on R20 in respect of high risk investments and aggressive investment strategies. The Deputy Bailiff reached the view that there was more overlap than in respect of paragraph 15 but, arguably, less than for paragraph 16. The critical point for him appears to have been that the focus of the present allegations was breach of trust by failing to preserve sufficient assets for minor beneficiaries or to retain sufficient hedges against collapsing markets, allegations which did not appear to have been considered in Guernsey 1.

24. Turning, fourth, to paragraphs 18 and 20 which contain specific allegations in respect of relationships with Kaupthing bank: again in the context of failures in monitoring and diversification, the learned Deputy Bailiff reached the view that, whilst there was some degree of overlap, it was also apparent that not everything which could now be said about Kaupthing had been aired in Guernsey 1. Finally, looking at paragraph 19 the learned Deputy Bailiff noted that allegations about the poor maintenance of records and documents and how they were used had emerged in Guernsey 1, although they were not at the heart of that litigation. No view was expressed as to the degree of overlap.

25. Having reached the view that the extent of the overlap was sufficient to instruct a finding that the allegations in the present action could have been raised in Guernsey 1, but before considering whether they should have been, the learned Deputy Bailiff considered further issues. The first turned on what the plaintiff did after receiving documents from the defendants as a result of a successful application for delivery up of files. This point arose between the parties below essentially upon the separate arguments for the plaintiff (a) that it should not be penalised for not having resources adequate to pursue claims and (b) that it was legitimate in complex litigation to handle matters in a sequential manner.

26. The learned Deputy Bailiff rejected those contentions on behalf of the plaintiff and, in determining that the funding position did not affect his conclusion that the plaintiff could have brought the claims in the Guernsey 1 proceedings, observed:

> "96. I share the concerns that have been expressed by the Lieutenant Bailiff about the choice that has been made by the plaintiff and its advisory team as to how to deal with the documents obtained pursuant to the order made following its application dated 8 August 2011. There seems to have been little point in making that application at the time it was made if the Plaintiff had not intended to make use of the documents quicker than turned out to be the case. I can understand that, in the minds of those controlling the defendants, having been required to supply material outside the context of Guernsey 1 for the express reason that the Plaintiff wished to consider carefully whether steps should be taken to hold the Defendants to account for their performance as trustees more generally, there was an expectation that these matters

would at least be ventilated in the context of the Guernsey 1 proceedings. When they were not, the defendants can perhaps be forgiven for thinking that they would hear nothing further about these other allegations. More importantly, although I appreciate that the Plaintiff had to seek funding from elsewhere because it did not have control of the assets of the TDT, I am satisfied that, had the request for funding been put on the basis that it was essential to review the documents at that time, rather than choose to defer that exercise, the resources to do so would have been made available to it. In summary, therefore, the funding position does not affect my conclusion that the Plaintiff could have brought the claims in the present proceedings in Guernsey 1."

27. At paragraph 97 the learned Deputy Bailiff, however, expressed himself satisfied that the plaintiff had not remained silent in the manner referred to in *Stuart v Goldberg Linde* in that, whilst it may not have spelt out explicitly what it had in mind, it was not keeping claims up its sleeve. Although not indicated expressly, it is clear that this view did not disturb the view that the plaintiff could have brought the claims in Guernsey 1.

28. In turning to the resolution of the concluding issue, namely, as to whether the claims in the present Cause, or any of them, should have been brought in Guernsey 1, the thrust of the discussion by the learned Deputy Bailiff fell upon case management: see paragraphs 98 to 107.

29. His first consideration was the defendants' criticism of the plaintiff for failing to raise the likelihood of further claims being made within Guernsey 1 so as to permit the court to engage in active case management: an argument made by reference to paragraph 30 of *Aldi Stores*. Whilst emphasising, for the avoidance of doubt in future cases, that the principles deriving from the civil procedure rules in England and Wales form part of Guernsey law, the learned Deputy Bailiff found, in relation to the instant case, that the plaintiff should have been more forthcoming and at least raised the possibility of bringing into Guernsey 1 some or all of the claims now being made: paragraph 98. In his view, the fact that the plaintiff had not was something which tipped the balance towards the conclusion that there had been an abuse of process, but was not a complete answer: paragraph 98.

30. In the view of the learned Deputy Bailiff, in order to resolve the issue as to whether or not the claims, or any of them, should have been brought in Guernsey 1, he had to analyse whether the position would have been different from what had happened if the prospect of the further claims had been aired in Guernsey 1. In proceeding to carry out this analysis the Deputy Bailiff recognised that, to an extent, this involved speculating as to how the learned Lieutenant Bailiff would have reacted; but considered that the best he could do would be to identify how he himself would probably have reacted if faced with the position of having to decide whether to delay the trial fixed for June 2012 to admit the additional claims: paragraph 99.

31. In proceeding to place himself in this position, the Deputy Bailiff carefully and helpfully set the hypothetical issue in the context of case management in Guernsey generally, with a small resident judiciary and a small number of Advocates regularly participating in complex litigation. As he indicated, at paragraph 100, whilst case management in Guernsey is not conducted by the court in quite the same robust way as is the case in England and Wales – that is, with case management steps here being driven more by the Advocates than the court – complex litigation in Guernsey had the advantage of greater flexibility in the management of proceedings and a comparatively straightforward ability to obtain directions from either the trial judge or another available judge. Put simply, and of relevance for his hypothetical consideration, the vacation of trial dates and rearrangement of the court's business was more straightforward in Guernsey than in larger jurisdictions because of these flexibilities.

32. With these considerations in mind, the learned Deputy Bailiff agreed with the defendants that the proper process was to have addressed the issue of further claims prior to the Guernsey 1 trial, leaving it to the court to hear representations on the different options and to decide how to deal with the whole case justly. It should not have been the unilateral choice of the plaintiff as to how to conduct its claims: paragraph 101.

33. After rejecting arguments for the plaintiff which lacked palpable substance, the learned Deputy Bailiff then proceeded to consider, upon analysis, whether there would have been an order vacating the Guernsey 1 trial listed for hearing in June 2012. He reached the view that it would not and that the position would have been, in essence, as it is now: paragraph 104. As he made clear, however, the issue appeared to be very finely balanced: paragraph 106. His overall impression was that splitting the trial felt the right way to deal with the claims and manage them: paragraph 106. He went on to confirm however that, being "just satisfied that the failure to raise these matters back in 2012 has not affected the way in which the case would have been managed", the decision might have been affected by considerations of fairness to parties as well as fairness to witnesses: paragraph 107.

34. In his reasoning at paragraphs 104 to 106 the learned Deputy Bailiff commenced by taking the view that the BVI companies would not have wished to have the new claims heard at the same time as the proceedings centred on the loans to them. He speculated that the trial might have doubled in length and the additional matters would have had no bearing on the resolution of the issues between the BVI companies and the other parties. The new allegations would have transformed the litigation from a reasonably narrow consideration of the alleged loans to a quite different trial and he would have wanted to have avoided the BVI companies being involved in matters that were of no interest to them. In his view it was likely that extensive amendment would have been required: paragraph 104.

35. He also took into account a submission for the plaintiff that the relief sought in Guernsey 1 differed from the relief now being sought. The latter was said to be compensation for breach of trust. In the former, the plaintiff's primary case was said to be that the defendants should not be entitled to rely on their indemnity over the assets of the TDT in order to meet liabilities which they had met as trustees. There was an alternative case that the defendants should provide an account before indemnifying themselves: paragraph 105.

36. The Deputy Bailiff considered the matter very finely balanced. In his view, if he could have been persuaded that there would only have been a short delay in re-listing the trial, and that the length of the trial would not have increased by very much, he would probably have concluded that the only aspect to sever was the Somerfield Claim. On the other hand, if he had recognised that it would delay the trial and result in wasted time for the BVI companies, he indicated that he would probably have concluded that it was most sensible to proceed with the new claims being commenced in separate proceedings. Of importance in his analysis was that the defendants had not provided a clear picture as to the benefits and disadvantages of the case management aspect, and bore the burden of establishing the abuse. He concluded therefore, on balance, that he would have been more likely to have reached the view that the additional claims should have been dealt with separately.

37. It is also noteworthy that the learned Deputy Bailiff again emphasised the very fine balance in his reasoning at paragraph 111. As he summarised matters in that paragraph, there was indeed evidence showing the existence of some factors pointing towards the conclusion that the claims should have been raised in Guernsey 1 but there was other evidence pointing away from that conclusion. He confirmed that he had been in two minds as to whether the defendants had persuaded him that the plaintiff's approach was an abusive one but concluded that they had not satisfied him that what had happened met the tests which he had sought to apply.

38. It may be noted that, in the foregoing rehearsal, we have not referred to paragraphs 108 to 110 of the judgment or to paragraphs 112 and following. The former are germane only to the defendants' third ground of appeal and the latter are not called under review.

39. Returning to paragraphs 108 to 110, the learned Deputy Bailiff noted at paragraph 108 that the defendants had submitted that the plaintiff now wished to advance a case that was inconsistent with the case advanced in Guernsey 1 and that this was a further factor demonstrating that there was an abuse, reliance being placed on the principles of common law election.

40. For the plaintiff it was argued that the failure in prosecuting its position in Guernsey 1 did not mean that it was now prevented from pursuing an alternative case, and the learned Deputy Bailiff agreed with that submission: paragraphs 109 and 110. In his view, had all the claims been made in a single set of proceedings, the plaintiff would have been able to pursue its alternative positions, but could only have asked for judgment on one of them. As the learned Deputy Bailiff concluded at the end of paragraph 110, he had not proceeded to consider whether any issue estoppels would affect his decision; he had merely considered whether the inconsistent case amounted to a factor showing that there had been an abuse as alleged, and concluded that it had not.

Submissions on the Defendants' Appeal: Overlap

41. The defendants complain that the learned Deputy Bailiff failed to appreciate the nature and full extent of the overlap between Guernsey 1 and the Cause: in part, perhaps, by focusing too heavily on the wording of pleadings, inconsistently with the sixth point of principle identified by the learned Deputy Bailiff and set out in paragraph 10 above. The background facts to each of Guernsey 1 and the Cause were the same, namely, the impact of the global financial crisis on the assets of the TDT and the necessity for third party lending, all of which ultimately resulted in what was referred to as the Oscatello Restructuring in the form of what was referred to as the Framework Agreement. Indeed, the learned Deputy Bailiff had been correct to note, at paragraph 91 of the judgment, that Guernsey 1 was fundamentally about alleged loans: both in the sense that the existence of the loans was essential to the counterclaim for judgment by the BVI companies and also because the plaintiff's counterclaim against the present defendants turned on the allegation that they were in breach of trust for failing to take steps to prevent those loans becoming repayable out of the TDT trust assets.

42. It was apparent from paragraphs 15 to 20 of the Cause that not only was the factual background identical to that in Guernsey 1, but the complaint was the same, namely, that loss had been suffered by the inter-company loans becoming repayable out of the trust assets. The key allegations in the Cause were reformulations of what the defendants should have done to avoid the result complained of in Guernsey 1 in the same period of time. In consequence of the error in the approach of the learned Deputy Bailiff, he had failed to acknowledge, properly or at all, either the extent of the common factual background or the centrality of the complaints underpinning both claims. Having failed to do so, he failed to take account of the context within which specific allegations were explored, thus highlighting the mutuality of subject matter in the two sets of proceedings.

43. On behalf of the present plaintiff it was submitted that it was neither surprising nor significant that the background facts were the same for Guernsey 1 as for the Cause. Properly characterised, the defence and counterclaims by the plaintiff against the defendants, and by the plaintiff in its third party claim against the BVI companies, were concerned solely and exclusively with the informal inter-company loans. The plaintiff's allegations were not made

more widely than being concerned with the informal loan liabilities. The Lieutenant Bailiff had identified the issues arising for determination in Guernsey 1. Whilst Issue 6 of his list referred to the plaintiff's allegations of unreasonable conduct by the defendants and Issue 7 comprised the plaintiff's allegations of breach of trust, both were tied to the plaintiff's pleaded case which was concerned only with the loans. Furthermore, this court, in its judgment of 10 August 2005, held that the Lieutenant Bailiff was correct to tie the plaintiff to its pleadings.

44. As to the defendants' first ground of appeal, the plaintiff supported the views expressed by the learned Deputy Bailiff. Further, whilst the first ground of appeal was advanced as an error of law, it was, in fact, a disagreement with the assessment by the learned Deputy Bailiff of the various factors considered by him. The first ground, accordingly, was bound to fail.

45. As to the detailed appraisal of the alleged overlap, the plaintiff submitted that the thrust of the Cause is that the defendants' investment strategy and execution was inappropriate for the TDT and in breach of trust.

46. Looking at paragraph 15 of the Cause, the plaintiff submitted that there was no consideration in Guernsey 1 as to whether the defendants ought to have entered into certain specified transactions. Turning to paragraph 16 of the Cause, such material as was common with Guernsey 1 was pled merely as background facts, context and uncontroversial matters and no allegations were pleaded of the nature of breach of trust which are to be pursued in the present Cause. Furthermore, the contentions in paragraph 16 were that the defendants should have diversified (or considered diversifying) from the portfolio of assets being transferred. Nor, it is to be alleged, did the defendants revise investment strategies when earlier recommendations by R20 became unsuitable or inappropriate.

47. Paragraph 17 of the Cause, as the learned Deputy Bailiff concluded, contained some overlap with Guernsey 1; but the present claims went considerably further and dealt with the defendants' lack of protection of the interests of other beneficiaries and improper reliance on R20 for investment advice.

48. As to paragraph 18 of the Cause, this again made new allegations of failure to diversify and exposing to unacceptable risk.

49. As to paragraph 20, the learned Deputy Bailiff was correct to hold that, whilst there was some overlap with Guernsey 1, the overlap was not complete as not all of the allegations were explored in Guernsey 1.

50. Dealing with paragraph 19 of the Cause, the alleged failure to ensure that the TDT's books and records were kept confidential and separate were not at the heart of Guernsey 1, and the issues pleaded in paragraphs 19(c) to (f) were not pleaded in Guernsey 1 nor the subject of the Lieutenant Bailiff's judgment.

51. In any event, the plaintiff contended that the overlap argument did not assist the defendants as it did not affect the ratio of the decision of the Deputy Bailiff.

Submissions on Defendants' Appeal: Case Management

52. The defendants did not suggest that it was incorrect for the learned Deputy Bailiff to consider whether or not leave would have been granted to introduce the Investment Allegations and the Books and Records Allegations; but they submitted that his conclusions were incorrect.

53. Firstly, had such an application been made in Guernsey 1, the scope of the underlying subject matter and of the relief sought would have been of paramount importance; and the relief of equitable compensation was sought in both sets of proceedings.

54. Secondly, if the plaintiff had sought leave to introduce the new allegations, it would have to have done so explicitly on the footing that it wished to run a case contrary to the evidence expected to be given by its own witnesses of fact.

55. Further, having regard to the view of the learned Deputy Bailiff that the BVI companies would have opposed the applications, it was clear that there were potential circumstances in which it would have been very much in the interests of the BVI companies to ensure that all allegations of breach of trust were defeated in order for those companies to seek subrogation to the defendants' rights of indemnity. The BVI companies may well have opposed an application by the plaintiff for leave to introduce new allegations, but it was fanciful to suggest that they would have sought a separate trial of matters of direct relevance to them.

56. Further again, there was no reasonable basis for the suggestion that the inclusion of the additional allegations would have doubled the length of Guernsey 1, as disclosure had already taken place and there was no suggestion from the plaintiff that other witnesses would be required. Doubtless the extent of expert witness evidence would have increased and there would have been additional cross examination but it was fanciful to suggest that this would have added twelve days to the trial estimate.

57. These points applied with equal force to the Investment Allegations and the Books and Records Allegations, the latter also being allegations of breach of trust.

58. For the plaintiff it was pointed out that, as a matter of case management, there was no clear indication that the Lieutenant Bailiff would have adjourned the trial in Guernsey 1. In any event, the plaintiff would not have been advancing contradictory cases. The focus in the present Cause was whether the investment strategy pursued was appropriate for the TDT. Requiring the defendants to consider whether to enter into the Framework Agreement was not inconsistent with the earlier allegation that the defendants were negligent in their failure to deal with the inter-company loans when they did in fact enter into the Framework Agreement.

59. There was little or no substance to the defendants' suggestion that the BVI companies would not have opposed consolidation and would have had an interest in the various allegations being heard together. The defendants had not served any evidence addressing this point. In the Guernsey 1 trial the BVI companies were content to leave it to the defendants to argue whether or not they were in breach of trust; and, as the subsequent appeal showed, it suited the BVI companies to argue that the defendants were personally liable. The BVI companies wanted resolution on the issue of the inter company loans and would not have consented to joinder of claims that had nothing to do with them.

Submissions on Defendants' Appeal: Case Management in Guernsey

60. For the defendants it was contended that the views of the learned Deputy Bailiff, at paragraph 100, that case management in Guernsey was not as robust as in England and Wales showed the error of the Deputy Bailiff in drawing such a distinction. There was no distinction in principle between the two regimes as a matter of procedure and case management, and no basis for a finding that a different result would have been reached on the ground of case management practices in Guernsey as opposed to England and Wales.

61. For the plaintiff it was submitted that the reasoning of the learned Deputy Bailiff for assessing that the trial in Guernsey 1 would not have been vacated did not turn upon those general

observations, but upon the particular circumstances of the case: see paragraphs 104 to 107. Furthermore, there was no basis for the assumption by the defendants that, if their case of abuse had been considered by a court in England, it would have succeeded. The parties were accorded some measure of freedom to choose when to bring other claims and the courts of England and Wales took account of whether joining further claims might result in complex and unwieldy litigation.

Submissions on Defendants' Appeal: Plaintiff's Conduct

62. In the submission of the defendants, this court was entitled to take into account various criticisms of the plaintiff which had taken place after the decision below. Those judicial findings of bad conduct, including findings of this court, added weight to the conclusion that the plaintiff had inappropriately kept matters secret in order to seek to obtain an inappropriate advantage. They also demonstrated that the plaintiff was engaging in unjust harassment of the defendant. The appraisal of abuse of process was an evaluative assessment, focusing on the question of whether a party was misusing or abusing the processes of the court. Given that the Deputy Bailiff had correctly held that the plaintiff ought to have provided information to enable the first instance judge to consider the appropriate course in case management, the learned Deputy Bailiff was wrong to weigh in the balance the statement that the plaintiff had not kept its cards up its sleeve. Viewed as a whole, the conduct of the plaintiff suggested that it was pursuing a campaign of unjust harassment of the defendant.

63. For the plaintiff it was contended that there was no substance in these arguments. The broad, merits-based test was focused on whether the particular proceedings that had been brought were abusive because they could and should have been brought earlier. Other issues were irrelevant.

64. Further, if in 2011/2012 the defendants had been concerned, genuinely, that it would be oppressive or vexatious for them to face a possible second action in the future for breach of trust claims, they should have raised that before the Guernsey 1 trial. In other respects, the plaintiff supported the reasoning of the learned Deputy Bailiff.

Submissions on the Defendants' Appeal: Ground 2

65. In relation to Ground 2, the matter which the defendants wish to bring under review is the way in which the learned Deputy Bailiff approached the application of the principle derived from *Henderson v Henderson* as a matter of Guernsey law, as set out in paragraph 98 of the judgment.

66. Within that paragraph the learned Deputy Bailiff had stated:
"… if these proceedings were being conducted in the High Court the failure of the Plaintiff to raise with the Lieutenant Bailiff its wish to bring further claims against the Defendants would pose considerable problems for it now in seeking to resist the striking out of its subsequent proceedings. Of course, as a matter of Guernsey law, there is no such existing guidance on which the Defendants can rely. Accordingly, I cannot, in my view, be as critical of the Plaintiff as an English judge inevitably would be."

67. The defendants accepted that the learned Deputy Bailiff had not been taken to any Guernsey authority on the point but noted that they had referred in their skeleton argument to a decision of the Royal Court of Jersey (*Ernest Farley & Sons v Takilla* [1992 JLR 54]) where the principle had been recognised in that jurisdiction. Given that it was common ground between the parties at the hearing that the principle in *Henderson v Henderson*, as interpreted in *Johnson v Gore Wood & Co*, was part of Guernsey law – as the learned Deputy Bailiff

recognised in the Judgment at paragraph 32 – he ought to have applied the rule in accordance with those authorities without moderation.

68. In the submission on behalf of the defendants, there was neither a rule of law nor a justifiable reason for applying a principle with less force on the first occasion that it was recognised by the courts than in subsequent instances. If this were not so, the establishment of clear authority on how a principle was to apply would be severely hampered. General principles of case management are the same under the Royal Court Civil Rules as under the Civil Procedure Rules. It was emphasised that, as no previous judgment in Guernsey had held that the guidance in *Aldi Stores* applied in Guernsey, it was just and appropriate of the learned Deputy Bailiff, when articulating for the first time that these principles applied in Guernsey, to do so for future claims. Indeed, the learned Deputy Bailiff was doing no more than that which the Court of Appeal in England had done in *Aldi Stores*, namely, clarifying that in the future, a litigant should raise the possibility of other claims with the Court. Even although the *Henderson v Henderson* principle, in its modern formulation, had been part of English law since 2000, the guidance about raising further claims with the court for case management was not articulated until 2008. Particular reference was made to paragraphs 29 and 31 of the judgment of Thomas LJ in *Aldi Stores*.

69. Further, since principles such as those being discussed were about how a litigant should behave, it would be draconian to strike out a litigant on the basis of a rule that had not been articulated at the time when it carried out its actions.

70. In any event, the issue raised in the second ground of appeal had not affected the outcome of the decision of the learned Deputy Bailiff. He concluded that the plaintiff could have raised the issues in Guernsey 1 but that, had the present claims been raised with the Lieutenant Bailiff in Guernsey 1, the outcome would have been that the trial would not have been vacated. Furthermore, the Deputy Bailiff was not saying – and nor did the decisions in *Aldi Stores* and *Johnson v Gore Wood & Co* – that, in the circumstances of those cases, the failure to raise claims amounted to an abuse of process by itself. To do so would have turned a factor (appropriate case management) into a rule of law and would have been contrary to the essence of the *Henderson v Henderson* type of abuse being a broad merits-based principle depending upon all the circumstances of the case.

Submissions on the Defendants' Appeal: Ground 3

71. As to the third ground of appeal, regarding the common law doctrine of election, the defendants had contended before the learned Deputy Bailiff that the case now pursued by the plaintiff was wholly inconsistent with that pursued in Guernsey 1. The fundamental premise of the counterclaim in Guernsey 1 was that the core investments of the TDT should be protected by the restructuring of the financing provided by the Framework Agreement; whereas the fundamental premise behind the Investment Allegations in the Cause was that the core investment should have been realised and the Framework Agreement not entered into. Evidence of the parties at the Guernsey 1 trial had been presented upon the basis of the former premise.

72. The learned Deputy Bailiff had dealt with this matter at paragraphs 108 to 110 in the judgment below. In paragraph 109 he had noted the argument for the plaintiff that the position of the plaintiff was not covered by the doctrine of election because, had the claims been made in a single action, it would have been permissible to run alternative arguments depending upon the findings of the court on the primary case.

73. In paragraph 110 the learned Deputy Bailiff had agreed with the analysis put forward on behalf of the plaintiff and expressed the view that the plaintiff's position was not one where

the common law principle of election applied: reference was made to *United Australia Limited v Barclays Bank Limited* [1940] AC 1, 30 and *Express Newspapers v News (UK) Limited* [1990] 1 WLR 1320, 1329. In the view of the learned Deputy Bailiff, had all the claims been made in a single set of proceedings, the plaintiff would have been able to pursue its alternative positions, but could only have asked to take judgment on one of them. The Deputy Bailiff had not been persuaded that, if the plaintiff had sought to amend its case in Guernsey 1, the defendants could have objected to the alternative ways in which the case was to be put. If findings which had been made in Guernsey 1 now cause the plaintiff some problems, those are matters to be dealt with by way of raising estoppels.

74. Addressing applicable legal principles, the defendants referred to *Express Newspapers v News (UK) Limited* at page 1329F where the learned Vice-Chancellor (Browne-Wilkinson) stated:

> "There is a principle of law of general application that it is not possible to approbate and reprobate. That means that you are not allowed to blow hot and cold in the attitude that you adopt. A man cannot adopt two inconsistent attitudes towards another: he must elect between them and, having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance.
>
> To apply that general doctrine to the present case is, I accept, a novel extension. But, in my judgment, the principle is one of general application and if, as I think, justice so requires, there is no reason why it should not be applied in the present case."

75. For the defendants it was pointed out that it had been held in the Court of Appeal in England that election is itself an element which may render a second claim an abuse where two claims are mutually exclusive: *Bradford and Bingley Building Society v Seddon* [1999] 1 WLR 1482, 1498. Reference was also made to the views expressed in the House of Lords in *United Australia Limited v Barclays Bank Limited* at page 30:

> "If a man is entitled to one of two inconsistent rights, it is fitting that, when, will full knowledge, he has done an unequivocal act showing that he has chosen the one, he cannot afterwards pursue the other, which, after the first choice, is by reason of the inconsistency, no longer his to choose."

76. Reference was also made to *Balgobin v SW Regional Health Authority* [2013] 1 AC 582 at paragraph 20 where it was said that "the claimant could have opted for either of two possible causes of action … but they could not have been pursued concurrently because the legal base for each was antithetical to each other"

77. In practical terms, the present was not a case where it could sensibly have been open to the plaintiff to plead each inconsistent factual hypothesis as it could not have adduced evidence and cross examined on the two inconsistent hypotheses, namely, realisation of the core assets and retention of the core assets.

78. Upon the basis of the authorities it was clear that a party should not be permitted to run a different case once one has been brought to judgment (whether successfully or not).

79. For the plaintiff it was contended that the defendants had mischaracterised the two separate claims by the plaintiff. The plaintiff's case in Guernsey 1 was that in December 2007, when entering into the Framework Agreement, the defendant should have done so properly and in a way so as not to expose all the other trust assets to risk: that is, they should have ring fenced the Oscatello structure. Such a case was not inconsistent with the plaintiff's case in the present cause which was that the investment strategy pursued by the defendants was inappropriate and they should have diversified: as part of this duty the defendants should not

have got themselves into the position where they needed to enter into the Framework Agreement.

80. Further, in the submission of the plaintiff, the defendants' reliance on the doctrine of election was misplaced. The authorities referred to demonstrated that the essence of the doctrine was that a person had to choose between two inconsistent rights or two inconsistent causes of action where the inconsistency arose from the fact that the legal basis for one is antithetical to the other. Here, however, the legal basis for the claims in the two litigations were the same, namely, failure by the defendants in their duty to protect the TDT assets. Reference was also made to the views of Viscount Simon LC in *United Australia* at page 21 where emphasis was placed upon appellants already having received satisfaction. As the plaintiff had not succeeded in Guernsey 1 it was still open to it to pursue the claims in the present cause.

81. In conclusion, the plaintiff pointed out that this third ground of appeal did not affect the basis of the decision of the learned Deputy Bailiff who had not considered that the claims in the two litigations were inconsistent.

Defendants' Appeal: Discussion

82. The issue which the learned Deputy Bailiff had to determine on this element of the plaintiff's claim was whether, on the matters put before him, the plaintiff's pleading should be struck out as an abuse of the court's process. The basis upon which the application was presented by the defendant was that the present issues should have been pursued in Guernsey 1 and that to allow them to be pursued now would be unacceptably vexatious. The principle has been expressed in numerous authorities, most accessibly, perhaps, in *Johnson v Gore Wood & Co* where Lord Bingham of Cornhill expressed it in this way (page 31):

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

83. Where the issue upon which the application is based is overlap between the present and the earlier proceedings, the proper approach, as set out by Lloyd LJ in *Stuart v Goldberg Linde*, at paragraph 47, is:

> "Obviously there was a lot of common ground between the subject matter of the two actions. Inclusion of the same text in the two statements of case, especially given that the claimant was acting for himself, does not seem to me to demonstrate by itself that either the misrepresentation claim or the inducement claim should have been included with the undertaking claim in the 2000 action. The overlap between the two actions needs to be assessed by reference to the substance of the respective claims, not by a literal comparison of the two statements of case."

84. As far as this appellate court is concerned, it should be reluctant to interfere with the determination of the court of first instance in respect of the balancing of relevant factors (*Aldi Stores*, paragraph 30); but issues such as a failure of logic may dictate the need for a review. Apart from that restricted ambit of interference, the court will only interfere in cases exhibiting what is commonly referred to as *Wednesbury* unreasonableness, namely, the lower court having taken account of irrelevant factors, having failed to take account of relevant factors, having been in error in principle or having reached a perverse decision.

85. In approaching his task here, the learned Deputy Bailiff considered, first, whether the relevant part of the Cause could have been raised in Guernsey 1. He found that it could have been: see paragraph 95. He was neither persuaded nor impressed by the plaintiff's ancillary arguments against that view: see paragraph 96.

86. Whilst, at paragraphs 83 to 95, the learned Deputy Bailiff expressed no firm view as to the degree and extent of overlap between the claims made in paragraphs 15 to 20 of the Cause and the claims made in Guernsey 1, it is clear that he considered the extent and degree to be sufficiently palpable to make justiciable what to him was the logically separate query, namely, whether the claims should have been raised in Guernsey 1. Were there to be any lingering doubt as to that characterisation of his position, it is dispelled by his emphasis in both of paragraphs 106 and 111 as to the fine balance of the matters before him. In his mind therefore, the defendants had presented a very real issue as to whether or not the present claims should have been pursued within Guernsey 1.

87. In our judgment the circumstances before the learned Deputy Bailiff were such that, upon this initial analysis, his determination ought to have been not only that the allegations could have been brought in Guernsey 1 but also that this should have been done. The Deputy Bailiff focused in some detail on the question whether the pleaded issues in Guernsey 1 overlapped with the pleaded issues in the Cause; but it seems to us, with respect, that what the learned Deputy Bailiff failed to do was to analyse and emphasise the substance of the respective claims. Upon such an analysis it can be seen that, although there is not a precise identity between the two, the claims in both actions involve (i) essentially the same parties (ii) acting in essentially the same capacities (iii) in relation to events occurring in essentially the same time period (iv) and in relation to essentially the same series of transactions (v) raising essentially the same cause of action (breach of trust) (vi) whose disposal would turn on essentially the same documentary evidence and (vii) essentially the same witnesses. That is the accumulation of reasons why, having decided that the allegations in the Cause could have been brought in Guernsey 1, the court below ought then to have come to the conclusion that, absent any special reason, those allegations should have been brought in Guernsey 1.

88. Returning to the approach of the learned Deputy Bailiff, without reaching a firm view as to the degree and extent of overlap between the two sets of proceedings, he then moved to deal with the second stage of his analysis through consideration of the likely approach of the Lieutenant Bailiff at first instance upon the hypothetical event that an application was made, in advance of the trial in Guernsey 1, for inclusion of additional claims as presently presented in paragraphs 15 to 20 of the Cause. His logic appears to have been that the basis and compulsitor for making the new allegations was the then recovered documentation and that,

given the stage which Guernsey 1 had reached, an application for amendment would be required. In other words, the circumstances here did not disclose a simple situation where a litigant could take responsibility, himself or herself, for failing to introduce matters into the earlier litigation: rather, the situation was one where a decision on that had to be in the hands of the court.

89. Whether or not we are correct in the views expressed at paragraph 88, in our judgment the learned deputy Bailiff at this stage erred in that he took into account a matter which, in the whole circumstances before him, was irrelevant: that is, what might or might not have happened at a case management conference. The general principles which are set out at paragraph 10 above expand upon the general principle that a person is not to be vexed twice with litigation unless there is good reason. In the circumstances before the learned deputy Bailiff, and before this court, the present defendants are about to be vexed twice at the instance of the present plaintiff which presented its counterclaim against them in Guernsey 1; and the learned Deputy Bailiff, with whom the plaintiff does not disagree, found that the new allegations could have been brought in Guernsey 1. What is lacking before this court, as it was before the learned Deputy Bailiff, is any sufficient evidence or reasoned basis to explain when the claims in this Cause were first identified and why the new allegations were not brought in Guernsey 1.

90. Guernsey 1 started with an application by the present defendants for declarations regarding their position as regards the BVI companies. The latter made their specific claims for payment and when, shortly after, the defendants were replaced as trustees by the plaintiff, the plaintiff was added as a party and presented its own counterclaim. That counterclaim dealt with allegations of breach of trust relevant to the claims by the BVI companies. At that stage the Plaintiff had been given access to hardcopy trust documentation and had access to, amongst other potential witnesses, Robert Tchenguiz.

91. After having accepted appointment as trustee, but before being made a party to Guernsey 1, the present plaintiff had commenced its own proceedings against the present defendants for delivery up of electronic trust documentation for the specified purposes not only of obtaining trust documentation necessary for the administration of the TDT but also for appraising whether and to what extent there might have been culpable conduct on the part of the present defendants in respect of the losses in asset value which the TDT had sustained.

92. Delivery up was made between late 2011 and early 2012. A significant number of files were received, and the plaintiff has sought to suggest that concentration on Guernsey 1 was in some sense to blame for a failure to concentrate on what had been recovered. However there is no evidence that the proposed new allegations depend upon information only discovered from an examination by the plaintiff of the documents recovered in late 2011 or early 2012. Nor is there any suggestion that the proposed new allegations depend upon witness evidence from individuals who were not known or available to the present plaintiff prior to having access to those documents. To the contrary, we were informed by counsel for the plaintiff that amongst the relevant witnesses supporting the new allegations would be those who gave evidence on behalf of the plaintiff in Guernsey 1.

93. In almost every civil litigation there comes a point when the evidential burden moves from one party to another: and may do on more than one occasion. Here, the learned Deputy Bailiff, having identified that the present plaintiff could have raised the relevant part of the present Cause as part of Guernsey 1, should have recognised that it was incumbent upon the plaintiff to explain, credibly, why that was not done. Failing such a credible explanation it seems to us to follow, on the balance of probabilities, that the party complaining is entitled to a determination that the failure to raise in the earlier litigation that which could have been so raised is an abuse through double vexation. Absent that credible explanation, consideration of

what might or might not have occurred at a case management conference was an irrelevant consideration as the complaining party was already entitled to the order striking out the offending pleading. There may be exceptional circumstances where the outcome of any hypothetical case management decision would have been so inevitable that the court could take it into account in a strike-out application: but manifestly that was not the case here, as is apparent from the finely balanced judgment the learned Deputy Bailiff said he needed to use.

94. Having reached these views, we can deal with the other elements of the defendants' appeal quite shortly. First, each of the views which we have just expressed cover the issues raised under the sub-heading of case management. Second, as to case management in Guernsey, following the analysis which we have already given, we are of the view that the plaintiff was correct in submitting that the reasoning of the learned Deputy Bailiff did not turn upon his general observations but, rather, upon the particular circumstances of the case as set out at paragraphs 104 to 107. Third, as regards the conduct of the plaintiff outwith this particular part of this series of litigations, such matters, in our judgment, are irrelevant to the question as to whether, having regard to the substance of each of Guernsey 1 and the Cause, the bringing of the latter is properly to be characterised as an abuse.

95. As regards the second ground of appeal, we have noted the submission for the plaintiff that the issue raised in this ground of appeal as to the appropriate application of the line of authority from *Henderson v Henderson*, and as to some of the views expressed by the learned Deputy Bailiff, did not affect the outcome of the decision by the learned Deputy Bailiff. We are not persuaded that it is a correct reading of the judgment below at paragraph 98. At that point in his discussion the learned deputy Bailiff expressed the view that the failure by the present Plaintiff to raise its new allegations with the court seized with the first matter would have posed considerable problems for it if the allegation of abuse had been determined in England. He then appears to indicate that, here, such a position was not determinative: failure to be more forthcoming with the defendants and the Lieutenant Bailiff '[tipped] the balance towards' abuse but was not a complete answer to the question whether the claims should have been brought in Guernsey 1. We have difficulty with that approach. Once abuse has been identified, the court should strike out the abusive pleading (in the absence of wholly exceptional circumstances).

96. As to the third ground of appeal and the doctrine of election, the views which we have already expressed mean that it is not necessary to reach a detailed view on the competing arguments. In short, however, had we reached the view that the conclusions of the learned Deputy Bailiff had been one with which this court could not interfere, we would have been of the view that the greater width of the claims in the Cause indicated that it should be allowed to proceed, albeit reserving to the defendants – were that step necessary – the ability to contend, after trial, that an individual matter had already been finally determined between the present parties. Nevertheless, we are also satisfied that the tension between (on the one hand) the plaintiff's case in the Cause and (on the other) its case in Guernsey 1 is exactly the kind of factor which is liable to make it abusive for a party to keep different claims up its sleeve.

The Plaintiff's Appeal

97. As indicated briefly at the outset of this judgment, in paragraph 2, one element of the Cause, referred to as the "Somerfield Claim", seeks compensation in respect of alleged failures on the part of the defendants in prosecuting litigation ("the English proceedings" and "the BVI proceedings") in their then capacity as the trustees of the TDT. Before the learned Deputy Bailiff the defendants presented arguments in support of an application which they had made dated 31 December 2014 to the effect of seeking summary judgment under Rule 19(2) of the Royal Court Civil Rules 2007 which provides:

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

98. There was, and is, no dispute between the parties as to the principles to be applied by a court seized with an application for summary judgment under Rule 19(2) and that, in this jurisdiction, the courts follow those principles set out in the guidance from case law in England and Wales where the Civil Procedure Rules have equivalent, and similarly worded, provisions at CPR 24.2.

99. In terms which the parties accept as accurate, the learned Deputy Bailiff set out what appeared to him to be the applicable principles: paragraphs 25 to 29 of the judgment below.

100. From the decision of Lewison J (as he then was) in *Easyair Limited (t/a Openair) v Opal Telecom Limited* [2009] EWHC 339 (Ch) at paragraph 15, he identified the following guidance:

1. Does the claim have a realistic as opposed to a fanciful prospect of success?
2. A realistic claim is one which is more than merely arguable and must carry some degree of conviction.
3. The court must not conduct a mini trial.
4. That said, the court may appraise and analyse what is said by a claimant as it may be clear, perhaps from contemporary documentation, that the factual assertions have no real substance.
5. The court's conclusions may be instructed both by evidence actually placed before it and evidence that can reasonably be expected to be available at trial.
6. Where reasonable grounds exist for believing that a fuller investigation into facts would add to or alter the evidence available a court is entitled to hesitate about making a final decision without a trial.
7. It may be important to identify that important material in the form of documents or oral evidence is likely to exist and can be expected to be available at trial. 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 issues at trial.
8. Short points of law or construction which may be determinative should be dealt with sooner rather than later.

101. The learned Deputy Bailiff also referred to the decision of this court in *Musa Holdings Limited v Newmarket Holdings (Guernsey) Limited* [2013-14] GLR 445 and its citations from *Three Rivers D.C. v Bank of England (No. 3)* [2003] 2 AC 1 at paragraph 91 and from *Credit Suisse Intl v Ramot Plan OOD* [2010] EWHC 2759 (Comm) at paragraph 24, as well as to paragraph 158 from the speech of Lord Hobhouse of Woodborough in *Three Rivers*. These various passages appear to be iterations of the same points which can be taken from *Easyair Limited*; but it is, perhaps, worth noting a particular point of emphasis set out by Lord Hope of Craighead in his speech at paragraph 91 of *Three Rivers* where he observed that the English equivalent rule at CPR 24.2 "gives somewhat wider scope for dismissing an action or defence. … Particularly in 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."

102. Having considered these passages, the learned Deputy Bailiff noted, at paragraph 28, that the present parties had not sought to explain the areas where their witnesses might differ in evidence at trial, but had referred him to material generated in other proceedings and invited him to consider to what, inevitably, those documents would lead. As he further observed, he could also consider what evidence could reasonably be expected to be available at trial.

103. Seeking to apply that guidance, the learned Deputy Bailiff granted summary judgment in favour of the present defendants.

The Plaintiff's Grounds

104. The ten grounds upon which the plaintiff seeks to have the decision below overturned may be simplified and summarised in the following way. In the first place, the learned Deputy Bailiff in effect conducted a mini trial and should not have done so in a particularly fact sensitive case in the trial of which there would be detailed consideration of documentary evidence, of witness evidence and of expert evidence. Secondly, there were conclusions which the learned Deputy Bailiff should not have reached: for example that, contrary to his findings, the factual and legal issues had a very real prospect of success, as could be seen from documentary evidence. Thirdly, the learned Deputy Bailiff had misunderstood the point of the plaintiff's claim which was that the defendants had caused the losses by failure to prepare the Somerfield Claim in a proper fashion. Fourthly, the learned Deputy Bailiff was wrong in concluding that he could find no other compelling reason why the Somerfield Claim should be disposed of at trial.

105. Before proceeding to consider the reasoning below, it is important to note that as part of its appeal the plaintiff has accepted that, as presented in oral argument to the learned Deputy Bailiff, its claim is one for damages for loss of chance. It therefore undertakes that, in the event of this appeal being allowed, it will apply to amend the Cause to make clearer that the claims are for loss of a chance. The analysis and discussion which now follow will proceed upon that basis.

The Reasoning Below

106. The opening reasoning of the learned Deputy Bailiff, at paragraphs 53 to 55, reflect the position that the Cause was expressed somewhat more broadly than a case based on loss of chance to which, as the learned Deputy Bailiff recorded in paragraph 68, the plaintiff's counsel acknowledged that the case had to be limited. Even so, it can be seen from paragraphs 53 to 55 that the learned Deputy Bailiff understood the defendants' application to be based upon the lack of sustainable allegations as to what the defendants could and should have done differently in relation to the Somerfield proceedings and how that would, or possibly could, have resulted in either improved settlement terms or a greater prospect of success at trial. Further, it was tolerably clear to the learned Deputy Bailiff that the plaintiff saw its allegations as being that the defendants had been liable for an allegedly chaotic and grossly negligent way in which the case had been prepared, thus leading inevitably to a damaging effect on the prospects of success.

107. Upon that understanding the learned Deputy Bailiff determined that it was necessary to consider carefully the evolution of the advice given to the defendants during the process of preparation of the Somerfield proceedings. At the outset, however, the learned Deputy Bailiff indicated, at paragraph 56, that he had, himself, questioned whether such an approach meant that he was conducting some form of impermissible mini trial. He then detailed his reasoning for proceeding in this way and observed that the exercise before him was one of considering what was set out in documents, an approach quite commonplace in summary judgment

applications. As he indicated, if the documents permitted only one conclusion, that result could be factored into the test for summary judgment; but if they did not do so, such an analysis might well point away from granting the summary judgment application.

108. The learned Deputy Bailiff then proceeded, with exemplary care and clarity, to consider the evolution of the advice given to the defendants. The earliest advice available to him was that taken from leading counsel in January 2009 relating to the BVI proceedings. That advice contained a view that the Somerfield Claim was clearly arguable, it set out broad tactical objectives and it gave advice as to how draft pleadings should be tailored with the purpose of creating an obstacle, by way of protracted substantive litigation, to the BVI companies/Kaupthing receiving all of the Somerfield proceeds.

109. The learned Deputy Bailiff then noted that by June 2009 the English proceedings had been commenced in the High Court, that Kaupthing by then controlled the BVI companies, and that settlement of the BVI proceedings was not going to emerge rapidly. In June 2009 the defendants' London solicitors, Quinn Emanuel, produced a comprehensive review concluding both that the BVI counterclaim was more likely than not to fail at trial and, in any event, that it was more likely than not to be held to be an unsecured claim. They advised the exploration of settlement and the timing any approach with care. In particular they advised, with specific reasons, that there was a real imperative to settle the Somerfield proceedings before disclosure was required.

110. The next documentary evidence of legal advice to the defendants was a Joint Note from their legal team dated 2 March 2010. By that stage Guernsey 1 was in prospect. A mediation was scheduled for 23 March 2010. The combined advice of the legal team was to take such steps as were required in the English proceedings to protect the defendants' position during settlement negotiations; but with the caveat that likely levels of costs in the English proceedings, if the defendants lost at trial, were a matter of great concern.

111. The learned Deputy Bailiff went on to note, at paragraph 60, that the mediation was unsuccessful, that leading counsel was required to advise on prospects for the English proceedings, and that the advice was that proving a critical part of the defendants' case had a chance of no more than thirty per cent of success and, even if established, led only to realistic prospects of recovery of less than ten per cent. Leading counsel noted that the trustees had always considered that they would not be successful at trial of the English proceedings.

112. As the learned Deputy Bailiff further noted, leading counsel also considered procedural issues and the prospect of adjournment of the trial of the English proceedings listed for June 2010. In his view adjournment would have put the defendants in an impossibly weak position and, in reality, they would have no choice but to withdraw and pay their opponent's costs, possibly on an indemnity basis.

113. The learned Deputy Bailiff then noted that BVI law advice had been received by the defendants at the end of April, that the content of that advice did not cause leading counsel to change his view on prospects and that a witness statement newly disclosed suggested that, if the witness was accepted as credible and reliable, the case for the defendants would be fatally damaged.

114. By early June 2010, shortly before the trial was due to commence, the defendants were advised by Quinn Emanuel, upon the basis of all advice received, that continuing with the Counterclaim in both England and in the BVI could well expose the trustees to an order for indemnity costs. As noted by the learned Deputy Bailiff, in paragraph 67, the position for the defendants before him, upon the basis of the totality of this advice, was that the poor prospects outlined by leading counsel demonstrated that the present plaintiff had no real

prospect of establishing that the Somerfield proceedings could have been conducted in any other way.

115. The submission for the plaintiff to the learned Deputy Bailiff, however, was that the case on loss of chance was based on the alleged failings of the defendants in preparation and that the learned Deputy Bailiff had before him none of the material from which to assess the question of the prospects of success in the event that the case had been properly prepared.

116. Faced with those competing submissions the learned Deputy Bailiff considered it necessary to look closely and carefully at the allegations made in the Cause, at paragraphs 40 and 41, to see whether there was a real, as opposed to fanciful, prospect of success. At paragraph 70 the learned Deputy Bailiff noted that the issue of alleged defect in pleadings had been covered by leading counsel. There followed his appraisal of the allegations in relation to the disclosure of the documents, the preparation of witness statements and the application to adjourn the trial.

117. As regards alleged defective pleading, the learned Deputy Bailiff took the view that exploration of this would not be fruitful as it was clear that the defendants had been seeking to negotiate the best possible terms: see paragraph 75 of the judgment below. Once the mediation had failed the landscape for negotiation changed and, as the terms of the settlement reflected those which had been raised previously as being appropriate if the advice on the merits was as bleak as it in fact became, this suggested strongly that the legal team assisting the defendants had achieved a respectable outcome. Given that the defendants were entitled to take and rely on the advice of their lawyers, the learned Deputy Bailiff was satisfied that there was no real prospect of the plaintiff succeeding on its claim in respect of the Somerfield proceedings: paragraph 76.

118. In summary, whilst the learned Deputy Bailiff had noted the suggestion for the plaintiff that there were areas of the defendants' conduct of their case which could be looked at more closely, none of the alleged failings would be capable of being demonstrated to have a real chance of having caused any loss to the TDT: paragraph 77.

119. The learned Deputy Bailiff then proceeded to consider whether there were any other compelling reasons to permit this aspect of the claim to go to trial. Given that there was, in his view, a dearth of material put forward on behalf of the plaintiff to show cause, the learned Deputy Bailiff considered that he had to ask himself whether there was something more to the case than obviously met the eye: paragraph 78. In his view, whichever way the Somerfield proceedings were viewed, and even working on the basis that the claim in the present Cause could be amended to make it a tighter claim as a loss of chance case, there was nothing outside of the consideration of the prospects of success which pointed towards permitting it to proceed.

Submissions on the Plaintiff's Appeal

120. For the plaintiff, the first contention was that the Somerfield Claim was fact sensitive on the merits and at trial would involve an intense focus on, and a close analysis of, what the defendants did, what they failed to do and how those matters impacted upon the prospects of success in the Somerfield proceedings. None of these points could be dealt with summarily and the learned Deputy Bailiff should have hesitated before making a final decision when the claim had progressed only to close of pleadings and disclosure by the defendants had not been given. Reference was made to *Doncaster Pharmaceuticals Group Limited & Ors v The Bolton Pharmaceutical Society 100 Ltd* [2006] EWCA Civ 661 at paragraphs 17 – 18.

121. The second contention was that there was ample and credible factual support for the plaintiff's case that the defendants had mishandled the conduct of the proceedings. This could be seen

from the severe criticism from the defendants' own leading counsel in his advice of 20 April 2010, paragraph 6. Those criticisms included failures to complete disclosure, to complete chronological bundles, to take detailed and complete proofs of evidence or witness statements and to clarify in detail the defendants' factual case. The reasons for these failures required further investigation at trial.

122. The third was that there was no conclusive legal point which would enable the court safely to conclude that, even if the plaintiff succeeded in establishing all the facts which it alleges, nevertheless it would not be entitled to the remedy which it seeks.

123. Fourth, the analysis by the learned Deputy Bailiff to the effect that the settlement was in line with advice missed the point of the plaintiff's claim. The plaintiff's case required consideration of the prospects of success at trial or in settlement had none of the failures identified by leading counsel occurred.

124. Fifth, the learned Deputy Bailiff had failed to take account properly of the plaintiff's submission that considerable evidence, which might become available at trial, simply was not available to him.

125. Sixth, the learned Deputy Bailiff had failed to consider adequately or at all the plaintiff's submission that the BVI insolvency law advice was itself open to challenge.

126. Seventh, the plaintiff was not seeking to show that the defendants' strategy was inherently flawed but that it had implicit risks; the defendants' poor negotiating position had been caused or contributed to by the defendants' own lack of preparation for and imperfect execution of the strategy.

127. In the eighth place there were a number of conclusions which had been reached by the learned Deputy Bailiff which simply were not open to him on the material before him. The conclusion that the defendants were seeking to negotiate the best possible terms before the mediation was not a finding which could possibly have been made on the limited evidence before the court. The conclusions that the state of the defendants' pleading was irrelevant and that it would not have assisted to overload the counterclaim were not sustainable as pleading is a crucial matter in assessing prospects of success. The conclusion that other parties would have seen through alternative approaches could not safely be reached on the basis of the material before the court. There was no basis for the conclusion that the defendants' position was not prejudiced by failure to comply in time with High Court orders. The conclusion as to a reasonable settlement being achieved overlooked the plaintiff's submission that the defendants had failed to prepare the case properly.

128. In the ninth place the learned Deputy Bailiff had overlooked the point that the Somerfield Claim required an intense factual inquiry and, if of the view that the plaintiff had failed to put forward adequate factual material, should have adjourned the application and given the plaintiff an opportunity to put forward such further material.

129. Lastly, the conclusion of the learned Deputy Bailiff that he could find no other compelling reason appeared to be based upon a flawed conclusion on the merits and upon an overall impression, neither of which was a permissible basis for such a conclusion.

130. For the defendants it was contended that the position of the plaintiff remained quite obscure as to how, even if made out, any of the allegations could have resulted in improved settlement terms or a greater prospect of success at trial. The position remained wholly speculative.

131. Further, the defendants laid particular emphasis on the point that the claim by the plaintiff now depended entirely upon the unpleaded allegation that the defendants had lost the chance to settle the Somerfield Claim on better terms or to win at trial. The test for loss of chance was relevant only to the issue of causation and did not obviate the requirement to establish breach of duty. If breach of duty was established, and the chance said to be lost would have depended upon what a third party would have done, the relevant test was as recently summarised by the Court of Appeal in England in *Wellesley Partners v Withers LLP* [2016] 2 WLR 1351 at paragraph 99 where Floyd LJ, referring to *Allied Maples Group Limited v Simmons & Simmons* [1995] 1 WLR 1602, said:

> "… In many cases the causation of the claimant's loss may depend on the hypothetical action of a third party, either in addition to the claimant himself or independently of him. In those cases the court does not demand that the claimant establish his case of causation on the balance of probabilities: see the *Allied Maples* case, at p 1611A-C. All the claimant has to show in such cases is that the chance is a real or substantial one. Having done so he must still show, on the balance of probabilities, that the defendant's act has cause the loss of the chance (see to this effect per Lord Nicholls of Birkenhead in *Gregg v Scott* [2005] 2 AC 176, para 17). Once the claimant has shown on the balance of probabilities that he has lost the relevant chance, the valuation of the chance is a question for the quantification or assessment of damages."

132. There was not thought to be any Guernsey authority in point and, in the absence of such authority, it should be assumed that English principles apply, as has been the recent approach of the courts in Jersey: see *Café de Lecq Limited v R A Rossborough (Insurance Brokers) Limited* [2012 (1) JLR 245] at paragraph 54.

133. Where the prospects of success of the underlying claim were negligible, there could be no recoverable loss at all because nothing of value had been lost: reference was made to *Dickson v Clement Jones (A Firm)* [2005] PNLR 6, at paragraphs 26 – 27 and to *Mount v Barker Austin (A Firm)* [1998] PNLR 493, at pages 510 – 511. The possibility of settlement did not alter this as the prospect could be little more than nuisance value: cf *Kitchen v Royal Airforce Association* [1958] 1 WLR 563, 575. In this respect it might be appropriate to reflect on the fact that it was not negligent for a solicitor to fail to display special ingenuity and tactics, such as securing a victory which would not otherwise have been achieved: see Jackson & Powell on Professional Liability (7th edition) at 11-184.

134. Furthermore, the plaintiff here would be required also to prove that the defendants themselves had been grossly negligent in relying on their highly experienced advisers.

135. Turning to the grounds of appeal, the defendants submitted that, properly categorised, they fell into four heads of complaint. The first was the handling by the learned Deputy Bailiff of the allegations in the Cause concerning the conduct of the Somerfield proceedings. The conclusive difficulty for the plaintiff under this head was that the advice received by the defendants made it clear that their prospects at trial and on settlement were dictated by the legal position, not by the conduct of the proceedings. The various references to leading counsel's concerns were taken out of context and leading counsel at no stage suggested that they had any bearing on his conclusions. Indeed, leading counsel had noted clearly, without demur, that the approach and tactics consistently adopted by the trustees had been to protect their position and to create the best possible environment for achieving a settlement. Without any other potential evidence being put before the court, the court was entirely capable of determining prospects by reference to leading counsel's advice. None of the matters set out in the Cause address the matters of law which formed the basis for the conclusions of leading counsel.

136. As to the suggestions that further relevant material might emerge, this line of argument was misplaced: not only for the reasons given by the learned Deputy Bailiff but, in addition, because nothing within the suggestions in paragraph 40 of the Cause tended to suggest a different result in settlement through matters of law. Without a different view as to the likely result on matters of law within the Somerfield proceedings, the plaintiff's claim was doomed to fail as there could be no gross negligence in failing to act so as to extract some ransom payment from the other parties for a nuisance claim. The learned Deputy Bailiff had not conducted a mini trial as there was no question of any disputed issues of fact between the parties in relation to leading counsel's advice. The new contention that expert evidence on BVI law might be required was not open to the plaintiff who had not pleaded the point (at least not explicitly) and had elected not to put in any such evidence before the learned Deputy Bailiff in response to the defendants' application.

137. Generally under this head, the likelihood of any further relevant material emerging was dispelled by the fact that it was the position of the plaintiff, before this application was made, that standard disclosure be dispensed with because the respective parties already had in their possession a significant number of documents pertaining to the matters in issue.

138. Turning, thirdly, to the issue as to whether certain conclusions reached by the learned Deputy Bailiff had been open to him, each of the matters put forward was ill founded. First, it had been open to the learned Deputy Bailiff to observe that it was clear from the advice before mediation that the defendants were seeking to negotiate the best possible terms because that had been stated in the April 2010 advice. Second, as regards the state of pleadings and overloading the counterclaim, the conclusions of the learned Deputy Bailiff had flowed naturally from the terms of the May 2010 Responses. Third, the conclusion that other parties would have seen through any attempt to overload pleading these difficulties had already been identified at mediation. Fourth, as to whether there was prejudice through the making of the Unless Order for the exchange of witness statements, the plaintiff offered no explanation as to how the defendants' ultimate position could have been prejudiced in light of the fact that the order was complied with and that this compliance post-dated the failed mediation. Fifth, the learned Deputy Bailiff had been entitled to conclude that the settlement was reasonable as the terms reflected those which had been raised previously as being appropriate.

139. Finally, as to absence of any other compelling reason, the existence of another compelling reason for allowing a trial, where there was no real prospect of success, would arise in extremely limited circumstances. If a case is fact sensitive then that particular circumstance is a factor which will weigh against granting summary judgment and suggest that there is a palpable prospect of success. No separate compelling reason had been put forward by the plaintiff.

Discussion

140. The starting point in addressing this appeal must be to consider the importance of the confirmation on the part of the plaintiff that its claim is limited to one based on loss of chance. Whilst, as noted by the learned Deputy Bailiff, this position had been acknowledged before him by Advocate Swan on behalf of the plaintiff, the Cause had not been pleaded with that principal proposition in mind and it is clear that the learned Deputy Bailiff, in his reasoning, had to approach matters both upon what may have been a differently focused approach on behalf of the plaintiff and upon the loss of chance basis. The position now, however, is clear and certain essential matters must be addressed first in order to identify which of the plaintiff's complaints remain relevant and, to the extent that they do, how to address them.

141. Claims based upon loss of chance have regularly been accepted in other jurisdictions to which the courts of this Island regularly have regard. The leading decision in the courts of England and Wales probably remains that of *Allied Maples Group Limited v Simmons & Simmons (A Firm)* [1995] 1 WLR 1602, especially at 1609-1613. The appropriateness of following that line of authority appears to be accepted in the courts of the Island of Jersey: *Café de Lecq Limited v R A Rossborough (Insurance Brokers) Limited* [2012 (1) JLR 245], at paragraph 54. That line of authority is also followed in the courts in Scotland: see *McCann v Messrs Waddell & MacIntosh and Others* [2014] CSOH 15 at paragraph 115.

142. Part of the approach to such claims is that, whilst the nature of the claim precludes levels of certainty or precision which are normally expected in many processes for civil claims, it is necessary to adopt a principled approach; and that principled approach requires the plaintiff to establish, on the balance of probabilities, that the chance of enforcing a claim, making a profit or otherwise was real and not fanciful and, only if that threshold is met, is there inquiry as to valuation of the chance. It is pertinent also to recollect the views expressed by Lord Diplock in *Mallett v McMonagle* [1970] AC 166, 176E-G;

> "… in assessing damages which depend on its view as to what … would have happened in the future if something had not happened in the past, the Court must make an estimate as to what are the chances that a particular thing … would have happened and reflect those chances, whether they are more or less than even, in the amount of damages it awards …".

143. Here, therefore, the issue before the learned Deputy Bailiff, for the purposes of Rule 19(2) was to assess whether the plaintiff had no real prospect of succeeding on its claim; that is, to look at the breach of the duty, the cause of loss through the loss of chance of receiving something otherwise lost, and the issue of valuation. The appraisal of the position in respect of each aspect must be real and not fanciful.

144. Upon the basis of the advice given to the defendants by their legal team, the chance of achieving a better final result than was attained in the settlement was fanciful. There is no contradictor to the April 2010 statement and advice by leading counsel, whose view was that the chance of succeeding on a critical matter was no more than 30 per cent and that the realistic prospects of ever receiving any money were less than 10 per cent. As he explained, indeed, the defendants had always considered that they would not be successful at trial. After the failed mediation, the advice in June 2010 was, unsurprisingly, that continuing with the counterclaim in both England and in the BVI could well expose the defendants to an order for indemnity costs.

145. Applying the legal test which we have outlined above, at paragraph 100, to the situation which the Somerfield proceedings had reached, we are satisfied that the only proper conclusion is that the prospects of success for them were fanciful. The percentages identified are clearly of a level at which only the most committed or foolhardy litigant proceeds, at his or her own potential detriment, to a full blown expensive trial with the prospect of a damaging award of costs. It would be a rare position in which to see a trustee.

146. Upon the most generous consideration of the position of the plaintiff, although it has put forward, both before this court and below, numerous indications that other matters might be pursued, there has been no real indication that there is a serious likelihood of a point of substance being found which would have altered the prospects for the defendants of achieving any settlement based upon actual evaluation as opposed to nuisance value.

147. This is not a case, for example, where there is a suggestion of failure to carry out a critical step, or a suggestion of loss of a critical piece of evidence or of a failure in diligence: all that

has been done is to suggest, in effect, that certain matters earlier identified by the defendants' leading counsel, might be worthy of exploration. But there is not even an arguably firm suggestion that any one of those matters has a clear prospect of leading to different prospects of success which, upon that hypothesis, were lost to the defendants as trustees.

148. In our judgment the analysis above is determinative of the plaintiff's appeal but we deal, briefly, with the various points raised in the grounds and submissions, albeit against that principal background.

149. The first point which the plaintiff sought to emphasise is the fact sensitiveness of the claim, which should have led to allowance of a trial. Few litigations are not fact sensitive. Here the defendants acted following legal advice on which they were entitled to rely. There is no clear suggestion that any action or inaction upon their part would have altered the nature and effect of that advice by the time that the case was settled.

150. The second appeared to be somewhat more specific suggestions of failure on the part of the defendants, namely failures to complete disclosure, to complete chronological bundles, to take detailed and complete proofs of evidence or witness statements and to clarify in detail the Defendants' factual case. But there was no clear indication that had those alleged failings, or some of them, not occurred, the likelihood of achieving an evaluable – as opposed to nuisance – settlement would have emerged. There were two serious obstacles to the position of the present defendants in the litigation. The first was that to claim a right to proceeds they would have had to succeed in proving that an undocumented agreement reached between members of R20 and another individual over a meal at a restaurant was enforceable in their favour.

151. The prospect of such a finding had all but evaporated for the reasons set out by Mr Auld QC: an antithetical witness statement from the other individual and a damaging memorandum internal to the present defendants. Neither Advocate Swan before the learned Deputy Bailiff nor Advocate Robison before us could point to the serious, practical likelihood of documentary evidence emerging which would have had material prospects of challenging the reliability of that contrary witness or of overcoming the import of the content of the internal memorandum.

152. The second was that, even were that agreement able to be proven, the insolvency of Oscatello resulted in the funds being locked in the Oscatello structure. That position had been identified as a result of advice on BVI law, which had been shared with the TDT Protector and his eminent City solicitors, and which has never been shown to be challengeable.

153. The result of those two obstacles is that there is no basis for any suggestion that a materially better position for the present defendants in the Somerfield proceedings would have emerged.

154. The third point, as to the lack of any conclusive legal argument in favour of the defendants' position appears to misunderstand the speech of Lord Hope of Craighead in *Three Rivers DC v Bank of England (No 3)* to which reference has already been made. As his Lordship emphasised, particularly in the light of the CPR, the court should look to see what will happen at 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. For the reasons which we have just given, that is the situation which obtained before the learned Deputy Bailiff.

155. The plaintiff's fourth point appeared to repeat what had already been suggested, namely, the failure of the defendants properly to discharge their case preparations. As we have said, there is no specific indication of some failure or failures, the meeting of which would have placed the defendants and the TDT in a much better position.

156. As to the fifth point, and the possibility of "considerable evidence that might become available at trial", this somewhat weak submission again fails to meet the second part of the seventh proposition to which we have referred in paragraph 100: that 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.

157. The sixth point, the possibility of BVI insolvency or advice being different to that given at the time, is met by the issue identified by the defendants, namely, that the point was not raised earlier and that there is no such competing evidence before this court or the court below and to which we have referred at paragraph 152 above.

158. The seventh point attempts to identify the plaintiff's position in relation to the loss of chance formulation: that the defendants' poor negotiating position had been caused or contributed to by the defendants' own lack of preparation for and imperfect execution of the strategy. We have referred to the requirements of loss of chance claims above. As indicated at paragraph 142, the plaintiff requires to establish, on the balance of probabilities, that the chance of enforcing a claim, making a profit or otherwise was real and not fanciful. The obstacles to which we have referred at paragraphs 150 to 152 preclude such a potential finding.

159. The eighth complaint, set out in paragraph 127 above, as to various individual conclusions reached by the learned Deputy Bailiff, again does not advance the plaintiff's case because of the obstacles to which we have referred.

160. As to the ninth complaint it seems to us that, for the reasons expressed by the learned Deputy Bailiff, he was entirely justified in identifying that the plaintiff was merely hoping that something else might turn up.

161. As to the tenth ground of complaint, it seems somewhat jejeune of the plaintiff to complain as to the nature of the search by the learned Deputy Bailiff for a compelling reason to permit the action to go to trial notwithstanding all other considerations, when the plaintiff had not itself done so. The plaintiff had indeed asked the learned Deputy Bailiff to take into account a further consideration but, from examination of the transcript, it seems only to have been that, if the loss of chance claim was being permitted to go to trial, then the plaintiff should also be allowed to proceed with its higher case of 100% loss of the Somerfield Claim. Self-evidently that consideration could not be another compelling reason why the loss of chance claim itself should be disposed of at a trial.

Overall conclusion

162. For all these reasons we shall allow the defendants' appeal and refuse the plaintiff's appeal.