[2019]GRC050

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

Between: **ALNASHIR POPAT** **Plaintiff**

-and-

(1) ADIL POPAT
(2) AZIM POPAT
(3) LOUVRE TRUSTEES LIMITED

Defendants

First Defendant's Application to strike out Cause or for summary judgment

Hearing date: **24th and 25th (pm only) June 2019**

Judgment handed down: **29th August 2019**

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

Advocate for the Plaintiff: **Advocate A M Ozanne**
Advocate for the First Defendant: **Advocate A M Davidson**
The Second and Third Defendants did not appear and were not represented

Cases & legislation referred to:

The Royal Court Civil Rules, 2007
Tranquillity Holdings Limited v Invista Real Estate Management (CI) Limited (unreported, 13 August 2015)
Musa Holdings Limited v Newmarket Holdings Limited (Guernsey) Limited [2014] GLR 41
Easyair Limited (t/a Openair) v Opal Telecoms Limited [2009] EWHC 339 (Ch)
Invescap Holdings Limited v Douglass (unreported, 30 July 2014)
Tchenguiz v Hamedani [2015] GLR 154
AK Investment CJSC v Kyrgyz Mobil Tel Limited [2012] 1 WLR 1804
Jefcoate v Spread Trustee Company Limited [2013] GLR 220
Lewin on Trusts (19th ed.)

The Inheritance (Guernsey) Law, 2011
The Trusts (Guernsey) Law, 2007
Knight v Knight (1840) 3 Beav 148,

Introduction

1. By an Application dated 24 January 2019, the First Defendant, Adil Popat seeks to bring the proceedings commenced by the Plaintiff, Alnashir Popat, who is one of his brothers, to an end, whether by striking out the Cause or by awarding summary judgment in the First Defendant's favour. The Application is made pursuant to rules 19, 22, 50, 52, 54 and 82 of the Royal Court Civil Rules, 2007 and the inherent jurisdiction of the Court. It is supported by the First Defendant's Third Affidavit sworn on 24 January 2019. In the alternative, the First Defendant seeks an order limited to striking out paragraphs 20 and 21 of the Cause.

2. The Plaintiff opposes the relief sought by the Application. He relies on the content of his Affidavit sworn on 3 May 2019. Because the matters addressed by the Application do not involve the third brother, Azim Popat, who is the Second Defendant, or the Third Defendant, Louvre Trustees (Guernsey) Limited, both of those parties were excused from the hearing of the Application. At the end of the hearing on 25 June 2019, I reserved judgment.

3. In this judgment, because the Popat family members share the same surname, I will generally refer to them solely by their first names.

Background

4. The dispute before this Court between Alnashir, as Plaintiff, and other members of his family, though that is now confined to his two brothers, and a trust company first began over four years ago. Procedurally, it has been quite complicated, but I do not need to go into any particular detail for the purposes of this judgment.

5. Given that the First Defendant, Adil, is not within the jurisdiction, leave to serve the summons on him out of the jurisdiction was required. In due course, I set aside the ex parte order granting leave to serve out, although the proceedings continued against *inter alia* the Second Defendant, Azim. Azim's position has been the one constant in these proceedings. Alnashir's Cause was then amended by leave granted pursuant to rule 59 of the 2007 Rules in February 2017. The Amended Cause no longer made any claim against the mother of the brothers, Gulzar, or against Seagrace Limited, and the trust company within the Louvre Group was changed. This successful amendment led to a further ex parte application for leave to serve a summons on Adil out of the jurisdiction, which was granted and the Amended Cause as against Adil was tabled and placed *inscrite* on 12 May 2017. Adil's Defences, including *exceptions de forme*, were tabled on 3 July 2017. The other Defendants' Defences were tabled around this time as well. Alnashir filed his responses to the *exceptions de forme* and a Réplique on 9 March 2018, which also included *exceptions de forme*, to which responses were given on 18 May 2018. Alnashir expanded upon his responses to Adil's *exceptions de forme* and filed an Amended Réplique on 22 August 2018. Adil's Defences were amended on 19 October 2019. Alnashir further refined his responses to the *exceptions de forme* and again amended his Réplique on 23 November 2018. Adil responded to Alnashir's further *exceptions de forme* on 5 February 2019. In summary, therefore, the result of these incrementally evolving pleadings is that there are currently an Amended Cause from April 2017, Adil's Amended Defences from October 2018, Alnashir's final responses to the *exceptions*

de forme in the Amended Defences and his Réplique from November 2018 and Adil's responses to Alnashir's *exceptions de forme* from February 2019.

6. There are a number of judgments in which I have summarised the nature of the dispute but, for the purposes of this judgment, I will briefly set out the position again.

7. The father of Azim, Alnashir and Adil was Abdulkarim. Abdulkarim died in 2013. Abdulkarim had five brothers. Three of them have died, but two remain alive. Jaffer Ali lives in Nairobi. Shamshudin, known as Sam, lives in the United Kingdom. The Popat family have been and are successful businessmen. Abdulkarim played a significant role in Kenya in relation to the family's car business, run principally through Simba Motors Limited and Simba Colt Motors Limited. The family's business empire stretched outside of Kenya. Adil went to Portugal, where the Hotel Lisboa was acquired. A second venture there concerned the Hotel Belo Sol, which was subsequently sold at a profit. Azim went to Canada, where he remains, and was also involved in running hotels. Alnashir joined the Kenyan car business in 1976 and worked with Abdulkarim. Adil returned to Kenya in 1994 and also joined Simba Colt Motors Limited, working alongside Alnashir and with Abdulkarim. However, the brothers did not work together harmoniously. Eventually, Alnashir resigned his employment in 2007. Alnashir's shareholdings in those car businesses were sold to Abdulkarim.

8. When Abdulkarim died in 2013, his Will from 2008 appointed Azim, Adil, Gulzar and a lawyer used by Abdulkarim, Karim Anjarwalla, as the executors of his estate. Probate was granted to them in early 2014 and a certificate of confirmation of that grant was issued later that year. However, Azim then refused to execute documents, which led to an application by the other three executors to enable distributions from the estate to be made. Alnashir sought to be joined to those proceedings on the basis that he had been excluded from Abdulkarim's Will when he should have received some benefit as a dependant. He swore an Affidavit in support of his contentions on 9 September 2016. There was a late development in the proceedings before the High Court of Kenya at Mombasa in that a judgment dated 14 June 2019 was made available, to which I will return in more detail in due course, which had the effect of removing from Adil's contentions some of those relating to the stance being adopted in those proceedings and what assets fell into Abdulkarim's estate.

9. Against the background of the family businesses, what Alnashir alleges is that monies were paid by the Japanese parties to the car transactions as rebates but kept outside of Kenya. Alnashir pleads in para. 11.1 of his Amended Cause that some of the financial institutions into which monies were paid included Leopold Joseph and Sons Guernsey and Bank of Butterfield Guernsey. Other monies were transferred from Kenya to these offshore accounts. These funds were used to make investments outside of Kenya. The totality of these monies, which he terms "the Offshore Wealth", are said by Alnashir to have been held by Abdulkarim on behalf of himself and his five brothers, with each of the six of them having an equal share to the assets. There is not, however, any written instrument declaring any such trust. In respect of Abdulkarim's one-sixth share, it is said Abdulkarim stated that he held this for the benefit equally of Azim, Alnashir and Adil.

10. Alnashir alleges that between the mid-1980s and 1996, Adil's involvement with the Offshore Wealth means that he was a "de facto" trustee. During that time, a portion of the Offshore Wealth passed into Seagrace Limited, a company incorporated in Gibraltar. There are proceedings before the court in Gibraltar dealing with Seagrace Limited, to which I will refer in more detail in relation to Adil's claim to strike out paragraphs 20 and 21 of the Amended Cause.

11. By 1996, or thereabouts, Abdulkarim had acquired any interest that any of his brothers had in the Offshore Wealth. As a result, the entirety of the Offshore Wealth was held by Abdulkarim. Alnashir says that Adil's role from this time was that he was a co-trustee of the Offshore Wealth. The Offshore Wealth continued to be held equally for Azim, Alnashir and Adil. On Abdulkarim's death, Adil continued in office as the trustee of the assets still comprising the Offshore Wealth. Paragraph 27 of the Amended Cause sets out a list of assets that are said to have fallen into the Offshore Wealth from time to time. The Amended Cause pleads in para. 18 that this trust is either a Guernsey law trust or one subject to Kenyan law.

12. In 1993, Abdulkarim settled the Almancil Settlement as a Guernsey law trust. Alnashir believes that the assets of this Settlement were derived from the Offshore Wealth. He was a beneficiary of that Settlement, along with Azim, Adil and Gulzar as the other principal beneficiaries. The assets were then appointed to a new trust, the Kalys Trust, in 2010, of which Alnashir is not a beneficiary. Indeed, Alnashir says he has derived no benefit from the Almancil Settlement and was not even previously aware of its existence. The relief sought against the Third Defendant relates to its dealings with the Almancil Settlement and the Kalys Trust and so is not directly related to Alnashir's claim against Adil.

13. Alnashir alleges that Abdulkarim and Adil have acted in breach of trust. As the surviving trustee, Adil is liable to provide a full and detailed account to him. Alnashir alleges that the source of funds used to settle the Almancil Settlement came from the Offshore Wealth, thereby enabling him to follow and/or trace into what is now held in the Kalys Trust. Accordingly, the relief sought by Alnashir against Adil is a declaration that one-third of the Offshore Wealth is held on express trust for him and the re-constitution of the value of the trust represented by the Offshore Wealth from time to time so that Alnashir can now be paid the amount due as being his one-third share.

14. Adil's defence is a simple one. He denies that any such trust ever existed, from which it follows that he denies that he has ever been the trustee of the assets Alnashir alleges have been and still are held on that trust. He asserts that Alnashir's reference to Offshore Wealth and any trust are inventions on his part. He accepts, however, that the Almancil Settlement existed and that the appointment of the assets held within that Settlement to the Kalys Trust was validly made. He suggests that the use of properly documented family trusts, such as the Almancil Settlement and similar settlements for each of Abdulkarim's brothers supports his case that this was how family members chose to organise their affairs when so desired, rather than through anything less formal, such as an oral express trust, as suggested by Alnashir. He points out that, until his death in 2013, Abdulkarim actively managed his investments, accepting that Adil did also help to manage various investments made by Abdulkarim and his brothers, although Sam oversaw and managed a large part of the assets held outside Kenya.

The law

15. There is no dispute between the Advocates as to the applicable legal principles.

16. Rule 52 of the 2007 Rules provides:

> "*(1) In this rule, reference to a pleading includes reference to part of a pleading.*
>
> *(2) 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, or

(c) that there has been a failure to comply with a rule, practice direction or Court order."

17. I am content to adopt the same approach that Advocate Davidson has on behalf of Adil of referring to the relevant principles that had been rehearsed in previous decisions and were extracted by the Bailiff at para. 47 in *Tranquillity Holdings Limited v Invista Real Estate Management (CI) Limited* (unreported, 13 August 2015) as follows:

> "*a) Claims 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 resources on both sides (Harris v Bolt Burdon [2000] L.T.L., February 2, 2000, CA).*
>
> *b) The principal test is whether the party's case is "bound to fail", which creates a high threshold before a pleading, or a part thereof, will be struck out. Simply because a case might be weak is not sufficient to justify striking out.*
>
> *c) A statement of case is not suitable for striking out if it raises a serious issue of fact which can only properly be determined by hearing oral evidence (Bridgeman v McAlpine-Brown January 19, 2000, unrep., CA).*
>
> *d) 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 the opportunity to amend (In Soo-Kim v Youg [2011] EWHC 1781 (QB)).*
>
> *e) The court may strike out, as an abuse of the court's process, particulars of claim which are so badly drafted that they fail to reveal to the defendant, or to the court, the case the defendant can expect to meet at trial. However, proof of bad drafting is not, by itself, sufficient. The court should not strike out the particulars without first giving the claimant an opportunity to amend (see In Soo-Kim v Youg [2011] EWHC 1781 (QB)).*
>
> *f) The purpose of the particulars of claim were explained by Moore-Bick LJ in Credit Suisse AG v Arabian Aircraft & Equipment Leasing Co [2014] CP Rep 4:*
>
> > *"Particulars of claim are intended to define the claim being made. They are a formal document prepared for the purposes of legal proceedings and can be expected to identify with care and precision the case the claimant is putting forward. They must set out the essential allegations of fact on which the claimant relies and which he will seek to prove at trial, but they should also state the nature of the case that is to be made in order to inform the defendant and the court of the basis on which it is said the facts give rise to a right to the remedy being claimed."*
>
> *g) 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)."

18. Rule 19 of the 2007 Rules provides:

> "*(1) The Court may, at any time after inscription of the action on the Rôle des Causes à Plaider, on the application of a party to the action, give summary judgment against any other party on the whole of the claim or on a particular issue.*
>
> *(2) The ground 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 trial.*"

19. Although the Court of Appeal in *Musa Holdings Limited v Newmarket Holdings Limited (Guernsey) Limited* [2014] GLR 41 made reference to a different formulation of the principles applicable to an application for summary judgment, both Advocates have relied upon the summary given by Lewison J (as he then was) in *Easyair Limited (t/a Openair) v Opal Telecoms Limited* [2009] EWHC 339 (Ch) (at para. 15), and to which regular reference has been made by this Court:

> "*The correct approach on applications by defendants is, in my judgment, as follows:*
>
> *i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 2 All ER 91;*
>
> *ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8]*
>
> *iii) In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman*
>
> *iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10]*
>
> *v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;*
>
> *vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without 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 anther 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."

20. As has been recognised in other cases, including *Tranquillity Holdings*, there is a degree of overlap between the two bases on which a party can seek to bring an end to proceedings. In both instances, there is a heavy burden on such an applicant because the respondent has to provide comparatively little in respect of his case to avoid the consequences of a Cause being struck out or resulting in summary judgment being entered.

The First Defendant's arguments

21. In his Skeleton Argument on behalf of Adil and in his oral submissions, Advocate Davidson submits that all the material elements of the purported cause of action have been omitted because, in the absence of reliance on a written instrument, Alnashir has failed to assert the way in which the oral statement or intention was made and how this gives rise to the express trust on which Alnashir relies. He highlights that Alnashir has been provided with a significant number of opportunities to do so, including in his responses to Adil's *exceptions de forme*. In those circumstances, enough is enough and no further opportunity to plead the case should be afforded to Alnashir.

22. His arguments in respect of para. (c) overlap with his reliance on para. (a). He refers to rule 10(2) of the 2007 Rules, which provides that:

> "*The cause shall contain*
>
> *(a) a statement of the material facts on which the plaintiff relies for his claim, but not the evidence by which those facts are to be proved …*".

23. He identifies a number of purposes of a Cause, including to inform the other party of the nature of the case to be met, so as not to be taken by surprise at trial, to enable the party to know what evidence needs to be prepared for trial and to limit and define the issues in respect of which disclosure will be required. As noted in principle (f) set out in the *Tranquillity Holdings* case, a

pleading is a formal document and operates as a form of constraint on the party preparing it. If a pleading is "*vague and incoherent*" (adopting wording I had mentioned in *Invescap Holdings Limited v Douglass* (unreported, 30 July 2014)) that pleading is susceptible to be struck out. He draws particular attention to the inconsistencies in para. 4 and para. 22.2 of the Cause and the absence of sufficient particulars in paragraphs 13, 14 and 16. He emphasises that, if the allegation is that an express trust existed, it should be capable of being identified when it came into existence, rather than by relying on numerous discussions over the years, which implies that it took time for the trust position to crystallise; either the alleged trust existed or it did not. There is no clarity on how it is said that Adil became a co-trustee, including nothing about assets vesting in him in that capacity. The language used by Alnashir, referring to unconscionable behaviour, is more aligned to some form of estoppel claim than the existence of a trust. As a result of these failings, it is suggested that Adil will be hampered in his own ability to plead to Alnashir's claims and in the preparation of his disclosure and evidence.

24. In respect of the abuse of process allegations, these principally turned on the inter-relationship of this action with the proceedings before the High Court at Mombasa. However, as a result of the latest decision in those Kenyan proceedings, Advocate Davidson accepted that Adil's contentions had to fall away, at least for now. It was suggested that the current action is a fishing expedition to obtain information about matters that might then assist in the Kenyan proceedings, but, as I will explain, the multiplicity of proceedings in which Alnashir is involved arises because of the multi-jurisdictional nature of Abdulkarim's activities.

25. Turning to the summary judgment aspect of the Application, Advocate Davidson acknowledges that the arguments are largely the same and that the inadequately pleaded case shows why it is that Alnashir's prospects of succeeding are not more than fanciful. Indeed, the main thrust of his submissions is that Alnashir's case is hopeless and bound to fail.

26. As an alternative, Adil suggests that the references made to Seagrace Limited in paragraphs 20 and 21 of the Cause raise issues that are not to be determined in this action, but will be resolved in the proceedings that are taking place in Gibraltar, and so must be struck out.

The Plaintiff's arguments

27. The first submission made on behalf of Alnashir by Advocate Alison Ozanne is that this Court has already considered whether or not what he is advancing raises a serious issue to be tried on the merits and this finding is sufficient to resist Adil's summary judgment application and also demonstrates that the Cause does not plead an unwinnable case. This follows from consideration of Alnashir's applications for leave to serve Adil out of the jurisdiction. The test applied by this Court, as confirmed by the Court of Appeal in *Tchenguiz v Hamedani* [2015] GLR 154 reflects what Lord Collins of Mapesbury set out in *AK Investment CJSC v Kyrgyz Mobil Tel Limited* [2012] 1 WLR 1804, which included an acknowledgement that this element involves considering "*the same test as for summary judgment, namely whether there is a real (as opposed to a fanciful) prospect of success*". This element of the test was found to be met by the Bailiff initially, as well as by me when considering the issue inter partes in 2015, and again when considering Alnashir's ex parte application for leave to serve out in 2017. That was a decision that Adil did not seek to have set aside. Advocate Ozanne also refers to the amendments to the Cause for which leave was granted by me in 2017, where I referred to one of the principles summarised by the Bailiff in *Jefcoate v Spread Trustee Company Limited* [2013] GLR 220 as being that "*an amendment will not be allowed if the case introduced by it has no realistic prospect of success*", again echoing the test for summary judgment.

28. In response to Adil's argument that the Cause omits all the material elements of the purported cause of action, Alnashir points out that the three elements for a valid trust to exist, as set out in *Lewin on Trusts* (19th ed.) are all covered. The Cause pleads the intention to create the trust, certainty of subject-matter and identifiable beneficiaries. Whether or not Alnashir's claim will succeed depends on the evidence to be adduced at a trial. Alnashir has done the best he can to particularise how the trust was established and how Adil has played his part as a trustee, but Alnashir's difficulty is that he does not have access to the type of information that Adil has to take matters further. Accordingly, there is no breach of rule 10(2)(a) of the 2007 Rules. Because the nature of an oral trust is necessarily fact-specific, what is alleged in the Cause, read with the responses to the *exceptions de forme* and the Réplique is far from being an unwinnable case and bound to fail because these are matters that can only be determined after hearing oral evidence. This makes the case advanced by Alnashir a realistic one.

29. Advocate Ozanne accepted that it is difficult to have a perfect pleading and that Alnashir expected to be in a position to make any further amendments to the pleadings once disclosure has taken place. The case being advanced was that decisions were taken by Abdulkarim and his brothers for certain family assets to be left outside of Kenya. This started with the rebates receivable from the Japanese companies with which they were doing business. Other assets previously from within Kenya were also transferred into this asset pool held outside of Kenya for the benefit of the six brothers equally, with Abdulkarim's share being held by him for the benefit of his three sons equally. It is what has happened to this asset pool about which Alnashir seeks an account and then payment of his one-third share. Adil's involvement since the mid-1980s means that he is the person who can explain everything that has taken place. The Offshore Wealth is distinct from the assets that fell into Abdulkarim's estate on his death. However, Alnashir recognises that what is to be resolved in Gibraltar about Seagrace Limited is separate from what remains in the Offshore Wealth Trust (as it has been termed by Alnashir). However, references to Seagrace Limited remain relevant as part of the material facts to be pleaded in support of Alnashir's claims explaining what happened to a portion of the trust assets. In similar fashion, the allegations relating to the use of trust assets to settle the Almancil Settlement, where those assets were then appointed to the Kalys Trust are comparable, because they also show how assets from the Offshore Wealth Trust have found their way into other hands and so are traceable in the hands of the Third Defendant.

30. In her submission, the recent decision in Kenya about the probate proceedings clearly demonstrated why it is not an abuse of process for Alnashir to be pursing his action in relation to the assets he alleges formed the trust of which he is one of the beneficiaries. The suggestion made by Adil that Alnashir's evidence in those proceedings sought to make the trust assets part of Abdulkarim's estate was a mis-reading of that evidence. Alnashir was explaining to the Kenyan court why he should be awarded some benefit from Adbulkarim's estate by reference to the fact that there was a separate claim for his share of the offshore trust assets. However, because the position in Kenya has reverted to how it was prior to the certificate of confirmation of the grant of probate being granted, it remained to be seen what the executors would state was comprised in Abdulkarim's estate.

Discussion

31. I will deal first with that position in relation to the Kenyan proceedings. At the start of this year I had formed the impression that there was apparently a significant overlap between what was taking place in Kenya and Alnashir's claims before this Court. It seemed to me (and still seems to me) that the heart of all the proceedings involving members of the Popat family lies in a complete breakdown of family relations between Alnashir and Adil. Their disputes go back over

a decade. On the one hand, Adil takes the view that Alnashir has been handsomely compensated by Abdulkarim by being advanced *inter vivos* what might otherwise have come to him on Abdulkarim's death. On the other hand, Alnashir accepts that his involvement in the Kenyan businesses was brought to an end by his interests being bought out, but that left unaffected his claim to be entitled to his share of what he has called the Offshore Wealth. Alongside those two positions, there is also Alnashir's claim in Kenya to a form of family provision, which I consider to be similar to what can be claimed by a person under Part II of the Inheritance (Guernsey) Law, 2011. Whatever else, in the absence of the parties seeking to settle their grievances without resort to the courts of various jurisdictions, these individuals will not let matters rest until some adjudication is made about the various claims advanced. Once I recognised that the apparent overlap did not exist, I realised it was not appropriate or helpful to stay Alnashir's action in this jurisdiction through active case management. Now that the position in Kenya has been unwound, this reinforces my view that it is not an abuse of this Court's process for Alnashir to bring his claim. Although this was not fully conceded by Advocate Davidson, he did acknowledge that this latest development weakened any argument based on rule 52(2)(b).

32. The decision of the High Court at Mombasa dated 14 June 2019 helpfully explains why it is that the steps taken by the executors in those probate proceedings have to revert to where they were some years ago. There is a distinction between the actual grant of probate, which has not been set aside and the proceedings that followed to obtain confirmation of the grant of probate, where there is a statutory requirement for those who are dependants to be able to participate. It enables a person who claims not to have been provided for adequately to file an affidavit of protest or an application for reasonable provision, which can only be made prior to the confirmation of a grant. If no protest or application is made before that time, thereafter the window of opportunity is lost. It was found that Alnashir had not been notified of the application for confirmation of the grant and so it fell to be set aside. As a consequence, the executors' summons for confirmation of the grant will have to be re-heard. Alnashir will be permitted to take whatever steps in that regard he wishes to take. The judgment also touches on what falls within Abdulkarim's estate. There is an obligation to set out a full inventory of all the assets and liabilities of the deceased. This is done when seeking a grant and any omission can potentially be cured by filing an application for inclusion of those omitted assets. The court has ordered the executors to produce a full and accurate inventory of the assets and liabilities of Abdulkarim's estate. Accordingly, if there are assets that were in his name that Alnashir alleges form part of the so-called Offshore Wealth that are included in this inventory, it is possible that there could be an argument that the proceedings start to overlap, but until that stage is reached, the assets in respect of which the current action deals are not being addressed in the Kenyan proceedings. As a result, I am not persuaded that what Alnashir seeks to achieve by his action before this Court is anything other than to advance a case in respect of assets that fall outside Abdulkarim's estate for the purposes of the probate proceedings. Further, I accept Alnashir's explanation that he has not taken a contrary position and that what he has sought to do thus far is to assert that the Offshore Wealth assets involve a separate exercise but may become relevant to his application for reasonable provision within the probate proceedings, if such an application is now to be made, given the recent unravelling steps taken in Kenya.

33. The main argument advanced on behalf of Adil relates to the adequacy of Alnashir's pleaded case. Time and time again during his submissions, Advocate Davidson returned to the inability of Alnashir to specify in his answers to Adil's *exceptions de forme* what is being alleged. Accordingly, it is on that aspect of the Application that I will concentrate, relating as it does to the claim to strike out the Cause under rule 52(2)(a) and (c) and for summary judgment, all of which depend on this particular submission.

34. I regard Advocate Ozanne's submission that this is re-visiting something that has already been determined on a number of occasions by the Court as a strong argument to defeat Adil's contentions, but I do not regard those previous decisions as determinative of the issue, in the sense of precluding Adil from advancing this issue within the context of the present Application. Although it is not a perfect analogy, I view it as akin to a presumption against granting the Application but one that could, in the appropriate circumstances, be capable of being rebutted. There is, in my opinion, a difference between looking at a pleading for the purposes of surmounting a threshold for leave to serve out and looking at the pleading again in the light of further development. All the applications to which Advocate Ozanne has quite properly referred involved looking at the Cause in isolation. Alnashir's pleaded case now goes further than just the Cause (or Amended Cause) because there are also the responses to Adil's *exceptions de forme* and the Réplique. Advocate Davidson has been particularly critical of the paucity of further detail provided in those responses. In other words, the review of the pleaded case now goes wider than it has previously and a fuller assessment of whether it does no more than advance an unwinnable case (or one with no real prospects of success) is capable of being made. It is also relevant should it be necessary to consider whether any further opportunity to amend should be afforded to Alnashir.

35. Guernsey law recognises that a trust may be created without a written instrument. Section 6 of the Trusts (Guernsey) Law, 2007 confirms that a Guernsey law trust can be created *inter alia* by oral declaration or by conduct. Although the trust on which Alnashir relies is alleged to have come into existence many years before there was any Guernsey legislation, it is common ground that there is no requirement for a written instrument before a trust can exist and the duties attaching to a trustee arise. Further, no one has provided me with any evidence as to what is required to establish a Kenyan law trust so I have proceeded on the basis that the law of Guernsey as it exists from time to time is equally applicable to such a trust were that to be found to be the proper law. Of course, the difference between a written instrument and a trust created by any other means relates to the way in which proof follows. As with any allegation that something arises as a result of spoken words rather than writing, a dispute relating thereto becomes much more fact-sensitive and dependent on the quality of the evidence that will be adduced.

36. I have taken into account the fact that, if this dispute has arisen during Abdulkarim's lifetime, the allegation that Adil was a trustee of this trust would probably have been more readily resolved by Abdulkarim's word. Further, the origins and the nature of what has happened since that time would also be heavily dependent on what Abdulkarim has to say. Unfortunately, what Abdulkarim recalls will not be available unless there is some document authored by him that assist. I find it surprising, therefore, that neither of the parties has given any indication at this stage as to what Sam, in particular, and Jaffer Ali, perhaps to a lesser degree, might have to say. Alnashir's case starts, at least chronologically, with the allegation that there were rebates receivable (and received) by the Popat family business that were retained offshore of Kenya for the benefit of all six brothers. What he says is that there was an agreement between the brothers of Abdulkarim that Abdulkarim act as trustee of these assets for their benefit. In para. 11 of the Amended Cause, this is described as the six of them having "*initiated practices*", which is redolent of there at least being a course of conduct. If Alnashir cannot establish that point then it seems to me that the entirety of his case disappears. The persons who can give direct evidence of whether these practices were initiated and what, if any, conversations were had about these rebates and any other transfer of funds out of the family's business empire are Sam and Jaffer Ali. Whilst I understand the low threshold over which Alnashir has to pass to resist this Application, I do not understand why Adil has not relied on the evidence of either or both of his uncles to support his case that Alnashir has invented the existence of the trust he now claims to benefit

from. As Adil bears the burden of establishing that Alnashir's case has no real prospect of success under rule 19, I regard the absence of evidence from either or both of these gentlemen as particularly relevant to whether he has discharged that burden.

37. On the material before me, I find myself left largely with the bare pleaded case that, back in the 1960s, a trust came into existence. I accept Advocate Ozanne's submission that the pleaded case in respect of this original trust contains the essential conditions set out in para. 4-001 of *Lewin*. The objects, being the beneficiaries, are described. The assets of the trust are identifiable by reference to actions, but the exact nature of what assets were acquired in time cannot be spelt out more fully because Alnashir, as a beneficiary of the trust he alleges exists, requires further information. The intention to create the trust is said to have been Abdulkarim's acting in concert with his five brothers. Although there may be difficulties about proving that intention, I am persuaded that there is a bare case and, if Adil requires more information then he can make further requests for it. These three requirements are elaborated upon by reference to the words of Lord Langdale MR in ***Knight v Knight*** (1840) 3 Beav 148, quoted in para. 4-003 of *Lewin*. One can well imagine that the coming into existence of a trust in Victorian times could take place without any great formality. The absence of the type of formalities with which many practising in this area today are now familiar could well have operated in the 1960s within the context of this family. Ultimately, this will be a factual issue at a trial, but Adil has not put before the Court anything supporting his denial that such a trust came into existence and so I do not find that the allegation pleaded that such a trust came into existence can be said to plead an unwinnable case, or one with no real prospect of success.

38. The position of how Adil became a trustee, though, is less straightforward. For these purposes, I proceed on the assumption that a trust of which Abdulkarim was the trustee was created in the 1960s, although, as I have just indicated, whether that is so will turn on the quality of evidence adduced supporting or opposing that contention. Although it has no direct bearing on the position in the 1980s to which Alnashir has referred, when Guernsey first introduced legislation relating to trusts at the end of that decade, section 1 (now repeated in the 2007 Law) provided that a trust exists if the trustee holds or has vested in him, or is deemed to hold or have vested in him, property which does not form, or which has ceased to form, part of his own estate for the benefit of one or more beneficiaries. Consequently, if Abdulkarim did hold the Offshore Wealth (as it then existed) on trust for his five brothers in equal shares and, in respect of his own one-sixth share, on trust for his three sons, which is how I read Alnashir's pleaded case, it begs the question as to how Adil became a co-trustee with Abdulkarim so that, on Abdulkarim's death in 2013, Adil was left as the remaining trustee and so now has to answer to the allegations put by Alnashir to the sole trustee.

39. Paragraph 4 of the Amended Cause states:

> "*Adil is sued in his capacity as de facto trustee of the Offshore Wealth Trust (as more particularly defined at paragraphs 13 to 19 below) between the mid 1980s and 1996 and thereafter as trustee of the Offshore Wealth Trust from 1996 to present.*"

Although Advocate Davidson raised concerns as to what was meant by the term "*de facto trustee*", I think the more important aspect of this paragraph is that it alleges that since 1996 Adil has been a trustee. If the intention is to distinguish between some other capacity of involvement with the alleged trust previously, it probably does not matter hugely because Alnashir's case is that Adil has been a trustee since 1996 and the trust of which he has been a trustee since that time is the same trust of which Abdulkarim was already the trustee.

40. Other references in the Amended Cause to events in 1996 and their consequences appear in paragraphs 15 and 16:

> "*15. In or around 1996, a settlement was reached in respect of the division of interests of Abdulkarim's brothers in the Offshore Wealth of which Alnashir does not know the details save that following the settlement Abdulkarim's brothers ceased to have any interest remaining in the Offshore Wealth.*
>
> *16. Accordingly, from 1996 it was expressly intended, understood and agreed by Abdulkarim and the Brothers [ie, Azim, Alnashir and Adil as a result of this being a defined term] that the Offshore Wealth was held by Abdulkarim and Adil on trust for the Brothers in three equal shares.*"

It seems that para. 16 is the closest the Amended Cause comes to explaining how Adil became a co-trustee with Abdulkarim. The wording used does not make it clear whether this was a new trust arising from a re-settlement of the Offshore Wealth, whether through a course of conduct or oral agreement or declaration, or whether this was the appointment of Adil as a trustee by Abdulkarim, which perhaps seems the most likely, or by some other means.

41. Paragraph 22 of the Amended Cause states:

> "*In the premises, at least from the mid 1980s Adil was:*
>
> *22.1 in a relationship of trust and confidence in respect of his dealings with the Offshore Wealth and the Offshore Wealth Trust generally and/or in respect of his dealings with Abdulkarim's one-sixth share; and*
>
> *22.2 was in primary de facto control of the Offshore Wealth and the Offshore Wealth Trust generally and/or in respect of Abdulkarim's one-sixth share.*"

In order to place the premises referred to into context, the preceding paragraphs state:

> "*19. From the mid 1980s Adil undertook a number of responsibilities in connection with the management of the Offshore Wealth and/or the Offshore Wealth Trust for the purported benefit of Abdulkarim and the Brothers and Abdulkarim and the Brothers entrusted Adil with those responsibilities including controlling, operating and administering the Offshore Wealth and the bank accounts holding the said Offshore Wealth and the books and records of account and dealing with all necessary administrative and investment matters in connection with the Offshore Wealth.*
>
> *20. In accordance with Adil's responsibilities for the Offshore Wealth as pleaded in paragraph 19 above, he procured in December 1988 the incorporation of a company in Gibraltar known as Seagrace Limited ("**Seagrace**") in order to hold funds and assets forming part of the Offshore Wealth. Following incorporation the shares in Seagrace formed part of the Offshore Wealth and in particular Abdulkarim's one-sixth share of the Offshore Wealth.*
>
> *21. By a deed of settlement dated 16 March 1989 Adil settled the shares in Seagrace in trust for the benefit of the Brothers in equal shares.*"

42. Turning to Alnashir's responses to Adil's *exceptions de forme*, the reply to a request for information about para. 4 of the Amended Cause states *inter alia*:

> "*The Offshore Wealth (as defined in the Cause) was historically held by Abdulkarim on trust on behalf of himself and his own brothers for the ultimate benefit of each of their respective families. After 1996, by agreement with his brothers, Abdulkarim and his sons bought out his brothers' interests in the Kenyan business. … from the mid 1980's, Abdulkarim increasingly involved Adil in undertaking the responsibility of controlling, operating and administering the Offshore Wealth. Adil well knew the position of trust he was undertaking in that regard (ie to hold the Offshore Wealth due to the family on trust for the Brothers equally) from numerous discussions and agreements over the years from inception onwards with Abdulkarim, Azim, Alnashir and Adil. Abdulkarim felt someone should be resident outside Kenya to manage the Offshore Wealth because of the political landscape in Kenya. …*"

The response then moves on to Adil's return to Kenya, which might be regarded as running contrary to someone outside Kenya managing the Offshore Wealth but, in any event, puts a case that relates to the time after 1996. In short, there appears to be no clarity in this response stating how it is that any trust assets were vested in Adil or deemed to be so vested.

43. The response to an *exception de forme* in respect of the rebates mentioned in para. 11 of the Amended Cause explains:

> "*The rebates were controlled by Shamshudin, and Adil. On occasion Alnashir did receive a distribution from Shamshudin. The money was remitted to his account at the Republic Bank of New York from Shamshudin / Adil. This practice was eventually stopped by Adil with the rebates being 'retained' in the family accounts controlled by Adil. The rebates were paid by Sumitomo in relation to shipping and by Mitsubishi Motors and Mitsubishi Fuso Truck & Bus Company in relation to the purchase of motor vehicles for sale in Kenya. This is otherwise pleaded to the best of the Plaintiff's ability at present taking into account of Adil's ongoing breach of duty to account and provide information. The Plaintiff expressly reserves his right to plead further after disclosure.*"

44. The response to an *exception de forme* about the original establishment of a trust for Abdulkarim and his five brothers as set out in para. 13 of the Amended Cause states that Adil has the details because Alnashir's interest was represented by Abdulkarim and Adil, adding that "*Abdulkarim always told Alnashir about it.*" The remainder of the reply deals with events in 1996 and the consequence that Abdulkarim's five brothers no longer had any interest in the Kenyan Business. Although it does not directly impact on my decision on this Application, I regard this reply as side-stepping the information sought. However, it is an area where Adil can, if he so wishes, re-put the request and I would then expect Alnashir to reply more directly about how it is that the original trust with Abdulkarim as sole trustee was established through these practices and any discussions between that generation of brothers.

45. The response to a further *exception de forme* in respect of the arrangement under which Abdulkarim held his interest in the Offshore Wealth Trust on behalf of Azim, Alnashir and Adil, as set out in para. 14 of the Amended Cause provides some further detail about how the trust is said by Alnashir to have arisen, although the final section could, I expect, be re-visited so as to remove the implication that this is about fairness as opposed to something agreed or arising from a course of conduct. The reply is relevant, though, on the basis that it supplements what is

pleaded in para. 14, which leads into what is then pleaded at paragraphs 15 and 16, as already quoted, through repeating some of the response to the request in relation to para. 4 and adding:

> "*Abdulkarim always expressly recognised and confirmed Alnashir's interest in the Offshore Wealth held in trust in numerous discussions over the years on many occasions when Adil was also present and Adil understood and accepted his obligations and duties as a result. Paragraph 33 of the Cause shows Abdulkarim's express acknowledgement of Alnashir's interest. During their argument about Alnashir leaving the Kenyan business, when Abdulkarim was very angry with Alnashir, Abdulkarim (and through him Adil) made it clear he would make it difficult for Alnashir to enforce his acknowledged interest in the Offshore Wealth. This is in fact exactly what has happened resulting in these proceedings. It is self-evident that Alnashir, having generated substantial profits for the family business, has a corresponding share in the offshore investments made with part of those profits, and that the legitimate expectation that he would receive his fair one third share of the Offshore Wealth from the Offshore Wealth Trust was at all times understood and accepted by Abdulkarim and all the Brothers whatever Adil says now.*"

Paragraph 33 of the Amended Cause, to which reference is made in this reply, states:

> "*As a consequence, in around November 2006 Alnashir decided to leave the family business. Alnashir informed Abdulkarim of this decision and said he wished to receive full compensation for his shares in SCM and SM and for his one third beneficial interest in the Offshore Wealth Trusts. This resulted in a serious falling out between Alnashir and Abdulkarim. Abdulkarim, who was offended by Alnashir's decision to leave the family business, stated that he would purchase Alnashir's shareholdings, but that as to the Offshore Wealth Trust Alnashir could "get lost". This disagreement was never resolved.*"

46. The response to an *exception de forme* in respect of para. 16, which I have indicated appears to me to be the closest Alnashir gets to explaining how Adil became a co-trustee of the Offshore Wealth Trust, also repeats earlier replies, before adding:

> "*It was a repeated assertion by Abdulkarim over time that the Offshore Wealth was to be shared equally by the Brothers. In due course, as set out above, Adil was entrusted to hold Alnashir's share on trust, as sole trustee after Abdulkarim's death. Adil was aware of his duties and obligations from the inception of his role in controlling, operating and administering the Offshore Wealth and onwards. He was present on numerous occasions when this position of trust was referred to in discussions he had with both Abdulkarim and Alnashir together and on their own. It is unconscionable behaviour by Adil to seek to deny Alnashir's interest now and not to account to him for his interest. Alnashir was involved in running the business from 1976 to 2007. The Offshore Wealth is the direct fruit of the success of the business and hence the Plaintiff's efforts over 30 years. The 2007 agreement was in relation to the Kenyan business only and in no way affected Alnashir's interest in the Offshore Wealth.*"

47. Finally, the response to an *exception de forme* in respect of para. 22.2 in the Amended Cause explains:

> "*This is already adequately pleaded at paragraphs 9.2, 9.3, 16, 19, 20 and 21 of the amended Cause. From the early 1990's Adil took over controlling, operating and administering the Offshore Wealth. To this day this includes some of the interests of*

Abdulkarim's Brothers as stated in reply 10(a) – (f) above and the interest in the Offshore Wealth held on behalf of Adil, Azim and Alnashir. The Plaintiff reserves the right to plead further particulars after disclosure, as one of his main complaints is Adil's improper failure to provide information to which he is entitled in relation to his interest in the Offshore Wealth. Particulars of which he is aware are pleaded at paragraphs 26 – 29 of the Cause."

48. I have quoted as extensively as I have from Alnashir's pleaded case in order to put Advocate Davidson's criticisms of it into context. I have had to consider carefully whether it really is so vague and incoherent that it should be struck out. Although the case set out is not as clear as I think it could be, I am persuaded by Advocate Ozanne that Adil has not surmounted the high threshold placed on him. If nothing else, I am satisfied that there is a case that can be advanced that will depend heavily on the evidence to be adduced and so it cannot be said to be unwinnable or that it has no real prospect of success.

49. As I have just touched on, Alnashir's case will fail if he cannot prove that any trust existed with Abdulkarim as the sole trustee. The impression I get is that Sam's evidence, assuming someone wishes to call him to give evidence, will be quite crucial to that issue. To a lesser extent, perhaps, this might turn on what Jaffer Ali has to say. However, these are clearly matters for trial and cannot be resolved in the context of this Application. Accordingly, assuming for the time being that Alnashir succeeds in establishing that the rebates were diverted into this trust, and that other assets were then added to the pool of those rebates, as alleged, the question then becomes whether Alnashir can prove that Adil became a trustee of this trust. There are various ways in which a person can become a trustee. There may, for example, be a formal appointment in writing, but that is not what is suggested here by Alnashir. There could be oral acceptance of the office. There can be implied acceptance of office from acts done in the administration of the trust, although it will be important here to distinguish between acts done in the capacity as trustee and those falling short of assuming office, for example, acting as a manager on behalf of a trustee. It would no doubt assist Adil to know the way the case is put by Alnashir through one or more propositions as to how Adil came to be a co-trustee, but the narrative replies given in the *exceptions de forme* are, in my view, just sufficient to demonstrate that Alnashir is relying upon many conversations in which oral agreements were reached (and once reached confirmed) that Adil was operating as a co-trustee with Abdulkarim. The replies also point to an assumption of the duties and responsibilities as a trustee, which I consider to be consistent with Alnashir saying, possibly as an alternative position, that there has been implied acceptance by Adil of the office of trustee. Again, it would probably help if requests for further information were made, possibly on both sides, to seek clarity in respect of specific assets. I have in mind the list given in para. 27 of the Amended Cause, with which Adil's Defences do not deal directly. If any of those assets are, or have been, vested in Adil, it may help to know whether that was in the capacity as trustee or personally. Similarly, if Adil knows whether any of those assets were vested in Abdulkarim before his death and do not form part of Abdulkarim's personal estate (of which he is one of the executors), it may support Alnashir's contention about the existence of the trust and Adil's ongoing role in respect of it. The status of a trust can arise where a person is deemed to hold or have vested in him the property subject to the trust. I regard the allegations made by Alnashir against Adil as reflecting that position and that Adil either took office through oral agreement in discussions with Abdulkarim, to which Alnashir may also have been privy or, if not expressly agreed, through his actions. The replies to the *exceptions de forme* do not state this as directly as that, but I take the view that that is the tenor of the case being advanced.

50. Accordingly, although I would invite Advocate Ozanne on behalf of Alnashir to consider whether the case being advanced can be set out more explicitly, and also leave Advocate Davidson on behalf of Adil to consider whether any further requests for information under rule 60 of the 2007 Rules could assist, I am not persuaded that the claim being made by Alnashir is so vague and incoherent that it cannot be allowed to be pursued. In reaching that conclusion, I recognise that Alnashir may feel he has done his best to date, but I do find that the case as to how Adil became a trustee of this alleged trust difficult to understand at the moment and so also appreciate why Adil could find himself in a similar difficulty. It became slightly clearer during the hearing, but the pleaded case would, in my view, benefit from being put as simply and straightforwardly as possible. Because I am persuaded that this is a case where more clarity can be provided, I am satisfied that Alnashir should have that opportunity, even though, as Advocate Davidson was keen to note, there have been several attempts to respond to the *exceptions de forme*. The additional expense involved in these attempts can, of course, be met in due course through costs orders.

51. For these reasons, I am not satisfied that Adil has demonstrated that Alnashir's case is unwinnable. From what is currently pleaded, there is a pathway through these facts that could result in Alnashir proving the existence of the trust he says was created many years ago and of which he is a beneficiary where Adil became, and so appears to continue to be, a trustee. As such, it is not, in my judgment, an unwinnable case in the sense of being bound to fail even though I imagine that Alnashir is aware of the evidential difficulties he will face, subject to what Sam and Jaffer Ali might have to say. It is not the Court's task in determining the present Application to resolve those difficult factual issues and, when considering whether this is a claim which has no real prospect of succeeding, I have taken into consideration that evidence will potentially be available from Sam and/or Jaffer Ali, which will assist Alnashir's primary contention about the initial creation of this trust. In other words, there is something further that can reasonably be expected at trial. Conversely, if that evidence would completely undermine Alnashir's contention, I wonder why Adil chose not to adduce it in support of his Application, which is why I am satisfied that he had not discharged his burden to show that the action has no real prospect of success.

52. For these reasons, I dismiss paragraphs 1 and 2 of the Application.

53. Turning to para. 3 of the Application, which relates only to paragraphs 20 and 21 of the Amended Cause, Advocate Ozanne accepted that the proceedings in Gibraltar will resolve the position in relation to Seagrace Limited and that this action will not be the forum in which anything relating to that entity is determined. Advocate Davidson submitted that this meant that both paragraphs needed to be struck out because Seagrace Limited is, therefore, irrelevant to this action.

54. I disagree with some of Adil's position in relation to these references to Seagrace Limited. As Advocate Ozanne submitted, what happened to a portion of the Offshore Wealth that existed prior to 1988 is that Alnashir alleges that it was diverted into Seagrace Limited, but the way in which whatever remains in Seagrace Limited is to be divided will be resolved in Gibraltar. However, I take the view that it must be a material fact in relation to the case being advanced by Alnashir in this action that, when considering the accumulation of the assets held in the trust he claims existed, when a portion of those assets were subsequently transferred to Seagrace Limited, the Offshore Wealth on which he founds this action was necessarily diminished in value. Whilst Seagrace Limited is not an asset of the so-called Offshore Wealth Trust, and it is this aspect of the paragraphs in question which really must be rectified, what happened in 1988 will, I suspect, be highly material to what is left thereafter in the trust Alnashir alleges had been created.

55. The second sentence of para. 20 of the Amended Cause does, however, fall to be struck out in its entirety. As became clear during the hearing and has just been mentioned, it is not part of Alnashir's case that the shares in Seagrace Limited continue to form part of the so-called Offshore Wealth. As Advocate Ozanne accepted, those shares are being dealt with in Gibraltar. In other words, they left the trust in respect of which Alnashir is making his claim in this action. In addition to this second sentence, the final words in the first sentence need to be corrected because Seagrace Limited was not incorporated "*to hold funds and assets forming part of the Offshore Wealth*", but rather received what was some of the Offshore Wealth.

56. On the basis that Seagrace Limited is separate from the trust Alnashir alleges exists and in respect of which he brings this action, what happened to the shares in Seagrace Limited in 1989 is irrelevant to this action. It is not a material fact and so I agree with Advocate Davidson that para. 21 of the Amended Cause falls to be struck out on that basis.

57. As I have just stated, it is necessary within the context of this action to record that Seagrace Limited was incorporated and that assets Alnashir says formed part of the Offshore Wealth were vested in it. If the assets previously within the Offshore Wealth vested in Seagrace Limited amounted to the entirety of Abdulkarim's one-sixth share, it begs the question of what ongoing interest Abdulkarim (and so Azim, Alnashir and Adil) had in the remaining five-sixths of the Offshore Wealth Trust at that time. If Seagrace Limited benefited from less than one-sixth of the whole, the position will be different. If all of Abdulkarim's one-sixth interest went to Seagrace Limited, when Abdulkarim acquired the interests of his five brothers, as Alnashir claims occurred in 1996, a fresh declaration of trust in favour of Abdulkarim's sons arguably would need to be shown, but that will be something for another day.

58. There may, of course, be more that could be said about the consequences of the incorporation of Seagrace Limited, but I have given this example of what must, I think, follow from this step in the chronology to explain why I am minded only to strike out the words "*in order to hold funds and assets forming part of the Offshore Wealth. Following incorporation the shares in Seagrace formed part of the Offshore Wealth and in particular Abdulkarim's one-sixth share of the Offshore Wealth*" in para. 20 and the whole of para. 21. It may well be preferable to Alnashir for Advocate Ozanne to seek to amend the words left in para. 20 and, in any event, to seek to supplement them to plead that assets from the Offshore Wealth transferred to Seagrace Limited thereafter did not form part of the Offshore Wealth. However, I accept that the incorporation of Seagrace Limited is a material fact that needs to be properly pleaded, which is why I do not grant the relief sought of striking out the whole of these two paragraphs.

59. To that extent, para. 3 of the Application is granted in part, albeit that that is the main part of what was pleaded, which is now accepted by Alnashir to be based on a false premise.

Conclusion

60. For the reasons I have given, Adil's Application to strike out the Amended Cause or have summary judgment entered in his favour is mostly unsuccessful. The principal reason is that the threshold over which he has to pass to have achieved the conclusion of these proceedings against him is a high one. I understand why the Application was brought because Alnashir's pleaded case is not a straightforward one and the various attempts to reply to the *exceptions de forme* raised have not, in my view, been answered as directly as they might have been. If I have understood what Alnashir wishes to claim properly, it centres on family arrangements that were not documented, but where Adil has become involved in relation to assets held outside Kenya and not forming part of Abdulkarim's personal estate, and in which Alnashir claims always to have

had a one-third beneficial interest, to such an extent that he agreed to become, or otherwise became, a co-trustee with Abdulkarim of those assets and, since Abdulkarim's death, as Adil is the surviving trustee, Alnashir accordingly seeks relief from him in that capacity. The very nature of such a claim, ranging as it does over events that took place over a considerable period of time, may present evidential problems for both parties, but it is not my task in determining this Application to resolve those matters. As required by the applicable legal tests, I have concentrated on the pleaded case. Although Alnashir's case would, in my view, benefit from being set out more clearly than at present, there is a case that cannot, in my judgment, be said to be bound to fail and, bearing in mind the further evidence that ought to be capable of being adduced, it is not an action where there is no real prospect of success. That is why I take the view that it must be allowed to proceed rather than being brought to an end as against Adil at this stage. Paragraphs 1 and 2 of the Application are, therefore, dismissed.

61. The one area where it is clear that Alnashir's pleaded case has not moved with the events that have happened since the action began is in relation to Seagrace Limited. Paragraph 20 of the Amended Cause pleads that Seagrace is an asset of the so-called Offshore Wealth Trust on which Alnashir bases his claim, yet it was accepted on his behalf that that is an error. Once Seagrace Limited was incorporated, it has been dealt with separately and is, in any event, the subject of litigation in Gibraltar. Paragraph 21 of the Amended Cause even refers to an express deed of settlement where there is no corresponding relief sought in respect of that trust. I suspect these paragraphs remain because of the way in which Alnashir's case was pleaded when Seagrace Limited was a party. Accordingly, para. 3 of the Application is granted to the extent of striking out approximately half of para. 20 and the whole of para. 21 because those facts are not material and, in relation to the second part of para. 20, even plain wrong.

62. Before Alnashir can proceed with his action against Adil, I will further direct that the Cause needs to be amended, if only to set out properly the consequences of the incorporation of Seagrace Limited and to clarify that anything previously comprised within the Offshore Wealth transferred to Seagrace does not form part of the Offshore Wealth Trust and so is outside this action. Advocate Ozanne may also wish to give further thought to whether Alnashir's case, especially as to how Adil became a trustee, is capable of being pleaded more clearly. Advocate Davidson may also wish to consider whether there is a better way of seeking further information in relation to the matters in issue that have formed the basis of this Application. Until the pleadings have been tidied up in this fashion, any case management conference would be premature but, given the antiquity of this action, I hope that stage can be reached as soon as practicable.

63. In all the circumstances, I am minded to reserve the costs of this Application. If the parties can agree an appropriate order, they are invited to do so. If agreement cannot be reached, either party can list the matter before a suitable Interlocutory Court with a view to making an application in respect of the costs of this Application.