

Application to the Court of Appeal against the order of Lieutenant Bailiff Marshall KC dated 10 May 2024 in relation to alleged breaches of various statutory duties, as well as breaches of the ordinary duties of care, misrepresentation claims and also a claim of mismanagement of affairs.

[2024]GCA052

IN THE COURT OF APPEAL (CIVIL DIVISION), GUERNSEY

ON APPEAL FROM THE ROYAL COURT OF GUERNSEY (ORDINARY DIVISION), CIVIL ACTION 2407

CIVIL DIVISION APPEAL No. 577

7 August 2024

BETWEEN:

- (1) WOLFGANG JOACHIM ERICH LANDL
- (2) ANDREA BRIGITTA SCHAERER LANDL
- (3) KHKJ HOLDINGS LIMITED
- (4) ALI HASAN MAHMOUD MOHAMED HUSAIN
- (5) KULDEEP SINGH LAMBA
- (6) GURVINDER SINGH LAMBA
- (7) L'OEILLET LIMITED
- (8) ANUPE DHORAJIWALA
- (9) RUPAL TERAIYA
- (10) RAJEN R. SHAH
- (11) TEO STRUCTURED INVESTMENTS LIMITED
- (12) JAMAL ALAMER
- (13) FABRIZIO CERÈ
- (14) MOHAMED NOORUDDIN
- (15) EUGENIO BERENGA
- (16) VELES MANAGEMENT CORP.
- (17) CAREY AG (AS TRUSTEE OF THE MARRAKECH TRUST)
- (18) VLADIMIR ISAKOV
- (19) NAJAH HASAN ALAALI
- (20) GIANCARLO PAROLO
- (21) LANDSEND INVESTMENTS LIMITED
- (22) YASSER JEIROUDI

(23) LUXX PCC LIMITED (IN LIQUIDATION)

Plaintiffs / Applicants

-and-

(1) STEPHEN WILLIAM HOGG

(2) STEPHEN WATTS

(3) IAN JAMES HENDERSON

(4) EFG PRIVATE BANK (CHANNEL ISLANDS) LIMITED

Defendants / Respondents

MATTHEWS JA:

Introduction

1. This is my judgment on an application to this court for leave to appeal against the order of Lieutenant Bailiff Marshall KC dated 10 May 2024, whereby, after a four-day hearing, she struck out all the plaintiffs' claims against the defendants (and, in relation to the fourth defendant, also gave summary judgment). This order followed a detailed and meticulous judgment, running to 460 paragraphs over 100 pages, handed down on 23 February 2024. On 14 June 2024, after hearing oral submissions, the judge dismissed an application for leave to appeal, and also for a stay of her order.
2. On 10 July the applicants applied to this court for leave to appeal, and also for a stay pending determination of this application for leave to appeal and any consequent appeal. On 17 July I dealt with the application for a stay, because that was more urgent. I now turn to deal with the application for leave to appeal. The parties' positions on this application were made clear in written and oral submissions before the judge in the court below, and further written submissions have been made to this court. In the circumstances it is appropriate for me to decide this matter on the papers.

Leave to appeal

3. Section 15 of the Court of Appeal (Guernsey) Law 1961 relevantly provides:

“15. [(1)] An appeal shall not lie to the Court of Appeal under this Part of this Law –

[...]

(e) without the leave of the presiding judge of the court whose decision is sought to be appealed from or of the Court of Appeal, from any interlocutory order or interlocutory judgment, ...

[...]

[(2) An application to the Court of Appeal for leave under subsection (1)(e) shall be made to a single judge of that Court and upon such application –

(a) the single judge's decision on the application shall be final, but

(b) the single judge may at any stage refer the application to the full Court of Appeal for decision].”

4. Section 16 of the same law provides:

“No appeal shall lie from a decision of the Court of Appeal under this Part of this Law without the special leave of Her Majesty in Council or the leave of the Court of Appeal ... ”

“Interlocutory” order or judgment

5. The meaning of the term “interlocutory” has been considered in a number of decisions. In *Havilland Estates Ltd v Channel Island Ceramics Ltd* (1993) 15 GLJ 78, this court, constituted by Collins, Harman and Frossard JJA, refused to extend time for lodging a case. The appellants thereupon sought leave to appeal against that refusal to Her Majesty in Council under section 16 of the 1961 Law. On this application, the judgment of the same constitution of this court (15 GLJ 81) followed the decision of the Court of Appeal of Jersey in *Forster v Harbours and Airport Committee* 1990 JLR 82 on the practically identical provision in the equivalent Jersey law, and held that the word “decision” in section 16 meant *final* decision.

6. This court then said:

“The grant or refusal of an application to extend time is in our view of an interlocutory nature, applying the test in *Salter Rex v Ghosh* [1971] 2 QB 597, which was expressed as follows in the 1988 edition of the *Annual Practice* para 59/1/25, ‘In deciding whether an order is final or interlocutory the Court of Appeal applies the test in [the *Salter* case]. To determine whether an order is final or interlocutory regard must be had to the nature of the application made in the court below. An order is not final unless it would have finally determined the proceedings whichever way the application in the court below had been decided’.”

7. In *McNamara v Gauson* 2009-10 GLR 387, Collas DB said:

“7. ... My understanding, both as an Advocate in private practice and as a Deputy-Bailiff, has been that in this Island we follow the test laid down by Lord Esher, M.R. in *Salaman v Warner* [1891] 1 QB 734, at page 735:

‘The question must depend on what would be the result of the decision of the Divisional Court, assuming it to be given in favour of either of the parties. If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for the purpose of these rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory’.”

8. In *Chilcott v Dockerill*, Judgment 49/2018, Logan Martin JA, sitting as the single judge of this court on an application for leave to appeal, said:

“10. The Deputy Bailiff in his judgment in the present case also noted that the analysis of the Deputy Bailiff (Collas) in *McNamara v Gauson* demonstrated that an order striking out part of a cause is an interlocutory order in respect of which leave to appeal to the Court of Appeal is required.”

9. Lastly in *ITG Ltd v Glenalla Properties Ltd* [2022]GCA091, Wolffe JA, giving the judgment of this court (Crow, Storey and Wolffe JJA), referred to section 15(1)(e) and said:

“31. ... It is not a matter of dispute that the order for an interim payment is an interlocutory order or interlocutory judgment for the purposes of this provision.”

As a result, In considering the present application, I proceed on the basis that the test for an “interlocutory order or interlocutory judgment” within section 15(1)(e) is that referred to in *Salaman v Warner* [1891] 1 QB 734, 735, and in *Salter Rex v Ghosh* [1971] 2 QB 597, and that an order striking out part of a cause is indeed an interlocutory order, and leave to appeal is therefore required.

10. The skeleton argument dated 22 March 2024 in support of the application for leave to appeal says:

“5. The Judgment contains decisions which are final and in relation to which permission to appeal is not required, including decisions to strike out claims or particular allegations finally.

6. Permission is therefore sought with respect to the intended appeal as regards the Judgment, where it contains interlocutory decisions to strike out claims or particular allegations with permission to apply to amend or contains consequential case management decisions, as indicated in the Grounds.”

11. However, the skeleton makes no attempt to identify which are the interlocutory decisions in respect of which leave to appeal is required, and which the final decisions, in respect of which no such leave is needed. The point having been raised by the court with the applicants’ advocates, the court has been told by them that “leave to appeal is required for all of the grounds set-out in the Draft Notice and Grounds of Appeal ... because all of the decisions in question in the Judgment and in the Order dated 10 May 2024 are interlocutory.” The Grounds of Appeal are summarised later in this judgment.

The test for leave

12. The test for giving leave to appeal is not prescribed by the rules (as it is, for example, in England and Wales under the CPR). Instead, it is laid down by the caselaw. In the recent decision in *ITG Ltd v Glenalla Properties Ltd* [2022] GCA 091, to which I have already referred to, Wolffe JA expressed it in this way:

“40. The correct approach, in our view, is that this Court should not grant leave unless it is at least satisfied either: (i) that the appeal has a real prospect of success; or (ii)

that, even though the case has no real prospect of success, there is an issue which, in the public interest, should be examined by the Court of Appeal. Cases in the second category – which will be exceptional – may arise, in particular, where a question of general principle falls to be decided for the first time, or where there is an important question of law upon which further argument and a decision of the Court of Appeal would be to the public advantage ... ”

13. This test was applied by the judge below. It is based heavily on the English rules, contained in CPR rule 52.6. In England it is clear that “real prospect of success” means a prospect which is not fanciful or unreal: *Tanfern Ltd v Cameron-MacDonald (Practice Note)* [2000] 1 WLR 1311, CA, [2]. It is not necessary to show that the appeal would be more likely than not to succeed. In my judgment, the same is true in Guernsey.

Background

14. I can take part of the background to this matter from my judgment on the stay application. There I said:

“5. The claims concern a fund known as the London Heritage Fund, which is the single cell of the 23rd plaintiff, a Guernsey protected cell company. This fund was created in order to invest in high-end residential apartment construction in London. The first 22 plaintiffs hold 89.05% of the Fund. Unfortunately, the Fund has not been successful, and the 23rd claimant was put into voluntary solvent liquidation on 16 June 2021.

6. The plaintiffs by their claims sought to recover compensation for their losses due to the failure of the Fund. The first three defendants were directors of the 23rd plaintiff. The fourth defendant was a Guernsey bank of which the second defendant was a director and the third defendant was a senior employee. It fulfilled the role of company secretary, administrator, registrar and also “Designated Member” in relation to the 23rd plaintiff.

7. The claims were begun on 16 November 2021. They alleged breaches of various statutory duties, as well as breaches of the ordinary duties of care, misrepresentation claims and also a claim of mismanagement of the affairs of the 23rd plaintiff. As I have said, these claims have all been struck out. Lieutenant Bailiff Marshall KC refused permission to appeal and a stay on 19 June 2024. On that occasion she extended the stay until 19 July 2024.

8. The applicants’ grounds of appeal, which I have read, run to 8 substantive pages, plus the title page. There are nine grounds of appeal. Since the applicants prepared them, and the respondents responded to them, I do not think it is necessary to set them out *verbatim* in this judgment. For present purposes, they may be summarised (very briefly) as follows:

(1) the judge was wrong on a summary application to determine issues of statutory construction arising under the relevant legislation and the interpretation of the so-called “Offering Memorandum”;

- (2) the judge made errors of law in so determining the statutory construction and interpretation issues;
- (3) the judge was wrong to strike out the misrepresentation claim for not containing (i) particulars of reliance of each shareholder, or (ii) particulars of causation, or (ii) a sustainable basis for causation and quantifying loss;
- (4) the judge was wrong in a summary application to strike out certain of the allegations with respect to the Offering Memorandum, as these issues were not suitable for summary determination in the absence of evidence as to the factual context;
- (5) the judge was wrong to strike out the shareholders' mismanagement claim, because she had held that it had reasonable prospects of success as pleaded, at least to a certain extent;
- (6) the judge was wrong to strike out parts of the 23rd plaintiff's claim of negligence against the first three defendants, because the allegations were sufficiently pleaded, and sustainable without giving further particulars;
- (7) the judge was wrong to strike out the remainder of the 23rd plaintiff's claim, because the allegations made were reasonably arguable and sufficiently particularised;
- (8) the judge was wrong to strike out parts of the 23rd plaintiff's claim on the basis of the need for additional particulars of causation, because the allegations had been sufficiently stated, are likely to require disclosure and expert evidence and the judge was wrong to find that the 23rd plaintiff could give such particulars before disclosure;
- (9) the judge was wrong to order that to the extent that the shareholders' misrepresentation claim, the shareholders' mismanagement claim and the 23rd plaintiff's claim were to proceed separately, because they were properly brought together and/or properly ought to proceed together and the degree of amendment mandated by the judgment did not reasonably warrant a decision to strike out the cause as a whole."

Additional points

15. To this brief summary I add three further points. The first is that an important aspect of the whole project was the involvement of Mr Luigi Becherini, an experienced and successful property developer. As the judge below said, he was the "principal driving force" behind the Fund. He was the fourth director of the 23rd plaintiff. Unfortunately, he died from pancreatic cancer in July 2018. His untimely death meant that the projects undertaken lost the benefit of his knowledge and experience.
16. The second point is that the whole of this current part of the litigation, that is, the applications to the court below and the application for leave to appeal to this court arises from the way in which the plaintiffs' advocates chose to plead the claims that they put forward on behalf of their clients. In the Guernsey system, as in the English, clear pleading is vital.

17. Thus, in *Rolled Steel Products (Holdings) Ltd v British Steel Corporation* [1986] Ch 246, 309-10, Lawton LJ said:

“Pleadings are formal documents which have to be prepared at the beginning of litigation. They are essential for the fair trial of an action and the saving of time at trial. The saving of time keeps down the costs of litigation. A plaintiff is entitled to know what defences he has to meet and a defendant what claims are being made against him. If the parties do not know, unnecessary evidence may be got together and led or, even worse, necessary evidence may not be led. Pleadings regulate what questions may be asked of witnesses in cross-examination ...”

18. More recently, Lewison LJ (giving the judgment of himself and Christopher Clarke and Sales LJ) in *Prudential Assurance Co Ltd v HMRC* [2017] 1 WLR 4031, said:

“20. ... Our procedural system is and remains an adversarial one. It is for the parties (subject to the control of the court) to define the issues on which the court is invited to adjudicate. This function is the purpose of statements of case. The setting out of a party's case in a statement of case enables the other party to know what points are in issue, what documents to disclose, what evidence to call and how to prepare for trial. It is inimical to a fair hearing that a party should be exposed to issues and arguments of which he has had no fair warning ...”

19. The same is true in this jurisdiction. However, in this case, the judge below at the end of her substantive judgment said:

“439. The pleadings in this case are, I find, such as to make the case as originally pleaded and constructed virtually untriable.

440. The vice of the Cause is not so much that it pleads irrelevant matters or evidence (it does so, but only to a minor degree) but that it attempts to amalgamate many claims - at least four clearly entirely separate types of claim - into one documented cause, and does so without making the alleged component elements for any discrete cause of action clearly and easily identifiable. In effect, it pleads a wide basket of facts and ultimately alleges that these support a variety of claims, as to which the matters which are required and relied on as the constituent elements are left to be extracted by the reader. Frequent use of the safety-play phrase ‘further or alternatively’ contributes to this lack of clarity and imprecision. That approach is just not good enough. The facts relied on for any particular cause of action need to be clearly identified by the pleader, according to the particular case and situation. This just has not happened here.”

20. The judge’s comment in the last sentence of that extract chimes with something else that she said in her judgment. She was moved to comment on the plaintiffs’ advocate’s proposition (set out at [355]) that it would be necessary for the court at the trial to

“embark on a forensic deconstruction and reconstruction of the life of the Fund and then stand back at the end of it and assess if there was anything capable of criticism.”

The judge called this “a startling proposition”, and continued (at [356]):

“This tribunal is a Court, not a Commission of Enquiry. Its processes are adversarial, not inquisitorial. It decides disputes which have been identified and defined between the parties.”

I respectfully agree.

21. The third point is that notice of appeal in this matter is unfortunately unclear as to a number of matters. One matter that does not appear from the Notice of Appeal, but which I glean only from written submissions filed, is that the plaintiffs do not seek to appeal against the decision of the judge to strike out (and give reverse summary judgment on) the claim against the fourth defendant. That claim is at an end and that defendant is now out of the litigation. I do not know why it could not have been made clear in the notice that the proposed appeal extended only to the claims against the first three defendants.

Submissions

22. As I have said, judgment in the court below was handed down on 23 February 2024, though the court’s order, the Act of Court, was not made until 10 May 2024. In the meantime, the applicants sought leave to appeal from the Royal Court. They filed a skeleton argument in support dated 22 March 2024. The respondents filed one dated 30 March 2024. The applicants filed reply submissions dated 12 June 2024. The oral hearing of the application for leave took place before the judge below on 14 June 2024, when she refused such permission on each of the nine grounds advanced.
23. On 10 July 2024 the applicants applied to this court for leave to appeal. They supported this by reference to a draft Notice of Appeal annexed to the application. In correspondence with the court, they indicated that their submissions on this further application would be the same as those that were before the judge below. The respondents filed a further written submission dated 16 July 2024. I have read all these submissions.

The law on summary judgment and strike out

Summary judgment

24. The power to grant summary judgment is conferred by Royal Court Civil Rules 2007, rule 19, which relevantly provides:

“(2) The grounds of the application for summary judgment shall be that-

- (a) the plaintiff has no real prospect of succeeding on the claim or issue, or
- (b) the defendant has no real prospect of successfully defending the claim or issue,

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

25. The judicial approach to this rule can conveniently be taken from a decision of this court (Crow, Perry and Fulford JJA) delivered on 19 April 2024, at an earlier stage in this very litigation, under neutral citation reference [2024] GCA027. On that occasion the first three defendants (the three directors of the 23rd plaintiff) were appealing against the refusal of the

Royal Court (Finch LB) to grant summary judgment and/or strike out in relation to one claim brought by the 23rd plaintiff against them. The court below refused leave to appeal. This court granted leave to appeal on four grounds (one in part) out of six.

26. In giving judgment, this court said:

“33. The question for the Royal Court was whether the Directors were entitled to summary judgment. The jurisdiction to give summary judgment is defined by r. 19 of the Royal Court Civil Rules, 2007. The question is whether ‘*the plaintiff has no real prospect of succeeding in the claim or issue*’ or whether ‘*the defendant has no real prospect of successfully defending the claim or issue*’ and whether there is any ‘*other compelling reason why the claim or issue should be disposed of at trial*’.

34. The applicable legal principles have been examined and explained in *EFG Private Bank (Channel Islands) Ltd v. BC Capital Group SA (in liquidation)* (Royal Court judgment, unreported, 14 July 2014) *Invescap Holdings Ltd v. Douglass* (Royal Court judgment, unreported, 30 July 2014) and *Tranquility Holdings Ltd v. Invista Estate Investment Management (CI) Ltd* (Royal Court judgment 38/2015, unreported, 13 August 2015), by reference to the English decision in *Easyair Ltd v. Opal Telecom Ltd* [2009] EWHC 339 (Ch), at para. 15. We set out below our own summary of those principles, partly in order to clarify certain issues that are relevant in this case, and partly also because there are certain transcription errors in the quotation from *Easyair v. Opal Telecom* in para. 2 of the Judgment below:

(i) In deciding an application for summary judgment, the court must consider whether the party against whom the relief is being sought has a ‘realistic’ as opposed to a ‘fanciful’ prospect of success. For these purposes, a ‘realistic’ prospect of success is one that carries some degree of conviction, *i.e.* one that is more than merely arguable.

(ii) In reaching its conclusion, the court must not conduct a ‘mini-trial’. This observation was made in para. 15(iii) of *Easyair v. Opal Telecom* by reference to the decision in *Swain v. Hillman* [2001] 1 All ER 91. For present purposes, it is important to understand what was meant. *Swain v. Hillman* concerned a claim for personal injury in which there was a dispute of fact as to (a) how the injury had occurred, and (b) whether the defendants were in occupation of the relevant premises at the time: *ibid*, at p. 94d – j. Having outlined the nature of those factual disputes, Lord Woolf MR then said this, at p. 95a: ‘*Those are matters which will have to be considered carefully by the judge at the trial*’, adding that an application for summary judgment ‘*does not involve the judge conducting a mini-trial*’: *ibid*, at p. 95b – c. He was thereby deprecating any attempt to resolve reasonably contested issues of fact on a summary application.

(iii) In deciding whether there is a reasonably contested issue of fact, the court is not bound to take at face value and without analysis everything that either party says in its evidence. In some cases, it may be clear that there is no real substance to some or all of the factual assertions made by one or other party, particularly if it is contradicted by reliable, contemporaneous documents. If so, the court can determine those factual questions without a trial.

(iv) 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. Although a case may turn out at trial not to be particularly complicated, it does not follow that it should be decided without a fuller investigation into the facts than is possible or permissible on an application for summary judgment. Thus, the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case.

(v) On the other hand it is not uncommon for an application for summary judgment 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 either side's case is bad in law, then it would not be consistent with the overriding objective for the parties to be put to the added expense of a trial, or for court resources to be deployed in conducting the trial, in order to resolve an issue that can fairly be decided summarily.

(vi) If it is possible to show by evidence that, although documentary or oral evidence that would put the available documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment, because in that situation there would be a real, as opposed to a fanciful, prospect of success.

(vii) 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 outcome. There must be a reasonable evidential basis for reaching the conclusion that further relevant, admissible evidence is likely to be available at a trial.

35. It should be emphasised that the references in para. 34(iv) above (and in the case-law on which this summary is based) to a 'fuller investigation' are references to a fuller investigation of the facts. As a matter of principle, there is no warrant for making an *a priori* assumption that any legal argument at trial on a point of law or construction would necessarily be any 'fuller' than it would on an application for summary judgment (unless, of course, it was likely that further relevant evidence would emerge before trial, which is a different point). The 'summary' determination of a point of law or of construction does not connote either hasty or incomplete consideration of the legal arguments. On an application for summary judgment, there will always be full argument from the parties, and careful deliberation by the court. The expression 'summary' judgment simply refers to a judgment which is entered without the need for a trial.

36. Finally in this context, it is also important to underline the point made by Marshall LB in paras. 114 and 158 – 159 of the Strike-out Judgment. Litigation costs are high, and if it is possible, properly applying the approach outlined in para. 34 above, to determine issues summarily without the added costs of a trial, then it is in the public interest to do so, because it is in the parties' interests and also in the interests of the efficient use of court resources. If a point of law or a point of construction is difficult, that of itself is not necessarily a sufficient reason to refuse to

decide it summarily. If all relevant material is available at the interlocutory stage, and the point is of sufficient significance in the context of the case as a whole for it to be resolved at an early stage, then it should be.”

Strike-out

27. As to the law on strike-out, the power to strike out a pleading arises generally from Royal Court Civil Rules 2007, rule 52(2), which provides:

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

(a) that the pleading discloses no reasonable grounds for bringing or defending an action,

(b) that the pleading is an abuse of the Court’s process or is otherwise likely to obstruct the just disposal of the proceedings, or

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

28. In *Tranquility Holdings v Invista Real Estate Investment Management (CI) Ltd*, Guernsey judgment 38/2015, Collas B said:

“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 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 that defect might be cured by amendment and, if it might be, the court should refrain from striking it out without first giving the party concerned an opportunity to amend (*In Soo-Kim v Youg* [2011] EWHC 1781 (QB)).

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).”

29. These were the principles applied by the Lieutenant Bailiff in the present case.

The decision below

30. Before looking at the grounds of appeal themselves, it is important to appreciate what the judge below actually decided. The Act of Court of 10 May 2024 records her formal decision. There were three applications before the court. One was the plaintiffs’ application to amend their cause, which was granted by consent (paragraph 1 of the Act). The second was the fourth defendant’s application to strike out all the plaintiffs’ claims against it. This too was granted (paragraph 2), together with costs (paragraph 3). As I have already said, there is no attempt to appeal against those orders.

31. The third application was that by the first to third defendants to strike out all the plaintiffs’ claims against them. These claims fell into three groups: (A) the shareholders’ misrepresentation claim, (B) the shareholders’ mismanagement claim, and (C) the 23rd plaintiff’s mismanagement claim. The third application was granted (i) in part absolutely (paragraphs 4 and 9), and (ii) in part subject to liberty within a certain time to apply to re-amend the cause in certain respects (paragraphs 4 and 6), once more together with an order for costs (paragraph 5). It is the orders made on the third application which are the subject of the application for leave to appeal.

32. The parts of the cause against the first to third defendants which were struck out absolutely are set out in paragraph 9. They are as follows:

“9.1. paragraphs 12(f), 26A and 88(a); (and for the avoidance of doubt, paragraphs 88(b)(ii) and 88(b)(iii) in the absence of satisfactory particulars); the word ‘all’ in paragraph 88 (d):

9.2. the allegation in parenthesis in the preamble to paragraph 89: (‘including by making (the continuance of the appointment of the Property Adviser and/or the Development Manager at all material times conditional on their compliance with the terms of the Offering Memorandum’):

9.3. paragraphs 89(a), 89(b) and 89(d)(i) and (v); (and for the avoidance of doubt, paragraphs 89(d) (ii), (iii) and (iv) in the absence of satisfactory particulars);

9.4. paragraphs 95 (b): paragraph 95 (c) insofar as it refers to ‘the Original Projected Outcome’; 96(c) and 96(d) insofar as it refers to ‘the Original Projected Outcome; and

9.5. Paragraphs 97(b) and 98(a)”.

33. The remainder of the cause against the first to third defendants was subject to the liberty to apply for leave to re-amend, which was to be by substitute documents rather than mere amendment of the existing text, and to be pleaded separately in relation to (A) the shareholders’ misrepresentation claim, (B) the shareholders’ mismanagement claim, and (C) the 23rd plaintiff’s mismanagement claim (paragraph 7).

Discussion

34. Of the nine grounds of appeal advanced, the first two are concerned with issues of construction generally. Grounds 3 and 4 concern the shareholders’ misrepresentation claim. Ground 5 is concerned with the shareholders’ mismanagement claim. Grounds 6, 7 and 8 are concerned with the 23rd plaintiff’s mismanagement claim. Ground 9 is concerned with case management issues. I will deal with each ground in turn.

Ground 1

35. The first ground advanced is that the judge should not have determined issues of statutory construction arising under the relevant legislation and the interpretation of the so-called “Offering Memorandum” on a summary application. The applicants say that there is no relevant authority on the point, it is of “considerable difficulty” and “public importance”, requires full argument, requires evidence as to the factual context, and another issue of interpretation was held to be unsuitable for summary determination.
36. The mere fact that there is an issue of construction, even for the first time, and even though the question be an important one, does not prevent its being suitable for summary determination. I see nothing in the questions raised here to suggest otherwise. Indeed, this court in the earlier decision this year referred to above said:

“50. ... the Judgment below [not by Marshall LB] betrayed a misunderstanding of the significance of the issue under consideration. The Royal Court expressly recognised (in para. 1 of the Judgment below) that the issue of construction was ‘likely to be important, as it may well go to the root of the action’. In our judgment, that is correct. Not only is it an important point of law in its own right, but its determination is also likely to have a profound impact on the dynamics of the litigation. If the Directors are entitled to an indemnity from LPCC in respect of any liability they might owe to the Shareholder Plaintiffs, that is likely to have a profound impact on the enthusiasm of those Plaintiffs to continue pursuing the claim. The sooner that question is resolved, the better. As such, the importance of the issue should have been regarded as a powerful argument in favour of summary determination, rather than as a reason for declining to deal with the issue summarily, as the Royal Court appears to have done in this case.”

37. The court in that case also pointed out that even arguments about public policy (assuming that there were any) could be determined summarily: see at [62].

38. As to the need for evidence at trial, what the judge below said in relation to this ground was:

“10. ... There was no suggestion made that there was actually any identifiable area of additional material that could or would come before the Court if the matter proceeded to trial that could be material to a decision on the construction of those provisions, and what they in fact meant, in so far as they were material to the question of whether a reasonable cause of action dependent on any such point of construction was disclosed.”

On that footing, this submission is pure Micawberism. There is no real prospect of success on this ground, and no issue arising within it which in the public interest should be examined by this court. Accordingly, there is no basis for giving leave in relation to it.

Ground 2

39. The second ground is that the judge made errors of law in determining the statutory construction and interpretation issues. It is submitted (i) that she failed to consider the relevance of the Authorised Closed-Ended Investment Scheme Rules 2008, made under the Protection of Investors (Bailiwick of Guernsey) Law 1987, and the duties imposed by those rules, and (ii) that she failed to conclude that each allegation of breach of duty thereunder had reasonable prospects of success.

40. As to (i), in her substantive judgment, at [90]-[109], the judge below expressly referred (by reference to the statements of case) both to the duties imposed by the 2008 rules, which in the plaintiffs' pleading are called the “Authorised Funds Duties”, and to the allegations that they were breached by the defendants. In subsequent paragraphs, she discussed the parties' submissions on these duties and allegations, and then expresses her conclusions. There is no real prospect of showing that she failed to consider the relevance of the 2008 rules and the duties imposed by them.

41. As to (ii), the Notice of Appeal does not identify the particular “errors of law” alleged to have been made by the judge. Indeed, it does not even identify the particular “issues” which are said to have been wrongly decided. The plaintiffs have had their opportunity to do both. I therefore proceed on the basis that the issues are the decisions by the judge in relation to the allegations of breaches by the first to third defendants of the Authorised Funds Duties. These appear to be those made in paragraph 100 of the plaintiffs' pleading. They found on rules 2.01(2) and 4.02 of the 2008 rules.

42. Rule 2.01 relevantly provides:

“(1) It is the duty of the designated manager [EFG] to administer the Authorised Closed-Ended investment scheme in accordance with

(a) the principal documents and

(b) these rules and

(c) the most recently published information particulars and

(d) in the case of a company subject to any proper directions from time to time given by the directors ...

(2) In the case of a company it is the duty of the directors not to give any directions or exercise any powers duties or discretions which would or might cause the company to operate otherwise than in accordance with the principal documents and information particulars or these rules.”

43. Rule 4.02 relevantly provides:

“The directors ... are to be treated as responsible for the information particulars of an Authorised Closed-ended investment scheme and shall take all reasonable steps to ensure that they do not contain any false or misleading statements or omit facts which would make misleading any statement in the information particulars”.

44. The judge deals with questions of construction of these rules in paragraphs 269, 299, 306 and 309 of her judgment. Those in paragraphs 269 and 299 are however decisions in *favour* of the plaintiffs, because she construes the rules in a way which leads to her refusing to strike out. I assume that the plaintiffs accordingly do not disagree with the judge’s assessment.

45. In paragraph 306, she holds that the fundamental purpose of the duty imposed by rule 2.01(2) was “that directors should not use their company law powers to divert or subvert the nature of the enterprise which constitutes the authorised investment scheme in question.” At first sight, this seems entirely non-contentious. In the absence of any specific criticism from the plaintiffs directed at this opinion I cannot see any real prospect of this court’s taking a different view.

46. In paragraph 309, the judge declined to construe the words “cause the company to operate otherwise than in accordance with” the relevant documents as including an obligation on the directors not to breach *their own* duties to the Fund. She considered this “a highly strained interpretation” and “fanciful”. Once more there is no specific criticism directed by the plaintiffs at the judge’s reasoning in this paragraph. The question is whether there is any real prospect of this court’s disagreeing with her view. In my view there is none. The plaintiffs’ interpretation is indeed fanciful.

47. Accordingly, unless there is some issue arising within this ground which in the public interest should be examined by this court, it must fail. However, I see no such issue.

Ground 3

48. The third ground of appeal is that the judge was wrong to strike out the misrepresentation claim for not containing (i) particulars of reliance of each shareholder, or (ii) particulars of causation, or (ii) a sustainable basis for causation and quantifying loss. The plaintiffs explain this by submitting:

(i) that the arguably correct analogy for the shareholder claims is “negligent misstatement” rather than “misrepresentation”;

(ii) that a plaintiff in a negligent misstatement claim need not allege and prove reliance on the document containing the misstatements and not on the misstatements themselves, as long as reliance on the document was objectively reasonable;

(iii) that section 38 of the Protection of Investors (Bailiwick of Guernsey) Law 1987 and rule 4.02 of the 2008 rules arguably require only that an investor has relied on a *document* to which the duty imposed by that rule applies;

(iv) that it was enough to assert reliance generally by the shareholders without giving particulars of the facts and matters relied on alleged to constitute such reliance, and there was no evidence challenging that allegation;

(v) that the necessary factual causation was established by the allegations that the shareholders invested in the Fund;

(vi) that there was a clearly sustainable case on causation, claimed as the difference between amounts invested, and amounts distributed to investors.

49. In her substantive judgment, the judge below said:

“179. As a matter of fact there are 19 claims of damages for misrepresentation in the OM contained in the Cause and being pursued by 22 shareholders individually (except for three joint claims) against the Directors. This is not a class action, where matters of general application might possibly be presumed as applicable, or be likely to be applicable to the whole class, or perhaps might fairly be pleaded in general terms. It is 19 separate actions which the Plaintiffs have chosen to bring into one cause, but as to which the necessary reliance has to be proved individually in relation to each. If that has to be proved, it must be pleaded, and it therefore must be pleaded with sufficient particularity to disclose the factual nature of the reliance which is going to be relied on in each individual case. The Shareholders have chosen to come together to make one Cause, but that does not absolve them of the requirement to prove, and therefore to plead, their own individual cases.”

50. On the application for leave to appeal in the court below, the judge said:

“15. ... the suggested ground of appeal in this respect just does not seem to me to have grappled with the fact that there are 19 separate claims, and that, at the end of the day, the individuals who are making these claims are going to have to demonstrate their own separate claims, and that the elements of reliance by each of them that are asserted here are going to have to be particularised in relation to each of them. They have not been particularised, and unless and until they are, it seems to me correct to say that no properly pleaded cause of action had been made out. Consequently that was a fundamental flaw which went to the proper pleading of the entirety of the Shareholders’ Misrepresentation or Misstatement Claim.

[...]

17. A distinction is sought to be drawn by the Plaintiffs, in relation to this third ground, as an alleged distinction between a negligent misstatement claim and a misrepresentation claim. It is submitted that in the latter reliance on particular statements needs to be pleaded, but in the former it does not, and one only has to plead and prove reliance on the document generally, and that this is covered by the allegations in the original pleading.

18. I did not understand, and I still do not really understand, the basis on which this argument is put. When one is alleging that one has suffered damage as a result of a breach of duty (and this is expressly the statutory breach of duty here; the words that are used in the Rules are, ‘has suffered loss as a result’ of this) one has to show causation. If one is showing causation of loss ‘as a result’, then showing that one has actually relied on some specific matter is the way in which such the causation is shown. So I simply do not understand that there is any arguable distinction between cases in which reliance has to be proved because there were negligent misrepresentations relied on, and a case in which, as suggested here, you can call a statement a ‘misstatement’ and then say you do not have to prove that the loss was related to the misstatement.”

51. First of all, there is the point about nomenclature. Misrepresentation and misstatement are two versions of the same idea, namely a positive act giving a false impression. Each can be (i) deliberate (fraudulent), (ii) negligent or (iii) innocent (non-negligent). Misrepresentation is perhaps more often used by lawyers in the context of a contract, but it can be used outside that context. Misstatement usually refers to giving a false impression by the use of *words*, whereas misrepresentation can equally be by *conduct*. A *failure* to say or do something is not normally treated as either a misrepresentation or a misstatement.
52. The important point in English law is that the Misrepresentation Act 1967 creates a statutory cause of action for non-fraudulent misrepresentation. So, in England a claim for ‘misrepresentation’ is usually employed in that context. Outside the statute, there is also the tort of negligent *misstatement*, which is a development of the tort of negligence: see *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.
53. But Guernsey does not have a statutory equivalent of the 1967 Act. On the other hand, it does have a law of negligent misstatement: see *eg Long Port Properties Ltd v Trinity Investment Ltd* 2000-02 GLR 319. So there is no similar *juridical* reason to prefer misstatement to misrepresentation (or *vice versa*). As a result, the first point made by the plaintiffs falls away. In the *Guernsey* context, the two words broadly have the same meaning. Whether you call it a misrepresentation or a misstatement, you still have to show that you relied on it. You have to show that the wrong caused the loss of which you complain.
54. No authority is cited for the second explanatory proposition, and in my judgment it is incoherent. A document contains statements. The person reading the document is induced by the *statements*, not the *document*, to do or not to do something.
55. There is nothing in section 38 of the Protection of Investors (Bailiwick of Guernsey) Law 1987 and rule 4.02 of the 2008 rules which gives any colour to the plaintiffs’ third explanatory proposition, and they cite no authority in favour of it. It is simply wrong. In my judgment, it is quite unarguable.
56. No authority is cited for the fourth explanatory proposition, and there is English authority against it. In *Hunt v Optima (Cambridge) Ltd* [2015] 1 WLR 1346, CA, Christopher Clarke LJ said:

“54. In order to recover in the tort of negligent misstatement the claimant must show that he relied on the statement in question ... It must operate upon his mind in such a way that he suffers loss on account of his reliance e.g. by buying at too high, or

selling at too low, a price, or making an agreement or doing something which he would not otherwise have made or done ... ”

57. The RCCR 2007, rule 10(2)(a) relevantly provides that

“The cause shall contain ... 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 ... ”

58. Here, the material fact is not that the plaintiff *relied* in the abstract, but *what the plaintiff did or did not do* in reliance. Otherwise the plaintiff has not pleaded, and therefore cannot prove, the causation of any loss, and loss is an essential element of the tort. In my judgment, there is no basis for assuming that the plaintiffs’ second proposition forms part of the law of Guernsey.

59. As for the fifth proposition, factual causation is not alleged by saying that the shareholders invested in the Fund. That is simply not enough. They may have invested for all manner of other reasons than being induced by alleged misstatements. *Post hoc propter hoc* proves nothing. Mere temporal succession does not establish a causal connection.

60. The sixth proposition simply deals with one way of calculating a loss. It does not allege the causation of that loss.

61. My overall assessment of ground 3 is that it is hopeless. There is no real prospect of success upon it, and no issue of public interest to be examined by this court.

Ground 4

62. Ground 4 is that the judge was wrong on a summary application to strike out certain of the allegations with respect to the Offering Memorandum, as these issues were not suitable for summary determination in the absence of evidence as to the factual context

63. The substantive judgment below said:

“240 ... b. Of the alleged subsequent misrepresentations, only the ‘Inadequate Warnings’ representation (Para 88 (b) (i) and (c) of the Cause and the Amended Cause) succeeds, just, in surmounting the “real as opposed to fanciful prospect of success” test; the other four asserted misrepresentations (Paras 88(a), 88 (b) (ii) and (iii), and 88 (d)/(e)) disclose no reasonable cause of action as pleaded. I do not think that the basis of claim in Para 88 (a) is susceptible to cure by possible amendment, and I am sceptical as to whether that alleged in Para 88 (b) (ii,) (b) (iii), (d) and (e) could be.”

64. Para 88(a) of the cause pleaded the alleged “false track record” of two companies which had just been formed, to act as the property adviser and the development manager respectively. As the judge said, both in her substantive judgment ([204]-[207]) and in refusing leave to appeal, there was no basis for saying that this could be taken literally, when it was obviously the track record of their *personnel* that was being put forward. This is hopeless.

65. Para 88(b) of the cause pleaded the omission of “material warnings” from the Offering Memorandum, namely (i) of the high degree of reliance of the Fund on Mr Becherini, (ii) of the intention of Mr Becherini to give personal guarantees of the borrowings of the SPVs involved, “if this was so”, and (iii) the intention that Mr Becherini’s death would be an event of default under the SPV loan agreements, “if this was so”.
66. The judge did not strike out para 88(b)(i) (though she considered the claim weak), but she did strike out para 88(b)(ii) and (iii), for several reasons. These included: there was no explanation as to why these matters would be material factors bearing on an investor’s willingness to invest, it involved descending to an unrealistic level of detail in relation to terms of potential commercial arrangements, it assumed that any such detail would have been formed at the time of the Offering Memorandum, the addition of the words “if this was so” meant that a mere possibility was sufficient to require the warning, and the complaints were of alleged omission, with no explanation of how such omission rendered any express statement inaccurate or misleading.
67. Taken all together, the judge considered these two complaints too far-fetched to amount to a reasonable cause of action. I respectfully agree. In my judgment, this attempt to pile Pelion upon Ossa does not raise a serious question of fact for determination at trial. It is simply unwinnable, and was rightly struck out. There is no real prospect of success in this court on this part of this ground.
68. Para 88(c) of the cause repeated some of the substance of para 88(b), and added nothing to that. It stands or falls with para 88(b), and I need say nothing more about it.
69. Para 88(d) of the cause pleaded a representation in the Offering Memorandum that it would be possible to obtain Key Man Insurance to protect the Fund against all losses flowing from Mr Becherini’s death, and that it would obtain such insurance, though the defendants knew or ought to have known that this was (in summary) impossible to obtain at economic cost for adequate cover. Para 88(e) further asserted that the defendants failed to investigate the obtaining of Key Man Insurance before the Insurance Addendum was made to the Offering Memorandum in January 2016.
70. The judge held that the claim under para 88(d) and (e) was not maintainable, and struck it out, because the construction placed by the plaintiffs on the Insurance Addendum (“insurance cover to protect the Fund against *all* financial losses”) was not what the Addendum actually said. What it referred to was “insurance cover to protect the Fund against losses”. There was no real prospect of success on this claim, because the construction was wrong, and the wording used could not have conveyed the meaning that the plaintiffs sought to derive from it. I am not persuaded that there is any real prospect of success on appeal. Nor is there any public interest in an appeal on any other basis.

Ground 5

71. Ground 5 is that the judge was wrong to strike out the shareholders’ mismanagement claim, in paras 89 to 92 of the cause, and wrong to strike out parts of paras 95(b), (c), (d), because she had held that the claim had reasonable prospects of success as pleaded, in relation to the allegation (in para 89(c)) that the property adviser failed to obtain key man insurance in accordance with the Insurance Addendum (though she struck that out too, but subject to the liberty to apply for permission to re-amend). She was also wrong to strike out paras 95 and

96(c), (d), in relation to the allegations as to quantum, because they were reasonably sustainable as a matter of law.

72. The real gravamen of this ground is that the judge below held that the allegation at para 89(c) about a failure to obtain key man insurance could possibly go to trial, *if repleaded*, and yet the remainder of this claim could not. In the plaintiffs' view, the judge's decision was therefore inconsistent. It is important however to note that the judge herself said (at [261]) that, in order to make the applications to strike out manageable, she had to break the allegations down to consider particular claims in turn.
73. Para 89 alleges failures by the defendants to take reasonable steps to ensure that the property adviser and the development manager "acted in accordance with" the terms of the Offering Memorandum. This is founded on the substance of the obligation placed on the first to third defendants by rule 2.01(2) of the 2008 rules, namely, "not to give any directions or exercise any powers duties or discretions which would or might cause the company to operate otherwise than in accordance with" the Offering Memorandum.
74. Para 89(a) alleges that Mr Becherini gave personal guarantees having the effect of subjecting the Fund to additional risk of which investors were not aware. Para 89(b) alleges that Mr Becherini agreed with lenders that his death should be an event of default. Para 89(c) alleges that the defendants failed to obtain key man insurance. Para 89(d) alleges that (i) there was a failure to appoint a full time architect to each project, (ii) no steps were taken to respond to or manage Mr Becherini's apparent ill-health from July 2017, (iii) improper payments were made to the development manager and no independent quantity surveyor had been appointed, (iv) no sufficient steps were taken to recover these improper payments, and (v) (not original, but sought to be added) that the development manager's professional indemnity insurance "wrongfully excluded" claims by the relevant SPV or the Fund.
75. As to paras 89(a) and (b), the judge held that it was unarguable that they constituted breaches of rule 2.01(2) of the 2008 rules, because neither matter was expressly or impliedly forbidden by the Offering Memorandum. They were matters of discretionary management. As to para 89(c), the judge held that it depended on whether the conduct of the directors fell within the phrase "exercise any powers duties or discretions" in rule 2.01(2). This could only be decided at trial, after full argument. As to para 89(d), the judge held that the Offering Memorandum did not impose any obligations which could have been breached by the matters alleged. In other words, the complaints were about the ways in which operations in accordance with the Offering Memorandum were carried out, rather than being complaints that the acts concerned were outside the scope of the Offering Memorandum.
76. Para 90 alleged failures by the first three defendants before the death of Mr Becherini in July 2018 "to exercise independent judgment and/or proper care, skill and diligence in relation to the operations of the Fund". The judge held that these allegations did not assert any causing of the Fund "to operate otherwise than in accordance with" the Offering Memorandum. The only way she would be able to do that was to construe rule 2.02(2) as meaning that, for the Fund to operate in accordance with the Offering Memorandum, the directors had not to breach *their directors' duties* to the Fund. In other words, all the normal directors' duties would *also* be statutory duties owed under rule 2.01(2). This was the "highly strained" interpretation of the rule that was referred to at an earlier stage (above, [46]), which led to the striking out of para 90.

77. Paras 91 and 92 alleged failures by the first three defendants *after* the death of Mr Becherini in July 2018. Para 91 began with a statement that the alleged breaches following were breaches of the Authorised Fund Duties, although the duties in fact then pleaded were those arising under ordinary company law, rather than under rule 2.01(2) of the 2008 rules. Para 92 set out particular complaints about alleged acts and (mainly) omissions by the directors. The judge held that none of these complaints alleged breach of a duty arising under the 2008 rules, and that accordingly there was no sufficiently clearly pleaded breach of a statutory duty. She therefore struck out paras 91 and 92.

78. The judge explained her own refusal to give leave to appeal in these words:

“28. The fifth ground of appeal was in much the same vein, and related to the Shareholders’ Mismanagement Claim. This was more in relation to the particulars of the Original Projected Outcome and the extent to which this could produce a properly arguable basis for quantification of any claim which could reasonably mounted. I do not think I need to go to any more detail, because it seems to me that what is really said is that once I had actually allowed, as I did allow, that there was a point in relation to the obtaining of insurance, then I could not strike the matter, or the relevant part of the matter out for failing to plead a maintainable allegation as to the loss said to be caused. I do not think that that argument stands any real prospect of success on appeal, when examined.

29. It is undoubtedly the case that the Offering Memorandum said that insurance on the death or disablement of Mr Becherini (and I think possibly Mr Hill also, but, anyway, key man insurance of some suitable nature) would be obtained, and it is undoubtedly the case that it was not. Again of course, the question who was to decide the suitability of it, and what would responsibly be regarded as ‘suitable’ insurance becomes material. I held, however, that there was the kernel of an arguable cause of action there, because it did not happen. It is said that I was then wrong to strike out the Mismanagement claim as a whole for disclosing no reasonable cause of action when I had in fact admitted that that was a reasonable case, and allowed that pleading to go forward.

30. I reject this ground of appeal because, at the end of the day, my decision was in the context of the entirety of the pleading which had been made – and which by this time had been so extensively disallowed that it would not be possible or convenient simply to extract the allegations supporting this one part from the remainder – but also in the context that it did seem to me that the quantification of such a claim had not been properly and adequately pleaded, on any basis. This was again a case management decision, because parties need to know what claims are being made and on what basis of what cause of action, and how much loss it is being said any sustainable cause of action produced. That was something that was not clear, and therefore needed to be made clear if even that identifiable claim was to be allowed to go ahead to trial.”

79. So the judge treated the refusal to allow the allegations other than the key man insurance point to go forward to trial without repleading as a case management decision. In *Royal & Sun Alliance Insurance plc v T & N Ltd* [2002] EWCA Civ 1964, Chadwick LJ said:

"37. ... these are appeals from case management decisions made in the exercise of his discretion by a judge who, because of his involvement in the case over time, had an

accumulated knowledge of the background and the issues which this Court would be unable to match. The judge was in the best position to reach conclusions as to the future course of the proceedings. An appellate Court should respect the judge's decisions. It should not yield to the temptation to "second guess" the judge in a matter peculiarly within his province.

38. I accept, without reservation, that this Court should not interfere with case management decisions made by a judge who has applied the correct principles, and who has taken into account the matters which should be taken into account and left out of account matters which are irrelevant, unless satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge."

80. I do not think that there is any real prospect that this court would take a different view of the allegations in para 89(a) and (b). As the judge said, it is unarguable that they constituted breaches of rule 2.01(2) of the 2008 rules. Nor do I think that there is any real prospect that this court would take a different view of the allegations in para 89(d). As the judge said, the Offering Memorandum did not impose any obligations which could have been breached by the matters alleged. The real argument is about para 89(c), as to which the judge said "there was the kernel of an arguable cause of action there", but still struck it out, subject to the liberty to apply to re-amend.
81. The judge justified taking this course as a case management decision. She did this partly because the shareholders' mismanagement claim "had been so extensively disallowed that it would not be possible or convenient simply to extract the allegations supporting this one part from the remainder", but also partly because "the quantification of such a claim had not been properly and adequately pleaded". The key man insurance claim would thus have to be repleaded before it would be fit to go to trial.
82. Whether this was the case or not was a matter relying on both the judge's familiarity with the case and her own long experience in the law. It was a matter of how best to manage this litigation. And this decision (in the words of Chadwick LJ) was made by a judge who, because of [her] involvement in the case over time, had an accumulated knowledge of the background and the issues which this Court would be unable to match." In my judgment, I cannot give leave to appeal against this case management decision unless I can see a plausible argument that the judge applied the wrong principles or chose the wrong things to take into account, or was so plainly wrong that the decision should not be allowed to stand. In my judgment, that is not the case here. And there is no public interest in an appeal on any other basis.

Ground 6

83. Ground 6 is the first of those concerned with the 23rd plaintiff's (rather than the shareholders') claims of mismanagement. It is that the judge was wrong to strike out parts of the 23rd plaintiff's claim of negligence against the first three defendants, because the allegations were sufficiently pleaded, including in the Réplique, and sustainable without giving further particulars. This is supported on the basis that the shareholders' mismanagement claim "had reasonable prospects of success as pleaded", that is, in relation to para 89(c). But this ground is based on the same footing as the previous ground. It is in effect parasitic upon ground 5. If that fails, then so does this.

84. This is reflected in what the judge said in her judgment on leave to appeal:

“31. ... it was said that I was wrong to strike out on the final basis the same arguments made by the company that three of its directors were negligent in allowing its fourth director to give personal guarantees, or allowing the death of the fourth director to become an event of default. This, again, I think comes down to the fact that the detriment and the loss that is actually pleaded needs to be properly alleged. It is said that in fact the mere pleading that this had a detriment to the Fund, or that it caused loss in purely general terms, is perfectly adequate. I took (and take) the view, on the grounds of case management, and particularly in the context that already, previously, particulars had been sought of what was the nature of the claim, and the way in which the causation was said to arise in the asserted quantum, that on that basis the actual Cause itself was appropriately struck out, but allowed to be re-pleaded with more appropriate detail if that could be achieved.”

85. I see no more real prospect of success for this ground than I did for ground 5, and no issue of public interest to be examined by this court. I add only that I agree with the judge’s comments (at [330]-[334]) about the use of the Réplique to introduce allegations that should be in the Cause. In *D & G Cars Ltd v Essex Police Authority* [2013] EWCA Civ 514, [70], Briggs LJ approved the statement in the 2013 edition of *Civil Procedure*, vol 1 para 16.7.3, that

“A reply must not contradict or be inconsistent with the claim; for example it must not bring in a new claim. If the claimant wishes to depart from the case set out in their claim they should seek to amend that claim rather than serve a reply.”

And Martin Griffiths QC, sitting as a deputy High Court judge, put it well in *Donovan v Grainmarket Asset Management LLP* [2019] EWHC 1023 (QB) when he said:

“38. A Reply must be responsive to a Defence. It cannot raise a new claim for new relief.”

Ground 7

86. Ground 7 is that the judge was wrong to strike out the remainder of the 23rd plaintiff’s claim, because the allegations made were reasonably arguable and sufficiently particularised. The judge had decided in her substantive judgment that this claim as pleaded was one solely for breach of ordinary directors’ duties under company law, and did not plead any breach of statutory duty (see at [327]). So, at some length, she examined the allegations in paras 89-92 to see whether they disclosed any breach of such ordinary directors’ duties.

87. The judge concluded (at [395]) that

“... there are matters pleaded in the Cause which are capable of disclosing a reasonable cause of action, if properly particularised. However, I am not going to deal with the allegations in Paragraphs 89 - 92 in detail, paragraph by paragraph, in an attempt to extract pieces of text which properly survive scrutiny, pieces which do not, and pieces which are doubtful. I do not regard it as my function to do this.”

The judge gave directions to allow for the possible repleading of the cause. But she also struck out some aspects of the mismanagement claim on a final basis, either because the

allegations were not arguable, or because they were embarrassing, or because they were prescribed.

88. In refusing leave to appeal on this ground, the judge said:

“32. It is then said – and this is the seventh ground of appeal – that it was wrong to strike out the rest of the facts contained in the Cause as a whole. In my view, I would maintain that this is, par excellence, a case management decision, which is usually and generally the province of the potential trial judge or the judge at first instance, who has actually to work out and try and project how a claim is going to be managed and be made manageable, and how in fact it is going to be triable, and triable conveniently. As to this, I do not consider that a ground of appeal of any substance is made out under the seventh ground of appeal.”

89. I agree that the decision whether to pick out parts of a complex and detailed claim which would go to trial and strike out the rest, or to strike out the whole subject to liberty to apply to re-amend is a case management decision. As with ground 5, I cannot give leave to appeal unless I can see a real prospect of this court’s being satisfied that the judge applied the wrong principles or chose the wrong things to take into account, or was so plainly wrong that the decision should not be allowed to stand. Like ground 5, that is not the case here. There is no public interest in an appeal on any other basis.

Ground 8

90. Ground 8 is that the judge was wrong to strike out parts of the 23rd plaintiff’s claim on the basis of the need for additional particulars of causation, because the allegations had been sufficiently stated, are likely to require disclosure and expert evidence and the judge was wrong to find that the 23rd plaintiff could give such particulars before disclosure.

91. The judge had held that the relevant paragraphs of the cause did not plead a reasonable cause of action and, to the extent that it might do so, it was embarrassing for lack of particularity (at [360]). She found that the allegation of loss and damage amounting to the loss of a 200% rate of return on the investment was “entirely speculative, and [had] no foundation in reality” and “simply fanciful” (at [363]). If the directors had obtained key man insurance (the main criticism made of them), it might have covered losses, but it would not have produced *profits*. She struck it out. Alternative forms of pleading of loss and damage, as “loss of a chance”, or “a better outcome would have been achieved”, she found to be “wishful thinking or speculation” (at [367]) and lacking in particularity. She struck those out too, but with liberty to apply for leave to re-amend.

92. On the application to the judge below for leave to appeal, she said:

“33. The eighth ground of appeal, comes back again to the point about adequate and adequately maintainable details of claimed quantum and causation, and my having struck these out for not having been pleaded on a maintainable basis as regards the supposed calculation of the allegedly ‘better outcome’ for the Fund, and relating this to the alleged breaches of duty that are complained of. In this context, in my judgment, in both respects (quantum and causation) the company’s claim of loss, *etc.*, has to be related to the matters of complaint which are made, and consequently the causal nexus, and the consequent quantum have to be alleged and made out on the

pleading. This just does not seem to me to have been done and arguing, as the Plaintiffs have tried to do, that such detail is all premature and it must all be allowed to go off for trial and it will be given later strikes me as being inconvenient and improper. It seems to me that there is no identification by the Plaintiffs of any further matters or materials that are likely to come forth in the course of further trial preparation procedures which are going to make the quantification of loss and damage any easier or more accurate.”

93. I cannot see any real prospect of success of an appeal of the decision to strike out the allegation of loss of a 200% rate of return on the investment. So far as concerns the alternative forms of allegation, “loss of a chance”, and “a better outcome would have been achieved”, the judge’s decision to strike out with liberty to apply was a case management decision. I see no prospect of showing that the judge applied the wrong principles or chose the wrong things to take into account, or was so plainly wrong that the decision should not be allowed to stand. So far as I can see, there is no public interest in an appeal on any other basis.

Ground 9

94. Ground 9 is that the judge was wrong to order that to the extent that the shareholders’ misrepresentation claim, the shareholders’ mismanagement claim and the 23rd plaintiff’s claim were to proceed at all they were to proceed separately, because they were properly brought together and/or properly ought to proceed together and the degree of amendment mandated by the judgment did not reasonably warrant a decision to strike out the cause as a whole.

95. What the judge said in her substantive judgment was:

“452. As to the three remaining claims [that is, the shareholders’ misrepresentation claim, the shareholders’ mismanagement claim, and the 23rd plaintiff’s mismanagement claim] : I will strike out the three remaining claims identified above, but with leave to apply to amend the Cause by re-pleading those claims in a convenient form, if so advised.

453. This is mandated as to the Shareholders’ Misrepresentation Claim because it does not survive at all at present. It is mandated as to the Shareholders’ Mismanagement Claim and LPCC’s Mismanagement Claim as a matter of practical case management, because, after the excisions which I have made, so little of either (in particular the Shareholders’ Mismanagement Claim) survives that the Cause itself is simply not a convenient document for further pursuit of either claim.

454. Therefore, all three claims, if further pursued, must be drafted and pleaded separately. In other words, I am severing these claims, and they must also proceed independently for the purposes of convenient management, although of course it may be convenient for case management issues to be dealt with, in respect of more than one of such resuscitated claims, with at the same time.”

96. In giving judgment refusing leave to appeal on this ground, the judge said:

“36. The ninth ground of appeal is very much a matter purely of case management. In fact, I think, most of these grounds of appeal come down to a form of case management in some aspect or other, in the end, but this one I have described as a sort of a sweep-up point. It is complained that I was wrong to make an order striking out everything because I had, in fact, held that there was one, at least, element of the claim which did have a point to it and was reasonably arguable, and I should not therefore have ordered it to be struck out at all. And it is also alleged that I was also wrong to deal with the whole matter by making the order which I considered appropriate with regard to the re-pleading any claims which the Plaintiffs might consider could be properly advanced, separately, as regards the three bases of causes of action which had been identified within the Cause against these Defendants. However, it was, in my judgment and having thought about it, as one can imagine, for quite a length at the time when actually deciding the matter, essentially a matter of case management as to how it now became convenient for the case to go forward, if it was to go forward at all to trial.

37. At the end of the day, separate identification of the relevant causes of action is the way in which the case will have to be dealt with, even if it all proceeds, by actually identifying what the separate claims actually are, and it is only fair that the Defendants are allowed to know, as soon as possible, what exactly are the bases of the individual claims that are being made against them by the separate plaintiffs, and they are enabled to deal with them methodically. The Plaintiffs have made one attempt to bring these claims which, as I said in my judgment, have resulted in a pleading which I regard as actually being so ‘embarrassing’ that it was likely to obstruct the just disposal the claim(s). They have simply thrown all the facts into the pleading and then said that they, therefore, have various causes of action against various people but have not sufficiently identified exactly what these are in fact. They had not cured this by voluntary, interlocutory, means, and it was therefore appropriate, it seemed to me, that if the matter proceeded and they were given a second chance, closer control on the pleadings should be exerted. My order was intended to enable this, and that was a case management decision.”

97. I agree with the judge below that, she having reached the view that the cause as it stood was untriable, even after an attempt to amend, her decision to strike out *subject to liberty* to apply to re-amend was pre-eminently a case-management decision. Once again, I see no prospect of showing that the judge applied the wrong principles or chose the wrong things to take into account, or was so plainly wrong that the decision should not be allowed to stand. And there is no public interest in an appeal on any other basis. This ground too must fail.

Conclusion

98. It is important to notice that the judge below (after striking out the claim against the fourth defendant) did not strike out the whole of the three remaining claims *absolutely*. Although certain limited parts were struck out finally, the rest of those three claims were struck out *subject to liberty* to the plaintiffs to apply for leave to replead their claims against the first three defendant.

99. Notwithstanding some of the comments made by the plaintiffs’ advocates in their submissions, the order made by the judge below was not punitive of the plaintiffs. Instead, it was a combination of (i) a clear statement by the Royal Court that bad pleadings will not be

taken to trial, coupled with (ii) the desire at the same time *not* to “drive the plaintiffs from the judgment seat” (*cf HRCKY v Hard Rock Ltd* [2019] JCA 123, [7]), *so long as* a workable pleading could be presented.

100. I do not know whether the plaintiffs have taken advantage of the opportunity offered to them to apply to replead their cases. But, if they have not, that is a matter for them, and not for this court. I am concerned only with the grounds of appeal advanced in the draft Notice of Appeal attached to the application for leave to appeal. For the reasons given above, I refuse permission to appeal on each and every one of the nine grounds advanced.