Application to strike out a paragraph of the Cause, or parts of the paragraph and for further information in relation to the Cause

[2024]GRC035

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

Civil File No. 2498

BETWEEN:

(1) BARING FINTECH FUND III MANAGERS LIMITED

(2) BARING VOSTOK FUND IV MANAGERS LIMITED

(3) BARING VOSTOK FUND V MANAGERS LIMITED

(4) BARING FINTECH FUND III MANAGERS LIMITED

in its capacity as general partner of

BARING FINTECH FUND III (GP) L.P

(5) BARING VOSTOK FUND IV MANAGERS LIMITED

in its capacity as general partner of

BARING VOSTOK FUND IV (GP) L.P

(6) BARING VOSTOK FUND IV MANAGERS LIMITED

in its capacity as general partner of

BARING VOSTOK FUND IV SUPPLEMENTAL FUND (GP) L.P

(7) BARING VOSTOK FUND V MANAGERS LIMITED

in its capacity as general partner of

BARING VOSTOK FUND V (GP) L.P

(8) BARING VOSTOK FUND V MANAGERS LIMITED

in its capacity as general partner of

BARING VOSTOK FUND V SUPPLEMENTAL FUND (GP) L.P

(9) BARING FINTECH FUND III MANAGERS LIMITED

in its capacity as general partner of

BARING FINTECH FUND III (GP) L.P

in its capacity as general partner of

BARING FINTECH PRIVATE EQUITY FUND III L.P 1

BARING FINTECH PRIVATE EQUITY FUND III L.P 2

BARING FINTECH FUND III CO-INVESTMENT L.P

(10) BARING VOSTOK FUND IV MANAGERS LIMITED

in its capacity as general partner of

BARING VOSTOK FUND IV (GP) L.P

in its capacity as general partner of

BARING VOSTOK PRIVATE EQUITY FUND IV L.P

BARING VOSTOK FUND IV CO-INVESTMENT L.P 1

BARING VOSTOK FUND IV CO-INVESTMENT L.P 2

(11) BARING VOSTOK FUND IV MANAGERS LIMITED

in its capacity as general partner of

BARING VOSTOK FUND IV SUPPLEMENTAL FUND (GP) L.P

in its capacity as general partner of

BARING VOSTOK FUND IV SUPPLEMENTAL FUND L.P

(12) BARING VOSTOK FUND V MANAGERS LIMITED

in its capacity as general partner of

BARING VOSTOK FUND V (GP) L.P

in its capacity as general partner of

BARING VOSTOK PRIVATE EQUITY FUND V L.P

BARING VOSTOK FUND V CO-INVESTMENT L.P 1

BARING VOSTOK FUND V CO-INVESTMENT L.P 2

(13) BARING VOSTOK FUND V MANAGERS LIMITED

in its capacity as general partner of

BARING VOSTOK FUND V SUPPLEMENTAL FUND (GP) L.P

in its capacity as general partner of

BARING VOSTOK FUND V SUPPLEMENTAL FUND L.P

Plaintiffs/Respondents

- and –

APEX FUND AND CORPORATE SERVICES (GUERNSEY) LIMITED

Defendant/Applicant

Defendant's application to strike out part of Cause and for further information

Judgment handed down: 20 May 2024

Before: Simon H Davies, Lieutenant Bailiff

Counsel for the Plaintiffs/Respondents: **Advocate T W McGuffin**

Counsel for the Defendant/Applicant: **Advocate A R Lyall**

Cases, legislation and references referred to:

The Royal Court Civil Rules, 2007

Hutcheson et al v Spread Trustee Company Limited (Guernsey Judgment 10/2009)

Tranquility Holdings v Invista Real Estate Investment Management (CI) Limited (2015) (Guernsey Judgment 38/2015)

SPL Guernsey ICC Limited & Ors v Addison [2018] GLR 355

Providence Investment Funds PCC Limited (Managed by Administration Managers) v Pricewaterhousecoopers CI LLP [2020] GRC021

International Healthcare Solutions Limited v Utmost Worldwide Limited [2021] GRC059

International Healthcare Solutions Limited v Utmost Worldwide Limited [2023] GRC051

Lucille Holdings PTE Ltd v HSBC Management (Guernsey) Limited and HSBC Alternative Investments Limited [2024] GRC006

Landl and Others v S. Hogg and S. Watts and I. Henderson and EFG Private Bank (CI) Limited [2024] GRC010

Chitty on Contracts 35th Ed

Introduction

1. The Defendant has brought an application dated 5 March 2024 (**Application**). The Application seeks (amongst other things) orders that:

    a. the time for notice of the application be abridged;

    b. paragraph 106 of the Plaintiffs' Cause be struck out in its entirety;

    c. alternatively, that sub-paragraphs 106.2, 106.3, 106.4, 106.5, 106.7, 106.10, 106.29 and 106.31 of the Cause be struck out; and

d. the Plaintiffs provide further information in relation to the Cause as requested in paragraphs 19(a), 21 and 23(c) and 23(d) of the *exceptions de forme* contained in the Defendant's Defences dated 18 August 2023.

2. The Application is supported by the Second Affidavit of Vikaash Keshav Singh and exhibit VKS2 sworn on 5 March 2024. The Plaintiffs elected not to file any evidence in response.

3. The first order sought (for an abridgement of time) need not be considered. When the Application was served it was envisaged that it would be heard without the required 4-clear days' notice being given (see Rule 81(2) of the Royal Court Civil Rules, 2007 (**RCCR**)).

4. In fact, the intended hearing date was delayed and the Application was first tabled on 15 March 2024, by which time the Plaintiffs had been given sufficient notice of the Application. Therefore, there is no need for any order to be made abridging time.

5. The hearing that took place on 15 March was a case management conference (**CMC**). Pursuant to Rule 42(2)(c) of the RCCR, I was satisfied in all the circumstances of the case, and in particular because of the need to determine the Application, that it was appropriate to adjourn the CMC until 2 May 2024, when the Application was listed to be heard.

The Cause

6. The Plaintiffs' Cause of 19 June 2023 (**Cause**) is brought by thirteen Guernsey-registered companies or limited partnerships. The first three Plaintiffs are described as funds (Fintech Fund 3, Vostok Fund 4 and Vostok Fund 5), licensed by the Guernsey Financial Services Commission (**GFSC**) under The Protection of Investors (Bailiwick of Guernsey) Law, 2020 (**POI Law**) to (amongst other things) manage, administer and take custody of collective investment schemes, general securities and derivatives.

7. The remaining ten Plaintiffs are the companies in paragraph 6 each acting in their capacity as a general partner of various limited partnerships.

8. The Defendant is a Guernsey company licensed by the GFSC to carry on controlled investment business under the POI Law.

9. It appears to be common ground that the Plaintiffs entered into thirteen written agreements with the Defendant pursuant to which the Defendant agreed to provide various services for reward. Collectively these agreements are referred to as the **Administration Agreements**.

10. The Plaintiffs allege that the Defendant failed to meet its contractual duties to them to the extent that the alleged breaches of duty are said to be material breaches of the Administration Agreements. The Plaintiffs allege that the material breaches required extensive remediation work, the costs of which are pleaded to be the losses caused by the alleged breaches of duty.

11. The Plaintiffs also plead a claim in tort alleging that the Defendant was grossly negligent in the provision of its obligations under the Administration Agreement.

What must be pleaded in a cause?

12. Rule 10 of the RCCR sets out what a cause must contain. It provides:

> "***Cause to be tabled.***
>
> *10. (1) In every action a cause shall be tabled before the Court.*

(2) The cause shall contain

(a) a statement of the material facts on which the plaintiff relies for his claim, but not the evidence by which those facts are to be proved, and

(b) a statement of the relief sought (including, where damages are claimed, particulars of the amount thereof so far as reasonably possible)."

13. The parties appear to be agreed as to the law but not as to its application to paragraph 106 of the Cause. Part of the Defendant's challenge to paragraph 106 is (in effect) whether or not paragraph 106 meets the requirements of Rule 10(2)(a).

14. There has been no attempt to argue that the Cause does not contain a statement of the relief sought and sufficient particulars of the amount of damages claimed in the circumstance of this case. I will therefore focus initially on the requirements of Rule 10(2)(a).

15. In my judgment, Rule 10 sets out a regime for what must and what must not be contained within a cause. A cause is required to contain material facts on which a plaintiff relies for its claim and which it will seek to prove at trial. Accordingly, if a plaintiff does not intend to seek to prove a fact at trial, it is not a material fact for the purposes of Rule 10. Rule 10(2)(a) contains an express prohibition on the pleading of the evidence by which the material facts are to be proved at trial.

16. If the matter pleaded is evidence it is liable to be struck out for a failure to comply with a rule (under Rule 52(2)(c) of the RCCR).

17. If the matter pleaded in a cause is not a material fact but is not evidence, the remainder of Rule 52 may be engaged either by a party making an application or even by the Court of its own volition if it is satisfied that exercising its powers under Rule 50(2)(p) to strike out a Cause (or any part of it) would be "*... for the purpose of managing the case and ensuring the just resolution of the case.*"

18. At the case management conference on 15 March 2024, I invited all parties to address the Court at the hearing listed for 2 May 2024 as to what extent a pleading must link alleged duties to alleged breaches of duty and in turn the alleged breaches to any losses alleged to have been caused thereby.

19. In their skeleton argument of 28 March 2024, the Plaintiffs focused on the extent to which alleged breaches ought to be linked to losses alleged and how loss is to be determined. Their principal submission appears to be that costs incurred in remedying a defendant's defective works is a recognised method for quantifying damages and any question as to the reasonableness of the quantum is a question of fact to be determined at trial (and is therefore a matter for evidence not pleadings).

20. The Plaintiffs accept that they carry the burden of proving, on the balance of probabilities, a causal connection between the breaches of duty alleged against the Defendant and the loss claimed.

21. The Plaintiffs rely on paragraphs 110 and 112 of their Cause as pleading the breaches of duty relied on which they intend to seek to prove at trial. They rely on paragraph 113 as pleading the nature of the losses alleged to have been caused by the alleged breaches of duty. The Plaintiffs further argue that causation is a question of fact that can only be determined at trial. The Plaintiffs rely on paragraph 116 of their Cause as pleading the losses that they claim have been caused by the Defendant's alleged conduct.

22. The Defendant relies on the judgment in *Tranquility Holdings v Invista Real Estate Investment Management (CI) Limited* (2015) (Guernsey Judgment 38/2015) as setting out certain requirements for the content of particulars of claim. They quote from paragraph 47(f) of the Bailiff's judgment which in turn quotes from the judgment of Moore-Bick LJ in *Credit Suisse AG v Arabian Aircraft & Equipment Leasing Co [2014] CP Rep 4* as follows:

> "*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."* (emphasis added)

23. The Defendant also relies on paragraph 114 of the Bailiff's judgment in *Tranquility*. It states:

> "*Other parts of the pleadings would also be liable to be struck out on the ground that they do not go towards establishing the loss pleaded and/or are matters of evidence and/or are inappropriate.*"

24. The principles enunciated in *Tranquility* were applied by the Deputy Bailiff in *International Healthcare Solutions Limited v Utmost Worldwide Limited [2021] GRC059*.

25. The Defendant also refers to paragraph 121 of the judgment of Her Honour Hazel Marshall KC, Lieutenant Bailiff in *Landl and Ors v Hogg and Ors [2024] GRC010*. It states as follows:

> "*121. The constituent elements of any cause of action are broadly threefold:*
>
> *i. the facts and law making out the necessary "obligation", for founding a claim, such obligation being a function of the factual relationship between the relevant plaintiff and defendant and the duty (contractual, statutory or tortious) to which that relationship gives rise in law in the circumstances;*
>
> *ii. the asserted facts constituting a breach of that obligation/duty; and*
>
> *iii. the facts and law demonstrating the necessary causal link between such breach and the loss claimed to have been caused thereby to the plaintiff within the principles of recoverability at law.*
>
> *Each of the above must be reasonably maintainable to enable the whole cause of action to be "reasonable", ie to have some "real" prospect of success.*"

26. The Defendant also makes some submissions as to what constitutes an adequate pleading with reference to decisions of the Deputy Bailiff in *International Healthcare Solutions Limited v Utmost Worldwide Limited [2021] GRC059*, and *Lucille Holdings PTE Limited v HSBC Management (Guernsey) [2024] GRC006*.

27. The Deputy Bailiff was critical in both cases of broad brush and speculative pleadings. For example, the Deputy Bailiff recorded her views on broad brush pleadings at paragraph 46 of *International Healthcare* in the following terms:

"*…Broad brush statements are not enough. In those areas which are the subject of outstanding Further and Better Particulars, the Plaintiff has failed to nail its colours to the mast in terms of what duties that the Defendant is alleged to have breached, what it is that the Defendant failed to do that it should have done, and/or what the Defendant did that it should not have done, what would have happened but for those acts or omissions, and the loss that eventuated…*"

28. Similar criticism is also contained within the judgment of Her Honour Hazel Marshall KC, Lieutenant Bailiff at paragraph 444 in ***Landl*** in which it is stated:

"*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*."

29. Paragraph 448 of the judgment in ***Landl*** states:

"*448. Any pleading should plead facts and only material facts. It can plead law but should do so only sparingly, insofar as is necessary to enable the party's case to be understood (but not the detail as to how it is alleged to arise). A pleading should not contain immaterial facts, evidence, argument, comment, prejudice, hyperbole, or self indulgent literary flourishes. It should have the flavour of an efficient "executive summary*".

30. I have found the approach taken by the judges presiding in the cases mentioned above to be of very considerable assistance and respectfully agree with all of them. Bringing these various judgments together, in my judgment, so far as is relevant to the Application, Rule 10 requires a cause to contain:

    a. the essential allegations of fact on which a plaintiff relies and which he will seek to prove at trial;

    b. a sufficiently clear and specific statement of facts that reveal to both the defendant and the court the nature of the case the defendant must meet at trial (including a sufficiently clear explanation of the basis on which it is said the material facts pleaded give rise to the remedy being claimed).

31. A pleading that contains matters that are evidence or other matters that are not material facts (including argument, comment, prejudice, hyperbole, or self-indulgent literary flourishes) are vulnerable to have (at least) those parts of the pleading struck out on the application of a party or, in a clear case, at the volition of the Court. Equally, broad brush pleadings are insufficient and liable to be struck out to the extent they do not satisfy the requirements of Rule 10.

The Law on Strike Out of Pleadings

32. It is common ground that the Court has jurisdiction to strike out part of a pleading if the test set out in Rule 52 of the RCCR is met. Rule 52 is found in Part IX of the RCCR which is headed "*Conduct of Proceedings*". So far as is material to the Application, Rule 52 provides as follows:

"*Power to strike out a pleading*.

52. (1) In this rule, reference to a pleading includes reference to part of a pleading.

(2) The Court may strike out a pleading if it appears to the Court

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

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

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

(3) ...

(4) ....

(5) ...

[(6)] This rule is without prejudice to any other power of the Court to strike out a pleading."

33. The Application is also brought under the inherent jurisdiction of the Court (which, such as it is, is preserved by Rule 52(6)). Both advocates are agreed that the inherent jurisdiction of the Court adds no legal issues for consideration in addition to those raised under Rule 52.

34. The parties are agreed that the leading Guernsey case on when it is appropriate to strike out part or all of a pleading is the Royal Court decision in in *Tranquility Holdings v Invista Real Estate Investment Management (CI) Limited (2015) (Guernsey Judgment 38/2015)*. At paragraph 47 the Bailiff set out the principles he extracted as being relevant to the application before him (which included an application to strike out the whole of the Plaintiff's claim):

"a) Claims which are suitable for striking out on ground (a) [Rule 52(2)(a) of the RCCR] *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) [quoted at paragraph 22 above]

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)."

35. The Defendant also refers to the recent judgment of Her Honour Hazel Marshall, KC, Lieutenant Bailiff, in *Landl and Ors v. Hogg and Ors* ([2024] GRC010). The Defendant relies on paragraph 445 of the judgment in which the learned Lieutenant Bailiff struck out the Plaintiffs' Cause in its entirety as she considered that course of action was "*... amply justified as an exercise of my powers under RCCR r52(2)(b), to strike out a pleading on the grounds that it is 'likely to obstruct the just disposal of the proceedings ...'. The opacity of the various claims made in this single Cause had had just that effect.*"

Paragraph 106 of the Cause

36. The Defendant seeks to strike out all of paragraph 106 (alternatively some specific sub-paragraphs) of the Cause.

37. Paragraph 106 of the Cause appears in a section headed "Written Notice of Material Breach". That section starts at paragraph 103. In paragraph 104, the Plaintiffs plead that by letter dated 21 May 2021, the Defendant was notified of the breaches committed, demanding that the breaches be corrected immediately. It goes on to allege that no remedial steps were taken.

38. Paragraph 105 alleges that the Defendant was sent a further letter on 28 October 2021 alighting the Defendant to further breaches of their fiduciary duties. It goes on to allege that again no remedial steps were taken by the Defendant to remedy those breaches.

39. Paragraph 106 starts with the words "*These breaches included:*" and pleads various matters in the following thirty-eight sub-paragraphs with varying levels of clarity and specificity.

40. Despite seeking to strike out some or all of paragraph 106 of the Cause, the Defendant has managed to plead to that paragraph at a high level. During submissions Advocate Lyall was asked whether the fact that the Defendant was able to plead to paragraph 106 made any difference to his client's application. Advocate Lyall submitted that it did not and pointed out that (amongst other things) in addition to denying that the matters alleged alone or collectively amounted to a material breach and were not causative of loss, the Defendant had pleaded that the allegations in paragraph 106 are embarrassing and should be struck out in their entirety. In my judgment, what was pleaded by the Defendant in response to paragraph 106 does not limit the Defendant's ability to pursue its strike out application.

The Positions of the Parties

41. The Defendant's criticisms of the Cause are not limited to paragraph 106. It's general complaints are that:

    a. on its face the Cause is vague and embarrassing;

    b. it amounts to an abuse of process and/or is such to obstruct the just disposal of the proceedings;

    c. the Cause contains numerous allegations that appear to be entirely irrelevant to the losses pleaded;

    d. the alleged breaches are poorly particularised;

e. no attempt is made to connect the alleged breaches to the duties alleged;

f. no attempt is made to connect the alleged breaches with the remediation and take-on costs the Plaintiffs allege were suffered.

42. Even though the Defendant's criticisms of the Cause are wide ranging, the Application itself seeks only to strike out some or all of paragraph 106 of the Cause. In relation to paragraph 106 specifically, the Defendant complains:

a. the allegations pleaded are vague and embarrassing;

b. no attempt is made to connect the alleged breaches with duties and obligations under the Administration Agreements;

c. paragraph 105 describes the matters pleaded in paragraph 106 as breaches of fiduciary duties but no such duties are pleaded;

d. the matters pleaded do not give rise to or support any cause of action pleaded in the Cause; and

e. the Defendant ought not to be put to the cost of addressing the vague, embarrassing and irrelevant matters by way of disclosure and witness statements.

43. The Defendant seeks to strike out paragraph 106 (or sub- paragraphs thereof) under Rules 52(2)(a) and (b). The Application also seeks orders striking out part of the pleading under the inherent jurisdiction of the Court.

44. Advocate McGuffin for the Plaintiffs argues that when paragraph 106 is read in context, it is clear from the preceding paragraphs of the Cause that paragraph 106 is simply setting out the relevant background leading to the termination and the basis for it.

45. During his oral submissions, Advocate McGuffin went further and submitted that under the terms of the Administration Agreements, the Plaintiffs were required to give to the Defendant notice of breaches of those agreements requesting remediation before termination of the Administration Agreements was possible. He submitted that whether the necessary notice of any breaches was given was provided is a matter of fact for determination at trial. Advocate McGuffin went on to submit that paragraph 106 went beyond background and provided the context against which the Administration Agreements were terminated.

46. Advocate Lyall for the Defendant argues that this goes nowhere because the fact of termination is not in dispute and his client ought not to be put to the expense of dealing with the allegations in paragraph 106. In the Defendant's reply skeleton argument, the Defendant argues that the real purpose of paragraph 106 when read in context is what the Plaintiffs say at paragraph 6 of their skeleton, namely instead it is "*... simply setting out the relevant background leading to the termination and the basis for it.*"

47. The Defendant goes on to argue that the inclusion of voluminous and irrelevant background material should be struck out whether as failing to establish a cause of action or as an abuse of process.

48. The Plaintiffs submit that the costs of dealing with the paragraph 106 allegations will "*likely*" be incurred given the content of paragraphs 110 and 112 of the Cause.

49. The Plaintiffs argue that the Application should be dismissed with costs because even without paragraph 106 the requisite elements of the causes of action will remain properly pleaded in

paragraphs 17-54 (dealing with the agreements allegedly entered into), 110-112 (dealing with alleged breaches of the Administration Agreements) and paragraphs 113 and 116 (which plead the losses allegedly caused by the Defendant's conduct). Advocate McGuffin submitted that even if the whole of paragraph 106 was struck out it would not affect the Plaintiffs' case in any way and would not change what needs to be proved at trial.

50. The Defendant has responded that plainly the Court has the power to strike out paragraph 106 and makes no concession as to the adequacy of the remainder of the pleaded Cause. Notwithstanding the Defendant's position as to the balance of the Cause, the Application remains limited to seeing the striking out of the whole or some specific sub-paragraphs of paragraph 106. It is that Application that is determined by this judgment.

Decision on Strike Out Applications

51. In my judgment, the fact that the Plaintiffs accept that striking out paragraph 106 in its entirety will not change what needs to be proved at trial is a clear indication that paragraph 106 does not contain any material facts that need to be independently proved. I would strike out the whole of paragraph 106 for that reason alone but I would go further and also strike out the whole of paragraph 106 because its thirty-eight sub-paragraphs disclose no reasonable grounds for bringing an action and also as an abuse of the Court's process and as otherwise likely to obstruct the just disposal of the proceedings.

52. It would in my view be disproportionate to go through each of the thirty-eight sub-paragraphs to explain why each fails to disclose reasonable grounds for bringing an action. I mentioned above that paragraph 106 contains sub-paragraphs that plead matters with varying levels of clarity and specificity.

53. By way of example only, the following are pleaded within paragraph 106 as alleged breaches:

> "*106.2 A delay in response time to queries by the Plaintiffs and the investors;*
>
> *106.3 email communication not monitored regularly by the Defendant;*
>
> *106.10. Failure to respond to the queries of the investors with regards to dividends;*
>
> *106.21 the distribution allocation spreadsheet for Baring Fintech Fund 3 for July 2021 contained a large number of errors;*"

54. None of these sub-paragraphs contain sufficient factual information to reveal to the Defendant or the Court what the Plaintiffs' complaints actually are. These sub-paragraphs (in common with the remainder of paragraph 106) do not disclose any reasonable grounds for bringing the action. They do not contain essential allegations of fact that the Plaintiffs will seek to prove at trial nor do they identify with care and precision the case that the Plaintiffs are putting forward.

55. The lack of specificity means that it is impossible to see how the Defendant can plead to such vague allegations. The Defendant should not have to guess what is being alleged against it and should not be expected to expend time and resources on disclosure and the preparation of witness statements dealing with matters that need not be proved by the Plaintiffs at trial. Accordingly, paragraph 106 is in my judgment an abuse of the process of the Court and is likely to obstruct the just disposal of the proceedings.

56. Further, the lack of specificity and the lack of any pleaded causal link between paragraph 106 and the losses alleged is likely to obstruct the just disposal of the proceedings.

57. I have considered whether the Plaintiffs ought to be afforded an opportunity to amend paragraph 106. I have considered in particular the guidance provided by paragraph 47 of the Bailiff's judgment in *Tranquility Holdings v Invista Real Estate Investment Management (CI) Limited*. I have concluded that paragraph 106 does not raise any serious issue of fact that can only be properly determined by hearing oral evidence. I have further concluded that the defects I have found with paragraph 106 cannot properly be cured by amendment and that the case does not raise issues in an area of developing jurisprudence. Accordingly, I do not consider that permitting an amendment would serve the interests of justice in this case.

***Exceptions de Forme*/Requests for Information**

58. The Defendant also seeks orders requiring the Plaintiffs to provide further information in response to three *exceptions de forme* that were contained in the Defendant's Defences of 18 August 2023 (**Exceptions**). The Defendant argues that the responses to those Exceptions provided in the Plaintiffs' Response to the Exceptions (**Response**) dated 3 November 2023 are inadequate.

59. Before dealing with the specific requests that are pursued in the Application, it is convenient to set out here briefly that the Defendant made extensive requests for information as Exceptions in its Defences dated 18 August 2023.

60. Rule 16(7) of the RCCR provides that *"… an exception de forme shall be deemed to be a request by the defendant for further information under the provisions of Rule 60.*"

61. In turn Rule 60 provides:

> "***Obtaining further information.***
>
> ***60.*** *(1) Subject to any rule of law to the contrary, the Court may at any time order any party to -*
>
> *(a) clarify any matter which is in dispute in the proceedings, or*
>
> *(b) give additional information in relation to any such matter, whether or not the matter is contained or referred to in any pleadings.*
>
> *(2) Where the Court makes an order under paragraph (1), the party against whom it is made must –*
>
> *(a) file his response, and*
>
> *(b) serve it on the other parties*
>
> *within the time specified by the Court.*
>
> *(3) The Court may require a response to an order made under this rule to be supported by affidavit evidence*."

Request 19(a)

62. I will now turn to consider each request pursued in turn. The first response said to be inadequate is to be found at paragraph 19(a) of the Response.

63. Paragraph 19(a) seeks further information about paragraph 110.6 of the Cause. That paragraph is in the section of the Cause headed "Material Breach of the Administration Agreements". Paragraph 110.6 is pleaded as follows:

> "*Upon review of the information provided during the exit period by the Defendant, Carey Commercial determined that the information provided by the Defendant was lacking in the following manner:*
>
> 110.6 *Email correspondence from the Administered Entities had been left unanswered.*"

64. The paragraph 19 of the Defendant's Exceptions requests "*(a) what specific email correspondence the allegation relates to.*" The Plaintiffs' answer at paragraph 19.1 is "*The allegation relates to email correspondence between the Plaintiffs and the Defendant. See references to unanswered email correspondence at paragraphs 12, 13 and 15.*"

65. Paragraph 12 of the Response responds to a request for information about paragraph 106.28 of the Cause as originally pleaded. The answer set out at paragraph 12 refers to a number of specific invoices that it is alleged were unpaid for periods of time. Paragraph 12 makes no express reference to unanswered emails.

66. Paragraph 13 of the Response responds to a request for information about paragraph 106.30 of the Cause as originally pleaded. Again there is no specific reference to unanswered emails but it is alleged that there were "*daily follow-up requests*" and (at paragraph 13.3) that a "*reminder"* was sent to the Defendant on each of 4 August 2021 (which "*reminder*" was acknowledged by the Defendant), 17 September and 4 October 2021.

67. Paragraph 15 of the Response relates to a request made for more information about paragraph 106.36 of the Cause. Again, there is no express reference to unanswered emails but there is reference (in paragraph 15.2.1) to a request allegedly made of the Defendant by Zedra on 22 July 2021 that is alleged not to have been actioned by the Defendant.

68. In paragraph 15.5.2, it is alleged that Zedra contacted the Defendant on 1 April and 19 May 2021. It appears that these two communications were responded to but the information provided is alleged to have been incorrect.

69. Returning to the answer provided to request 19(a), the Plaintiffs set out at paragraph 19.2 various emails alleged to have been between the Defendant and investors, who are named as Morgan Lewis & Bockius LLP, Moreland Management Co and Capital Group.

70. I have concluded that the Plaintiffs' response to the request at paragraph 19(a) is insufficient and that the Defendant should be told with clarity precisely which emails it is accused of not responding to. I direct that the Plaintiffs provide the additional information requested in paragraph 19(a) by 4pm on the day falling 14 days after the handing down of this judgment.

Request 21

71. The Defendant also seeks further information about request 21 of the Exceptions. This request relates to paragraph 110.8 of the Cause which also appears in the section of the Cause that deals with the alleged "*Material Breach of the Administration Agreements*". Paragraph 110.8 is pleaded as follows:

> "*110 Upon review of the information provided during the exit period by the Defendant, Carey Commercial determined that the information provided by the Defendant was lacking in the following manner:*

…

110.8 The Intralinks data had not been updated, despite the Defendant receiving payment for such services."

72. The Defendant has made three requests for further information about paragraph 110.8 and the Plaintiffs' have provided answers that are said by the Defendant to be inadequate.

73. The first request for information is "*(a) what Intralinks data the Plaintiffs allege should have been but was not updated.*" to which the Plaintiffs responded: "*21.1 The updates relate to the uploading of accounts and Capital Account Statements.*"

74. The second request of paragraph 110.8 is "*(b) What the Plaintiffs allege the update/s to this data should have been.*" to which the Plaintiffs provided this answer "*21.2 The Defendant, as administrator, had historically uploaded the Capital Account Statements to Intralinks. Therefore, they were aware of the requirements to upload. In addition, uploading the statements to Intralinks formed part of the services to be provided by the Defendant.*"

75. The Defendant's third and final request for further information about paragraph 110.8 of the Cause is "*When and how the Plaintiffs allege the Defendant was made aware of the updates which were required.*" to which the Plaintiffs responded "*21.3 The Defendant's staff were reminded weekly in team meetings that they were required to upload the data to Intralinks. The Defendants* [sic] *were required to update any user changes or partnership interest changes both on their own database and the Intralinks platform.*"

76. I have concluded that the Plaintiffs' responses to the three requests for further information about paragraph 110.8 are sufficient for the Defendant to understand the allegations being made against it. Accordingly, I reject the Defendant's request for further information at paragraph 21 of the Exceptions.

Requests 23(c) and (d)

77. The Defendant also seeks a further response to requests 23(c) and (d) of its Exceptions. Those requests relate to paragraph 110.9.2 of the Cause which, once again, is in the part of the Cause under the heading "*Material Breach of the Administration Agreements*". It pleads:

"*110 Upon review of the information provided during the exit period by the Defendant, Carey Commercial determined that the information provided by the Defendant was lacking in the following manner:*

…

110.9. The Share and Director Registers included the following defects:

…

110.9.2 The Share Registers were outdated and incomplete, for example, old names, who no longer held shares in the different Administered Entities, had not been removed and the new shareholders' details have not been updated; "

78. The Defendant's request at paragraph 23(c) of its Exceptions is "*(c) Which "new shareholder details" the Plaintiffs allege should have been updated but were not.*" to which the Plaintiffs responded "*23.3 This is a request for early disclosure and inappropriate for purposes of Rule 60.*"

79. The request seeks information about conduct alleged to form part of the material breaches of the Administration Agreements by the Defendant that have led to the losses claimed.

80. In my judgment, the Defendant is entitled to know with sufficient specificity the case that is being made against it. Here it is pleaded that the alleged failure to update the Share Register with the details of the new shareholders has led to loss. In order to plead to the allegation of breach of duty at paragraph 110.9.2 the Defendant is entitled to be told the identities of the new shareholders whose details it is alleged ought to have been updated on the Share Register.

81. I direct the Plaintiffs to provide a further answer to paragraph 23(c) identifying the new shareholders whose details it is alleged ought to have been updated on the Share Register by 4pm on the day falling 14 days after the handing down of this judgment.

82. The final request that the Defendant seeks a further answer to is at paragraph 23(d) of the Exceptions. That request also seeks further information about paragraph 110.9.2 of the Cause.

83. The request is "*When and how the Plaintiffs allege the Defendant was made aware of the updates which were required.*" to which the Plaintiffs have responded "*23.4 It was part of the Defendant's functions as secretary and administrator to ensure that the updates were updated and provided to the Guernsey Register.*"

84. The answer provided by the Plaintiffs does not in my judgment answer the request made at paragraph 23(d). The request itself is in my view a reasonable request for additional information as to the allegations being made against the Defendant in paragraph 110.9.2 of the Cause. I direct that the Plaintiffs provide the information requested at paragraph 23(d) of the Exceptions by 4.00 pm on the day falling 14 days after the handing down of this judgment.

Simon H Davies
Lieutenant Bailiff

20, May 2024