

The Plaintiff, acting through its trustee in bankruptcy, commenced an action by which it seeks to set aside an agreement.

[2021]GRC090

IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)

Between:

QUDOS INSURANCE A/S (IN BANKRUPTCY) BY ITS TRUSTEE, BORIS FREDERIKSEN **Plaintiff**

-and-

PRINSTAD LIMITED (IN VOLUNTARY LIQUIDATION) **Defendant**

Hearing date: 11th December 2020

Judgment handed down: 9th July, 2021

Before: Richard James McMahon, Esq., Bailiff

Counsel for the Plaintiff: Advocate J J Barclay
Counsel for the Defendant: Advocate S P Florance

Cases, texts & legislation referred to:

The Royal Court Civil Rules, 2007
The Arbitration (Guernsey) Law, 2016
Yaddehighe v Credit Suisse Trust Limited 2007-08 GLR 282
Cherub Investments Ltd v Channel Islands Aero Club (Guernsey) Ltd (unreported, 13 January 1982)
Tranquillity Holdings Limited v Invista Real Estate Investment Management (CI) Limited (unreported, 13 January 2015)
Vardinoyannis v Ansol Limited (unreported, 20 November 2001)
Flightlease Holdings (Guernsey) Limited v International Lease Finance Corporation (unreported, 26 October 2005; 2006-06 GLR Note 11)
In re the Esteem Settlement 2002 JLR 52
Golder v Société des Magasins Concorde Ltd 1967 JJ 721
Pothier, *Traité des Obligations* (1821 ed.)
Poingdestre, *Les Lois et Coutumes de l'Île de Jersey* (1928)
Daloz, *Répertoire*, vol. 33, *Obligations* (1860 ed.)
Justinian, Book IV, Title VI (*de actionibus*)
Feniks Sp. Z o.o. v Azteca Products & Services SL (Case C-337/17)
French Code Civil (2006 and 2019 editions)
Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd [2019] AC 271
Dacey, Morris and Collins on the Conflict of Laws (14th and 15th eds.)
Baring Brothers & Co Ltd v Cunninghame District Council [1997] CLC 109
OJSC Oil Company Yugraneft (in liquidation) v Abramovich [2008] EWHC 2613 (Comm)

Mackender v Feldia AG [1967] QB 570

Dimskal Shipping Co SA v International Transport Workers Federation [1992] 2 AC 152

Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC [2001] QB 825

Macmillan Inc v Bishopsgate Investment Trust plc (No 3) [1996] 1 WLR 387

Introduction

1. The Plaintiff, Qudos Insurance A/S, acting through its trustee in bankruptcy, Boris Frederiksen, has commenced an action by which it seeks to set aside an agreement dated 8 October 2018, which is headed “Letter Agreement” and so referred to as “the October Letter Agreement”, made between that entity and the Defendant, Prinstad Limited, which is now in voluntary liquidation. If successful, the effect would be that the agreements that were replaced by the Letter Agreement dating from earlier in 2018 would regulate the obligations between the two companies. The basis on which the action is pleaded is summarised at para. 45 of the Cause, tabled on 26 June 2020, which states:

“In the premises the October Letter Agreement was entered into on behalf of Qudos and Prinstad with an intention on the part of each of them or, in the alternative, on the part of Qudos to place its assets beyond the reach of creditors and thereby cause them prejudice.”

2. For the time being, the Defendant has confined its defence to this action to pleading an *exception de fond*. Les Defences were tabled on 24 July 2020. In its Amended Les Defences dated 20 November 2020, that *exception* is set out in para. 4:

“The Defendant avers that the Set Aside Claim is not governed by the law of the Island of Guernsey and, as a result, does not contain any cause of action capable of being heard or determined by the Court, on the following grounds:

- (a) *The Set Aside Claim is pleaded on the basis that the October Letter Agreement is voidable and/or should be set aside.*
- (b) *The question of whether a contract should be set aside or avoided is to be determined by the proper (that is, applicable/governing) law of that contract.*
- (c) *Further, and in any event, the Plaintiff has now confirmed that the Set Aside Claim is a Pauline action. In the premise, the Set Aside Claim is governed by the proper law of the restitutionary obligation the subject of the Set Aside Claim, being the applicable/governing law of the October Letter Agreement.*
- (d) *By clause 6 of the October Letter Agreement, the Plaintiff and the Defendant agreed that such agreement “shall be governed by and construed in accordance with the law of Denmark excluding the application of its conflict of laws rules.” This reflected the law of the contractual relationship between the Plaintiff and the Defendant, as per their agreements preceding and/or referred to in the October Letter Agreement. Accordingly, the applicable/governing law of the October Letter Agreement is the law of the Kingdom of Denmark.*
- (e) *Further or in the alternative, if the restitutionary obligation the subject of the Set Aside Claim is not governed by the applicable/governing law of the October Letter Agreement, then it is governed by the law with which that obligation has its closest and most real connection. This is also the law of the Kingdom of Denmark.”*

3. In addition to pursuing this *exception de fond*, the Defendant has made an application dated 15 September 2020 pursuant to rule 52(2)(a) of the Royal Court Civil Rules, 2007 to strike out the Set Aside Claim in the Cause. The Cause also contains a Breach of Contract Claim, but that element of the action is currently stayed pursuant to an order made under section 6(4) of the Arbitration (Guernsey) Law, 2016.
4. The hearing of the Defendant's *exception de fond* and strike out application in relation to the Set Aside Claim took place on 11 December 2020. I reserved judgment. I also gave the parties the opportunity to make any additional submissions they wished to make in writing, particularly in relation to the approach that should be taken to the Plaintiff's Pauline action. Their further brief written submissions were forwarded to me just before Christmas. Unfortunately, it has taken me longer than I would have liked to be able to consider them properly and prepare this judgment, for which I apologise.

Legal principles

5. It is accepted by the Advocates that the approach to an *exception de fond* is to follow what the Court of Appeal held in *Yaddehighe v Credit Suisse Trust Limited* 2007-08 GLR 282, citing with approval the test expressed by Hoffmann JA in *Cherub Investments Ltd v Channel Islands Aero Club (Guernsey) Ltd* (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 the trial – which would allow the Plaintiff to succeed in the action ...”.

In other words, the Plaintiff's Cause is treated as if everything pleaded is capable of being proved, but consideration is given as to whether, even in those circumstances, the claim is going to fail.

6. In relation to the Defendant's application to strike out on the basis that the Cause discloses no reasonable grounds for bringing the action, reference is made to the summary of the applicable principles extracted from previous decisions by Bailiff Collas in *Tranquillity Holdings Limited v Invista Real Estate Investment Management (CI) Limited* (unreported, 13 January 2015, at para. 47):

- 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 Budron* [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 be properly 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 the 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)).*

- 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 & Engineering 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 elements 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).”*

7. Under both heads on which the Defendant relies, there is a degree of overlap. The Plaintiff's case is taken at its highest, with the Defendant arguing that it is an unwinnable case and there is no usefulness in permitting it to proceed further. It is acknowledged that this is a high hurdle to surmount. If the *exception de fond* or the strike out in principle succeeds, it is then necessary to consider whether the unwinnable nature of the Plaintiff's case is capable of being resolved through amendment to the Cause.
8. Given that the preliminary issue hearing turns on the pleaded case, it is not entirely clear to me why there has been evidence in support. One of the joint liquidators of the Defendant, Jamie Toynton, has sworn an Affidavit dated 14 September 2020. He sets out a little background about the Defendant, which was only incorporated in Guernsey on 5 February 2018 and was placed into voluntary liquidation on 5 June 2019, at which time it had a sole corporate director. He explains further that the Plaintiff is registered in Denmark and operated as an insurance company, being placed into solvent liquidation on 27 November 2018, but a Danish court then made a bankruptcy order on 20 December 2018. More helpfully, he exhibits copies of the various agreements between the Plaintiff and the Defendant. He further explains that there had been correspondence with Mr Frederiksen about the claim that the Plaintiff had indicated it was minded to make and the need for a suspension agreement, stopping time running for any claim, particularly one under the legislation in Denmark relating to bankruptcy, that would be subject to a limitation period or any objections that could be raised regarding inaction. There were a number of variations to the suspension agreement, the last of which suspended time running until 1 May 2020. It also exhibits various items of correspondence relating to the issues now raised by the *exception de fond* and the strike out application.
9. The other evidence before the Court are two Affidavits from Danish lawyers. The Plaintiff has instructed Jesper Saugmandsgaard Oe. His Affidavit was sworn on 12 November 2020. The Defendant has instructed Dan Terkildsen. His Affidavit was sworn on 26 November 2020. Between them they offer some explanation about the process in Denmark affecting the Plaintiff.

There is, though, little need to know anything about these features because the determination of the *exception de fond* and strike out application will consider the Guernsey law position. I have, though, considered what they set out so far as it is helpful to do so.

Parties' contentions

10. The Defendant, through Advocate Florance, suggests that the central issue is whether the Plaintiff's claim to set aside the Letter Agreement from October 2018 ("the Set Aside Claim") is governed by Guernsey law. If it is not, as the Defendant asserts, then the *exception de fond* should be upheld. However, if it were to be found to be governed by Guernsey law, or if the Court did not uphold the *exception de fond*, then the strike out application should produce the same outcome of ending these proceedings against the Defendant.
11. The Defendant submits that the Plaintiff's claim is a Pauline action. Because the Cause does not state that it is subject to any foreign law, clarification was sought from the Plaintiff, which confirmed that the action is being advanced in accordance with the customary law of Guernsey. The Defendant has also clarified that it is not raising any challenge to forum, recognising that this Court has jurisdiction as of right over a Guernsey company (in accordance with the principle in *Vardinoyannis v Ansol Limited* (unreported, 20 November 2001), confining itself to the argument that the Court simply cannot entertain the Plaintiff's claim and so has no power to adjudicate upon the Set Aside Claim. This is because Guernsey's private international law principles follow those of English law and so the governing law of the Plaintiff's claim is not Guernsey law, but rather Danish law.
12. In any event, if the *exception de fond* fails, the Defendant argues that what the Plaintiff has pleaded is not a Pauline action because the elements of such an action are not present. In particular, the Defendant contends that the Pauline action involves a creditor seeking to set aside a transaction between its debtor and a third party, whereas the facts pleaded in the Cause show that the transaction the Plaintiff is seeking to set aside is between it and the Defendant and does not involve the required third party. This is not something that can be cured by amendment.
13. In response, the Plaintiff has accepted that the Set Aside Claim it is making is not governed by any law other than that of Guernsey. Indeed, this is clear from the fact that there is no reference in the Cause to relying on any foreign law. It is submitted that the approach of the Defendant overlooks that Guernsey is the place where the wrongful acts were carried out, resulting in a device being used deliberately to prejudice the creditors of the Plaintiff company. The Plaintiff's position is that the relief sought arises from a fraud perpetrated on the creditors generally. As such, the Defendant's categorisation of the action as restitutionary does not fit neatly into the English rules on conflicts of laws. It is also suggested that the Plaintiff is really the trustee in bankruptcy, Mr Frederiksen, acting on behalf of those creditors, so he is a third party to the transaction he seeks to set aside so as to restore the better position for the creditors under the agreements that were replaced in October 2018 by the Letter Agreement.
14. In relation to the strike out application, the Plaintiff adds that this is an area where the law is developing, there having been only one Guernsey case referring to the availability of a Pauline action domestically, and so it is an inappropriate case to be struck out without first considering the evidence.
15. The Defendant's reply to these arguments points out that the wrongful acts concerned actually involved those acting for the Plaintiff, none of whom was acting in Guernsey. Advocate Florance submits that, even if one has to look for where the enrichment occurs as the connecting

factor, this still points towards Denmark rather than Guernsey. Accordingly, applying established principles of private international law, there is no basis for the Plaintiff to bring the action under Guernsey law, so no cause of action exists on which it can rely.

16. The further researches of the Advocates following the hearing confirm what they had both submitted about the origins of the Pauline action. It derives from Roman law. However, Advocate Barclay has pointed to some material in French law suggesting that there is a form of the action that applies to an office holder, for example like Mr Frederiksen, being able to bring the action on behalf of creditors. This is an issue which the courts in the Channel Islands have not previously had to consider. Advocate Florance acknowledges that an office holder can bring a Pauline action, but notes that it is done in the name of the company and so does not constitute a different discrete form of the action where different elements are involved. Advocate Barclay also develops the submission that there is in reality no conflict of laws involved where it is common ground that the courts in Denmark have no jurisdiction to exercise in the matter.

The Pauline action in Guernsey

17. Because it is central to the parties' arguments, I will start by considering the nature of a Pauline action. So far as Guernsey is concerned, the only case to which the Court has been referred is *Flightlease Holdings (Guernsey) Limited v International Lease Finance Corporation* (unreported, 26 October 2005; 2005-06 GLR Note 11). In that case, the Court heard applications for leave to amend and to strike out. Leave was granted to plead a Pauline claim against any company which received money from two of the parties to the proceedings flowing from alleged fraudulent transactions. In other words, this decision did not consider the finer details of any such claim because it had not yet been pleaded. As it was put in para. 60, the opportunity was being given to plead a Pauline claim, where available, without "*at this stage concluding either that a reasonably arguable Pauline claim can be pleaded against any particular company, or that it cannot*".
18. The position in Guernsey law was summarised by reference to two paragraphs set out in the skeleton argument that had been produced by Advocate Wessels, where that summary had not been challenged by Advocate Paul Richardson. Those paragraphs were not, therefore, subjected to any critical analysis. They summarise the position in Jersey law taken from the judgment of the Royal Court of Jersey in *In re the Esteem Settlement* 2002 JLR 52 as follows:

"132. *In Esteem the Royal Court of Jersey decided that the elements of the Pauline action were as follows:*

- (a) *The person bringing the Pauline action must have been a creditor at the time of the transaction under attack.*
- (b) *For the purposes of the Pauline action, a person is properly described as a "creditor" if the facts giving rise to his claim pre-date the transaction under attack even if such person does not establish that he is a creditor until some date in the future.*
- (c) *The creditor seeking to set aside a transaction must show that the debtor was insolvent at the time of the transaction under attack, or rendered insolvent by that transaction.*
- (d) *The debtor's insolvency is measured on the balance sheet test.*

- (e) *In order to succeed in an action to set aside a transaction, the creditor must show that the debtor carried out the transaction with the intention of defrauding his creditors.*
- (f) *If the debtor carried out the transaction with more than one purpose, it suffices that the dishonest intention to defraud was a substantial purpose of the transaction.*
- (g) *The Pauline action is by nature a revocatory action which, if successful, leads to the setting aside of the transaction being attacked. The Pauline action does not give rise to any entitlement to compensation either from the debtor or the person with whom the debtor dealt with as part of the transaction under attack.*
- (h) *There are a number of possible defences to a Pauline action, including a defence based upon change of position.*

133. *The Pauline action is a form of relief that a creditor can bring in respect of the affairs of his debtor. The Pauline action is not a means by which the Respondent can establish itself as a creditor of any of the Guernsey Companies since the Respondent's locus as a creditor is an essential pre-condition to the Respondent's ability to bring the Pauline action."*

19. On the basis that the law in Guernsey is being adopted from the law in Jersey, it is necessary to consider in greater detail what was actually discussed in the *Esteem Settlement* case. The facts are briefly summarised in the headnote. The case was brought by a company owned by the Kuwait Investment Office ("KIO"). The first defendant was chairman of both the plaintiff company and the KIO. Over a period of some 18 months, he defrauded the plaintiff of US\$430 million, of which his personal share was US\$120 million. The proceeds of the fraud were paid into two accounts. The plaintiff obtained judgment against the first defendant in England for US\$687 million. Prior to the fraud, the first defendant had established the discretionary Jersey law Esteem Settlement, as well as other structures. Of particular note was the transfer on 14 March 1990 by the first defendant of £5 million to the trustee of the Esteem Settlement from one of the accounts into which the proceeds of the fraud had been paid. There were other transactions allegedly relating to the proceeds as well. The proceedings concerned a proprietary claim or alternatively a claim in restitution for £1,276,686 plus a Pauline action to set aside all transfers made into the Esteem Settlement, another trust and an identified entity at any time after the fraud began in May 1988 on the ground that these transfers were made in fraud of the plaintiff as the first defendant's creditor. The court allowed the proprietary tracing claim, rejected the claim in restitution and allowed the Pauline claim in part.

20. Section E of the judgment contains a detailed analysis of the elements of the Pauline action and then applies those elements to the particular factual issues that needed to be resolved, which were set out in para. 166 and not all of which are directly relevant to the present case. I consider it helpful to jump first to the position summarised at para. 261:

"In briefest summary, therefore, we hold that a creditor, whose claim predates the disposition in question, may set aside a disposition made by his debtor where the debtor is insolvent at the time of the disposition or becomes insolvent as a consequence of it, provided that the disposition is made with an intention on the part of the debtor to prejudice his creditors and provided that prejudice is indeed caused. For these purposes, the claim of a creditor is deemed to arise upon the occurrence of the facts which give rise to the creditor's cause of action, regardless of the date upon which the creditor's claim is upheld by a court. The right of action against an innocent volunteer who was a party to the disposition is restricted to the continuing enrichment in the

hands of the recipient, who will therefore have available to him a change of position defence.”

21. Support for the existence of the Pauline action as a matter of Jersey law was found in a previous decision, *Golder v Société des Magasins Concorde Ltd* 1967 JJ 721. In that case, the court gave judgment on the question of liability in a case claiming wrongful dismissal and conspiracy to procure that wrongful dismissal. The quantum of damages was resolved later. Between those dates, what followed were some transactions that resulted in the assets of the company that was the judgment debtor diminishing to such an extent that those judgments were “*likely to prove fruitless, so that the plaintiff will be deprived of that which this Court considers to be justly due to him*” (page 729). By reference to principles expounded by Pothier in his *Traité des Obligations* (1821 ed.), it was found that the judgment on liability created an obligation, even though the amount to be paid had not then been quantified. The court noted (page 731) that “*It is difficult to believe that any legal system would readily permit a debtor so to manipulate his affairs that without detriment to himself he could defeat his creditor.*”
22. In that case, as repeated in the *Esteem Settlement* case, reference was made to Poingdestre’s *Les Lois et Coutumes de l’Ile de Jersey* (1928, at page 210):

“Nul débiteur ne peut aliéner ni transporter à un autre, par aucun acte solennel, en fraude (in damnum, au préjudice ou dommage) de ses créanciers chirographaires et personnels tant seulement, quand mesme ce seroit à une personne ignorante de la fraude: et que s’il le fait, lesdits créanciers qui auront été fraudés, seront reçus a rappeler ladite alienation.”

Further, the inspiration for this passage was taken from the Roman Law Pauline action, of which Dalloz, *Répertoire*, vol. 33, *Obligations* (1860 ed. para. 954) explained:

“C’est l’action connue dans le droit romain sous le nom d’action paulienne. Cette action, qui tire son nom du prêteur qui l’avait introduite dans le droit romain, permettrait aux créanciers de faire révoquer les actes qui avaient été faits en fraude de leurs droits, actes d’aliénation, d’obligation, de libération, actes positifs ou négatifs. Mais pour que les actes fussent réputés frauduleux, en droit romain, il fallait qu’ils réunissent la double condition de l’intention de frauder et du préjudice réel, consilium fraudis et eventus damni.”

Similarly, in Pothier’s *Traité des Obligations* (para. 153), it is also stated:

“Observez néanmoins que si le débiteur, lorsqu’il a fait passer à un tiers la chose qu’il s’était obligé de me donner, n’étoit pas solvable, je pourrais agir contre le tiers acquéreur pour faire rescinder l’aliénation qui lui en a été faite en fraude de ma créance, pourvu qu’il ait été participant de la fraude, conscient fraudis, s’il étoit acquéreur à titre onéreux: s’il étoit acquéreur a titre gratuit, il ne seroit pas même nécessaire pour cela qu’il eût été participant de la fraude.”

23. These origins in Roman Law led Counsel to refer to how the action was put in Justinian, Book IV, Title VI (*de actionibus*), no. 6:

“Item si quis in fraudem creditorum rem suam alicui tradiderit, bonis eius a creditoribus ex sententia praesidis possessis, permittitur ipsis creditoribus, rescissa traditione, eam rem petere, id est dicere eam rem traditam non esse et ob id in bonis debitoris mansisse.”

The 1932 translation by S.P. Scott renders this passage as:

“Moreover, where anyone has transferred his property to another for the purpose of defrauding his creditors, and the latter have been placed in possession of said property by the decision of a magistrate, the creditors are authorized to set aside the transfer and bring an action for the property, that is to say, allege that it never was transferred and for this reason remained a part of the property of the debtor.”

24. From these Roman Law origins, various continental systems of law have developed their own forms of action derived from such an *actio pauliana*. Advocate Barclay’s researches led to him drawing attention to the summary given by Advocate General Bobek in his Opinion dated 21 June 2018 in the European Court of Justice in Case C-337/17 *Feniks Sp. Z o.o. v Azteca Products & Services SL*. The historical description of the action starts at para. 29. I will quote the passage but without referring to the footnotes which give the authority for each statement:

“29. As Advocate General Ruiz-Jarabo Colomer put it, even in Roman times, *actio pauliana* had already evolved from being ‘an enforcement instrument which granted the creditor the right to sell the debtor as a slave’, to a procedure ‘which enabled a creditor to revoke any acts carried out fraudulently and to his detriment by bringing an ‘action against a third party who has acquired the disputed asset’.

30. In the classical period, it would appear that two particular remedies to address the fraudulent transfer of assets existed: *restitutio in integrum ob fraudem* and *interdictum fraudatorium*.

31. First, *restitutio in integrum ob fraudem* allowed the insolvency administrator (*curator bonorum*) to request the respective magistrate to order the reintegration of the fraudulently transferred assets back to the estate of the debtor. This remedy was usually triggered after the initiation of the insolvency proceedings but before the execution of the assets. It allowed the fraudulently transferred assets to be taken into consideration in the execution of the debtor’s estate.

32. Second, the *interdictum fraudatorium* was a remedy for a particular creditor. The affected creditor could request the magistrate to issue an order (*interdictum*) to restore the fraudulently transferred assets to the debtor’s estate, so that the affected creditor could claim the damages caused by such a transfer.

33. The Justinian codification seems to have merged these two remedies into one action named *Pauliana*. Interestingly enough (and perhaps with some present-day relevance), it was apparently believed that the nature of the action is sufficiently similar irrespective of whether it is filed within the insolvency procedure or by an individual creditor, thus justifying the fusion of both previously separate remedies under one heading.

34. In any case, there appears to be a consensus on three defining elements of such an action: First, effective harm (of an objective nature) which existed at the time the action was filed (*eventus damni*); second, the debtor’s intention to harm its creditors (*consilium fraudis*), that is, a will on the part of the debtor to carry out an *eventus damni*; and third, the bad faith of the third party (*scientia fraudis*), the awareness of the third party that the fraudulent act was carried out with the *consilium fraudis* of the debtor.”

25. The Advocate General’s Opinion next explains the various current national forms of the action:

- “35. Today, *actio pauliana* is generally used to refer to a specific type of legal remedy that provides a creditor with the possibility to have an act declared ineffective with respect to that creditor, that act having been carried out by a debtor to diminish its assets by passing them to a third party. The creditor typically brings the action directly against the third party. The notion of *actio pauliana* is described as a ‘series of techniques for granting protection to creditors in cases where the debtor diminishes his seizable assets to avoid paying his debts’.
36. However, on a closer look, the common elements give way to many differences. Perhaps not in type, but certainly in how the instrument is executed. Metaphorically, much like in *Cloud Atlas*, a number of (general) themes and motives remain the same throughout the film, while the (actual) times, faces, and locations in which those themes are set and rerun keep changing. From a comparative perspective, there are currently two common elements, but also at least two significant divergences amongst the Member States.
37. The first common element is the triangular relationship between the three parties based on (i) the existence of a debt between a debtor and a creditor, (ii) a transaction between the debtor and the third party, and (iii) the existence of an ‘intent to defraud’ on the part of the debtor – as well as the transferee’s awareness of that fact. In this triangular relationship, the function of *actio pauliana* is essentially protectionary in all systems: limiting the legal effects vis-à-vis the creditor of the disposal of the debtor’s assets where such a disposal hinders the creditor’s possibilities of collecting the debt.
38. A second relatively common feature is an internal division of *actio pauliana* between its more general form in the context of civil law and its more specific expression in the context of insolvency. The main difference between these two categories ‘lies in the effects which each action produces’: as in civil law effects are ‘confined to the individual creditors who have brought the action’ whereas under the insolvency rules, the benefit concerns all the creditors concerned in the insolvency proceedings.
39. As far as the differences are concerned, first, at the level of the conceptual classification of *actio pauliana*, there does not seem to be a consensus as to whether *actio pauliana* constitutes a right in rem, attached to the assets fraudulently transferred, or a right in personam, attached to a specific creditor. According to some, the latter approach seems to prevail ‘even if certain proprietary effects [of *actio pauliana*] are recognised’.
40. That differentiation in fact has much deeper roots. It has a link with the systemic perception and classification of *actio pauliana* in the respective legal system. Some national laws provide for that action under the procedural provisions for asset execution. Other systems regulate it by substantive law rules such as those applicable to contracts and obligations. There are also legal systems that conceive of the action as a general remedy, systematically connected to the issue of the validity or opposability of legal acts. The latter scenario also seems to be the case of the Polish rules quoted in the order for reference.
41. Second and more importantly for the present case, a comparative study reveals further differences when it comes to classifying *actio pauliana* for the purpose of determining the international jurisdiction and the law applicable to it. On both accounts, the fact that *actio pauliana* concerns a triangular relationship

between the creditor, debtor and a transferee creates difficulties in classification of the legal relations created in this context. Those difficulties stem from the multiplicity of connecting factors and interests at stake, that multiplicity making it problematic to determine ‘any of these interests as predominant and guiding’.”

26. This additional background information about the evolution of the action across the European Union is informative because it potentially supports a wider form of relief being available than the version dealt with in the Jersey cases, in both of which there was already a judgment creating a relationship founded on the law of obligations. Moreover, it highlights that there might be a difference where the action is brought within the context of insolvency proceedings where the benefit of it is intended to benefit the class of creditors as opposed to just the particular creditor bringing the action.
27. Advocate Barclay’s supplemental submissions build on this distinction through referring to the French Code Civil from two different points in time. First, in the 2006 edition, Art. 1167 provided “*Ils peuvent aussi, en leur nom personnel, attaquer les actes faits par leur débiteur en fraude de leurs droits*”, where the commentary explains the “*conditions de l’action paulienne*” before moving on to consider “*exercice de l’action*”:

“16. Procédure collective. Le droit conféré aux créanciers peut également être exercé, en leur nom et dans leur intérêt collectif, s’agissant d’une action tendant aux mêmes fins, par le représentant des créanciers ainsi que par le commissaire à l’exécution du plan. ... Le droit exclusif reconnu au représentant des créanciers pour agir au nom et dans l’intérêt de ceux-ci lorsque le débiteur fait l’objet d’une procédure collective n’interdit pas l’exercice par l’un d’entre eux de l’action paulienne contre tous les actes faits en fraude de ses droits par le débiteur.”

28. Following a measure passed and effective in 2016, Art. 134-2 provides that “*Le créancier peut aussi agir en son nom personnel pour faire déclarer inopposables à son égard les actes faits par son débiteur en fraude de ses droits, à charge d’établir, s’il s’agit d’un acte à titre onéreux, que le tiers cocontractant avait connaissance de la fraude*”. Again, the commentary on “*exercice de l’action*” (now para. 26) begins with the same first sentence before continuing:

“Mais le liquidateur n’est pas recevable à exercer l’action paulienne, faute de pouvoir prétendre agir dans l’intérêt collectif des créanciers, dans une hypothèse où seule une partie des créanciers a intérêt à voir juger que la déclaration d’insaisissabilité leur est inopposable pour cause de fraude paulienne. ... Le droit exclusif reconnu au représentant des créanciers pour agir au nom et dans l’intérêt de ceux-ci lorsque le débiteur fait l’objet d’une procédure collective n’interdit pas l’exercice par l’un d’entre eux de l’action paulienne contre tous les actes faits en fraude de ses droits par le débiteur. ... Dans ce cas, l’inopposabilité de l’acte résultant de l’admission de l’action paulienne n’a d’effet qu’à l’égard du créancier qui a agi.”

This section of the commentary then refers to a decision dated 16 June 2016 relating to procedure (“*Sur la compétence procédurale*”), to which Advocate Barclay has referred, which states: “*l’action paulienne du liquidateur, distincte de l’action en annulation des actes passés pendant la période suspecte, n’est pas soumise à la compétence exclusive du tribunal de la procédure collective prévue par l’art. R. 662-3 C, com.*” On the basis that no court in the Channel Islands has been asked to determine whether a Pauline action is available to an office holder as well as to a creditor, he submits that there is no reason in principle why it should not be found to be available for the benefit of creditors generally and collectively.

Applicable law

29. With that background to the development of the Pauline action in Guernsey, adopting the approach from Jersey, and considering it a little more widely, I can turn to what Advocate Florance has submitted is the central question, namely whether the applicable law of the action is not Guernsey law.
30. In a broad sense, there is common ground in the present case that Guernsey's private international law principles follow those found in English law. This was the conclusion reached by the Judicial Committee of the Privy Council in *Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd* [2019] AC 271, similarly on the basis that this was common ground between the parties, except where there has been any modification by statute (para. 64). Advocate Barclay points out that what is stated in the majority opinion delivered by Lord Hodge DPSC does not actually support Advocate Florance's submission that the principles are the same, but as a general proposition, Guernsey law does draw its principles on conflicts of law from those found in English law. As further explained in para. 65:

"All counsel treated as a starting point the following well-known three stage test set out by Mance LJ in Raiffeisen Zentralbank Österreich AG v Five Star Trading Ilc [2001] QB 825, para 26, namely: (i) characterisation of the relevant issue; (ii) selection of the rule of conflict of laws which lays down a connecting factor for that issue; and, (iii) identification of the system of law which is tied by that connecting factor to that issue."

Both Advocates have made their submissions in light of this three-stage test applying in this case. However, before turning to that test, I must first deal with Advocate Barclay's suggestion that no question of the conflict of laws arises anyway.

31. On behalf of the Plaintiff, it is said that the Pauline action is a customary law remedy predicated on wrongful acts carried out in Guernsey by third parties. Because there is no forum challenge, there is no good reason not to apply Guernsey law to the Plaintiff's action. There are no competing jurisdictional or systems of law that fall to be considered. The approach of Advocate Florance contending that the Danish choice of law provisions in the contractual relationship between the parties somehow displaces these Guernsey law remedies now being pursued is artificial. The parties had agreed in correspondence that, in the absence of any submissions to the Danish courts, which did not occur within the period concerned, the courts in Denmark have no jurisdiction to exercise.
32. In reply, Advocate Florance highlights the opening paragraph to *Dicey, Morris and Collins on the Conflict of Laws* (15th ed.), which summarises the nature and scope of the conflict of laws:

"The branch of English law known as the conflict of laws is that part of the law of England which deals with cases having a foreign element. By a "foreign element" is meant simply a contact with some system of law other than English law. Such a contact may exist, for example, because a contract was made or to be performed in a foreign country, or because a tort was committed there, or because property was situated there, or because the parties are not English."

It is self-evident that the parties to whatever the obligations are that are involved do not both come from the same country. This is not an instance of arrangements between two Guernsey entities where one is seeking relief against the other and where this Court will naturally apply the internal or domestic law of Guernsey. There is a foreign element and so the principles of private international law are engaged. I will proceed to consider the Defendant's case on that basis.

33. Advocate Florance has referred to Rule 230 in *Dicey, Morris and Collins*. (The Rule is taken from the 14th ed. from 2006 because later editions deal with a new approach under the Rome

II Regulation, which has no application in Guernsey.) Rule 230 is found in Chapter 34 dealing with restitution. This arises because he characterises the relevant issue of the Pauline action between the parties as being one of a restitutionary nature so the first contentious issue relates to selecting the applicable rule of conflict of laws laying down the connecting factor to that issue. This version of Rule 230 stated:

“(1) *The obligation to restore the benefit of an enrichment obtained at another person’s expense is governed by the proper law of the obligation.*

(2) *The proper law of the obligation is (semble) determined as follows:*

(a) *If the obligation arises in connection with a contract, its proper law is the law applicable to the contract;*

(b) *If it arises in connection with a transaction concerning an immovable (land), its proper law is the law of the country where the immovable is situated (lex situs);*

(c) *If it arises in any other circumstances, its proper law is the law of the country where the enrichment occurs.”*

34. The primary position of the Defendant is that Rule 230(2)(a) applies. To the extent that Rule 230(2) applies at all, the Plaintiff submits that it must be para. (c). Advocate Florance has referred to the commentary on clause (2)(a) of the Rule found in para. 34-020 to explain why it applies:

“Although the obligation to restore an unjust benefit does not arise from a contract, it may, and very frequently does, arise in connection with a contract. This is the case where a party seeks to recover money paid pursuant to an ineffective contract, e.g. by reason of a failure of consideration or as a repayment of money paid under an illegal contract or where he claims a quantum meruit for work done or services rendered under a contract which turned out to be void. In all these and similar cases, it is submitted that the existence and scope of the obligation to restore the benefit are in principle governed by the law which governs the contract, or by what would have been the governing law of the contract, if it had been validly concluded.”

35. Whilst Advocate Florance has acknowledged that the Court of Session did not follow this approach in *Baring Brothers & Co Ltd v Cunninghame District Council* [1997] CLC 109, he relies upon the decision reached in a later case in England, *OJSC Oil Company Yugraneft (in liquidation) v Abramovich* [2008] EWHC 2613 (Comm). In this case, Christopher Clarke J distinguished between (a) and (c) in clause (2) of the Rule (at para. 247):

“If there is a contractual or similar relationship between the claimant and the defendant, the law of that relationship is likely to govern. If the parties are complete strangers and the defendant is a recipient from a wrongdoer, the place of receipt is likely to be relevant, although that may well not be so if, for instance, the place of receipt is a transitory home. If the defendant is the primary wrongdoer or the instigator of, or someone vicariously liable for, the wrongdoing, it is likely to be relevant to examine where the wrongdoing and its effects took place. As Dicey puts it at 34-06:

“[2 (c)] is not to be applied whenever the centre of gravity of the factors relevant to the obligation indicates that the proper law is different; and this will be more likely when the claim arises in connection with a wrong committed by the defendant against the claimant.”

36. He further cites *Mackender v Feldia AG* [1967] QB 570 and *Dimskal Shipping Co SA v International Transport Workers Federation* [1992] 2 AC 152 as supportive of the proposition that one should look at the proper law of the putative contract that is to be avoided when looking at the obligation to return what has passed under that voidable contract. However, neither of these cases is directly in point in relation to the law governing the obligation between the Plaintiff and Defendant in the present case, and so I do not find it necessary to consider either further.
37. On behalf of the Plaintiff, Advocate Barclay does not accept that the Pauline action, even if restitutionary in nature, fits neatly into the operation of Rule 230. This is because the Plaintiff's entitlement to relief is founded on the fraud perpetrated on creditors generally where the October Letter Agreement was just the vehicle by which that fraud was perpetuated. If, as he suggests, one is looking for the law which has the closest and most real connection with the obligation (adopting the language used in the *Abramovich* case and also the formulation of Lord Penrose in the *Baring Brothers* case: "*the proper law of the obligation is the law of the country with which, in the light of the whole facts and circumstances, the critical events have their closest and most real connection*" (page 127)), the wrongdoing took place in Guernsey.
38. In his supplemental submissions, Advocate Barclay develops what he had to say about the first stage of the test in his oral submissions. The Plaintiff does not consider that a Pauline action can be characterised readily as something covered by Rule 230 in any event. This is for the simple reason that no English court would be seized of a Pauline action and so Advocate Florance's ready characterisation of the application of this Rule because the Pauline action has been described in Jersey as restitutionary means that this is an attempt to fit Guernsey law square pegs into English law round holes.
39. I have some sympathy with that submission. I have noted first how in the *Esteem Settlement* case, the court pointed out (at para. 165) that, by referring to the claim as a Pauline action:

"... it is important not to be misled by the label. It does not mean that we are considering the exact nature of the action in Roman Law and how that would have applied to the particular case. We are endeavouring to establish the parameters and principles of Jersey law in relation to transfers made to defeat creditors."

In a similar vein, it is difficult to categorise an action that derives from civil law rather than a common law heritage in the light of principles of common law nomenclature. I also find a degree of attraction in what Lord Briggs had to say in the *Investec* case (at para. 241) that "*I do not regard a case about the private international law of Guernsey, in a Guernsey appeal, as an appropriate platform upon which*" to decide how English private international law should develop. Through attempting to use Rule 230 as if it were almost a statutory formulation, Advocate Florance runs the risk of doing this in reverse.

40. As a result, I have reminded myself that what needs to be resolved here is how to treat the Pauline claim being made in this action by the Plaintiff against the Defendant in relation to Guernsey principles of private international law. Moreover, that falls to be considered in the context of the Defendant's *exception de fond* and its strike out application, where what is pleaded by the Plaintiff is treated as having been proved.
41. Having previously quoted para. 45 of the Cause, it is necessary to consider what the October Letter Agreement was intended to achieve and on what basis. It dealt with the previous agreements between the parties, which were stated to be fully and finally settled. Those agreements included an earlier agreement, termed "the February Letter Agreement", which related to a share purchase agreement relating to Alpha SPV II ApS and how part of the payment for those shares had been agreed by way of a loan of DKK 10 million, repayable over four years, and in respect of exploiting certain portfolios of the Defendant over the same period in

return for payment. The second agreement settled by the October Letter Agreement was a PIK loan note for DKK 20 million issued by the Defendant in favour of the Plaintiff company, where the principal and interest had been payable on 5 March 2022. This was backed with a pledge of some shares in Alpha Insurance A/S. Finally, there was a share purchase agreement dated 13 March 2018 relating to shares in Seal Insurance Ltd, where the purchase price was €3.7 million, with another related loan agreement by which the Plaintiff loaned the Defendant €4 million, repayable with accrued interest on 13 March 2022, which also involved a pledge of the shares being purchased. The amount loaned ended up being slightly higher than €4 million and so valued at approximately DKK 30 million. The aggregate amount owed by the Defendant was, therefore, around DKK 60 million.

42. Paragraph 38 of the Cause sets out some specific terms of the October Letter Agreement:

- a. *“The DKKm 10 loan note from Qudos to Prinstad is terminated and off set in the payment obligations of Qudos for the right to exploit the “Assorted portfolio renewal rights from Alpha” with a net present value of DKK 11.8 million, thus resulting in a net obligation on Qudos to pay [Prinstad] DKKm 1.8.”;*
- b. *“The Loan agreement between the Parties relating to the investment in SEAL Ltd is terminated with the effect that [Prinstad] no longer owes [sic] Qudos money in relation to this, and that Qudos instead directly has the investment stake in and funding obligations towards SEAL Ltd by the payment by [Prinstad] in the form of Bonds in the equivalent amount of EURm 4 This includes any unpaid interests [sic];” and*
- c. *“The DKKm 20 PIK Loan of March 2018 from Qudos to Prinstad is terminated and settled one and for all by the payment by Prinstad in the form of Bonds in the equivalent amount of DKKm 18.2 as the debt, cf. above, owed by Qudos in the amount of DKKm 1.8 is set off at the same time. This includes any unpaid interests [sic].”*

These terms meant that the Defendant was obliged to transfer to the Plaintiff Bonds with a total value of DKK 48.2 million (para. 39). Bonds to the value of DKK 38.6 million were transferred (or caused to be transferred) (para. 41).

43. For these purposes, the knowledge pleaded by the Plaintiff relating to those who were then responsible for the company he is now the trustee in bankruptcy of is found in para. 42:

“At the time of executing the October Letter Agreement, the directors of Qudos knew that Qudos was insolvent or that the termination of the loans due from Prinstad under the said agreement would render Qudos insolvent.

Particulars of Knowledge

The Plaintiff will rely, without limitation, on the following facts and matters;

- a. *The October Letter Agreement was entered into after extensive communications and scrutiny by the DFSA into, inter alia, the solvency and capital sufficiency of Qudos.*
- b. *The half-year report for 2018 recording a loss of DKK 32,360,000.00 were signed by the board of directors of Qudos on 2 October 2018.*

- c. *The Bonds were transferred to Qudos after the board meeting of the directors of Qudos on 16 October 2018 at which the decision to cease writing insurance had been taken.*
- d. *The value of the Bonds is dependent upon the value of the Qudos' shares which amounted to greater than half of the value of the security structure in the Bonds.*
- e. *By reason of the aforesaid it is to be inferred that the directors of Qudos knew the value of the Bonds was not at par value or the nominal value specified or had no honest belief that they were at par value or the nominal value specified."*

Accordingly, the link to undermining the position of creditors is given in the next paragraph: *"The directors of Qudos knew and intended wrongfully that settlement of the outstanding secured loans from Prinstad in return for assets without any value or worth significantly less than [sic] the value of the said loans would benefit Prinstad to the detriment of the creditors of Qudos."*

44. Turning to the knowledge within the Defendant, para. 44 sets out:

"Further, Prinstad knew or ought to have known that the October Letter Agreement was intended to prejudice the creditors of Qudos.

Particulars of knowledge

The Plaintiff will rely, without limitation, on the following facts and matters;

- a. *Mr Borchers Hansen, the former Deputy Chairman of the board of Qudos, was the ultimate beneficial owner of and/or participated in the management of Prinstad.*
- b. *Mr Borchers Hansen signed the Alpha II SPA on behalf of Prinstad.*
- c. *It is to be inferred by reason of Mr Borchers Hansen's said ownership and/or participation in the management of Prinstad and his participation in the ownership and/or management of Qudos and the other entities comprising the New Nordic Group that he would have communicated or have caused to be communicated the true financial position of Qudos to Prinstad at the time of execution of the October Letter Agreement.*
- d. *It is also to be inferred that the commonality of the individuals holding directorships across the New Nordic Group entities will have facilitated the transmission of information as to Qudos' financial position to Prinstad."*

45. Further to para. 45, which draws these consequences together, what the Plaintiff seeks is an order setting aside the termination of the earlier agreements (the February Letter Agreement, the PIK Loan Note and the Seal SPA related loan) by the October Letter Agreement (para. 46).

46. Returning to how best to categorise the Plaintiff's action, in the *Golder* case (at page 735), by reference to how it had been put in *Domat*, it was said of the Pauline action that *"the true nature of the obligation is to make restitution"*. In the *Esteem Settlement* case, it was stated (at para. 228):

“The Pauline action has always been a revocatory action. The creditor is not entitled to compensation from an innocent volunteer from whom the creditor has transferred property; he is entitled to reclaim the property. What is the situation where the original property is no longer in the hands of the recipient? In our judgment, it is clear that in the case of innocent receipt, there is no liability beyond the enrichment (if any) which the recipient still enjoys.”

The court then added (at the end of para. 236):

“... once a creditor has established that all the other conditions of a Pauline action are satisfied, the court must consider whether, in reliance upon the receipt, an innocent recipient has so changed his position that it would be inequitable to require him to make restitution or to make restitution in full. The underlying principle is that an order for restitution should not result in an innocent recipient being worse off as a result of the transactions in question than he would have been if those transactions had not occurred. The burden of showing that it would be inequitable to order restitution lies upon the recipient.”

47. The manner in which the Royal Court of Jersey commented further on the categorisation of the Pauline action arose when it was considering the applicable prescription period. That is why (at para. 243) the court distinguished between an action brought against the debtor and one brought against the recipient of the assets, where “no “wrong” is alleged against that recipient”, adding “*The action is essentially a restitutionary action seeking to place the parties, i.e. the creditor, the debtor and the recipient, back into the position in which they would have been before the transaction.*” Because no compensation is sought for damage suffered as a result of a “wrong”, “*a Pauline action does not constitute an action in tort*” (para. 244).
48. *Dicey, Morris and Collins* deals with the law of obligations in Part Seven. In classic English law style, it distinguishes between contracts and torts, as well as covering (in Chapter 34) restitution and also, in a final chapter, foreign currency obligations. On the basis that the Plaintiff’s action is not in tort, because that categorisation had been rejected in the *Esteem Settlement* case, Advocate Florance has concentrated on categorising the action as one in restitution. Whilst I understand his reasons for doing so, I think that the Advocates have taken an unnecessarily narrow approach to the question of how to deal with the *exception de fond* and, almost by extension, the strike out application. The question involves more than just applying how the issue would most likely be resolved if being argued in an English court.
49. In reaching that conclusion, I have had regard to the more detailed analysis of the issue than the bare test already mentioned as applied in the *Investec* case and derived from *Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC* [2001] QB 825. The judgment of the English Court of Appeal given by Mance LJ explains (at para. 2) that “*The judge was warned that he was being set an examination question on the applicable law*” and I have a similar feeling in the present case. The three-stage process summarised had actually been articulated by Staughton LJ in *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1996] 1 WLR 387, 391-2, and, as Mance LJ commented (at para. 26), “*The process falls to be undertaken in a broad internationalist spirit in accordance with the principles of conflict of laws of the forum*”. That means that the private international law of Guernsey is what matters in the present case and, whilst guided by English law, there must be scope to approach the issue in the manner most appropriate for Guernsey.

50. As Mance LJ put it in the following paragraph:

“While it is convenient to identify this three-stage process, it does not follow that courts, at the first stage, can or should ignore the effect at the second stage of characterising an issue in a particular way. The overall aim is to identify the most appropriate law to

govern a particular issue. The classes or categories of issue which the law recognises at the first stage are man-made, not natural. They have no inherent value, beyond their purpose in assisting to select the most appropriate law. A mechanistic application, without regard to the consequences, would conflict with the purpose for which they were conceived. They may require redefinition or modification, or new categories may have to be recognised accompanied by new rules at stage 2, if this is necessary to achieve the overall aim of identifying the most appropriate law ...”.

He further explained that the steps of that three-stage process cannot just be taken in turn and in isolation, which is a trap into which both Advocates have arguably fallen, referring to how it had been put in the judgment of Auld LJ in the *Bishopsgate Investment* case (at page 407):

“... the proper approach is to look beyond the formulation of the claim and to identify according to the lex fori the true issue or issues thrown up by the claim and defence. This requires a parallel exercise in classification of the relevant rule of law. However, classification of an issue and rule of law for this purpose, the underlying principle of which is to strive for comity between competing legal systems, should not be constrained by particular notions or distinctions of domestic law of the lex fori, or that of the competing systems of law, which may have no counterpart in the other’s system. Nor should the issue be defined too narrowly so that it attracts a particular domestic rule under the lex fori which may not be applicable under the other system ...”.

In the light of that, Mance LJ next referred to there being “*an element of interplay or even circularity in the three-stage process*”, adding that the conflict of laws did not depend “*upon the application of rigid rules, but upon a search for appropriate principles to meet particular situations*” (para. 29).

51. The first section of Chapter 2 of *Dicey, Morris and Collins* deals with the question of characterisation, by which the juridical concept or category to be applied needs to be determined in respect of any given case. Often, the issue falls to be resolved between applying either the *lex fori* or the *lex causae*. In some instances, although the present case is not necessarily one of them, the applicable law is the *lex situs*. Commenting on both the *Bishopsgate Investment* case and *Raiffeisen*, *Dicey, Morris and Collins* refers to the need to consider “*the rationale of the English conflict rule and the purpose of the rule of substantive law to be characterised*”, which will help to decide whether the rule is one of substantive law.
52. Taking a step back, I find there is considerable attraction to the arguments of Advocate Barclay. What the Plaintiff has pleaded is a Pauline action, acknowledged to be based on the customary law of Guernsey. The law applicable to the pursuit of this action should, therefore, be the law of Guernsey. It is artificial on behalf of the Defendant to argue that the applicable law to the obligation arising under this relationship should be anything other than the law of Guernsey, just because the parties to the contracts had generally chosen the law of Denmark to govern those contractual relations. In particular, the October Letter Agreement was expressly made subject to Danish law. To that extent, I am not persuaded that Rule 230(2)(a) is the appropriate rule to use to determine the law of the obligation arising in the present case. That means I do not accept para. 4(b) and (d) in *Les Defences*.
53. In reaching the conclusion, I recognise that the parties had chosen to make the law of Denmark the law governing their contractual relationship and that it might be said that the obligation to revert to the pre-existing contractual relations between the parties, which would be the effect if the Pauline action were to succeed, means that “*the obligation arises in connection with a contract*”, but I take the view that this is to approach the question too mechanistically. It would mean taking a rule of English private international law which does not cater for the type of Pauline action involved, simply because such an action does not exist in the context of English domestic law, and where neither party has addressed whether it exists in the form in which it is

being pursued as a matter of Danish law, and deciding as a result that the *exception de fond* must succeed. This is not an approach that seeks to identify the most appropriate system of law to apply to that action. I prefer to categorise the Pauline action as revocatory rather than as an action in restitution as that term would be understood in English law. I have noted that it has also been described as restitutionary in nature, but that was more to assist in deciding the applicable prescription period as a matter of Jersey law and more particularly to differentiate it from an action in tort. In the context of the action between the Plaintiff and the Defendant, if successful, the consequences of the action would be to restore the parties to the contractual relationships that existed between them before the two companies executed the October Letter Agreement. Whilst those respective rights would be being restored, this is not exactly akin to the type of relief available in a classic restitution case as understood in English law.

54. That is also why Rule 230(2)(c) is not necessarily the best formulation of the issues arising. If one is looking for “*the law of the country where the enrichment occurs*”, the real benefit of the October Letter Agreement, acknowledging that the Plaintiff has proved its case for the purpose of the *exception de fond*, lies with the Defendant. This is on the basis that the Defendant appears to have obtained a better bargain as a result of re-structuring the contractual relationship between the two parties than has the Plaintiff company. When coupled with the fact that the Pauline action being advanced is a particular creation of the customary law of Guernsey, derived originally from Roman law and having no real equivalent in English law, trying to shoe-horn the action into the English rules set out in *Dicey, Morris and Collins* strikes me as trying to adopt too rigid an approach. There appears to be scope to argue that the Pauline action recognised in Guernsey law extends to an action brought by an insolvency office-holder, because one might need to go back to the origins of the different forms of action, as explained in the *Feniks* case. More generally, I prefer the argument that this has the look and feel of a Guernsey law action, applying Guernsey law principles to it, all of which is designed to be for the benefit of the cohort of creditors of the Plaintiff company to avoid the adverse effects of the October Letter Agreement on what falls within the bankruptcy estate being managed by Mr Frederiksen. The case pleaded by the Plaintiff is not the same as the situation in the Jersey cases where there was a pre-existing judgment where the execution of that judgment was being frustrated by the actions of the judgment debtor and so warrants giving the Plaintiff the opportunity to pursue it further. The position might be different as and when all the evidence comes out but, for the purposes of this *exception de fond*, I am not persuaded that it is clear that the applicable law is not the law of Guernsey. In order to find for the Defendant on the *exception de fond*, I would need to conclude that the applicable law is not that of Guernsey, but I cannot reach that conclusion at this stage of the action. In my judgment, the high hurdle that needs to be surmounted has not been established by the Defendant.

55. I have deliberately applied a high threshold to this question because that is, in my view, the proper approach to such an *exception de fond*. Further, I have noted the way it is put at para. 34-005 of *Dicey, Morris and Collins*:

“Although there is no strict need for the rules of the conflict of laws to mirror in every detail the emerging structure of the domestic law of restitution, it is obviously preferable that there should be reasonable harmony between them. In drawing the lines which will identify those claims to be regulated by this Rule, and which will separate it, in particular, from the areas governed by the choice of law rules for contracts, for torts, for trusts, and for property claims, regard may properly be had to the role played by restitution in domestic law. In some ways, the definition of the territory governed by this Rule is the most difficult aspect of choice of law for restitution.”

Because of the difficulties described and my concern that otherwise the underlying fraud being alleged would not be investigated any further, I am satisfied that the Plaintiff’s action should not be terminated through this mechanism of an *exception de fond* where such difficulties as

are described in this passage can be brought into greater harmony by finding, at least at this stage of the proceedings, that Guernsey law principles potentially apply to the Pauline action that has been pleaded. That is why the Plaintiff's action should, in my view, be permitted to continue and a decision reached once the evidence has been considered.

The strike out application

56. I can deal with the alternative strike out application of the Defendant comparatively briefly. Whatever else is involved, I find that the Pauline action in Guernsey must be treated as an area of developing jurisprudence where it is not appropriate to strike out the Plaintiff's Cause because it is preferable for the novel points of law being raised to be based on actual findings of fact. As a result, the strike out application will also be dismissed.
57. The only Guernsey case relating to the Pauline action to which I have been referred is the *Flightlease Holdings* case. That decision did not deal in any detail with the elements of the action and quite how they operate as a matter of Guernsey law. The decision was, in effect, confined to finding that a Pauline action exists as a matter of Guernsey customary law, following the approach that had been taken in Jersey. The principles extracted from the *Esteem Settlement* case were adopted without any further discussion and the Court was keen to explain that all that was being offered was the opportunity to amend the pleading to advance a Pauline action in any instance where one could be advanced. Accordingly, the present action is the first case in which the Pauline action as pleaded has been advanced in the manner it has and would, unless struck out, proceed to a trial.
58. In rejecting the strike out application, I am not overlooking the submissions made by Advocate Florance that the usual form of a Pauline action is one where there is a creditor, a debtor and a third party recipient of the debtor's assets. The case pleaded by the Plaintiff does not have that tripartite hallmark. I have given careful consideration as to whether this means that the case should not be permitted to succeed, noting in particular that the formulation of this type of action as set out in the Advocate General's Opinion in the *Feniks* case also refers to there being three parties involved and where the usual defendant is the third party recipient of the debtor's assets. However, the possibility that the law of Guernsey should recognise that a claim can be made by an office-holder on behalf of all the creditors of an insolvent creditor where a transaction has adversely affected the ability of that office-holder to realise more by way of assets than might otherwise be the case from that creditor's debtor is, in my view, something that is worth exploring further. Whether that results from an argument that the customary law of Guernsey has developed in a manner similar to the developments of the principles in French law, thereby affording a form of Pauline action to an office-holder, or whether it arises because of the need to go back to the basics of the action as it existed in Roman law, as also explained in the *Feniks* case, it is an issue where I accept Advocate Barclay's submission that it needs to be considered once the evidence has been adduced. I am certainly not suggesting that there is bound to be acceptance that seeking a remedy in this manner does lie in the hands of an insolvency practitioner, because it may be that there are still fundamental difficulties for Mr Frederiksen to surmount, but I cannot on the basis of the case as it currently stands find that the argument is unwinnable. In those circumstances, it is not appropriate to strike out the Plaintiff's Cause.
59. In this regard, I can echo the words of the Royal Court of Jersey in the *Golder* case: "*It is difficult to believe that any legal system would readily permit a debtor so to manipulate his affairs that without detriment to himself he could defeat his creditor.*" What is alleged against the Defendant as the debtor in the present case is akin to that. It is tantamount to alleging that those involved with the two companies knew that they could place them into a revised debt situation that would differ from how it would be if the October Letter Agreement had not been executed. By entering that transaction (and this follows if, as has to be the case, the claim made by the Plaintiff is presumed to have been proved), the Plaintiff company lost what would otherwise have been a more valuable set of agreements from which it benefited and these were replaced with something of lesser value, there is a suspicion of some form of conspiracy operating to leave the creditors of the Plaintiff company in a worse position. In effect, it is being alleged that those reaching the decisions represented by the October Letter Agreement knew that they were acting fraudulently to place the Plaintiff company in a worse position.

Because that outcome does not seem right, it would be better for the parties to have the opportunity through this action to see whether the case being advanced by the Plaintiff has merit, in which case, reverting to the previous set of agreements could well be the just outcome. Equally, the Plaintiff would be unwise to forget that those who were the directing minds of the Plaintiff company at the time the October Letter Agreement was executed appear to have been complicit, as the creditor in the Pauline action relationship, in re-structuring the relationship between the two companies in this manner. Again, the voluntary nature of the involvement of the Plaintiff company in acting so as to affect its own creditors in this fashion is something that may best be assessed on the evidence rather than through the strike out application. Further, the Defendant has not sought to strike out the Plaintiff's Cause in whole or in part on this basis, but rather on the basis that the absence of a tripartite claim means it is unwinnable, where I am not persuaded that, when the action is brought by an insolvency office-holder, that necessarily follows.

60. In passing, I have considered whether there should be any direction to the Plaintiff to re-cast the claim to make it clear that the claim is being advanced as a variant on what would normally be a claim against the third party recipient of the debtor's assets. That does not work where the Defendant is the debtor. This may mean that this is not a form of Pauline action in the sense that Advocate Florance has approached it. Indeed, the Plaintiff may wish to consider whether there is a better way of defining the claim it is making in this case and whether, for example, Borchers Hansen, to whom reference is made in para. 44 of the Cause, should be added as a further party as a means of advancing the contention that he is at the root of the fraudulent actions being criticised as providing the reason why the October Letter Agreement should be set aside. However, I have decided that it is more appropriate to leave any consideration of how the Plaintiff's case should now be progressed to the Plaintiff and would simply encourage him, on behalf of the company, to clarify with the Defendant's Advocate whether there is any likelihood of the Cause being amended before the Defendant is required to table its substantive Defences. If the Cause remains unamended, then the period for the Defendant to expand Les Defences should, subject to any different agreement between the parties, be treated as if the Cause had been tabled on the Friday following the handing down of this judgment.
61. In the light of these conclusions, I do not need to comment further upon the possibility that para. 45 of the Cause should be partially struck out to remove the alternative claim found within it. Advocate Barclay is aware from comments at the hearing that this is likely to be a difficult argument to run. Accordingly, having decided to leave the perfection of the pleading to the Plaintiff, I will confine myself to commenting that removing this alternative claim may well make the action more focused, but I will not go so far as to order its removal because this is a sufficiently novel area of Guernsey law for me to choose not to do so.

Conclusion

62. For all the reasons I have set out, I am not persuaded that the Defendant's *exception de fond* or its strike out application should bring this action to an end. I understand the reasons why the Defendant has argued that the Plaintiff's claim has no foundation, and Advocate Florance may well prove to be right in those arguments once the action has developed further, but I take the view that it would be unjust to leave the Plaintiff, acting through Mr Frederiksen, with no avenues to try to set aside the October Letter Agreement when, at this stage of the proceedings, the Court works on the basis that the fraud alleged will have been proved. In my view, there is scope for those arguments to be developed and it is preferable to require the Defendant to meet those allegations through the evidence that will ultimately be heard because that will provide some benefit to the cohort of creditors affected who now rely on Mr Frederiksen to achieve the best outcome for them that he can if he is correct.
63. I am minded to reserve the costs involved in arguing this stage of the proceedings. However, it is always open to the parties to agree where the costs should lie or, if either side wishes to

make an application for a different order, the most appropriate way will be to liaise with the Greffe over a suitable hearing time at which to do so.