

Application for leave to appeal from striking out of Plaintiffs' claims but with time-limited permission to apply to restore by re-pleading. Test considered. Leave to appeal and stay pending further application to Court of Appeal refused.

[2024]GRC047

**IN THE ROYAL COURT OF GUERNSEY**

**ORDINARY DIVISION**

**Civil Action No. 2407**

**BETWEEN:**

**(1) WOLFGANG JOACHIM ERICH LANDL  
and others**

**Plaintiffs**

**and**

**(1) STEPHEN WILLIAM HOGG  
and others**

**Defendants**

**Before Her Hon Hazel Marshall KC Lieutenant Bailiff**

**Hearing date: 14 June 2024**

**Judgment given: 14 June 2024**

**Counsel for the Plaintiffs:**

**Advocate T Bamford**

**Counsel for the First to Third Defendants:**

**Advocate P Ferbrache**

[Note:

The factual background to this judgment appears in the judgment in *Landl & Ors v Hogg & Ors*, Guernsey Royal Court Judgment [2024] GRC010.]

**Judgment (approved)**

**LIEUTENANT BAILIFF MARSHALL:**

1. The decision I make, at the end of the day, is that I am not going to grant leave to appeal.
2. I have looked at the question of the test for granting leave to appeal. The test which we have here is a test that has been approved and set out in the *Glenalla* case [*ITG Ltd v Glenalla Properties Ltd* [2022] GCA091] at [40], to which I was referred:

*“the correct approach in our view is that this Court should not grant leave unless it is at least satisfied that (1) either the appeal has a real prospect of success, or (2), 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”*

and the Court of Appeal say the second category would be exceptional as one would expect, because, obviously, if you have already concluded that the appeal has not got a real prospect of success, actually allowing it to go ahead does have an impact on resources of questionable utility. (I note that the quotation above says “*this Court*” but it does not seem to me that the test for the Royal Court itself granting leave to appeal could be materially different in principle.)

3. I also noted however, when that paragraph was cited to me, the comment at [39], that it is not a test to the effect that “*if the prospects are more than merely fanciful leave must be allowed*”. It is said there that that is actually putting it too strongly. So if that was argued to be the contrast between “real” as opposed to “fanciful” prospects, the Court of Appeal rejects that, and at the end of that paragraph it says that to approach the question of leave in the manner proposed by F&B [the applicants in that case], ie as I have just cited, “*could result, in the case of certain types of interlocutory decisions, in leave being granted inappropriately*”. I think that is recognising the fact that certain types of interlocutory decisions obviously have an element of discretion and judgment in them, in which simply saying, ‘Oh well you can just conceive of a prospect of success so it is not entirely fanciful,’ might be too low a test.
4. But it is also interesting to look at the remainder of that judgment, from [44] onwards, which I will not cite in total, but I am grateful to have been referred to it as an example of the Court’s process of assessment, at this stage, of the merits of the decision below. It formed the view (this is at [50]) as a matter of impression, that, at least if taken together, the two arguments to which they had just referred, which were arguments about whether certain persons were actually provided with a sufficient opportunity to be able to object to a course that had been taken, would pass the threshold, and they decided that,

*“On the face of it they have sufficient substance to justify allowing them to be ventilated on appeal. It is not appropriate for us to seek to reach a more concluded view, and whether the arguments are correct or not, of course, remains to be seen.”*

5. So that describes the test. I conclude that it becomes that of “*sufficient substance to justify allowing the arguments made to be ventilated on appeal*”, and while that may not be very much “greater” (as it were) than the distinction between “real” and “fanciful” that we are all very familiar with at first instance as regards striking out or summary judgment, it seems to me that this is effectively saying that the reality

of success has to be taken into account in the context that it is to be an appeal, and not just a decision at first instance. The “sufficient substance” is slightly, but not greatly, higher than a real as opposed to merely fanciful prospect of success, stressing the “merely” fanciful. But it really is a matter of impression as to whether the grounds have sufficient substance to justify allowing them to be ventilated on appeal. So that is the nature of the test that I will apply.

6. Now, there are nine grounds of appeal that have been formulated. The notice of appeal, and those grounds, have been amended in the context, I think, firstly and principally, of this court’s order being ultimately finalised. It had not been finalised at the time that the Plaintiffs needed to file their application for permission to appeal. This does have the result that they have helpfully sought to identify what parts of the court order they are appealing against and it does seem, as submitted by Advocate Ferbrache, that the result is that they are effectively saying that the entirety of my order should fall, although they have not actually suggested any substitute order that should have been made. This would therefore have the result simply of going back to saying that the original pleading, ie the Amended Cause, as originally put before the Court in relation to these particular Defendants, should be allowed to stand.
7. I take it that that would mean that there would simply have to be a blue pencil applied to the parts of the pleading that relate to the original Fourth Defendant, now that the decision has been accepted that, in fact, there was no reasonable cause of action revealed against the Fourth Defendant in the Amended Cause, but that would presumably just be a matter of blue pencilling the pleading as it originally stood. Their grounds for saying that that is all that should happen are the cumulative effect of the grounds in their nine headings that they advance.
8. But it is of course possible, as Advocate Bamford accepted, that I might think it right, applying the rules appropriately, to grant leave to appeal on some but not all of the nine grounds. It is therefore necessary to consider them all individually. So I have to do that and I have done this in some detail in considering Advocate Bamford’s submissions with him. I have identified as we went through the points that were being made, that they fall into certain grounds that are rather general in their effect and approach, and others that are very much more specific and are aimed at specific decisions that I made in relation to specific parts of the pleadings. However, I have concluded in the end that I should not give leave to appeal on any of them.
9. The first ground of appeal is that it is submitted that the issues which I decided were unsuitable for summary determination at all. The basis for that ground is that they related to construction of the Authorised Fund Duties rules, (ie the duties contained in the *Authorised Closed-Ended Investment Scheme Rules 2008*), that these were difficult issues and they involved matters of public importance and that, as far as they were concerned, they really ought not to have been determined in isolation but ought to have been determined only after going to a trial. In particular, it is said that the issues, being ones of construction of either the Rules themselves or the Offering Memorandum itself, properly required consideration of evidence that was not before the Court as to the factual context, in particular of the OM. It is suggested that I had inappropriately decided the interpretation of the Rules “in a factual vacuum”.

10. I do not accept that there is any substance in those submissions at all, because as Advocate Ferbrache submitted, those were matters of construction of the Rules themselves and the offering memorandum itself and whilst they were indeed matters of construction there was obviously, in practice, a great deal of evidence about the context and the purpose of the documents. This can plainly be inferred as to the Rules from the general context and purpose of the Rules in any event. 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.
11. It is no good, in my judgment, just saying, ‘Oh well, other things might emerge on disclosure’ as a justification for postponing such a decision to a full trial, and regard also needs to be had to the fact that these Defendants, the directors had, in an attempt to “fend off” the case itself (as I put it), done what they considered to be an exercise of early disclosure. They had produced a very great deal of documents, which they had identified by relevant class of document, and which they put to the Plaintiffs, so the Plaintiffs could see, in effect, what the Defendants obviously regarded as being the material that would come forth on disclosure. If the Plaintiffs considered that there was in fact a real ground for saying that there was something else that needed to be brought before the Court’s attention before the Court could take these issues of construction and reasonably decide them, they had ample opportunity to do so. They did not. They just basically said, ‘Oh no, this really all needs to go to trial,’ and it seems to me that there was a distinct element, at that stage, of simply saying, ‘These are difficult points, and therefore it is appropriate that they should go to trial.’ That, however, is not good enough.
12. That element, which also effectively disposes of Ground 2 of the notice of appeal, has been effectively ruled out by the decision of the Court of Appeal allowing an appeal in relation to an earlier decision in this matter by Lt-Bailiff Finch (see *Landl v Hogg* [2024 GCA027]) where he refused to determine a preliminary issue as a matter of summary judgment but directed that the point should proceed to full trial. This was, as I understand it, in relation to a separate point, on the construction of indemnities which the directors had from the company, which they said should be decided first, and (I think) submitted would result in the company’s claim being struck out because any damages which the directors were ordered to pay the other 21 individual plaintiffs would be the subject of indemnity from the company, in any event, thus making the litigation circular.
13. That was a point of construction of the indemnities which Lt-Biliff Finch said ought to be allowed to go to trial. The Court of Appeal firmly rejected the view that, just because an issue is a matter of complexity and difficulty, it ought to go to a trial for that reason, if in fact the element of complexity and difficulty can logically be decided at an early stage. The Court of Appeal has approved the approach that it should be so decided, not least because, these days, the costs of pursuing litigation to its ultimate conclusion can be so considerable because of the amount of manpower and everything else that has to be involved, in completing all the procedures which need to be done if a matter goes all the way to trial. So if, in fact,

one can identify discrete points of construction of rules or documents which can fairly be decided at an early stage, because all material relevant to that construction point is in fact before the Court, then that is a course that should be taken.

14. That was the view which I took in this case. I therefore decided the points of construction at the time, on the Defendants' applications. It has not been advanced that there was, in fact, any identifiable area of material that would have been relevant to the points of construction which I effectively decided, and so I hold that those first and second grounds of appeal are without foundation and I will not give permission to appeal on them.
15. As to the third ground, which is what was called the 'Misrepresentation claim in relation to causation and loss', the objection there is that I struck out that claim in general on the grounds that, in reality, it was 19 separate claims advanced by 21 separate individuals as to loss that they had suffered through investing in this scheme on the basis, they claimed, of erroneous matters set out in the Offering Memorandum, but that such actual reliance had been pleaded in a completely blanket form, without any identification of the reliance allegedly placed by each of them. I struck the claim out on the grounds that there were 19 separate claims which needed to be made out, and therefore pleaded, individually. But 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.
16. Thus, at the end of the day, I regarded the absence of specific allegations of reliance, sufficiently related to each of the separate claims, as being a matter which would cause the claim in respect of the Shareholders' Misrepresentation or Misstatement claim to be struck out until that were remedied, but, equally, this is a point which, if it can be remedied, the Plaintiffs should be, and have been, given the opportunity to do so.
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.

19. Indeed, it seems to be suggested that all one had to do was show one had relied on the document, and if there was some misstatement in it, that was enough to found an actionable claim for damages. I do not see how that can be the case, because if the alleged misstatement was completely unrelated to any damage that had ensued or that one had suffered, as a matter of logical cause, then the two are simply unconnected. I was of the view, and I am still of the view, that with the way in which the claim is advanced in this case, it is going to be necessary, and it is necessary, for reliance on the actual misstatements or errors that are alleged (and which would have to be proved to be present in the Offering Memorandum) is going to have to be proved, and that such reliance would have to be proved in relation to each of the individuals who are making this claim - and that must be catered for in a properly pleaded claim.
20. Moving on, the fourth and I think fifth grounds, in particular, are with regard to pleadings that relate to the Shareholders’ claims, but as to specific matters of the contents of the Offering Memorandum. The first of these was called the “False Track Record” claim. It is said that I should not have struck that out because I did it on the basis that the interpretation that was being placed on the allegation was a literal interpretation, and while literally inaccurate, there was no evidence (and I could not see on the basis of the actual statements themselves that there could be any credible evidence) that in fact it could be taken literally in the way that the pleading itself purported to assert. It was an allegation of the “track record” of a company, when it was plain and that the company had only just been formed for the purpose and could have no such track record itself, but when the important thing, and the obviously meant thing, was the experience of the personnel who would have to have the acquired track record, and that this was quite obviously what was being referred to.
21. As to that allegation, I struck it out as a final matter, and said it was simply not maintainable. The actual allegation as pleaded relied on the literal falsity, but it was fanciful to say that that literalness was material. It was effectively saying that the literal falsity had been relied on, something which seemed to me to be a fanciful claim. I therefore directed that that particular claim would be struck out finally. Nevertheless, by allowing, as I did, that if the Plaintiffs can plead some kind of substantiable claim with regard to the facts surrounding this “track record” statements which do not purport to rely simply on its literal falsity, I do not see that my eventual order actually precludes them from doing so. If they can get the necessary facts together they could make a more nuanced claim in relation to some such matter of the track record.
22. There is also a complaint that it is said that I merely assumed that the asserted track record was correct as a reference to the track record of the individuals when that was not on the evidence. Once again, if a claim could be advanced on the basis that reliance was placed on the alleged track record as a track record of the relevant personnel when that was erroneously put forward, it does not seem to me that that my order has precluded any such claim being made, if it can be justified on the

facts. One must remember that I was here dealing with strike out. I have dealt with striking out the pleading itself, as it is pleaded, for being inadequate or flawed in certain bases, but I have given the opportunity, if the pleading can be remedied in a way that does actually pass the test of disclosing a reasonably maintainable cause of action, then it can be done, albeit particular aspects of the cause as pleaded I did decide were simply not arguable at all.

23. The above relates to the “False Track Record” claim. Similarly, there are complaints that I struck out certain other allegations for being unmaintainable or not adequately pleaded. There were complaints, for instance, that the Offering Memorandum did not disclose, that Mr Becherini was giving personal guarantees in respect of the loan finance which was to be obtained on commercial terms, or that his death would be made, or might be made, an “event of default” on the loans that were going to be taken out by the SPVs. It is complained that that made the Offering Memorandum false and misleading because it did not state these things.
24. Again, I struck those complaints out because it seemed to me that they were simply arguments that were, on that very general basis, simply not maintainable, because when one looked at the totality of the Offering Memorandum, one looked at the kind of scheme that was going forward, and when one looked at the complaints that were being made, it was plain that, as far as those complaints were concerned, they related to elements of the way in which the actual business of the entity might be conducted as to its detail on a day to day basis. They did not go to making the Offering Memorandum itself false or inaccurate; it described this business venture in more general terms, as to its form and its objectives, and explained who was charged with actually dealing with it and how they would deal with it a high level. There was ample evidence before the court, - and there would not be any real reality of any other evidence being produced if the matter went further, - to show that it was really fanciful to suggest that it could be argued to be somehow negligent for the other directors not to prevent their co-director – and as I said, I find this an oddity in this case because, of course, Mr Becherini, whose actions are the subject of this criticism, was himself also a director – from taking out finance that made his own death possibly an event of default, or, equally, to prevent him from giving personal guarantees, and that it was somehow a breach of duty for them not to prevent him doing it, or that it was a “misrepresentation” for them not to put in the Offering Memorandum that he might be doing it, when these were matters of such detail in relation to the running of a development business that they would be plainly within the discretion of those who were actually dealing with and implementing the business, within the parameters that were described in the Offering Memorandum in appropriate general terms. I do not think that there is any basis for saying that there is any real prospect of arguing that that decision which I made was not justified as a matter of procedure, in the circumstances, and on the evidence that was before the court, or that it erroneously failed to take into account any real (as opposed to fanciful) prospect that any further relevant material could emerge if the matter were to proceed to a full trial.
25. The same considerations apply to my decision to strike out the claim based on the “Insurance Amendment”, where I said that they way in which it had actually and specifically been pleaded was struck out. It had been pleaded on the basis that there was alleged to be a statement that the “key man” insurance that was to be

obtained would protect the Fund from “all” losses resulting from the death of Mr Becherini. I held that that pleading – itself a pleaded interpretation of the wording of the Insurance Amendment, which simply referred to “losses” and not “all losses” – was simply unsustainable, because, as a matter of practicality and common sense, there was no way in which that could ever be the kind of insurance that you could obtain. Indeed, the Plaintiffs themselves seemed to realise that this could not have been obtained, because they enlarged their claim to claim that it could not be obtained at an economic cost, and suchlike. But my decision was that, consequently, the way in which that claim had been pleaded would be struck out, but once again, and as I again have said today, that does not prevent a more nuanced claim (if it could be sustained) actually being put forward in some further amendment, for which I might give permission. So this was not a “final” point in relation to that matter generally, meaning that no such claim could be made, except as regards the word “all”. It was just that it would have to be made and pleaded properly in terms that actually disclosed a reasonably arguable cause of action, rather than one couched in exaggerated terms which could be seen at the outset not to be sustainable.

26. Further, however, causation would have to be demonstrated because, for example, as I recall my impression at the time, because it was also certainly said that although Mr Becherini’s death was made an event of default in certain of the loan transactions, in practice, the banks did not seek to rely on that as an event of default which justified their taking the steps that may have caused the financial difficulties that eventually caused the losses to the Fund. It was, in fact, rather more when the SPVs stopped paying the finance payments that were due to the banks that the problems actually arose.
27. But, in any event, the real point at this stage is also that, in my judgment, in the context of this pleading (the quality of which I will refer to later) these particular matters ought to be struck out in the terms in which they existed, but they could be reintroduced if they could be re-pleaded properly. That becomes, at that stage, a decision which is a matter, I would say, of case management and it is not therefore a decision as to which I think there are real prospects of a successful appeal, nor is there any reasonable justification for those points going to the Court of Appeal for decision. If the Court of Appeal takes a different view, then so be it.
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 Becherein (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.
31. Moving on to the company’s own claims, (the sixth grounds of appeal), relating to the breaches of directors’ duty, 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.
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.
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.

34. It may be the case that, where one is alleging losses of the kind which are apparently envisaged here (loss of business profits), one has to get, as it were, a preliminary expert's view as to how causation might be analysed as operating, and how, therefore, a case might be made out before one can reasonably plead it as a cause of action. But if so, so be it, because the point is that unless one can actually show that there was damage that had occurred as a result of the matters complained of, and that one can therefore make out a reasonably arguable case for, the claim should not be allowed to go ahead.
35. So, on this basis, a proper pleading depends on effectively showing how the claim might be properly and logically quantified, and, while there is obviously a balance between the amount of detail that anybody can be expected to go into in an initial pleading, and the amount of detail that might ultimately be required to be examined in a final case for ultimate trial, nevertheless, simply asserting that some damage has been suffered and we therefore do not have to give any detail as to how it resulted or how much, except the generalised point that "we have invested this amount of money and we were told we were going to get that amount of money" (we ought to make four times the amount of money, I think it was - I cannot remember what the figures were, but there was a 20% return and I think was suggested over a four or five year period) "we have not done it and therefore we have suffered loss" does not seem to me not to be an adequate way of pleading a case, where in fact the quantum, or the likely quantum, "ballpark" at least type of quantum of damage, and how it is alleged to have been suffered, does become highly material. It is material, in particular, for enabling any possible settlement to be examined and explored, which plainly would be a good idea, if it could be achieved, without the further expenditure of an awful lot more money if the matter had to be pursued to trial. It is, therefore, a balance, but in those circumstances, it does seem to me that it is incumbent on a Plaintiff to give more detail, and sufficient detail, to enable at least the shape of the case on causation and hence some idea of possible quantum, to be conveyed to the Defendants. That was the basis on which I held that I was not satisfied that the pleading contained a sufficiently particularised case on the causation and quantum basis of loss claimed, in relation also to the company's claim.
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. They 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.
38. So that deals with grounds nine. I think there is nothing in it. It is a hopeless ground for leave to appeal, and I will not grant it.
39. So, having gone through these grounds of appeal with (I accept) various degrees of emphasis, I do not consider that any of them displays the “substance” to justify ventilation in the Court of Appeal as required by the test described in the *Investec* case at [40] and [50]. I do regard them as therefore not having any real substance. They are effectively fanciful in my judgement, and I will not allow leave to appeal on any ground, in the circumstances.
40. So that then brings me, I think, to the question of the stay and the question whether I should allow a stay. The test for allowing a stay seems to me to be that you start from the position that in fact there is in principle: no stay, and the question is then whether any irremediable harm will be suffered by a party if a stay is or is not granted. Very therefore, when it depends on the question of payment and money, the point is that if a stay is actually not granted, does that mean that if the appeal is successful, the successful appellant will then not get the money back, (it will be the defendant in that case) that they have been ordered to pay?
41. We are obviously in rather different territory here, because there is no question of money being paid over and possibly not paid back in this instance. What we have is a situation in which it is said - and I would say I think the other way in which this is put - is that it is a question of: what is the justice of the case? Once you have the threshold that there is an arguable case, if you do not get over the threshold, how in fact the threshold weighs up with regard to the question of the balance of whether a stay should be ordered in terms of looking at the substance of the appeal itself, or looking at the other factors, they seem to mingle together, and

quite which is regarded as a more important factor, or the factor one looks at first in order to make a decision, seems to me to depend very much on the facts of the particular case.

42. But what I have here is a situation where I have made an order, and it is said by the Plaintiffs that the time that I gave for them to produce a re-pleaded case, which actually expires today, means that if they in fact are obliged to do that, but if they are successful in getting leave to appeal, and then if they are successful in the appeal being granted, the effect will be that their original pleading will apparently be reinstated, and all the work that they have been forced to do by being obliged to re-plead their claims individually and clearly, if they are going to, within the period that has been actually directed, will have been wasted, and a lot of costs will have been wasted.
43. It is argued by Advocate Ferbrache that actually it would not be wasted at all, because in fact, at the end of the day, there are various things that might happen. Firstly, if those costs are regarded as the costs of complying with the order, and the Court of Appeal takes the view that the order was unnecessary, (or the order was wrongly made I should have said), the Court of Appeal would be able to make a costs order in respect of that wasted expenditure in any event. I have to accept, however, that if that happened, it might be that the totality of the costs were not recoverable, because they would be recoverable on normal cost bases, rather than being recoverable on an indemnity basis, which would be the only compensation for having incurred them totally in the first place, so that might not be a full compensation.
44. The other reason why it seems to be being said that I should order a stay appears to be the effects at this stage of my order that these individual three sets of claims must be pleaded separately with regard to the facts that make up each, so that they can be identified separately. I repeat here that the reason I regard this as necessary is because, as I have already said, I regard the pleading as it was originally drafted with all these facts etc. put together, sort of thrown into the ring, with it then being said ‘accordingly we have got the following causes of action against the following people’, simply did not identify the individual causes of action sufficiently, and having had one chance to do it in the first place and not succeeded, (and in my judgment quite significantly not succeeded) in making it clear, exactly what elements of what cause of action were being alleged against any particular defendant, the defendants might reasonably expect that the plaintiffs are put on a tighter rein as far as having a second try to do it, and the second try, in my judgment as a matter of case management, is effectively fulfilled by requiring them to put their pleadings of the individual cases separately so they could each be examined on an individual basis. If it became apparent that it would be convenient for the claims to be tried together, or for aspects of the claims to be managed together with orders that went together subsequently, then so be it. But the basis would have to be that a proper claim was actually pleaded in each respect in the first place.
45. Now, what seems to be being said is that if that exercise is conducted now, somehow this would give the Defendant directors a tactical advantage in the appeal. As to this the only tactical advantage would appear to be that if in fact it turns out that the Plaintiffs actually can do this exercise, then the argument that they should have done it in the first place, and therefore that the judge was right to say that they

should have done it in the first place and to make them do it now, begins to gain force.

46. However, I do not regard that as stifling the appeal, or even rendering the appeal nugatory. It would only be rendering the appeal nugatory in a rather odd sense. So I do not regard that factor, although it has been advanced, as being a factor that says that I ought, in effect, to leave the canvas blank at the moment, so that the Court of Appeal simply has to cope with the pleading as they stands and review the criticisms I made of the pleadings with, otherwise, a completely blank surround.
47. The Defendants have succeeded in obtaining a judgment that in my judgment they must have. If these cases are to proceed against them, they must have a clear pleading of the individual claims that have been made by the individual shareholders and by the company separately and the basis of this, and the amount of the damage, either in relation to figures or in relation to some formula or in relation to looking at the aspects which will have to be quantified perhaps later, but some clear indication of what it is that is being pled against them. I do not think they should be deprived of that opportunity, and I do not think it would be wasted if the exercise was done because it seems to me it would only have to be done at the end of the day if the claims proceeded in any event, so that, if the claims proceeded, we would be left with the same sort of situation. It is said that if the appeal succeeds, and particularly if the appeal succeeds partially and the Court of appeal says that the Court should not have struck out, on a final basis, some of these allegations, then the existence of such re-pleaded claims will create more confusion because indeed they will then have to be reintegrated into the original claim.
48. I do not regard any additional work that would be engendered by that last exercise as being particularly great. It seems to me that it would be necessarily the case that, on that basis, the particular matters would have been identified in any Court of Appeal judgment, and actually extending and amending any subsequent pleading simply to add back any further claims that I have said appeared to me to be without foundation and not to found a reasonable cause of action, but that the Court of Appeal disagrees with, can be integrated into any claim that is made quite easily, and probably more easily if the claims have already been pleaded individually so that one can see exactly what they are.
49. So, in those circumstances, no, I am not prepared to grant a stay pending appeal, which I think is the way it would work, and it is because I do not regard the arguments about wasted effort or expenditure as being (a) significant in terms of the justice of the case nor and particularly (b) significant in terms of the case itself, simply because it indicates it is all to do with actually making sure that this case is actually shaped and formulated properly, even if aspects of that shape and formulation may, as a result, go to the Court of Appeal, and the Court of Appeal may decide that there is a slightly different and more appropriate shape and formulation from the one which I have used as the fundamental template for the order that I made in this instance, in relation to some specific points. So on that basis no, I am not prepared to allow a stay pending any application for leave to appeal made to the Court of Appeal.

Order accordingly. The Court granted a limited extension of the time within which the Plaintiffs had permission to apply to re-plead their claims in accordance with the Court's directions previously given.