



## Introduction

1. This is an Application, dated February 2016, by the Second Defendant, Nerine Fund Administrators Limited, for the striking out of, or alternatively for judgment to be entered in its favour in respect of, an action brought against it by the Plaintiff, Kleinwort Benson (Guernsey) Limited. The Application relies on the matters pleaded by the Second Defendant in paragraphs 3 – 7 of its Defences, in which it contends that the Plaintiff's claims are prescribed by virtue of article 1 of the Loi relative aux Prescriptions of 1889.
2. The Application is supported by three Affidavits sworn by a director of the Second Defendant, Robin Smith. Those Affidavits were sworn on 29 March, 23 June and 6 July 2016. (The content of the Second Affidavit contains little by way of fact and much more by way of argument than should have been given as evidence. The Third Affidavit contains no new evidence but complies with the formal requirements of rule 21 of the Royal Court Civil Rules, 2007, which had been overlooked in his earlier Affidavits.) It is also supported by an Affidavit of Mark Stockwell, a former director of the Second Defendant, sworn on 22 June 2016. In response, the Plaintiff relies on the Affidavit of Catherine Robert, one of its directors, sworn on 3 June 2016 (in which she explains that before her marriage she was known as Catherine Roe), and reference has also been made to an Affidavit of Keith Park sworn on 16 February 2011 in relation to other proceedings. I will refer to the content of these affidavits in more detail when I extract from them the relevant facts.
3. The Second Defendant is represented by Advocate Edwards and the Plaintiff by Advocate Gray. I am grateful to them both for the manner in which they presented their respective submissions. I apologise for not managing to complete this judgment earlier than now.

## Background

4. The Plaintiff's Cause was tabled on 3 July 2015. It brings its claim in its capacity as the trustee of the Arasbridge Unit Trust ("the Fund"), which was constituted by a trust instrument dated 17 November 2006 entered into by the Plaintiff and the First Defendant, Aras Investment Management Limited. The trust is an open-ended unit trust registered as a Class B Fund by the Guernsey Financial Services Commission. The First Defendant was appointed as the manager of the Fund on 17 November 2006. The Second Defendant was appointed as the administrator of the Fund with effect from 20 November 2006 pursuant to an agreement dated 22 November 2006 and acted in that capacity until its resignation, notice of which was given to the Plaintiff on 4 July 2008, became effective on 4 January 2009. The Second Defendant was also the designated manager of the Fund over this period. The Plaintiff's claim against the Second Defendant is that it wrongfully and deliberately caused to be made and/or made what it terms "the Deductions" and that it caused or permitted the books and records and investor reports to inaccurately record the Deductions (para. 30). In para. 17.1, the Deductions are described in the following terms: "*Deductions equivalent to 12% of the subscription made by an investor were made from the Client Monies Accounts upon receipt of the subscription monies to the Manager or for the Manager's benefit*". The Client Monies Accounts were the accounts held in the name of the First Defendant with Kleinwort Benson (Channel Islands) Limited. After subscription monies were received into these accounts, the subscription monies, or part of them, were then transferred to bank accounts held in the name of a Class Fund. The Plaintiff claims that the Second Defendant acted in breach of fiduciary duty, breach of contract, and/or breach of statutory duty. As a result, the loss set out in Schedule 1 to the Cause has been suffered. The amounts listed total €4,222,219.19 and £295,567.73. The Plaintiff seeks an inquiry into the

Deductions, damages for breach and an order that the Second Defendant re-constitutes the Deductions or accounts for them.

5. In Les Défences of the Second Defendant dated 19 November 2015, on the basis that the Plaintiff has accepted that the Second Defendant ceased to be the Fund's Administrator and designated manager on 4 January 2009, it follows that the Second Defendant did not take any steps (or omit to take such steps) after that date, so any cause of action for breach of contract or breach of statutory duty had to have accrued on or before 4 January 2009. Those claims are, therefore, prescribed because the action was commenced more than 6 years after that latest date. In respect of the Plaintiff's claim for breach of fiduciary duty, the Second Defendant has pleaded that the Plaintiff had actual or constructive knowledge for the purposes of section 76(2) of the Trusts (Guernsey) Law, 2007 before 3 July 2012.
6. The Plaintiff's Réplique dated 8 January 2016 relies on the doctrine of *empêchement de fait* and/or on the principle of reasonable discoverability. In doing so, it suggests that time only began to run against it from 12 December 2012, which is when it met with the entity that took over as administrator of the Fund, which is now known as Active Fund Services Limited ("Active"). In respect of the Second Defendant's reference to section 76(2) of the Trusts (Guernsey) Law, 2007, the Plaintiff points out that the provision deals with an action founded on a breach of trust brought against a trustee, and so it is inapplicable to its action against the Second Defendant. Accordingly, the same principles of prescription and *empêchement de fait* arise in relation to all of its causes of action. On behalf of the Second Defendant, Advocate Edwards conceded that he did not seek to rely on any shorter period of prescription such as is mentioned in the 2007 Law and that there was, for the purposes of this Application, no distinction between the approach to be taken relating to all three causes of action.
7. In short, the issue to be resolved by this Application is whether the prescription defence advanced by the Second Defendant is such that the Plaintiff's Cause is bound to fail or that there is no real prospect of its claim succeeding and no other compelling reason why the action should proceed to a trial. Whether or not this is so depends on the Second Defendant persuading me that the Plaintiff's claim to have been subject to an *empêchement de fait* is without merit.

## The facts

8. The Fund has always been subject to the Collective Investment Schemes (Class B) Rules 1990. Accordingly, the principal documents means the trust instrument, but those Rules also required scheme particulars to be made available. By Clause 8.5 of the trust instrument:

*"In addition to the Management Fee payable pursuant to this Clause the Manager is entitled to an Establishment Charge upon subscription amounts received into each Class Fund calculated upon such sums at a maximum rate of 0.375% per quarter payable for eight years from issue of Units."*

Appendix A of the trust instrument contains the interpretation provisions. These include:

*"Establishment Charge means the charge described in the Scheme Particulars payable to the Manager pursuant to Clause 8."*

9. Within the Scheme Particulars, which are dated 17 November 2006, "*Establishment Charge*" is defined as having the meaning given in para. 2 of Part 5. Under the heading "*Manager's remuneration*", para. 2 of Part 5 states:

*“The Manager shall be paid a quarterly fee in arrears of 0.20% (the equivalent of 0.8% per annum) of the Net Asset Value of each Class Fund, calculated and accrued daily or as at each Valuation Point, at the discretion of the Manager.*

*The Manager will be reimbursed for any reasonable out-of-pocket expenses necessarily incurred in the performance of its duties on a monthly basis.*

*The fees of the Administrator will be paid by the Manager out of its quarterly fee.*

*The Manager is entitled to receipt of the Establishment Charge, being an amount calculated upon subscriptions received into each Class Fund at a rate of 0.375% per quarter (the equivalent of 1.5% per annum) and payable for eight years from issue of Units, calculated as a percentage of subscription monies received. The Manager may utilise all or some of this charge for the payment of introductory fees to intermediaries.*

*For the purposes of calculating the Net Asset Value, the Establishment Charge will be amortised over a period of eight years. Any Early Encashment Charge payable by investors upon redemption of Units in a Class Fund will be credited against any unamortised Establishment Charge for that Class Fund.*

*The Manager is entitled to levy an incentive or performance fee against a Class Fund as identified in each relevant Appendix, at the discretion of the Manager, on any increase in Net Asset Value. Specific performance fees, if any, are detailed in the relevant Appendix.*

*Performance fees are calculated and accrued either daily or at the relevant Valuation Point and are payable monthly in arrears to the Manager.”*

10. Part 3 of the Scheme Particulars deals with valuation and unit dealing. Paragraph 1 includes:

*“The Net Asset Value of a Class Fund is determined by deducting the value of the total liabilities of that Class Fund from the value of the total assets of that Class Fund. Total assets include all cash, accounts receivable, accrued interest, amortised or prepaid expenses and the current market value of all Investments. Total liabilities include any fees payable to the Trustee and the Manager, any borrowings, provision for taxes (if any), allowances for contingent liabilities and any other costs and expenses reasonably and properly incurred by the Manager in effecting the acquisition or disposal of securities.*

*For the purposes of calculating the Net Asset Value of a Class Fund, acquisition costs (including bid / offer spreads and other relevant acquisition costs) will be amortised over a period of eight years or such shorter period as the Manager considers appropriate. Similarly, an Establishment Charge of up to twelve per cent (including introductory fees paid to introducers via the Manager) may be amortised over a period of eight years. Any amount payable by investors on the withdrawal of capital will be credited against the prepaid Establishment Charge. For the purpose of the statutory accounts, the acquisition costs and the Establishment Charge will be written off as incurred and a reconciliation to the Net Asset Value will be contained in the statutory accounts.”*

These words also appear in Appendix J (Valuation Rules) of the trust instrument.

11. Prior to the establishment of the Fund, application was made pursuant to the 1990 Rules for its authorisation by the Guernsey Financial Services Commission using a Form APB. That Form was dated 28 September 2006 and signed by Mark Symons, a director of the Plaintiff. As required, it cross-references to page numbering in draft Scheme Particulars that were attached to it, in which para. 2 of Part 5 relating to the Manager's remuneration was in the form that found its way into the final document and to which I have already referred.
12. Robin Smith's Affidavit exhibits various documents generated before and after establishment of the Fund. Mark Stockwell's Affidavit exhibits further documentation from this same period.
13. There were references made in e-mail correspondence to the Establishment Charge. One of the persons included in the list of recipients was Mark Symons of the Plaintiff. On 27 September 2006, in respect of the draft scheme particulars, Advocate Chan wrote:

*"p40 of mark-up – please confirm the fee per transaction payable [sic] to KB. Also, for clarity, is an amount equal to the total 12% of the Establishment Charge paid out to the Manager from the cash received by investors, on the Dealing Day on which investors subscribe? If so suggest this is stated here."*

The reply from Darren Ayres, a director of the First Defendant, on 29 September 2006 does not appear to answer this enquiry. The issue then appears to be re-visited in a message from Advocate Christopher on 3 October 2006, in which he wrote:

*"Please note I have also inserted a risk warning. Whilst talking this through it occurred to me that there was a risk to the manager in 2 cases:*

- 1. If the fund is wound up prior to 8 years as all monies, I understand, are paid out up front notwithstanding the accounting treatment of them being amortised over 8 years*
- 2. Managers put in their own money for the enhanced allocation shares which if the shares are then clawed back falls into the "pot" for investors."*

14. In a document attached to an e-mail sent by Philip Lane to Mark Stockwell on 10 October 2006 relating to accounting and reporting, under a heading relating to commission the following passage appears:

*"There is an immediate 12.00% marketing allowance generated by the amortisation of the 0.375% quarterly establishment charge. This is to be allocate [sic] at 7.50% to professional advisor commission and up to 4.50% extra allocation to customers dependent on the size of the investment. Where the 4.50% is not allocated or only partially allocated the balance is a AIMC revenue."*

Mark Stockwell then provided summary spreadsheets on 22 November 2006 to Philip Lane and others on which the amount available for investment from the subscriptions made is shown net of various sums, including one for 7.50% and one for 4.50%. Mark Symons acknowledged in a further e-mail that day to Mark Stockwell that it had been really helpful to meet and go through the workflows with everyone. Catherine Roe (now Robert), who was present at the meeting that day, does not recall leaving that meeting believing that the First Defendant would be paid the whole 12% Establishment Charge up front. She further points out that there is nothing to show that these documents were shared with the Plaintiff. Mark Stockwell, who was also present, says he is confident he would have discussed with the Plaintiff's representatives the way in which the Establishment Charge was deducted as the purpose of the meeting was to discuss the procedure for dealing, which he could not have covered without explaining the

preparation process for the Net Asset Value. He believes he would have had the summary spreadsheets with him at the meeting.

15. The Plaintiff, represented by Mark Symons and Catherine Roe (now Robert), undertook a due diligence visit at the offices of the Second Defendant, represented by Mark Stockwell and Hayden Morgan, on 15 December 2006. In a letter dated 27 November 2006, Catherine Roe explained that the visit “*will focus on [the Second Defendant’s] documented and operational procedures and overall pricing system for the scheme*”. Mark Stockwell suggests that this demonstrates that there was absolutely no way the Plaintiff could have understood the dealing process without understanding the process of deducting 12% up front. During the visit, Mark Stockwell invited Mark Symons and Catherine Roe to his workstation and distinctly recalls sitting there and talking them through the Microsoft Access Database that the Second Defendant had created, which was used for creating and then printing the dealing summaries. There is a short passage in the report generated from that visit headed “*Upfront fee*”, which states “*MJS advised he is working with ACUFUND to develop a system of recording and reporting this, due to the unique nature of the amortisation being spread over 8 years.*” Mark Stockwell says that he had explained that Acufund was unable to record the amortisation of the Establishment Charge. Catherine Robert, however, does not recall any discussion about how the First Defendant was receiving the fees and says that “*the purpose of the quoted comment was to highlight the fact that the dealing reports Nerine supplied at the time did not provide sufficiently detailed information about how fees and charges were recorded*”.
16. Following a request made by Natalie Lacey of the Plaintiff, Mark Stockwell provided full Net Asset Value workings under cover of an e-mail on 9 July 2007. They showed the fund valuation for the various Classes as at the 20<sup>th</sup> day of each month from November 2006 to May 2007. Robin Smith says that these show the Establishment Charge through looking at various entries and that “*The Fund Debt is a sum of approximately 12% of the total NAV.*” The best that can be said from a review of the figures is that the Fund Debts shown are very approximately in a range where 12% also falls within that same range. Equally, the amounts shown are considerably higher than just a fraction of a percentage point of the Net Asset Value. Catherine Robert says that “*it was very difficult to determine what Nerine was actually doing from these NAV workings*” and notes that it became apparent that what the Second Defendant was producing was inaccurate.
17. On 14 August 2008, James Cooper, on behalf of the Second Defendant, sent to Catherine Roe (now Robert) the valuation packs for each fund that had been requested in respect of June and December 2007. The response from Catherine Roe on 29 August 2008 indicated that these had been reviewed “*with Natalie and the info provided appears to be sufficient for our purposes*”. (It appears from what Keith Park says in his Affidavit that Mark Stockwell, who was the person working for the Second Defendant most closely involved with the Fund, was on long-term sickness absence from May 2008 and this may have been a factor in the Second Defendant’s decision to resign as administrator.)
18. There was a meeting on 24 September 2008 involving representatives of the First Defendant (the Manager), the Second Defendant (the Administrator), the Auditor and the Plaintiff (the Trustee). The note of the audit queries exhibited by Robin Smith is said by him to be relevant because “*the issue of Establishment Charge allocations was discussed at this meeting*”. What the meeting note states, under a heading “*Establishment cost allocations re: International Property Solutions sub-fund*”, is simply “*Item discussed – no further action*”. Catherine Robert explains that there had been a particular discussion of the set-up costs of this sub-fund and that there had been no discussion at that meeting about how the Establishment Charge would be paid to the First Defendant.

19. Audited Annual Aggregated Financial Statements in respect of the Arasbridge Unit Trust were produced by PKF (Guernsey) Limited for the period ending on 20 December 2007, which were signed on 14 November 2008 by directors of the First Defendant and of the Plaintiff in their capacities as Manager and Trustee respectively. For the period from establishment of the Fund to 20 December 2007, Establishment fees of €1,863,871 are recorded. In Note 2 (Principal Accounting Policies) an explanation about expenses is given:

*“Expenses are accounted for on an accrual basis. Establishment fees which are levied on issue of units in the fund have been expensed as incurred in the financial statements, though these have been amortised over a period of 8 years in the computation of NAV for dealing purposes as described in note 3.”*

Note 3 (Related Party Transactions) further explains:

*“The Manager is entitled to an Establishment Charge upon subscription amounts received into each Class Fund calculated upon such sums at a rate of 0.375% per quarter payable for eight years from issue of Units. For the purposes of calculating the Net Asset Value, the Establishment Charge will be amortised over a period of eight years. Any early encashment charge payable by unitholders upon redemption of units in a Class Fund will be credited against any unamortised Establishment Charge for that Class Fund. Fees paid to the Manager during the period are described as ‘Management fees’ or ‘Establishment Fees’ in the income statement according to the nature of the expense.”*

By this time, as Catherine Robert notes, the Second Defendant had tendered its resignation as administrator and so the Plaintiff’s primary concern was to check that these financial statements contained all the information that was required under the 1990 Rules. She is not aware of anyone within the Plaintiff being aware from them that the Establishment Charge was being paid in full up front.

20. The issue of the International Property Solutions sub-fund was re-visited in December 2008. On 16 December 2008, Ian Burns, who Keith Park explains was assisting the Second Defendant at that time, invited Catherine Roe (now Robert) to give the Plaintiff’s thoughts of the best way forward and, in an attached paper addressed to the First Defendant, explained the mathematics of what were termed “the switch” by reference to an assumption that “*the 12% entry commission is charged on this switch*”. In a further document sent by Ian Burns on 22 December 2008 to *inter alia* Catherine Roe, the following explanation was included:

*“You will note that the movement in NAV does not exactly track the underlying fund prices. There are a number of reasons for this:*

1. *The Arasbridge Funds have an extra layer of costs (notably establishment fees) which act as a drag on performance. ...”*

Robin Smith has explained that the reference to it being a “*drag on performance*” is because the Establishment Charge had been paid out and so was not available for investment, whereas the Net Asset Value was calculated as if this amount were available, and so had to be deemed to be a non-performing asset.

21. The Second Defendant ceased to be the administrator of the Fund on 4 January 2009. The Guernsey Financial Services Commission, at the Plaintiff’s request, suspended the Fund shortly thereafter by way of a letter dated 28 January 2009.

22. The new administrator, Active, began the task of re-working the Net Asset Valuations of the Fund. In an e-mail sent on 12 January 2009 by Marco Ferreira of Active and seen by personnel of the Second Defendant (although not apparently anyone at the Plaintiff), a question about the deferred establishment charges in respect of one sub-fund was raised. In a document to which Keith Park had referred in his Affidavit in the other proceedings, which was discussed in May 2009 at a meeting attended by Catherine Roe (now Robert) and Mark Symons, which deals with the valuation principles to be used by Active, there is a section headed “*Establishment Charge*” in which the following bullet points appear:

- “● *12% of subscriptions (capital & enhancements) paid from fund on dealing day and written back over 8 years.*
- *01 Jan 08 – check working sheet of total establishment fees paid agrees back to 2007 Financial Statements where total establishment costs to date have been expensed.*
- *Agree back the starting debtor amount by comparing to the share register amounts invested each month.*
- *Where adjustments in dealing have been done on the following month, need to check that the establishment costs have been re-adjusted also.”*

23. Marco Ferreira subsequently prepared a report dated 15 September 2009 to the board of the First Defendant providing an update on the work undertaken. Within that report, one of the errors, issues, difficulties or breaches identified thus far was “*Establishment fee not calculated correctly (Secure Cash)*”. Catherine Robert suggests that this is consistent with Active looking at how the Establishment Charge was being recorded for the purposes of calculating the Net Asset Value as opposed to examining how the First Defendant was actually being paid it.

24. The timing of the events leading to this report is covered by Keith Park in his Affidavit. He refers to the initial problems of the Second Defendant handing over information to Active and the concerns then identified relating to the accuracy of the work undertaken by the Second Defendant when it was the Fund’s administrator. Checking the Net Asset Value calculations from January 2008 was chosen because the last independent audit went up to December 2007. At para. 6.3, Keith Park states that:

*“The majority of the January 2008 valuations were approved by the Applicant [ie, the Plaintiff in the present action] on 5 June 2009 with the balance being approved on 4 August 2009. Work then started on the February 2008 valuations.”*

It was when reviewing the February 2008 valuations that the incompleteness of the information merged and “*This was the first time at which it became apparent that there may be serious problems with both the calculation of the Net Asset Values and the correctness of the Register*” (para. 6.4). This led to the report dated 15 September 2009, about which Keith Park explains (at para. 6.5):

*“The Ferreira Report says a number of administration errors within the Register and breaches of the Scheme Particulars and the Trust Instrument had resulted in the Net Asset Values for 15 out of the 16 active Class Funds being overvalued. The Report also identified the fact that no formal client account reconciliations had been supplied by Nerine and that it had therefore been difficult to reconcile Unit holders’ investments into each Class Fund. Further, in some instances, the Register was different from the business notification sheets.”*

25. In a letter dated 4 June 2010 to Keith Park of the Plaintiff, the Managing Director of Active indicated that the process of coming to an agreement, including engaging with the Guernsey Financial Services Commission, over the valuation principles to be followed was completed on 14 May 2009. He then summarised the work undertaken immediately thereafter. Because some work was subsequently outsourced in July 2009 to another entity, the inference is that the work associated with the January 2008 valuations was completed by Active before that time.
26. The Plaintiff sought directions from the Court in relation to the Fund on 16 February 2011. That application led to the Second Defendant commissioning KPMG Channel Islands Limited to consider matters. Two reports were produced dated 18 May and 14 October 2011 respectively. Catherine Robert says that it was a result of what was contained in those reports that attention began to be given to how the Defendants had actually administered the Establishment Charge. Subsequently, a meeting took place on 12 December 2012 attended by the parties to these proceedings, Active and representatives of the unitholders and, according to Catherine Robert, it was during this meeting that the issue of the Establishment Charge being paid as an up front fee was raised and discussed in the context of one particular sub-fund. The note of the meeting records that those present “*agreed that it may be for the parties to put forward an application to the Court on a neutral basis on this and the 12% issue and let the court rule on it*”.
27. At para. 23 of her Affidavit, Catherine Robert states:

*“I should start by saying that I have been involved with the Fund since its launch and I was not aware how Aras was actually being paid the Establishment Charge up front until well after Nerine’s retirement and only because of subsequent investigations into its management of the Fund.”*

Catherine Robert also explains that the Summons in this action was handed to HM Sergeant for service on the Defendants on 23 June 2015. Accordingly, that is the date on which these proceedings commenced and is the date to be used when considering the prescription period and any effect of *empêchement de fait*.

## **Legal principles**

28. The Advocates have adopted broadly similar approaches to what are the reasonably well-established principles applicable to applications to strike out and for summary judgment. They have referred, in particular, to *Savile AD4 Limited v Marlborough Trust Company Limited* (unreported, 10 February 2016).

### *Striking out*

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

*“The Court may strike out a pleading if it appears to the Court-*

- (a) that the pleading discloses no reasonable grounds for bringing ... an action,*
- (b) that the pleading is an abuse of the Court’s process ...”.*

As I pointed out in para. 13 of *Savile AD4 Limited*, “*It is clear that there is a high threshold to satisfy before the Defendant’s Application could be granted to strike out the Plaintiffs’ Cause. As the Court of Appeal stated in Silver Falcon Enterprises Ltd v International Hellenic*

*Operations Ltd* (unreported, 19 and 20 October 1994), the Defendants are required to demonstrate that the claims made by the Plaintiff are “unarguable”.

30. Because of the similarity to rule 3.4(2) of the Civil Procedure Rules in England and Wales, the commentary in *The White Book* can also usefully be repeated. At para. 3.4.1, the explanation is given that:

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

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

“Statements of case which are suitable for striking out on ground (a) include those which raise an unwinnable case where continuance of the proceedings is without any possible benefit to the respondent and would waste court resources on both sides (*Harris v Bolt Burdon* [2000] L.T.L., February 2, 2000, CA). A claim or defence may be struck out as not being a valid claim or defence as a matter of law (*Price Meats Ltd v Barclays Bank Plc* [2000] 2 All E.R. (Comm) 346, Ch D). However, it is not appropriate to strike out a claim in an area of developing jurisprudence, since, in such areas, decisions as to novel points of law should be based on actual findings of fact (*Farah v British Airways*, *The Times*, January 26, 2000, CA referring to *Barrett v Enfield BC* [1989] 3 W.L.R. 83, HL; [1999] 3 All E.R. 193). A statement of case is not suitable for striking out if it raises a serious live issue of fact which can only be properly determined by hearing oral evidence (*Bridgeman v McAlpine-Brown* January 19, 2000, unrep., CA). An application to strike out should not be granted unless the court is certain that the claim is bound to fail (*Hughes v Colin Richards & Co* [2004] EWCA Civ 266; [2004] P.N.L.R. 35, CA (relevant area of law subject to some uncertainty and developing, and it was highly desirable that the facts should be found so that any further development of the law should be on the basis of actual and not hypothetical facts)).

Where a statement of case is found to be defective, the court should consider whether that defect might be cured by amendment and, if it might be, the court should refrain from striking it out without first giving the party concerned an opportunity to amend (In *Soo-Kim v Youg* [2011] EWHC 1781 (QB)).”

Para. 3.4.3.6 relates to ground (b) and refers principally to poor drafting. It seems to me that ground (b) has not been developed by Advocate Edwards, although it is referred to on the face of the Application, which is why I will concentrate instead on ground (a).

#### *Summary judgment*

31. Rule 19(1) of the 2007 Rules permits the Court on an application by a party to an action that has been inscribed on the Rôle des Causes à Plaidier to “give summary judgment against any other party on the whole of the claim or on a particular issue”. Paragraph (2) 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

...

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

32. The principles extracted by Lewison J (as he then was) in Easyair Limited (t/a Openair) v Opal Telecom Limited [2009] EWHC 339 (Ch) (at para. 15) are that:

- i) *The court must consider whether the claimant has a “realistic” as opposed to a “fanciful” prospect of success: Swain v Hillman [2001] 2 All ER 91;*
- ii) *A “realistic” claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8]*
- iii) *In reaching its conclusion the court must not conduct a “mini-trial”: Swain v Hillman*
- iv) *This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10]*
- v) *However, in reaching its conclusions the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;*
- vi) *Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63;*
- vii) *On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent’s case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant’s case is bad in law, the sooner that it is determined the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which*

would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725.”

33. Once again, the further guidance offered by Lord Hope of Craighead in Three Rivers D.C. v Bank of England (No. 3) [2003] 2 AC 1 (at para. 91) merits repetition:

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

Advocate Edwards relies on that last sentence. I am satisfied that the similarities between the provisions in the Civil Procedure Rules and rules 19 and 52 of the 2007 Rules are such that it is appropriate to treat these principles as reflecting the approach that should be taken in this Court to our Rules. Accordingly, rule 19 offers wider scope for dismissing an action than the more technical rule 52. Further, as Lord Hobhouse of Woodborough pointed out in para. 158 of the same case, the applicable criterion is “not one of probability; it is absence of reality”.

*Prescription and empêchement de fait*

34. By the hearing, it was common ground that the only prescription period I needed to consider is the six-year period specified in article 1 of the 1889 Law. The date from which a cause of action usually arises is the date of the breach (Jefcoate v Spread Trustee Company Limited [2013] GLR 220, para. 99). Because of the uncontested evidence of Catherine Robert that the summons in this action was handed to HM Sergeant’s office on 23 June 2015, the key date six years earlier is 23 June 2009. It is common ground that any breach can only have occurred whilst the Second Defendant was the administrator of the Fund and that the last day that any such breach could have occurred is, therefore, 4 January 2009. Realistically, certain breaches must have occurred prior to that date. Consequently, the action is prescribed unless the Plaintiff is able to demonstrate that it was subject to the principle of *empêchement de fait* so that time did not begin to run against it until at least 23 June 2009.
35. The Court of Appeal in Yaddehighe v Credit Suisse Trust Limited [2007-08] GLR 282 dealt in some detail with the doctrine of *empêchement*. The case involved a claim founded on alleged breaches of contract and in tort. The defendants raised *Exceptions* contending that the Cause should be struck out as disclosing no cause of action because of prescription. In his *réplique*, the plaintiff alleged that his claim was not prescribed because he was *empêché d’agir* until any one of a number of dates, all of which fell within the applicable prescription period. The outcome of the judgment of the Royal Court meant that the plaintiff appealed certain aspects, and some of the defendants appealed other aspects, all of which led to respondents’ notices being lodged as well. The question of the extent to which the doctrine operates in Guernsey law was, therefore, squarely before the Court of Appeal.
36. Smith JA delivered the principal judgment. At para. 11, he referred to what Hoffmann JA had stated in Cherub Investments Limited v Channel Islands Aero Club (Guernsey) Limited (unreported, 13 January 1982):

“Now it seems to us that the test of whether an *Exception de Fonds* can succeed or not is whether there are no facts which might be proved at the trial which would allow the Plaintiff – no admissible facts consistently with the pleadings which could be proved at trial – which would allow the Plaintiff to succeed in the action...”.

In light of that, the Court of Appeal, adopting an approach broadly consistent with the test under rule 52 on striking out a pleading, took the plaintiff’s case at its highest.

37. On the central question of *empêchement*, I consider it helpful to refer extensively to what was said by the judges, starting with Smith JA, with whom the other members of the Court agreed before adding their own comments:

“26 *Turning to empêchement in Holdright, Day, Deputy Bailiff held that the maxim “à qui est empêché d’agir la prescription ne court point” (in Latin, contra non valentem agere nulla currit praescriptio) is part of the customary law of Guernsey as far as both contract and tort (with the possible exception of personal injury cases) are concerned. In so deciding, he was strongly influenced by two decisions of the Jersey Court of Appeal, Public Servs. Cttee. v. Maynard (which, as it happens was a personal injury case) and Boyd v. Pickersgill & Le Cornu (which was not).*

27 *In Maynard, in which it was accepted that the maxim forms part of Jersey law, Southwell, J.A., delivering the judgment of the court, said that the principle underlying its operation is the practical impossibility of the plaintiff being able to exercise his rights and he continued (1996 JLR at 354):*

“... Mere ignorance does not bring the maxim into operation ... Where there is an impediment creating such a practical impossibility of which ignorance is a part, then the maxim may come into operation and prevent time running.”

28 *Boyd v. Pickersgill & Le Cornu had parallels with the instant case in that the plaintiff’s claim was against her legal advisers. In that case, Beloff J.A., with whom the two other members of the Court of Appeal agreed, said the following (1999 JLR at 291):*

“In my view, the epithet ‘practical’ deployed in *Maynard* ... softens rather than strengthens the concept of impossibility. It requires a consideration of what is in fact, not in theory, possible. While ignorance of a cause of action does not *per se* trigger suspension of the limitation period, it may, in appropriate circumstances, constitute or create a relevant impediment ...

*The test, as it seems to me, is whether the ignorance of the cause of action is reasonable in all the circumstances, reasonable, that is, both in respect of the facts giving rise to the cause of action and that a cause of action arises in such circumstances,”*

*and further on (ibid., at 293), Beloff J.A. concluded “... that while the appellant was instructing the respondents, there was prima facie no practical possibility of her appreciating any failure of the respondents to advise her [appropriately].”*”

38. In Yaddehighe, Beloff JA added his views as follows:

- “41 *The defendants’ interest in seeking to strike out the claims against them is obvious. The events to which any trial court’s attention would be directed cannot merit the epithet “fresh.” We have indeed been furnished with no explanation as to why the claim is brought, if not actually outside any material limitation period, perilously close to its boundary. The issues raised of both fact and law, even in relation to the substantive claim, are potentially complex. Litigation would be expensive, and, whatever the outcome, unlikely to burnish the defendants’ professional reputations. So it is that the defendants have, excusably, among other vigorous submissions, focused on pleading points relating, in particular if not exclusively, to the allegations of breach made, prayed in aid limitation defences, and sought to rebut the plaintiff’s response to such defences that he was empêché d’agir.*
- 42 *But the very exercise exposed its fragility as a legal tactic. As Smith, J.A.’s succinct exposition illustrates, the issues of limitation and (especially) of empêchement are themselves acutely fact-sensitive and again raise not altogether easy points of law.*
- 43 *These features, i.e. difficult or developing areas of law and/or controversial matters of fact, are cases of where an application to strike out is inappropriate. See e.g. X (Minors) v. Bedfordshire C.C. ([1995] 2 A.C. at 740-741, per Lord Browne-Wilkinson), a classic but by no means isolated summary of the principles which are as pertinent in Guernsey and Jersey as in England and Wales.*
- 44 *In Cherub Invs. Ltd v. Channel Islands Aero Club (Guernsey) Ltd., Hoffmann, J.A. (Guernsey C.A. Judgments 1964-1989, at 240) repeated the saying: “A short-cut is sometimes the longest way round.” These applications (and these cross-appeals) provide further doleful illustration of that pithy epigram, which practitioners may too easily forget.”*

39. Finally, Carey JA, whilst not wishing to add any gloss to what Beloff JA had described in Boyd v Pickersgill & Le Cornu 1999 JLR 284, with which he agreed, also explained that:

- “51 *Empêchement d’agir appears to me to have developed as what might be called an equitable remedy, tempering the way in which the strict rules of prescription of the common law are to be applied. We must remind ourselves that the Island courts have never formally distinguished between law and equity in the way that the courts of England did, but that does not mean that the Royal Court over the centuries did other than endeavour to apply the law fairly in accordance with the principles of justice then prevailing.*
- 52 *At the stage that this court is with these proceedings, it would be wrong to form a view as to whether the plaintiff can rebut the defence of prescription by establishing that he was empêché. As Beloff, J.A. has said, these issues are “acutely fact-sensitive” and are matters peculiarly for the court at trial to determine.”*

40. Before leaving the Yaddehighe case, I can also refer in passing to the comments made in the judgment of Smith JA about reasonable discoverability. This principle has been touched upon in relation to this Application, almost by way of being a different formulation of empêchement:

- “32 ... In *Invercargill City Council v Hamlin* [1996] AC 624, the Privy Council accepted that it was open to the courts of New Zealand to adopt, in relation to the accrual of causes of action in tort in respect of defective buildings, the test of when the relevant defect became apparent or ought to have been discovered. In *Maynard*, the Jersey Court of Appeal opined (1996 JLR at 359) that the reasonable discoverability approach may have been available to the plaintiff-appellant. Southwell, J.A. said that it seemed to the court to be “... reasonably arguable that the Jersey common law should be developed so as to ensure that causes of action in the tort of negligence accrue on the basis of a reasonable discoverability test ...” In *Holdright*, Day, Deputy Bailiff said: “... I am satisfied that in principle the courts in this jurisdiction are free to develop as they see fit the principles relating to the accrual of a cause of action in tort; and that as a matter of policy it would be desirable not to follow the English examples in this field. The preferable position to adopt would be that which has been adopted in, amongst many other common law jurisdictions, New Zealand; that is to say, the ‘reasonable discoverability’ test should be that which in Guernsey determines the date of the accrual of a cause of action in tort.”
- 33 In *Boyd*, Southwell, J.A. suggested (1999 JLR at 295) that the reasonable discoverability approach might have been available to the plaintiff-appellant in that case beside *empêchement d’agir* and, indeed, implied (*ibid.*, at 294) that that approach may be available in relation to contract as well as tort.
- 34 In *Holdright*, Day, Deputy Bailiff then went on to hold that, in the light of ss. 5 and 11 of the Law Reform (Tort) (Guernsey) Law 1979, it was impossible for him to find that reasonable discoverability was the proper test and he accordingly accepted that, as in England and Wales, the date of accrual is when relevant actionable damage occurs, regardless of knowledge.
- 35 In my view, it is arguable that Day, Deputy Bailiff’s conclusion was a *non sequitur* akin to that which the Court of Appeal of New Zealand identified in *Cartledge v. E. Jopling & Sons Ltd.* ([1963] A.C. at 763) based on s.26 of the Limitation Act 1939. However, given the limited scope of this appeal, it is neither necessary nor appropriate to come to a firm conclusion on this issue. It may or may not arise as a live issue at the trial. If it does, it will fall to be considered in the light of the facts as found and not as presently assumed.”

41. On the question of knowledge, although it was a trusts case in respect of which section 76(2) of the 2007 Law fell to be construed, Advocate Edwards relies on certain passages in the *Broadhead* case (*supra*) as establishing principles that are equally as applicable to the present case. In short, he submits that the weight given to *Haward v Fawcetts (a firm)* [2006] 1 WLR 682 in that case can properly be adopted here, where it was stated that what is required is knowledge which renders it reasonable for the plaintiff to investigate whether it is possible that there has been the relevant wrong to him (see, eg, para. 71(c) of *Broadhead*). It was common ground that knowledge could be actual or constructive. Further, “the relevant “knowledge” is neither as low as the level of mere suspicion that there may have been the relevant breach of trust as one possibility, nor as high as certainty that there has been” (para. 78). Because it relates to when time starts to run, “It must, therefore by implication, be the degree of knowledge which is sufficient to make it reasonable to expect that the Plaintiff will be able to decide whether or not he will institute proceedings, at all, within a further three years, after making any such further enquiries, taking any such further advice, or gathering any such further evidence, as may be reasonably necessary for him to take that decision. Viewed in this context,

*the reasonableness of setting the bar at a sufficiently “low” level to encourage claims to be pursued with proper dispatch, and debarring dilatory ones, is apparent” (para. 79).*

42. Advocate Edwards has also referred to other formulations of the principle as they feature in England and Wales that were cited in the *Broadhead* case, but I do not consider it necessary to quote from them because they do not add anything to the way I have just explained how knowledge can be relevant to the consideration of whether a claim is prescribed. The directions on the law given to the Jurats who were to determine the facts on the preliminary issue in that case contained in para. 86 of the judgment can, in my view, properly be adapted when it comes to whether the Plaintiff’s Cause should be struck out or summary judgment entered in respect of it in favour of the Second Defendant.

### **The parties’ submissions**

43. On behalf of the Second Defendant, Advocate Edwards has highlighted the way in which the documents speak for themselves. Accordingly, a review of the trust instrument and the Scheme Particulars lead to the inevitable conclusion that the Establishment Charge was to be deducted up front, ie, paid at the outset, but amortised when, eg, calculating Net Asset Values. Accordingly, time should be taken to run from 2006, meaning that there was no practical impossibility on the part of the Plaintiff from the very outset whenever any alleged breach occurred.
44. Even if that date is not to be used, or any of the events from the creation of the Fund in respect of which evidence has been adduced cannot fix time as starting to run, the 2007 financial statements, which were signed on 14 November 2008, must be regarded as the latest time from which there was an appropriate level of knowledge of any breach of the type now alleged against the Second Defendant. If that is the case, because this is some months before 23 June 2009, the Plaintiff’s reliance on *empêchement* is unwinnable.
45. Finally, even if all these matters are no more than background to when the Plaintiff ceased to be *empêché*, the meeting to which Keith Park referred in his Affidavit in the other proceedings that took place on 14 May 2009 demonstrates more accurately than Catherine Robert’s bare assertion of absence of knowledge in her Affidavit when it was that personnel within the Plaintiff knew enough for time to start running. (Advocate Edwards did acknowledge that this evidence meant that the Second Defendant could not rely on there being actual knowledge, but that there was ample material from which constructive knowledge could be shown.) Accordingly, taking the Plaintiff’s case at its highest, its endorsement of the valuation method to be used by Active is a clear indication that its reliance on the *empêchement* doctrine is bound to fail.
46. In response, Advocate Gray places considerable reliance on the comments of the Court of Appeal in the *Yaddehighe* case (*supra*) that questions of prescription and *empêchement* are acutely fact-sensitive and so inappropriate for resolution summarily. She joins issue with the suggestion that the Fund’s documents demonstrate as clearly as Advocate Edwards has suggested that the Establishment Charge was always intended to be an up front deduction. She draws a distinction between what might or might not have been recorded as an accounting methodology and whether or not the monies in question had actually been paid over by the Second Defendant as now appears to have been the case. In particular, there was no evidence that the Plaintiff’s knowledge of that state of affairs was, or could have been, at the required level before 23 June 2009. Accordingly, the Second Defendant has failed to discharge the heavy burden on it at this stage of the proceedings to shut the Plaintiff out of the action effectively on the papers.

### **Discussion**

47. There has been no explanation as to why it took the Plaintiff until 2015 to issue its proceedings against these Defendants. The other proceedings to which I referred in which Keith Park's Affidavit was first used was an application for directions made by the Plaintiff dated 16 February 2011. There was a further application by the Plaintiff dated 23 June 2014, which was heard by the Bailiff on 8 December 2014, with judgment handed down on 15 January 2015 (*Kleinwort Benson (Guernsey) Limited v Aras Investment Management Limited* (unreported, 15 January 2015)). In it, the Plaintiff surrendered its discretion to the Court. There was then another hearing on 20 January 2015, dealing with the remaining matters arising from that application. Given that it must have been apparent to the Plaintiff at the time of making that application in 2014 that the sixth anniversary of the resignation of the Second Defendant as administrator of the Fund was fast approaching on 4 January 2015, I find it rather surprising that steps were not taken to preserve the position of the Plaintiff and the Defendants in the present action in relation to prescription. Had such a step been taken, the arguments raised by the present Application would not have arisen.
48. My initial thought on reading the papers in this case was that the prescription defence was bound to succeed because I struggled to see how the Plaintiff would be able to demonstrate that time had not begun to run against it either during the currency of the Second Defendant's administration of the Fund or very shortly after it ended. The Second Defendant's Skeleton Arguments seemed to me to put matters sufficiently clearly for me to be able to conclude that this was one of those rare cases where there did not need to be any further enquiry because the prospect of the Plaintiff satisfying the Court that it had been labouring under a practical impossibility of a type rendering it *empêché* did not exist. However, as a result of the hearing and further reflection, I find myself reaching the opposite conclusion and so will dismiss the Application. It is a draconian step to take to deny a party the opportunity to present its case as it wishes to do and so, despite my misgivings that the Plaintiff has only a weak case in respect of *empêchement*, I have to permit it to proceed.
49. I was reminded by both Advocates that it was not my function to reach a firm conclusion on their competing arguments about how to construe the trust instrument and the Scheme Particulars. I recognise that there are respectable arguments both for and against the construction that this was an up front fee. Indeed, in his supplementary written judgment dated 14 August 2015 containing the reasoning he had delivered on 20 January 2015, the Bailiff commented that "*the scheme documentation appears to suggest that the establishment fees should have been taken at a rate of 0.375% per quarter over an 8 year period*" (para. 5) and that "*The common view of all the parties in Court was that the fee should not have been deducted in a single amount and I see no reason to depart from that view although I express no formal decision without having heard formally from AIML*" (para. 6). The implication, therefore, is that there was a consensus of opinion that the opening words in Clause 8.5 of the trust instrument meant that the Establishment Charge was envisaged as being a periodic charge, but that was explicitly left open by the Bailiff in the same way that I leave it explicitly open in this judgment. I do so because the content of the Scheme Particulars indicate that the Establishment Charge is calculated by reference to a periodic charge, which is a different notion to it being payable periodically and had it been the intention that it operate as an up front deduction that could have been stated expressly. Instead, the wording remains ambiguous, although I do recognise that the way it was operated might be found to be consistent with the wording. Because this is not the point of construction on which summary judgment is being sought on this Application, and there has not been full argument on the point anyway, I will say nothing further about how I consider these documents should be construed.
50. The reason for referring to the alternative constructions that can be given on this question, though, is to explain why I am unable to conclude that the documentation prepared in 2006 affords only one interpretation. If that were the case, it would potentially support the contention of the Second Defendant that the action has no real prospect of success because the Plaintiff

must have been aware of how the Fund would be operated from the outset. However, the possibility that the wording means something different opens the door for the Plaintiff to say that it did not have the required knowledge at that time. In particular, this conclusion impacts on how the Second Defendant's other arguments in relation to rule 52 and striking out the Cause have to be viewed.

51. In relation to the events that followed, the evidence of Mark Stockwell and Catherine Robert differs as to what was said and the consequences of what was discussed when they met. I have reminded myself that I am not to conduct a mini-trial on the affidavit evidence for the purposes of resolving the application for summary judgment and further that I am not engaged in an exercise of weighing up the probabilities of who might ultimately be believed. The various exchanges to which these witnesses refer (and the documents associated with them to which Robin Smith also refers) put into some context what the trust instrument and Scheme Particulars state but, once again, they do not result in me being able to conclude that the Plaintiff's reliance on *empêchement* is bound to fail or that it has no real prospect of succeeding. These are, in my view, examples of why it has been said in previous cases that this type of issue is fact-sensitive and so placing too much reliance on these aspects of the chronology does not assist the Second Defendant. Quite what happened on these occasions will turn on the evidence to be given at trial and the way it points towards or away from the Plaintiff's reliance on *empêchement* and the Second Defendant's reference to knowledge.
52. In similar fashion, I find that I cannot regard the way that reports were made containing calculations of Net Asset Values as supporting the Second Defendant's contention that the Plaintiff must have realised that something was amiss. It is apparent on reviewing those documents that they do not show that only a fraction of a percentage of any investment was being taken by way of Establishment Charge. However, the figures are not uniformly consistent to show that it was a 12% deduction. In any event, these documents show calculations rather than what was actually happening to the monies themselves, whether that was in accordance with the trust instrument and Scheme Particulars or not. Accordingly, although they offer a good example of why it is that the Second Defendant can say that the Plaintiff should have contemplated making further enquiries within the period of six years thereafter, much will depend on the assessment to be made of how these documents were viewed at the relevant times. For present purposes, the Plaintiff is not obliged to meet any higher "bar" than to satisfy the Court that the prospects of success are more than fanciful and, because the threshold is as low as that, the explanations that the Net Asset Value calculations were inaccurate and that it was very difficult to determine from them what the Second Defendant was actually doing suffice to rebut the submission that the Plaintiff will fail to establish by reference to these documents that it was *empêché*.
53. The 2007 Financial Statements are, I think, the area where the Plaintiff will face the greatest difficulties. Although I have been taking each of the stages separately, it is, of course, important to remember that they are not all discrete but effectively cumulative. Ultimately, whether or not the action is prescribed will turn on what the Plaintiff knew as at 23 June 2009. Catherine Robert suggests that Robin Smith is drawing the wrong inference from these documents and states that there was no discussion at the meeting on 24 September 2008 about how the Establishment Charge would be paid. She also suggests that the Second Defendant had given notice of its resignation by this point and that there was a dispute between the Defendants on which the Plaintiff was focusing its attention. In relation to the present Application, these are all factors that can properly be relied upon as raising more than a fanciful prospect of the *empêchement* claim succeeding but in my view this is where it becomes quite marginal. The 2007 Financial Statements cannot be downplayed as much as the Net Asset Value calculations because they are more formal documents, prepared and considered in accordance with the 1990 Rules. The figures show clearly enough that what is described as "Establishment fees" is a significant amount and certainly more than what could be paid out if only paid at 0.375% per

quarter. Note 3, to which I have already referred, includes the statement “*Fees paid to the Manager during the period are described as ‘Management fees’ or ‘Establishment Fees’ in the income statements according to the nature of the expense.*” This is something that will require considerable explanation as to why it was not material that put the Plaintiff on enquiry as to why such a large amount had actually been paid to the First Defendant as Manager because the reference to “paid” indicates that the money had passed into the First Defendant’s hands and so appears to contradict what Catherine Robert says in her Affidavit.

54. Although I have reminded myself that I should not accept everything a party says without analysis, and that on one view it would be possible to disregard what Catherine Robert states in her Affidavit, I have chosen not to do so at this stage of these proceedings. I have given a clear indication that I take the view that the Plaintiff will struggle to overcome this particular barrier because the inference I draw from the 2007 Financial Statements is that, when combined with everything that preceded them and what took place early in 2009 when Active became involved, there is a real possibility that the Court will find that the Plaintiff has delayed commencing this action for longer than it was permitted to because of what it must have gleaned from this document when signing it off on 14 November 2008. There is a difference between an outcome being inevitable and one where the prospects are very slim.
55. I am also conscious that it was during the course of the Plaintiff’s discussions with Active in 2009 that a review of the Second Defendant’s documentation on the basis that there was a deduction of 12% as the Establishment Charge crystallised. I have treated this as further support for the contention that the 2007 Financial Statements paint an accurate picture as to what was being paid out, but I have been persuaded on behalf of the Plaintiff that I should not jump to conclusions because there is a potential difference between agreeing a methodology and receiving the benefit of that work being undertaken. In particular, I have noted that Keith Park referred to the Plaintiff’s approvals of the valuations provided by Active running into August 2009 and the report of September 2009. These events were all taking place at around the time six years immediately prior to the action being commenced. The factual findings, once there is the benefit of the evidence that can be adduced at trial, may well turn on precise timings of who looked at what when and, because the Second Defendant has the burden, I am not satisfied on this Application that it has been met. This is a further consequence of *empêchement* being so fact-sensitive and so I prefer to err on the side of caution.
56. In relation to rule 52 of the 2007 Rules, I am satisfied that the Second Defendant has not shown that the Plaintiff’s Cause should be struck out as an abuse of the Court’s process and/or because it discloses no reasonable grounds for bringing the action by reference to the prescription defence raised at paragraphs 3 to 7 of the Second Defendant’s Défences. The response pleaded in the Plaintiff’s Réplique is not, in my judgment unarguable. As the Court of Appeal has indicated, *empêchement* is acutely fact-sensitive. Accordingly, I consider that it was ambitious for the Second Defendant to invite the Court to reach conclusions on prescription in this case without having the benefit of a full fact-finding hearing. The Second Defendant has not satisfied the high threshold applicable to striking the Cause out on the papers.
57. In relation to rule 19 of the 2007 Rules, my decision is much more finely balanced. There is wider scope to bring a case to an end under this rule than under rule 52. As I have stated, the approach taken by the Second Defendant has come close to persuading me that the prospect of the Plaintiff resisting the prescription defence is not a realistic one. However, as I have explained, I have concluded that, when comparing realistic and fanciful, the prospect cannot properly be described as merely fanciful. Again, the comments of the Court of Appeal about the determination being one that is acutely fact-sensitive have played on my mind. Whilst I recognise the force with which Advocate Edwards argues that the decision can be reached on the papers, and I have not taken everything said by Catherine Robert in her Affidavit at face value and so as having been established, because the issue involves consideration of knowledge,

it is difficult on an application for summary judgment to disregard entirely what is said by a witness for a party. This is, in my view, the type of case where there has to be some opportunity for that evidence to be tested to see whether it stands up or crumbles. I do not regard this as allowing the case to proceed to trial merely on the basis that something may turn up. Whilst I do not go so far as to say that prescription and *empêchement* can never be resolved on a summary basis, I think it is preferable to consider, as in the *Jefcoate* case (*supra*), dealing with such matters by way of a preliminary issue, where relevant evidence can be given and properly assessed. In some cases, and this is probably one of them, that evidence cannot sensibly be extracted from the overall evidence needed at trial, which is why even a preliminary issue may be the type of apparent short-cut that is not the best option to take.

58. Even if I had been persuaded on the evidence adduced that the Second Defendant had satisfied me on the first limb of the test for summary judgment, I would have been minded to reject the Application by reference to the second limb. This results from the fact that the various cases on *empêchement* to which I have referred leave open a number of questions as to how a cause of action accrues in a claim such as that made by the Plaintiff. As Beloff JA commented in the *Yaddehighe* case (*supra*), these are not easy points of law. The precise scope of any question about, for example, reasonable discoverability in Guernsey law has not, in my view, been finally resolved and the commentary in *The White Book* indicates that cases should not be determined summarily where the area of law is developing and I take the view that this applies in the present case. A fuller investigation of the facts is desirable to ensure that the decision as to whether the claim is prescribed is based on all the facts and not the rather sterile position derived from the documents.

## Conclusion

59. For the reasons I have given, the Second Defendant's Application is dismissed. I have not been persuaded by Advocate Edwards that the Second Defendant has shown that the Plaintiff's reliance on the doctrine of *empêchement* will inevitably fail or that the prospects of success do not rise above the level of only being fanciful. Even if the prospects can be categorised in that way, I would still have dismissed the Application because the parameters of the doctrine are still developing and so this action is not an appropriate one to end summarily. I am, however, surprised that the Plaintiff sat on its hands for as long as it did when it must have realised that the sixth anniversary of the Second Defendant ceasing to be the administrator of the Fund was approaching and then passed. These arguments and any need even to raise *empêchement* could easily have been avoided by commencing the action in a more timely fashion.
60. Although my provisional view is that the costs of the Application are likely to follow the event, I propose to reserve the costs for the time being. If the parties were to reach some agreement as to the appropriate costs order, that can be dealt with by way of a Consent Order. However, if the parties cannot agree, the question of the costs can be raised when the matter is next before the Court for a case management conference.