Financial services - Authorised Closed-Ended Investment scheme. Action by shareholders and company against directors and scheme administrator alleging breach of directors' duties and statutory duties. Cause struck out for disclosing no reasonable cause of action in certain respects and being "otherwise likely to obstruct the just disposal of the proceedings", with limited leave to apply to amend. Function and requirements of pleadings.

[2024]GRC010

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

Civil Action No. 2407

BETWEEN:

(1) WOLFGANG JOACHIM ERICH LANDL
(2) ANDREA BRIITTA 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) GIANCAROLO PAROLO
(21) LANDSEND INVESTMENTS LIMITED
(22) YASSER JEIROUDI
(23) LUXX PCC LIMITED (IN LIQUIDATION)

Plaintiffs

and

(1) STEPHEN WILLIAM HOGG
(2) STEPHEN WATTS
(3) IAN JAMES HENDERSON
(4) EFG PRIVATE BANK (CHANNEL ISLANDS) LIMITED

Defendants

Before Her Hon Hazel Marshall KC Lieutenant Bailiff

Hearing dates: 16 – 19 October 2023

Judgment handed down: 23 February 2024

Counsel for the Plaintiffs:	**Advocate T Bamford**
Counsel for the First to Third Defendants:	**Advocate M Jones**
Counsel for the Fourth Defendant:	**Advocate C Edwards**

Cases, Legislation and texts referred to in the judgment:

Legislation

Guernsey

Protection of Shareholders (Bailiwick of Guernsey) Law 1987 s34
Protection of Investors (Bailiwick of Guernsey) Law 2020

Royal Court Civil Rules 2007 rr 19, 50, 52 and 59
Authorised Closed-Ended Investment Scheme Rules 2008 rr 2, 3, 4

England and Wales

Civil Procedure Rules [2023] Vol 1 para 17.3.6

Cases

Guernsey

Jefcoate v Spread Trustee Company Limited [2013] GLR 220
Tranquility Holdings v Invista Real Estate Investment Management (CI) Limited (2015), Guernsey Judgment 38/2015
Rawlinson and Hunter v Investec Trust Limited and another [2016] GLR 332:
Popat v Popat (2017) Guernsey Judgment 6/2017
Carlyle Capital Corporation Limited v Conway (2017) Guernsey Judgment 36/2017
JJW Hotels & Resorts v. Rhodes and others [2022] GRC 041

England and Wales

Chaplin v Hicks [1911] 2 KB 786
Prudential Assurance Co Ltd v Newman Industries Limited [1982] Ch 204,
Easyair Limited v Opal Telecom Limited [2009] EWHC 339 (Ch)
Vasiliou v Hajigeorgiou [2010] EWCA Civ 1475
Pantelli Associates Ltd v Corporate City Developments No Two Ltd [2011] PNLR 12

ACD Landscape Architects Limited v Overall [EWHC] 2012 100 (TCC)
Sevilleja v Marex Financial Limited [2020] UKSC 31
Kisen Kaisha Ltd v James Kemball Ltd [2021] EWCA Civ 33

Texts

Civil Procedure Rules (CPR): "The White Book" [2023] Vol 1 para 17.3.6

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J U D G M E N T

Introduction

1. There are three Applications before the court.

   - The first is an Application by the First to Third Defendants, dated 11 March 2023, and made pursuant to rr 52 and 19 of the *Royal Court Civil Rules 2007* ("**the RCCR"**), either to strike out the Plaintiffs' Cause in its entirety, or alternatively for summary judgment, on the grounds that the claim discloses no reasonable cause of action, or that it stands no reasonable prospect of success, and there is no other reason why there ought to be a trial.

   - The second is an application by the Fourth Defendant dated 7 March 2023 to the same effect.

   - The third is an application by the Plaintiffs dated 11 July 2023, and made pursuant to rr 50 and 59 of the RCCR, for permission to amend their Cause in the form of a draft Amended Cause annexed (hereafter called "**the Amended Cause**").

2. The state of the draft Amended Cause attached to this last Application requires comment. The Plaintiffs' Application was made after a good deal of correspondence between the parties in which the Defendants raised objections to the Plaintiffs' case, and asked them to re-consider. These were reinforced by *Exceptions de Forme* taken by the Defendants, and by points made in their Defences – and extremely lengthy Defences on the part of the First to Third Defendants. The proposed amendments appear to attempt to answer some of the Defendants' objections.

3. The draft Amended Cause is amended in two colours. Certain allegations appearing in the original Cause, which was dated 16 November 2021 are made and also struck

through in red typescript. This seems to mean that they are removed from the original. Certain other allegations, not contained in the original Cause, are inserted in blue, indicating that they are new text, at any rate as far as the Cause is concerned. These latter insertions appear to have been the product of very much more recent consideration by the Plaintiffs, and may reflect material previously included in the Plaintiffs' Réplique, which the Defendants had objected ought more correctly to be in the Cause, because it was apparently being deployed as part of the Plaintiffs' primary case.

4. It does not appear that the Cause has ever been formally amended before, and I infer, therefore, that it is the final combined effect of these red and blue amendments for which leave to amend is sought. There are factors which suggest that the "red" amendments were made in some earlier draft, independently of (and before) the blue amendments were made, because the red alterations also altered paragraph numbers, but the blue alterations altered these again (changing them back to the original ones in the Cause), whilst certain points made in skeleton arguments appear to have been made with reference to the "red" paragraph numbers as if they were still live. The history of the changes in the proposed form of the Cause has some relevance to the arguments made before me, because it is said by the Defendants to be indicative of the unsubstantiated and disorganised state of the Plaintiffs' purported claims. I therefore record my assumption that the Defendants issued their Applications whilst the Cause was still formally in its original state, but probably with knowledge that the Plaintiffs had already abandoned the "red" allegations, either from an earlier informal draft, or from that having been conceded in correspondence, but only in correspondence.

5. Whatever the precise history, the Defendants do not consider that the proposed draft Amended Cause in its latest iteration meets their objections and complaints, and they have therefore persisted in their Applications despite being served with the Plaintiffs' Application to Amend. The parties have therefore, pragmatically, agreed that the Court should determine the matter as if the Cause had been amended as the Plaintiffs propose, but subject to the Defendants' objections to the proposed amendments themselves.

Preliminary point - numbering of parties

6. It is convenient to mention and dispose of one purely procedural point of dispute here. It relates to the basic form of the Cause. The complaints of all but the last-named Plaintiff are made by the named Plaintiffs as Shareholders in the last-named Plaintiff. As originally issued by the Plaintiffs, the Cause contained (apparently) only 20 numbered Plaintiffs. This was because the First and Second Plaintiffs, the Fifth and Sixth Plaintiffs, and the Eighth and Ninth Plaintiffs are couples, and had been numbered together under one number as Plaintiffs, despite being two people. The rationale for this numbering was apparently that those pairs of Plaintiffs had invested on a joint basis, thus reducing the apparent number of Plaintiffs.

7. It is not correct to number Plaintiffs in that fashion. Every individual person or entity which is suing should be given a separate number, to identify him, her or it, in case separate reference to individual circumstances becomes material. That may well, in fact, be the situation in this case. That principle applies even if plaintiffs are suing as joint owners of relevant property. Of course there may be occasions when combining parties does not cause any problem in practice, (it is unlikely to do so where, for

example, joint liquidators of a company are taking action in their own names) but it still may do so and in any event, following the rule is simply an example of observing correct procedure.

8. The Defendants therefore renumbered and re-headed the action correctly in their Defences and Applications. As this is the correct method of numbering, the Court agrees and adopts this, as in the heading above, and I direct that the title of relevant court documents in the action should be headed in that way in future. If any identifiable additional costs are incurred by the Defendants because of this then they will have to be borne by the Plaintiffs, because they should have been numbered in that way in the first place.

The parties and the claims

9. The claims in this matter concern the London Heritage Fund ("**the Fund**"), which was the only cell of the Twenty-Third Plaintiff, Luxx PCC Ltd, a company which is now in liquidation ("**LPCC**"). LPCC is a Guernsey protected cell company incorporated on 17 September 2014. The Fund was an authorised closed-ended investment scheme regulated by the Guernsey Financial Services Commission. LPCC went into voluntary solvent liquidation on 16 June 2021 but by that time about 90% of the share capital raised from investors in the Fund had been lost.

10. The First to Twenty-Second Plaintiffs are certain shareholders in the Fund, either as original subscribers or as assignees of some such original subscribers. They are together referred to as "**the Shareholders**", but remembering that they are not the totality of the investors in the Fund, who will be referred to as such.

11. The Fund raised a total of £38.37Mn of share capital from subscriptions. The Shareholders hold £34.17Mn of this, including that referable to shares held by the Fourth Plaintiff by assignment from other original investors. The Shareholders thus hold 89.05 % of the total invested share capital of the Fund.

12. The Shareholders and LPCC acting by its Joint Liquidators have joined together to bring this action against the four Defendants in respect of losses which are alleged to have been suffered by the Shareholders and/or by LPCC (through the Fund).

13. The First, Second and Third Defendants ("**Mr Hogg**", "**Mr Watts**" and "**Mr Henderson**", together, "**the Directors**") were the Directors of LPCC and thus of the Fund at all material times. Mr Watts was a director and an employee of the Fourth Defendant, EFG Private Bank (Channel Islands) Ltd (**"EFG**"). Mr Henderson was a senior employee of EFG. Mr Hogg was not connected to EFG.

14. EFG is a company holding a banking licence in Guernsey. It assumed the role of LPCC's company secretary, administrator, registrar and "Designated Manager" (within the meaning and requirements of the *Authorised Closed-Ended Investment Scheme Rules 2008* referred to below) during the material times. Part of its function was, apparently, to provide individual directors to LPCC.

15. The Plaintiffs allege that the losses which they have suffered were caused by breaches of various obligations owed to them by the various Defendants. For the purposes of this introduction, it is convenient simply to note that those obligations fall under two

distinct types of claim, namely:

- breach of statutory duties imposed by the *Protection of Shareholders (Bailiwick of Guernsey) Law 1987* ("**the PoI Law**", which was the Protection of Investors Law then in force), and in particular s 34 of that Law, and the *Authorised Closed-Ended Investment Schemes Rules 2008*, ("**the 2008 Rules**" or "**the Rules**") made under it, and

- breach of ordinary duties of care under the general law, and in particular those of company directors;

but they also divide into two distinct factual areas of complaint, namely:

- alleged false statements contained in the Offering Memorandum which was produced to solicit investments (referred to as "**the Misrepresentation Claims**" or, as the Plaintiffs prefer, "**the False Statements Claims**") and

- alleged deficiencies in various aspects of the Defendants' conduct of the business of the Fund once it was constituted and operating thereafter (referred to as "**the Supervision Claims"** or **"the Mismanagement Claims").**

16. There are thus two distinct classes of Plaintiff (Shareholders and LPCC itself), two distinct classes of Defendant (EFG and three of LPCC's Directors), two distinct grounds for alleged breach of duty (statutory duty and general law duties) and two distinct areas of factual complaint (the content of the OM and the management of the Fund's affairs), all incorporated into one Cause. Mathematically, this means that this could give rise to as many as 16 differently constituted causes of action in principle, even leaving out of account the fact that the claims of the 22 individual Shareholders are themselves 19 separate and distinct claims in law, and that the two distinct areas of factual complaints each include several distinct factual allegations. Obviously not all such mathematically possible combinations of elements give rise to possible causes of action as a matter of legal analysis. It is immediately obvious, for example, that LPCC itself can have no claim in respect of false statements made to subscribing investors, and the Directors do not owe directors' duties to individual Shareholders, and of course, on analysis, the Plaintiffs have not pleaded every possible combination of such different elements. But that is not the point. The point is that the theoretical availability of a significant number of discretely constituted causes of action arising from materials which have been combined into one Cause makes it all the more important that the pleading should clearly identify which ones are being relied on, and should enable any Defendant to discern, easily and clearly, the content of the claims which actually are being advanced against him or it, from amongst the broad general landscape of alleged facts and complaints. Any defendant is entitled to know the actual case he has to meet and it is a plaintiff's duty to enable this.

17. The quest to identify the pleaded claims has also been made more difficult in this case, first because they have not, it seems to me, always been pleaded with strict consistency, and second because of changes made to terms of the Cause apparently at different times, as already described, when its contents were challenged in correspondence by the Defendants. However, the most convenient course is simply to try to deal with the Applications on the basis of the pragmatic approach mentioned in [5] above, and to consider the pleadings in more detail where issues naturally arise. I will, though, have

more to say about the pleadings in general, later.

The facts in outline

18. As mentioned above, LPCC was incorporated on 17 September 2014. The objectives of LPCC were the development and profitable sale of high-end residential flats in Central London. The Fund was to be its first protected cell; in the event it was the only one. The appointed Directors of LPCC at that time were the first three Defendants and a Mr Luigi Becherini. Mr Becherini was an experienced and successful property developer, and was, as everyone has accepted, the principal driving force behind the proposed business of LPCC and of the Fund. He was to be involved in that business, directly and indirectly, in various remunerative ways.

19. Before the incorporation of LPCC, the practical structure for the delivery of these residential development projects had been set up. On 18 March 2014 Luxx London Investments Limited ("**LLIL**") had been incorporated in Scotland, its shareholders being Mr Becherini as to 75%, with a Mr Harry Hill (20%) and a Ms Sharon Campbell (5%) as the remaining minority shareholders. Mr Becherini, Mr Hill and Ms Campbell were LLIL's directors. The purpose of LLIL was to be the advisor on all aspects of the development portfolio management, including project sourcing, space design, interior design, obtaining finance from banks and the property disposal strategy. Its principal asset was its ability to provide the services of Mr Becherini, in particular, with his knowledge, experience and expertise in delivering such projects profitably. LPCC entered into a Property Advisory Agreement with LLIL immediately upon LPCC's incorporation in September 2014, and LLIL also held a specific Management Share and a Class B Share in LPCC. This last share entitled it to specified dividend payments if certain levels of profits were achieved.

20. On 1 September 2014, and thus shortly before the incorporation of LPCC, Luxx European Developments Limited ("**LEDL**") was incorporated, also in Scotland. Again, its shareholders were Mr Becherini as to 75%, Mr Harry Hill 20% and Ms Sharon Campbell 5% and Mr Becherini, Mr Hill and Ms Campbell were its directors. It also availed itself of the services of Mr Becherini. The function of this company as Development Manager, was to manage the development projects as project manager or to undertake them as main contractor. It is my understanding that LPCC entered into a Property Management Agreement with LEDL at some time after its incorporation but before the Fund itself was launched. It also appears that conventional JCT construction contracts were later entered into the by LEDL with at least two of the SPVs (Special Purpose Vehicles) which were later incorporated to execute individual development projects.

21. LPCC also approved a draft Administration and Secretarial Agreement with EFG on 17 September 2014, and which LPC entered into upon being incorporated. EFG was thereby appointed to the functions described in [14] above.

22. Investor capital was to be sought for the Fund, and to that end an Offering Memorandum ("**OM**") was put together. (Further funding required would be sought by the usual means of taking commercial loans.) An initial version of the OM was approved by the Board of LPCC on 9 November 2015. It was amended, in a highly material respect for present purposes, on 22 January 2016. This was prior to the various rounds of capital raising for the Fund, the first of which closed in May 2016 and the

last in March 2018.

23. The OM contained details of the intended investment scheme, together with extensive information, terms and conditions. The investment strategy of the Fund was stated (OM p 32) to be to acquire and develop

> *"a portfolio of residential apartments spread over different locations* [in Central London]".

The projects were to comply with certain parameters described in the information contained in the OM. Ultimately, the object was, naturally, to sell them profitably. The parameters for the intended investment projects show that (and as the name Luxx PCC Ltd itself implies) the developments were aimed at the high-end residential market.

24. The life of the Fund was intended to be five years, and it was stated to be targeted (OM, p 33) to achieve a return (expressed as an "IRR" which I understand to be "Internal Rate of Return) of 20% per annum. The Plaintiffs thus equate this with a return by which their investment would be doubled at the end of the five year intended life of the Fund. (This financial equivalence, which equates IRR with RoI, or "Return on Investment", was not examined, but was assumed, for the purposes of these hearings). At the same time, though, it is notable that the Fund was also stated to be intended to achieve its investment strategy within four years (OM p35) - which would seem to mean, by parity of reasoning, that if it returned 180% of invested funds to investors at that time it would be regarded as having achieved its target.

25. Anticipated timetables for development projects were given. Funds for the acquisition of development sites or properties identified as being appropriate were to be raised, in the first place, by subscriptions for shares sought from investors on the basis of the information contained in the OM. The further development funds required would be raised in the normal way, from commercial bank loans.

26. The investment opportunity was only to be offered to "*Qualified Investors*" as defined by the Guernsey Financial Services Commission. This was a requirement of the GFSC for the Fund to be authorised by it – ie that the investment should only be offered to, and accepted from, such Qualified Investors. This requirement is made because investments of this type are speculative and risky, and are therefore suitable only for persons who understand what they are doing, and who appreciate, and are capable of withstanding, the financial risks of the investment. Such persons are often termed "sophisticated investors".

27. The basic investment pattern of the Fund's enterprise was to be carried out or supervised by Mr Becherini personally, assisted as necessary, of course, by other persons working for and with him, and in particular Mr Hill, who was his immediate assistant, and Miss Campbell. Mr Becherini would identify appropriate sites for purchase and development, arrange the obtaining of the additional commercial funding required, and supervise the implementation of the development project. Each separate project was to be vested in and carried out by a separate SPV company, owned 100% by the Fund, but the practical work of development would be carried out, or organised, by LLIL and LEDL. This *modus operandi* was explained in some detail in the OM.

28. Whilst the "target outcome" referred to above was stated in the OM, the OM also contained extensive Risk Warnings (OM pp 24 – 31) with regard to possibilities which might eventuate and prevent such an outcome. The adequacy of such warnings is a matter of dispute in the present case. In broad terms, the Plaintiffs complain that the warnings were merely generic, and failed to warn of the "*particular*" risks associated with the allegedly "*unusual*" role of Mr Becherini in the Fund, and the Fund's "*unusually high*" level of dependence upon him personally, thus rendering the extent and gravity of the warnings actually given inadequate and misleading.

29. The OM also stated (p 34) - and this has assumed significance – that:

> *"The Development Manager has delivered more than 650 units worth in excess of £200,000,000 on a similar basis prior to the launch of the Fund. It will be responsible for all aspects of the project: project management, finance, corporate and property law, planning and interior design. The Development Manager has proven experience in this area and as an affiliate of the Development Manager the Property Adviser shares the benefit of this experience and that of the Development Manager's personnel".*

30. The OM was amended in January 2016 ("**the Insurance Amendment**") to include the statement that:

> "*The Property Adviser will obtain suitable key man insurance cover to protect the fund from financial losses in the event of the death or extended incapacitation of Mr Becherini or Mr Hill".*

This statement has also assumed major significance in this case. In the event, such insurance was not pursued initially and was overlooked until raised at a Board Meeting of LPCC in August 2017, thus, some time well after the commencement of the Fund's active business.

31. The first site acquired was at 66-74 Notting Hill Gate, London W11 ("**NHG**") acquired on 25 June 2016. It was followed by 6 Breams Buildings London EC4 ("**BB**") on 19 December 2016 and 25 Buckingham Gate London SW1 ("**BG**") on 9 May 2017. In each case the SPV was a wholly-owned subsidiary of the Fund, and its directors were employees of EFG. In the case of NHG and BG, they included the Third Defendant, Mr Henderson.

32. Works began on the NHG and the BB sites in early 2017, under Mr Becherini's direction, and appeared to progress according to plan for about a year. The Fund had formally notified investors that it did not intend to produce regular reports on the projects to them, and would circulate only six-monthly financial statements, but informal investor updates were produced by Mr Becherini for investor information.

33. In August 2017 it was suggested at a Board meeting of LPCC (by the representative of EFG) that Key Man life insurance should be taken out on Mr Becherini, because of his key role and position. This had not yet been done, despite the general statement made in the OM that the Property Adviser would do so. Mr Becherini agreed to calculate the level of cover required to recruit personnel to replace him in the event of his death or incapacity. His figures were produced to the 15 January 2018 Board Meeting, and the Board approved obtaining quotations for such insurance at the top of his suggested

range for appropriate cover (£1.8Mn).

34. Such quotations were then promptly obtained, but the matter was not progressed before it came up on the agenda for discussion at the next routine Board meeting of 12 April 2018. At this meeting, Mr Becherini stated that he had recently been in hospital for a minor matter, from which he said he was recovering, and he suggested that taking out insurance should be deferred because doing so at that moment would lead to higher premiums. The matter was therefore stood over to the following Board Meeting scheduled for July 2018.

35. However, before this was held, Mr Becherini died on 22 July 2018, apparently of pancreatic cancer. There is a dispute as to whether his poor health was, or if not whether it should have been, previously known or apparent to the Defendants. The Directors say that his death was a shock to all concerned.

36. His death, of course, deprived the projects of their main driving force and overall supervisor, and obviously a person with a great degree of pertinent knowledge.

37. The directors of LPCC commissioned an initial report on the state of the developments from Savills, and this was provided on 1 October 2018. It appeared to show that everything was in order and under control. The Plaintiffs plead, however, that this was because the information available to Savills was insufficient, being only that available to Mr Hill, whereas much relevant information had been held on Mr Becherini's laptop to which Mr Hill had no access. They say that the inadequacy of this basis for reliable report was, or should have been, known by the Defendants. Mr Hill was appointed to the Board of LPCC in January 2019. An investor representative observer was later appointed to the Board, but the origins and circumstances of this are not common ground, but are not material for present purposes.

38. Through a shareholder, a consultancy firm, Development Managers Limited ("**DML**") was introduced to LPCC. Ultimately, LPCC's Board commissioned them to make a full report on the Fund. Again, the precise course of events leading up to this are not common ground, but are not material for present purposes. The Report, dated 11 June 2019, raised serious issues, in particular about the competence of LEDL to deliver the projects. It also opined that the NHG project, if developed out, would make a likely loss of just under £½Mn, the BB project would break even and the BG project, (then simply a cleared site), if immediately sold, would crystalise a loss of about £10.5Mn, and that developing out all three sites might make a return of 57p, or even only 44p, in the £ to the investors.

39. The Fund (LPCC) terminated LEDL's contracts in early July 2019, because of the concerns appearing in the DML report, and engaged DML to engage contractors for further work on the NHG and BB developments but plans were overtaken by events, and in the end contracts were never signed. DML discovered further deficiencies in the work of LEDL and, indeed, in the actual building works at NHG.

40. The Fund's finances were deteriorating, with a squeeze on its liquidity. An EGM of LPCC was called in order to enable the sale of the BG site to be made, to fund the completion of the NHG and BB projects. This EGM approval was required, because such sale was a departure from the terms of the OM.

41. However, in September 2019 RBS notified the Fund that it was withdrawing finance owing to the issues identified in the DML report and the delays in project completion. Although RBS was prepared to allow the Fund time to refinance, they subsequently notified the Fund that the loan was being transferred to their "restructuring" division - basically the division charged with recovery and damage limitation in the Bank's interests. Also, the freeholder owner of the NHG site commenced possession proceedings, under its own agreements with the NHG SPV, on the grounds of delay.

42. There was a further issue of new preference shares to investors, made in October 2019 which provided an injection of £1.5Mn to ease liquidity but the relief was only temporary. By March 2020 works on NHG and BB had ceased owing to lack of funds, and the financier of the BG loan (ABS International Bank) demanded full repayment (£20.5Mn).

43. Matters continued to worsen, and it was also reported that invoices rendered by LEDL and paid prior to July 2019 had been rendered for works and services which had not in fact been provided. All works on projects were then suspended to minimise expenditure. Mr Hill ceased to be a director of LPCC on 3 July 2020.

44. By August 2020 a sale of the BG site had been agreed, but a proposed sale of the BB property had fallen through. Insolvency practitioners had been appointed on the NHG project, where an offer of £8Mn had been received for the property but was insufficient to repay all its creditors, and the freeholder had exercised "step-in" rights to complete the development. The NHG SPV went into formal Administration on 29 September 2020, with an expected net deficiency of assets as regards members of £15.55Mn.

45. The Joint Administrators sold the NHG property on 1 October 2020 for £3.25 Mn. LPCC eventually sold the BG SPV (and thus the site) in October 2020 for £28.75 Mn. BB was sold in January 2021 for £5.7 Mn. Each sale crystalised a significant loss for the Fund but the precise figures are not material. LPCC went into voluntary liquidation on 16 June 2021.

46. At the time of the issue of these proceedings, the Shareholders anticipated a loss of about 90% of the Fund's capital of £38.37Mn, namely a deficiency of about £34.53Mn. Their aggregated share of such loss would therefore be approximately £30.75Mn.

The proceedings

47. This action was commenced on 16 November 2021. Although both EFG and the Directors sought further information from the Plaintiffs as to the founding facts for some parts of their claims apparently set out in the Cause, the Plaintiffs declined to provide this before the service of Defences.

48. The Directors filed their Defences and a Counterclaim, together with lengthy *Exceptions de Forme,* on 8 April 2022. EFG also filed its Defences on 8 April 2022, similarly with accompanying *Exceptions de Forme.*

49. The Plaintiffs filed a Réplique, and Defences to the Directors' Counterclaim on 29 July 2022. The Defendants objected that the Réplique inappropriately raised fresh matters which ought instead to be part of the Cause, because they were being deployed as part

of the Plaintiffs' claims. The Plaintiffs resisted this on the grounds that they were matters which had arisen from the Defendants' Defences.

50. At the same time as serving their Defences in April 2022, the Directors also served extensive Early Voluntary Disclosure of documents on the Plaintiffs. This comprised about 1,400 documents which the Directors believed to be a complete set of

- Board Minutes of LPCC, the Minutes of the Advisory Committee of LLIL, the Property Adviser,
- communications by LPCC to investors in the Fund,
- communications by Open Funds and Kroma (two intermediaries, linked to particular Shareholders and which had solicited investments from other investors) to the investors (which had not been made with the Directors' knowledge or authority at the time) and
- a record of all the decisions taken by the Board of LPCC.

They did this because they were of the firm view that the Plaintiffs had no claim against them, and wished them therefore to consider their position in the light of all the materials which the Directors regarded as demonstrating their own case that there was no proper claim against them, so as to be able (and no doubt be compelled) to give their responses to the Directors' *Exceptions de Forme* in the light of these materials. However, this advance disclosure did not bring about any substantial amendment to the claims made in the Cause, and nor did it evoke responses to the *Exceptions de Forme* which the Directors regarded as reasonable or satisfactory. Indeed, the Defendants all complain that the Plaintiffs have stone-walled the *Exceptions de Forme*, claiming for the most part, that the Defendants are not entitled to such information, because it is merely evidence, or that the claims are already adequately pleaded, or that matters relating (for example) to the quantification of their claimed damages do not have to be provided at this stage of the proceedings. I think it is fair to say that the Defendants see this conduct as an attempt to keep a completely unmeritorious case afloat with minimal work, so as to put pressure on the Defendants.

51. On 4 August and 9 August 2022, respectively, EFG and the Directors made applications for security for costs. These were compromised by a Consent Order on 16 December 2022 under which the Plaintiffs were to make a substantial payment into court and procure a letter of undertaking from their ATE Insurer. (This condition was fulfilled on 2 February 2023.)

52. On 18 November 2022 the Directors applied for summary judgment against LPCC on their Counterclaim, on the basis of a short point, namely that LPCC was contractually obliged to indemnify the Directors against all the claims being made against them in the Plaintiffs' actions; they sought summary judgment to that effect.

53. On 7 March 2023 EFG made this Application for strike out or summary judgment on the Cause, and on 11 March the Directors made their similar Application, supported by a lengthy fourth affidavit of Ms Alison Sarah Antill of 9 March 2023. Directions for determination of these Applications were given on 11 May 2023.

54. In response, to these Applications, the Plaintiffs

- on 1 June 2023 gave Voluntary Further Information regarding the (then) Para 89 of the original Cause
- on 2 June 2023 filed evidence in answer to the Defendants' Applications, (a Second Affidavit of Mr Greig Mitchell, sworn on 2 June 2023) in which they abandoned two of the allegations/arguments made in the original Cause,
- on 3 July 2023, served a draft amended Cause, (which the Defendants did not consider to cure the criticisms they had previously made), and
- on 11 July 2023 made the present Application to Amend their Cause.

The Defendants being of the view that none of the above answered their Applications, these have proceeded.

55. On 30 June 2023, Lt-Bailiff Finch heard the Directors' Application for Summary Judgment on the Counterclaim. On 8 August 2023 he dismissed that Application on the grounds that the claim was <u>not</u> plainly distinguishable from *prima facie* adverse authority, nor was it weak, fanciful or bound to fail, and that the counterclaim therefore merited further investigation and should go to trial. On 16 October 2023, (in fact the first day of this hearing), Lt-Bailiff Finch refused the Directors leave to appeal. (Subsequently to this hearing, on 30 November 2023, the Bailiff, sitting as a single judge of the Court of Appeal, has referred the Directors' application for leave to appeal to the Full Court, whilst indicating that he would have been minded to grant leave to appeal on a limited basis but regarded that as a less convenient course.)

The law relating to strike out, summary judgment and amendment

(i) Striking out and summary judgment

56. The court's power to grant summary judgment under RCCR r 19, and its power to strike out claims or defences under RCCR r 52 effectively mirror each other. I previously set out a distillation of the applicable principles and tests in *JJW Hotels & Resorts v. Rhodes and others* [2022] GRC 041. The parties appear to agree on these, although they naturally lay emphasis on different aspects, and dispute whether ultimately the applicable tests are met.

57. As regards summary judgment, the court's power, in RCCR r 19 is, on application by any party, to give summary judgment against another party on the whole of a claim or any particular issue, on the grounds (see r 19 (2)) 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."

58. The relevant considerations for summary judgment are to be found in the well-known passages of Lewison J's judgment in *Easyair Limited v Opal Telecom Limited* [2009] EWHC 339 (Ch) at [15] as approved by the Guernsey Court of Appeal in *Rawlinson and Hunter v Investec Trust Limited and another* [2016] GLR 332):

> *"(1) Does the claim [or defence] have a realistic as opposed to a fanciful prospect of success?*
>
> *(2) A realistic claim [or defence] is one which is more than merely arguable and must carry some degree of conviction.*
>
> *(3) The court must not conduct a "mini-trial".*
>
> *(4) That said, the court may appraise and analyse what is said by a claimant [or respondent] as it may be clear, perhaps from contemporary documentation, that the factual assertions have no real substance.*
>
> *(5) The court's conclusions may be instructed both by evidence actually placed before it and evidence that can reasonably be expected to be available at trial.*
>
> *(6) Where reasonable grounds exist for believing that a fuller investigation into the facts would add to or alter the evidence available, the court is entitled to hesitate about making a final decision without a trial.*
>
> *(7) It may be important to identify that important material in the form of documents or oral evidence is likely to exist and can be expected to be available at the trial. 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 issues at trial.*
>
> *(8) Short points of law or construction which may be determinative should be dealt with sooner rather than later."*

59. As regards striking out, the court's power is contained in RCCR r 52, and, so far as material here, can be used where it appears to the court (see r 52(2)):

> *"... (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..."*

60. The relevant considerations as regards striking out are summarised for Guernsey law in *Tranquility Holdings v Invista Real Estate Investment Management (CI) Limited* (2015) (Guernsey Judgment 38/2015):

> *"a) Claims which are suitable for striking out ... include those which raise an unwinnable case where continuation of the proceedings is without any possible benefit to the respondent and would waste resources on both sides (Harris v Bolt Burdon [2002] LTL 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 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 (Farsah v British Airways, The Times January 26, 2000 CA referring to Barrett v Enfield BC [1989] 3 WLR 83 (HL)".*

61. In *JJW Hotels* (above) at [41] I noted further judicial comments to the effect that the party seeking to invoke the jurisdiction to strike out or grant summary judgment faces a high hurdle, because a party in a dispute ought not lightly to be denied a trial. The interchangeable descriptions of the test for a strikeable case, such as "*unarguable*" *"bound to fail*" and "*unwinnable*", emphasise this, and thus that "*comparatively little*" needs to be shown by the respondent to an application for summary judgment or strike out to justify his case being permitted to continue.

(ii) Amendment

62. The cases also note that a claim or defence ought not to be struck out without giving the relevant party the opportunity to amend his or its case if this could cure the situation. In seeking cure by amendment, however, the burden is on the party under challenge, who now becomes the applicant on the question of amendment, to satisfy the court that the amendment should be permitted according to the court's powers in this regard.

63. The power of the court to permit amendments is contained in RCCR r 59, and the well-known distillation of the relevant principles is contained in the judgment of the then Bailiff Collas in *Jefcoate v Spread Trustee Company Limited* [2013] GLR 220 at [52], endorsed in *Popat v Popat* (2017) Guernsey Judgment 6/2017, but conveniently referred to as "**the Jefcoate Principles**". They are that:

> *"(a) The court has a wide discretion under the Royal Court Civil Rules, r.59 to permit amendments where one or more of the parties has not consented.*
>
> *(b) The discretion must be exercised judicially having regard to legal principles.*
>
> *(c) The overriding objective requires that cases be dealt with justly.*
>
> *(d) What justice requires depends on the circumstances of the particular case but includes taking account of the matters particularised in the Royal Court Civil Rules, r.1(2), which will be of special importance when a late amendment is sought.*
>
> *(e) In general, amendments should be allowed so that the real dispute between the parties can be adjudicated provided that any injustice to the other party can be compensated for in costs.*
>
> *(f) In the ordinary course it will not be just to allow an amendment if it will defeat a defence of prescription that may otherwise be available.*
>
> *(g) If a defence of prescription may be defeated, it is necessary to establish whether the proposed amendment seeks to introduce a new cause of action.*
>
> *(h) What constitutes a new cause of action is not determined by the label attaching to the proposed claim but by the factual situation which is required to be proved to entitle the plaintiff's claim to succeed. If the new cause of action which is sought to be added or substituted arises out of the same facts or substantially the same facts as a cause of action already pleaded, the court will not normally regard it as a new cause of action and hence will have a discretion to allow it.*
>
> *(i) However, even if the new cause of action arises from similar or substantially the same facts as already pleaded, the court will disallow the amendment if the justice of the situation so requires.*
>
> *(j) Where a new cause of action may be prescribed, the effective date as to when the limitation period expired is the date of the application, although if the amendment is permitted, the effect is that it is deemed to date back to the date of the original proceedings.*

(k) When considering the limitation period, it is necessary to have regard to any period of time during which the plaintiff was empêché d'agir.

(l) An amendment will not be allowed if the case introduced by it has no realistic prospect of success.

(m) Apart from considerations of prescription, the mere fact that the change effected by a proposed amendment would involve introducing a new cause of action or that it would substantially alter the character of the proceedings or the burden of conducting them is not a reason for refusing leave to amend provided that the change can be made without inflicting injustice on the other parties of a kind incapable of being compensated by an order for costs."

64. General discretionary considerations, including the application of the Overriding Objective which underlies the policy of all case management decisions (see RCCR rr 1, and [63(d)] above), will be applied, such that the mere fact that the opposing party can be compensated in costs if an amendment is allowed to be made against it may not be decisive in favour of allowing such amendment if other, more subtle or amorphous, considerations also come into play.

65. The obviously logical requirement that an amendment ought not to be allowed unless it is shown to carry a realistic prospect of success (see [63(l)] above) reverses, in practice, the burden of proof from that applicable on the inversely corresponding application for strike out/summary judgment. The commentary on the English CPR regarding the equivalent English rule as to amendment of pleadings, at [2023] Vol 1 para 17.3.6, states that a permissible proposed amendment must be

> "*…arguable, carry a degree of conviction, be coherent, properly particularised and supported by evidence that establishes a factual basis for the allegation"*

(referring to *Kisen Kaisha Ltd v James Kemball Ltd* [2021] EWCA Civ 33 at [18]) and also that

> *"the court may reject an amendment seeking to raise a version of the facts of the case which is inherently implausible, self-contradictory or is not supported by contemporaneous documentation*".

66. The parties referred to several further authorities, in particular English authorities, in the areas of strike out, summary judgment and amendment but I do not think it necessary to refer to any of these. It was really common ground that they simply provided examples of the application of the above principles to particular factual situations. The above, then, are the principles which I will apply to each of the two Applications to strike out, or obtain summary judgment on, the claims against the Defendants, and any question of permitting any amendment of the Plaintiffs' Cause. It will not, however, be practicable in the interests of attempting anything like reasonable conciseness, to refer expressly to all the relevant considerations from out of the above at the point of giving my reasons for the very many individual decisions which I will have to make below.

The pleaded/proposed pleaded Cause

67. As previously stated, the parties have agreed that the Court should determine the matter of summary judgment/strike out as if the Cause had been amended as the Plaintiffs propose, although always subject to any objections which the Defendants might properly make to the proposed amendments themselves. I have found it inconvenient to deal with the matter exactly in that precise order, but so long as all material arguments are considered, this will make no difference in the result.

68. The important immediate point is that, with these being procedural applications concerning the adequacy or sustainability of the Cause which the Plaintiffs wish, or are able, to plead, the focus of argument is inevitably on the actual terms of the Cause, or proposed Amended Cause. An analysis of the terms of the Cause/Amended Cause as the subject matter of the dispute, is therefore required, and, since it has been argued on this basis, I will be referring to the draft Amended Cause, which I have already described above in [2] - [5]. However, this brings me to another point with regard to pleadings, and proper pleading technique in general. This is that when pleadings are amended, the previous numbering or lettering of paragraphs should not be altered.

69. If a former paragraph is deleted, then the numbering should still simply be left as it was; this will cause no problem about finding assertions by paragraph, because the numbering will still be in numerical order, even if with gaps. If an additional paragraph or paragraphs require insertion, then these should be given alphabetical suffixes (ie after a former paragraph "1" inserted paragraphs would be "1A", "1B", etc). One good reason for this technique is that it reduces the quantity of visible alteration required by the amended pleading, and alterations to numbers (changed paragraph numbers, struck though and replaced) are a totally unnecessary distraction from the subject matter. But the major good reason is that adhering to this rule (a) avoids any respondent having to amend paragraph references in his own responsive pleading if the amendments are permitted, and, most importantly (b) avoids confusion as to which paragraphs may actually be being referred to in any documents drafted before the amendments are made.

70. Whilst the process of amendment in this case may not have been formal, the draft which has been supplied to the Court has not adhered to the above principle, and paragraph numbers have been altered, and with various interlocutory documents being prepared at different times, (such as the rather central fourth affidavit of Ms Antill on behalf of the First to Third Defendants) earlier paragraph numbers have sometimes been used. In particular, the Plaintiffs' allegations of certain breaches of duty were pleaded, as to different duties, originally in Paras 88 - 90, which subsequently became Paras 89 - 91 in (apparently) an earlier version of the proposed Amended Cause and then once more become Paras 88 - 90 (by alteration) in the final version. With each of these paragraphs having several lettered sub-paragraphs which letters had themselves been amended by alteration, it became confusing, difficult and exceptionally tedious to trace the material allegations in those sub-paragraphs of the Cause for the purposes of following and later evaluating arguments. All this would have been avoided if the basic tenet of never altering paragraph numbers had been observed when preparing draft amendments.

The averments in the Amended Cause

71. I refer, below, to the final paragraph numbers used in the draft proposed Amended Cause annexed to the Plaintiffs' Application, except where expressly indicated.

72. Paras 1 - 11 are not controversial. They recite the parties and some of the factual background to the matter related above.

73. Para 12 recites provisions of the OM giving material features of the development project. Originally, these were (and remain)

    (a) its duration,

    (b) the investment strategy being the redevelopment of up-market residential flats,

    (c) the target annual rate of return and

    (d) the structure of separate SPV's for each project, employing the Development Manager to supervise it and the funding structure being that of investment capital supplemented by commercial bank loans taken out by the SPV.

    In the original Cause, a limit on the intended Loan to Value ratio of such commercial borrowing was pleaded with a view to pleading a breach of this provision. That allegation has now been removed. However, the draft Amended Cause proposes to add a new pleaded Para 12 (f) of the stated "track record" of the Development Manager quoted at [29] above. This is highly contentious.

74. Para 13 recites further detail from the OM as regards the intended timetable for developments. Para 14 recites the Insurance Amendment to the OM relating to the obtaining of Key Man Insurance, noted at [30] above, and Para 15 pleads (though with what relevance is unclear) the fees recorded in the OM as being payable by the Fund to the Property Adviser (LLIL), to the Development Manager (LEDL), and to EFG under its Administration Agreement.

75. Paras 16 pleads the Administration Agreement between the Fund and EFG, and Para 17 pleads certain of its terms. Para 18 pleads EFG's obligation to provide two directors to the Board of the Fund. (These were Mr Watts and Mr Henderson). Para 19 records (although the relevance is again unclear) the total fees paid by the Fund to EFG between 2016 and 2019, and the fact that funds held by EFG were transferred to the Joint Liquidators' account in 2021.

76. Paras 21 - 26 plead details of LLIL and LEDL as Property Adviser and Development Manager to the Fund, their respective roles, that each was under the control of Mr Becherini as the majority shareholder, was under his direction until his death, and was thereafter under the direction of Mr Hill.

77. A new Para 26A is proposed to be inserted in the Amended Cause, to plead that LEDL was only formed on 1 September 2014 and did not have the "track record" stated in the OM, and that no such track record experience could be (and therefore was not) shared by LLIL (as stated in the OM), and that this was, or ought to have been, known to the Defendants. Again, this is a highly contentious proposed amendment.

78. Paras 27 - 30 plead the details of each of the three SPVs formed to carry out, respectively, the NHG project, the BB project and the BG project (all described above). Para 31 records the total payments made by the Fund to LEDL between 2016 and 2019 in respect of fees, design costs payments to contractors, of which the vast majority –

in fact over 80% - were the last.

79. Paras 32-34 plead details of the directors of LPCC at the material times, and specifically, (i) the roles of the First to Third Defendants as Directors of LPCC with respect to the Fund and the fact that Mr Watts and Mr Henderson were "*supplied*" as its directors by EFG for reward, and (ii) the dates and directorships of Mr Becherini and Mr Hill. Para 34 pleads the total directors' fees received by Mr Hogg, and by EFG in respect of the services of Mr Watts and Mr Henderson, between 2016 and 2019, the relevance of which is again far from obvious.

80. Para 35 asserts that in relation to LPCC

> *"the knowledge of EFG included the knowledge of the Second and Third Defendants at all material times.*"

81. Paras 36-38 plead the central role of Mr Becherini as the "*driving force"* behind the Fund, its operation and administration, with its success being dependent upon him and his involvements, and the Defendants' knowledge of this.

82. Paras 39-42 plead details of the financings of each of the three SPV projects by way of equity funding and bank loans. Para 43 pleads the fact that Mr Becherini gave personal guarantees in respect of some part of the bank loans made to the SPVs. Para 44 pleads that the bank loan agreements made Mr Becherini's death an "event of default" in relation to each bank loan, triggering a right to repayment, with Para 45 pleading that this showed that the banks saw Mr Becherini as the "*driving force*" behind the Fund projects, and the likelihood that the banks would decline to advance further funds if he died.

83. Paras 47-50 (now under reinstated numbering) plead the progress of the projects until July 2018 seemingly without problem but with informal rather than formal updates for investors (as mentioned above).

84. Para 51 pleads that:

> *"As the Defendants knew (or ought to have known), from about July 2017 at the latest, Mr Becherini was suffering from an apparently serious and… ultimately terminal illness"*

85. That paragraph originally then contained - presumably as the "particulars" of the Defendants' means of knowledge relied on to justify the assertion of actual knowledge - averments that:

    (a) Mr Becherini was receiving regular medical treatment in Italy and, "*unusually*", spending substantial time there; and

    (b) from July 2017 to July 2018 he asked for a number of Board meetings to be rescheduled (as they were) because of his ill-health.

    However, the draft Amended Cause proposes to add three further averments, namely

    (c) that by July 2017 Mr Becherini was visibly unwell, displaying an "*unhealthy pallor*" and having suddenly lost a lot of weight, suggesting he

was suffering from a serious illness,

(d) Mr Becherini's statement at a Board Meeting of LPCC on 12 April 2018 that he

"*had recently been hospitalised for a short period and whilst he was now recovering he suggested that initiating Key Man Insurance at this time would likely lead to higher premiums*"; and

(e) that "*accordingly*" if the Defendants were not aware that Mr Becherini was seriously ill before 12 April 2018, they were put on notice, from that date that Mr Becherini

"*was at an elevated risk of death which in* [his] *own view would* be *likely to cause an insurer to demand a substantially elevated premium before writing a Key Man Insurance on his life*".

86. The draft Amended Cause then inserts a new paragraph 51A to plead that, as the Defendants knew or should have known, LLIL took no steps to obtain Key Man Insurance either before or after August 2017 or before 28 [sic] July 2018, and that (quoting extracts from the Minutes of the Board Meeting of LPCC on 24 August 2017 summarised above at [33]) neither did LPCC itself obtain Key Man Insurance, and whilst EFG took *"some steps"* in the latter regard no such insurance had been obtained before 12 April 2018, nor was it obtained afterwards, with the (rather stating the obvious) averment that the Directors consequently knew that neither LLIL nor LPCC held any insurance against the death of Mr Becherini.

87. Paras 52-78 recite the sequence of events from Mr Becherini's death on 22 July 2018 up to the final disposal of the Fund's properties on 29 January 2021, as outlined in [35]-[45] above. Paras 79 and 80 then plead an assessed loss of capital to the Investors in the Fund, asserting that "*the Shareholders*" [ie the 1st to 22nd Plaintiffs] will suffer loss and damage of at least £30.75Mn "*on this basis"* and "*under this head alone",* and defining this assessment of their depleted likely recoveries as based on the "*Current Projected Outcome*".

88. Paras 81-86 are headed "***Duties of the Defendants***" and their assertions therefore require careful examination.

89. Para 81 is headed *"**Directors** [sic] **duties*"** and pleads that the Directors (ie the First to Third Defendants) owed such directors' duties <u>to LPCC</u>. It then particularises these as being

(a) duty to act in the best interests of the Fund;

(b) duty to exercise independent judgement; and

(c) duty to exercise reasonable skill care and diligence in carrying out their duties

and paragraph 82 further pleads that, <u>as such directors</u> "*among other things",* the Directors were

"*responsible for the determination of the Fund's investment objective and policy and [were required to] have overall responsibility for"* in effect all *"the Fund's activities…".*

Thus, Paras 81 and 82 are thus expressly directed at the duties of company directors, owed in the normal way to the company of which they are directors, ie they are pleaded as the foundation of a potential claim by LPCC. Para 81 recites ordinary directors' duties. Para 82 expresses what would be ordinary directors' duties related to the structure and business of the Fund.

90. Paras 83-86, are headed "***Authorised Funds Duties***". Paras 83 pleads the application to the Fund of the PoI Law 1987 which, as already mentioned, was the PoI Law then in force, and of the 2008 Rules made under it.

91. Para 84 specifically pleads Rule 2.01 of the 2008 Rules, namely that

> "*(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…"* [ie the 2008 Rules] *"…and*
>
> *(c) the most recently published information particulars…"* [ie the OM] "*…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."*

The "*principal documents*" are defined in Rule 1.02 as being a company's articles of association, administration agreement and custodian agreement (if applicable - which it is not in this instance). Para 84 also pleads Rule 4.02, namely that

> *"The directors … are to be treated as responsible for the information particulars of an Authorised Closed-ended investment scheme [including in this case the contents of the Offering Memorandum] 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".*

Previous reliance on Rule 3.01 is withdrawn, with the pleading of Rule 3.01 being expressly excised in the draft Amended Cause.

92. Para 85 pleads a slight paraphrase of s 34 of the PoI Law. The actual section reads, so far as here material:

> *"34 … a contravention of any provision of*

(a) …rules or regulations made under this Law ….

is actionable… as a breach of statutory duty by the person who has contravened that provision, at the suit of any person who has suffered loss or been otherwise affected as a result of that contravention"

93. Para 86 then alleges that the Directors (ie the First - Third Defendants) are

"personally liable for loss arising from any breaches of the Authorised Fund Duties for which they are found liable."

It is thus not expressly identified here to whom it is going to be alleged that the Director Defendants are liable under s 34, and this is left to be gleaned from later in the pleading.

94. Paras 87-92 are headed "**Breach of Duty**". Para 87 makes the overarching assertion that "*the Defendants*" (implicitly, therefore, all of them) breached the Authorised Funds Duties and the Directors breached the Directors' Duties in the ways subsequently set out. The precise ingredients of any such breach as the alleged component part of a cause of action are left to be identified subsequently.

95. Para 88 appears to contain the "**False Statements Claims"** or "**Misrepresentation Claims**" identified at [15] above. It asserts (although without expressly identifying to which duties these assertions relate) that "*the Defendants"* (thus again all the Defendants) failed to take reasonable steps to ensure that the OM did not contain false or misleading information in (apparently) five subsequently pleaded respects:

(a) Sub-para (a) asserts the alleged *"false track record of [LEDL] and/or [LLIL]"* but it is now proposed to amend this to include specific reference to the new paragraph 26A (above) and to add two sub-sub-paragraphs (i) asserting that the statement was literally false, whatever the experience of entities or personnel other than LEDL and (ii) asserting that this was "*highly material*" for conveying a false impression of the experience and competence of LEDL and LLIL, contributing to the (asserted) failure of the OM to disclose the (asserted) over-reliance by the Fund on one individual, and the "*particular risks*" associated with this.

(b) Sub-para (b), which is original, pleads the omission from the OM of "*material warnings*" regarding the risks associated with the key role of Mr Becherini and/or his possible death or incapacity during the lifetime of the Fund. It is asserted that these would have been a warning (i) of the "*highly unusual*" degree of reliance of the Fund on Mr Becherini personally, and that if "*for any reason*" he were unavailable to continue his multiple roles during the life of the Fund there was a material risk that it would not be successful, (ii) of the intention that Mr Becherini would give personal guarantees to support the borrowings of the SPVs *"if this was so",* and (iii) of the intention that Mr Becherini's death would be an event of default under the SPVs' loan agreements *"if this was so". (*A previous assertion of fault by omitting reference to Mr Becherini's giving costs overrun guarantees is removed);

(c) Sub-para (c) is really not a separate factual assertion at all, but a repetitious

averment that owing to "*these omissions*" (presumably, therefore, those pleaded in sub-para (b)) the OM misleadingly failed to disclose the particular risks associated with the "*unusual*" role of Mr Becherini and the Funds' "*unusually high level*" of dependence on him personally;

(d) Sub-para (d) asserts that the OM represented that it would be possible for LLIL to obtain "*and further that it would obtain*" Key Man Insurance for the benefit of the Fund

> "*on terms that the Fund would be protected against all losses caused by Mr Becherini's death,"*

when the Defendants (ie all the Defendants) knew or ought to have known that this would be (in paraphrase)

i. impossible or

ii. only possible at uneconomic cost, or such cost as would have prejudiced or impaired the projected outcome for the Fund or

iii. if obtainable at reasonable cost would only have given limited and inadequate cover (judged by the actual Current Projected Outcome of the events which in fact happened) or

iv. that the wording of the amendment to the OM in respect of such insurance (see [30] above) was

> "*unacceptably imprecise and/or apt to mislead and/or omitted material facts and allowed investors to gain he false impression that such a policy would be readily available to protect the Fund from the financial consequences of Mr Becherini's death."*

(e) Sub-para (e) asserts that "*the Defendants*" (ie all the Defendants) failed to investigate the availability of "*suitable*" Key Man insurance before proposing or concurring in the Insurance Amendment of January 2016 to the OM.

96. Para 89 becomes very involved. It asserts, "*further or alternatively*", that in breach of the Authorised Fund Duties and/or (in the case of the Directors) also in breach of Directors' Duties, the Defendants failed to take reasonable steps to "*ensure*" that LLIL and/or LEDL and/or the SPVs acted in accordance with the OM. The draft Amended Cause here inserts a new averment that such failure included: by omitting to make the continuance of the contractual appointments of LLIL and LEDL conditional "*at all times"* upon their compliance with the terms of the OM - but it then continues in the original, with what are apparently pleaded as particulars of the conduct complained of, but using the phrase "*in that the Defendants*" had or ought to have had knowledge of four matters following, presumably, therefore being those which they culpably failed to prevent. The first three of these are:

(a) that Mr Becherini gave personal guarantees to support the borrowings of the SPVs when this was not disclosed in the OM and subjected the Fund to "*additional risk*" of which the investors were not aware, and the need for

which caused the viability of the Fund's investment strategy to be called into question;

(b) that Mr Becherini agreed that his own death should be an event of default under the bank loan agreements made with the SPVs, when this was not disclosed in the OM and subjected the fund to additional risk of which the investors were not aware;

(c) that LLIL failed to obtain Key Man insurance in alleged breach of the OM, so that the Fund had no protection from losses arising from Mr Becherini's death, then criticizing "*further*" in seven numbered sub-sub-paragraphs, the actions and attitude of the Board of LPCC with regard to taking out Key Man insurance at its meetings of 15 January 2018 and 12 April 2018 as being inadequate, such that no steps to do so were taken prior to Mr Becherini's death.

97. At this point, an original allegation at (d) that the SPVs were allowed to exceed the advised LTV ratios in their bank borrowing has been excised. The (consequently renumbered) Para 89 (d) now pleads asserted breaches of matters specified in the OM, by, variously, the Development Manager (LEDL), the Property Adviser (LLIL), the Fund and/or the SPVs. These matters are, from the preamble to the whole of Para 89, what it is alleged the Defendants knew (or ought to have known) about but in breach of their own duties failed to prevent. They are contained in five numbered sub-sub-paragraphs being

(i) failure by the Fund, LEDL, LLIL "*or*" the SPVs to appoint a full time architect to each of the separate projects within the Fund, instead instructing architects on a "*piecemeal*" basis, thereby allegedly hindering design processes and the roles of other core professionals and leading to "*significant failures*" in the progress of design works and consequently the physical works of the developments; and

(ii) failure by the Fund, LEDL, LLIL "*or*" the SPVs to take any or any adequate steps, from or after July 2017 to respond to the "*discovery*" that Mr Becherini was seriously ill by identifying a suitable person to replace Mr Becherini, or to obtain a "*suitable*" Key Man insurance policy sufficient to compensate the Fund for "*all*" losses flowing from his death or incapacity in addition to the cost of appointing a competent project management company or personnel to replace him;

(iii) the Fund's or the SPV's payments to LEDL under invoices which were excessive or for work which had not been carried out, and without the Fund and/or LEDL having engaged an independent qualified quantity surveyor "*in relation to invoices issued for such work and invoices* [sic]";

(iv) the Fund or the SPVs taking no sufficient steps to recover such overpayments to LEDL when identified in DML's report;

and (but here as a new sub-sub-paragraph inserted in the draft Amended Cause)

(v) that the terms of LEDL's Professional Indemnity Insurance under the JCT

building contracts relating to the NHG and the BB projects "*wrongfully excluded"* liability for any claim by the relevant SPV or by LPCC itself.

98. Para 90 alleges - but (now) against the Directors only, and in respect of the period up to July 2018 (ie the death of Mr Becherini) - that in breach not only of their Directors' Duties but also of the Authorised Fund Duties, the Directors failed to exercise independent judgement and/or due skill, care and diligence in relation to the operation of the Fund, but instead

    (a) entirely relied on Mr Becherini, to the extent of an improper delegation to him of *"all responsibility*";

    (b) failed to take any steps to investigate Mr Becherini's apparently serious state of health. Particulars are here sought to be inserted by amendment, to emphasise that this refers to "*either before or after 12 April 2018"* and to add that this was mandated because of

        i. the central role which Mr Becherini was expected to and did play in the operation of the Fund, the SPVs, and the functions of LLIL (as Property Adviser) and LEDL (as Development Manager) and the SPVs' relations with the bank lenders;

        ii. the existence of his personal guarantees, and the fact that his death was an event of default under the loan agreement;

        iii. the January 2016 amendment to the OM "*specifically requiring*" LLIL to take out Key Man insurance;

        iv. the failure of LLIL to do so;

        v. the independent decision of LPCC in August 2017 to do so;

        vi. LPCC's "*abortive attempt*" to progress that decision from August 2017 onwards; and

        vii. Mr Becherini's disclosure regarding his health in April 2018.

    (c) failed (again a new but merely emphatic reference to "*either before or after 12 April 2018"* is here sought to be inserted by amendment) to put in place contingency arrangements to protect against the likely consequences of Mr Becherini's death or incapacity, such as the identification or appointment of a competent replacement project manager, or procuring that LLIL obtain insurance against losses which would flow to the Fund;

    (d) (in an entirely new sub-paragraph proposed to be inserted by amendment) failed to "*ensure*" that Key Man Insurance was taken out by LLIL or LPCC to provide a level of cover in excess of £15-£20Mn, as a realistic estimate of the additional working capital required to be applied for the benefit of the Fund for meeting costs or losses (there listed), likely to be incurred in the event of Mr Becherini's death.

A repetition of the previous allegations in (now) Para 89 (a) to (e), previously made at

this point, is removed.

99. Para 91, which is original, makes a further allegation against the Directors only, but again asserting breach of both their Directors' Duties and the Authorised Fund Duties, and now in respect of the period after July 2018 (ie after Mr Becherini's death). These charges are that they failed to act in the interests of the Fund, or to exercise independent judgement, or to act with proper care, skill and diligence in relation to the Fund, despite knowing (or as they ought to have known) that LLIL and LEDL would then not be able to fulfil their contractual obligations to the Fund, not least because Mr Becherini had advised that in the event of his death it would be necessary immediately to appoint a competent replacement at a cost of up to £1.8Mn and insurance for such costs should be taken out (as already pleaded).

100. Para 92 then sets out "*in particular*" a list of the alleged failings of the Directors' in this regard, namely;

    (a) continuing grossly to underestimate the likely impact of Mr Becherini's death when it should have been obvious to any reasonably competent director of LPCC that *"immediate and drastic action needed to be taken to avoid disaster*";

    (b) wrongly relying on Mr Hill's and Savills' assertions that all was well when there were no reasonable grounds for that reliance;

    (c) failing immediately to appoint a competent project management company or competent senior executives to replace Mr Becherini in his various roles;

    (d) failing to terminate the appointments of LEDL and LLIL and appoint competent alternatives;

    (e) failing adequately to engage with the SPVs' lenders between July 2018 and July 2019 to obtain greater finance and/or more flexible terms so as to avoid either liquidity issues or breach of lending covenants (or only doing so ineffectually);

    (f) failing to take steps against LEDL or LLIL or Mr Hill in relation to their defaults and breaches, pleaded in (now) paragraph 89;

    (g) (substituted by proposed amendment, in place of an abandoned sub-paragraph complaining at failure to enforce costs overrun guarantees, against Mr Becherini) (i) failing to terminate the appointments of LEDL (by way of termination of the JCT contracts between LEDL and the SPVs) before July 2010 and (ii) "*wrongly*" continuing to rely on LLIL, LEDL and Mr Hill from August 2018 until June 2019;

    (h) taking no sufficient or timely action to gain investor approval for a revised investment strategy to enable the developments (or some of them) to be proceeded with in the interests of the Fund;

    (i) alternatively taking no action to liquidate the Fund as soon as practical to limit losses;

(j) but instead "*wrongly*"

a. responding with timidity and inaction to the Fund's mounting difficulties and only acting positively when pressed to do so by certain of the Plaintiffs;

b. allowing the Fund to continue with a largely unaltered but increasingly compromised investment strategy for the benefit of EFG (which continued to draw fees) and not the Fund's investors, whose position continued to deteriorate.

101. Thus Paras 89-92 appear to contain all the claims which have been labeled as either the "**Supervision Claims**" or "**Mismanagement Claims**" (depending on the point of view being taken), identified at [15] above, and relating to the conduct of the affairs of the Fund after it was launched and was operating, as contrasted with Para 88, which contains the claims made in respect of matters occurring before the Fund was launched and investments solicited.

102. Paras 93-99 are headed "***Causation Loss and Damage****".* Paras 93-95 deal with this in relation to "**Breach of Authorised Fund Duties**". Para 93 pleads simply that

> *"The Shareholders were induced to invest in the Fund by the Offering Memorandum and relied, reasonably upon the Offering Memorandum when deciding to invest in the Fund."*

103. Para 94 invokes the previously pleaded respects in which it is alleged that the OM was materially misleading, cites s 34 of the PoI Law, and asserts that "*the Defendants*" (ie all of them) are therefore liable <u>to the Shareholders</u> in respect to loss occasioned by their investing in the Fund, on the basis of the misleading OM.

104. Para 95 pleads "*further or alternatively*" that as a result of the breaches of duty alleged in (now) Paras 87-92 (thus, against all the Defendants) the Shareholders have suffered loss and damage *pro rata* to their interest in the issued shares in the Fund, equal to the losses suffered by the Fund, in respect of the Defendants' breaches of the Authorised Fund Duties. It asserts that this should be calculated on the footing that if the Defendants had performed those duties the Original Projected Outcome (which is the targeted return mentioned in [24] above) would have been achieved, or would likely have been achieved, or that there was a substantial chance that it would have been achieved or that a better outcome than the Current Projected Outcome would have been achieved, and the Shareholders have suffered that loss due to those alleged breaches of duty.

105. Para 96 then pleads the Shareholders' consequent claimed loss and damage on four suggested alternative bases. These are

(a) an award of £30.75Mn being the amount of the Shareholders' aggregate investment in the Fund,

(b) an award of the profits which would have been made on an alternative comparable investment of such sums for the relevant period,

(c) an award of the difference between the value of the Plaintiffs' shares if the Original Projected Outcome (ie a return of 200%) had been achieved, and their value under the Current Projected Outcome, assessed at approximately £64.92Mn, or alternatively

(d) an assessment on the basis of a substantial chance that if the Defendants' had not breached their Authorised Fund Duties as alleged, the Original Projected Outcome (or at any rate an outcome better than the Current Projected Outcome) "*could*" have been achieved,

but in each case giving credit for any dividends the Shareholders may actually receive in the liquidation of LPCC "*by reason of the claim brought by [LPCC] in this Cause or otherwise*".

106. Paras 97-98 deal with "***Breach of Directors' Duties".*** Para 97 purports to claim "*further or alternatively*" in this respect. It invokes the same matters as pleaded in Paras 87-92 (thus, notably, including Para 88) as causing loss and damage to LPCC, equal to that suffered by the Fund, as a result of the asserted breaches of their Directors' Duties by the Directors. It asserts that the loss and damage should be calculated on the same bases as put forward in Para 95 (referred to above), asserting that LPCC has suffered that loss due to those alleged breaches of duty.

107. Para 98 then pleads LPCC's consequent claimed loss and damage as being equal to the difference between the Original Projected Outcome (ie a return of 200% on the invested funds) and the Current Projected Outcome, being approximately £72.96Mn. Alternatively, it is pleaded that the loss should be assessed on the basis that there was a substantial chance that, if the Directors had performed their duties, the Original Projected Outcome, or a better outcome than the Current Projected Outcome, "*could*" have been achieved.

108. Para 99 claims interest on any damages award.

109. Finally, Paras 100 and 101 set out the relief claimed. Para 100 sets out that the Shareholders claim against all the Defendants, damages pursuant to s 34 of the PoI Law to be assessed, together with interest and costs. Para 101 sets out that LPCC claims, against the Directors (ie the First to Third Defendants) damages for negligence or for breach of statutory or common law duties of directors to be assessed, together with interest and costs. An Annex to the Cause sets out the postal addresses of each of the Shareholders and their individual investments in the Fund, and their Assignors where applicable.

I <u>The Defendants' Applications</u>

Preliminary - Abuse of process - Cross submissions

110. I can now turn to consider the Defendants' challenges that the above assertions disclose no reasonable cause of action against them in all the circumstances, or should otherwise be struck out for being inadequately particularised or just plain vague and confusing.

111. However, the Plaintiffs make a preliminary general challenge to the Defendants' Applications on the basis of the procedural timetable set out at [47] to [55] above, and

the assertions in the second affidavit of Mr Greig Mitchell, one of the Joint Liquidators of LPCC, made on 2 June 2023. They submit that the Defendants' Applications for summary judgment/strike out should be dismissed *in limine* for being an abuse of process.

112. Their principal reason for this submission is that the Applications were brought only in March 2023, in respect of a Cause which was issued as long previously as November 2021. The Plaintiffs submit that this is part of an abusive strategy to wear out the Plaintiffs, or deplete their available finances with a succession of unmeritorious and unreasonable interlocutory applications. It is asserted that this can be seen from the fact that the Defendants appear, from the timing of their Defences and Applications, to be acting in concert, and from the extent of their *Exceptions de Forme,* their refusal to accept the Plaintiffs' responses to these, their objections to the Plaintiffs' Réplique, and the First to Third Defendants' separate Application for summary judgment on their Counterclaim.

113. I reject this submission. First, I can see absolutely no evidence of anything approaching abusive conduct of this litigation by the Defendants. The correspondence shows the Defendants seeking, quite justifiably and consistently with the Overriding Objective (of RCCR r 1), to get the Plaintiffs to consider critically their stance and their assertions, and meeting resistance to their (the Defendants') quite reasonable claims for clarification of the bases of the Plaintiffs' cases. The Plaintiffs have to accept that the Defendants may not regard their (the Plaintiffs') case as being expressed as clearly as the Plaintiffs would like to think it is, or as the Defendants are entitled to require, and that this may not be unreasonable. So long as the Defendants conduct their defences honestly and with due respect for the RCCR and the Overriding Objective, they are entitled to do so in whatever detailed way they think fit. Only in a most extreme case could a compliant use of the RCCR be considered to be abusive.

114. Moreover, with the costs of litigation nowadays being so extremely high, and the ordinary level of recoverable costs likely to fall very significantly short of a full indemnity even if a party is completely successful, it is, in my judgment, all the more appropriate that the Court should allow a party a proper opportunity to make out a case for summary judgment or strike out, if it can and wishes to do so, and should not be too quick to take the attitude that an action "might as well go to trial" just because considering a case for summary judgment or strike out may not be a simple or short proposition. This is always provided, of course, that any such application can be properly and fairly evaluated on the materials appropriately before the Court at that time, even if that takes some effort. Too great a readiness on the Court's part to refuse to consider summary judgment applications is likely to encourage the gamble of a plaintiff's pursuing a weak claim, and banking on the prospect that if it can just resist any summary application by taking advantage of the "*comparatively little*" hurdle that will be applied (see [61] above), that is likely to induce the other party to offer settlement to avoid the costs, diversion of resources, effort and stress of fighting the matter to a trial, even if the claim is without real merit. Such a calculation is not to be encouraged.

115. The Plaintiffs make a further submission - although this is directed at the Directors' Application rather than at EFG - that their Application should be summarily dismissed because the sheer volume of the material in the Fourth Affidavit of Ms Antill of 9 March 2023 sworn in support of that Application, and of the written submissions filed

on behalf of the Directors on 4 August 2023 is abusive. They criticise this extensive paperwork for lack of focus, being unnecessarily tendentious, being irrelevant and inviting the Court to conduct a mini-trial.

116. Again, I do not regard these criticisms as having anything like sufficient substance to justify summary rejection of either of the Defendants' Applications, and since those Applications themselves are, to quite a degree, founded on criticisms of the Plaintiffs' Cause, itself, lacking clarity and precision (exemplified in many of the perfectly reasonable *Exceptions de Forme* raised), being tendentiousness (as in the unnecessary definition of the First to Third Defendants as "the *Professional* Directors" when the epithet has no legal significance), and the irrelevance or repetitiousness of materials in the Plaintiffs' own pleadings, the criticisms are mutual. I therefore have no sympathy with this argument, and I simply note it.

117. For these reasons, I will not dismiss the Defendants' Applications on any grounds of lateness or inappropriateness, or any of the other generalised complaints made by the Plaintiffs and I will proceed to consider them on the merits.

118. I should record, though, that the Defendants have also themselves argued that the Plaintiffs' application to amend the Cause should be dismissed *in limine* for lateness, because it has only been made in July 2023, some 17 months after the original Cause was filed in November 2021, with no explanation for the delay, with the Plaintiffs having received (even if they did not want it) the Voluntary Disclosure made by the Defendants in April 2022 with their Defences, and with the Defendants having repeatedly put the Plaintiffs on notice that the Cause was deficient and causing the Defendants prejudice in responding to it for nearly two years.

119. I reject this submission for similar reasons to those above dismissing the Plaintiffs' arguments. I cannot see that the delay which is cited is, in itself, abusive (and it can really only be measured from the time of the Defences, in any event) and any prejudice to the Defendants will be dealt with as part of the merits of the Application to Amend. Any perceived delay in the Plaintiffs' taking the new points which they now wish to take in their draft Amended Cause is a fact which may be material as evidence with regard to the degree of conviction behind such new points, but it is not, in itself, any reason for simply precluding the Plaintiffs from making such an Application without consideration of its merits.

General approach

120. I have already noted the multiplicity of discrete causes of action which the Amended Cause potentially contains, and the reality of this will be apparent from my above review of the content of the proposed draft Amended Cause itself. A "reasonable" cause of action means one which stands a real (though not necessarily "likely", and simply as contrasted with merely "fanciful") prospect of success. Therefore to decide whether, and if so how far, any particular cause of action pleaded discloses a reasonable cause of action requires identifying its constituent elements and judging whether each is a realistically supportable plea in the above sense, ie has a sufficiently real prospect of being maintained in law, or proved as a fact.

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.

122. I will consider the arguments which have been made to the Court in this regard in a convenient order so as to deal with the possibilities comprehensibly and comprehensively.

(1) <u>Application by EFG</u>

123. I take EFG's application first, because it is the simpler of the two. According to paras 100 and 101 of the Amended Cause, claims against EFG are made only under and within Para 100, they are pursued only by the "Shareholders", ie the 1st to 22nd Plaintiffs, and such claims are in respect of breach of statutory duty pursuant to s 34 of the PoI Law, ie "Authorised Funds Duties".

124. From the material contained in the Cause/Amended Cause, EFG have identified that the claims made against them by the Shareholders fall into two separate and distinct factual areas. The first relies upon an assertion that EFG failed to take steps to ensure that the OM did not contain false or misleading statements or omit material facts (Cause Para 88). This is the claim conveniently called the "False Statements Claim". The second is that EFG failed to take reasonable steps to ensure that LLIL, LEDL and/or the relevant SPVs acted in accordance with the terms of the OM in conducting the Fund's business (Amended Cause Para 89(d)). This is the claim conveniently called the "Supervision Claim". Each of these claims therefore depends on the proposition that such steps were required of EFG by Authorised Funds Duties imposed upon it by the 2008 Rules and made actionable by the PoI Law.

125. On behalf of EFG Advocate Edwards submits that neither asserted basis of claim discloses a reasonable cause of action by the Shareholders against EFG, and he does so on two distinct grounds.

126. The first is that neither of the claims made against EFG is maintainable as a matter of law because the duty upon which each rests does not exist. The claims necessarily assert that the matters complained of were breaches of Authorised Fund Duties imposed on EFG by the 2008 Rules. He submits, however, that the 2008 Rules, properly examined and construed, do not impose any such legal duties upon EFG, at all, whether in respect of the contents of the OM or in respect of the conduct of the Fund's business. If Advocate Edwards' assertion is correct that is enough to dispose of the whole of the Plaintiffs' action against EFG.

127. EFG's second ground for its Application is that even assuming such a duty did exist, the claims of breach *"fail on the facts*". By this is meant that the facts pleaded either stand no realistic prospect of being made out, or do not constitute a breach of any such (now assumed) duty if they were made out, and consequently no reasonable cause of action is disclosed. That submission will require looking at the individual facts founding each distinct claim.

A. Do the pleaded "Authorised Fund Duties" of EFG exist?

128. EFG sought an explanation of the Shareholders' case as to how their claimed causes of action against EFG arose, in a Request for Further Information dated 31 January 2022. The Plaintiffs explained their case in a Response to this.

The Plaintiffs' case explained

129. As to the False Statements Claim, reliance is first placed on Rule 2.01 quoted at [91] above, which states that

> "*It is the duty of the designated manager* [ie EFG] t*o administer the* [Fund] *in accordance with……(b) these rules…".*

The Plaintiffs then refer to Rule 4.02, where it states that

> "*The directors* [of the Scheme, ie the Fund] *… shall take all reasonable steps to ensure that [the information particulars]* [ie the OM] *do not contain any false or misleading statements or omit facts which would make misleading any statement in the* [OM]*".*

130. The Plaintiffs' argument is that when these provisions "are read together," they impose a duty on EFG (under Rule 2.01) to prevent a breach of the rule set out in Rule 4.02. In other words, the duties of a designated manager to administer a relevant Scheme in accordance with "*these rules*" imports a duty to prevent the Scheme's directors from failing to perform their own separate duty imposed by Rule 4.02 to ensure that the OM does not contain false or misleading information.

131. As to the Supervision Duty claim, the Plaintiffs' case against EFG is simply that such duty is made out under the terms of Rule 2.01 (c) itself, namely that

> "*It is the duty of the designated manager* [ie EFG] t*o administer the* [Fund] *in accordance with……*
>
> *(c) the most recently published information particulars* [ie the OM]…."

The Plaintiffs contend that this duty amounts to or encompasses a duty on the designated manager to ensure that the business of the Fund is conducted in accordance with the terms of the Offering Memorandum, and if it is not, then the designated manager (EFG) is in breach of that duty.

EFG's submissions

132. On behalf of EFG, Advocate Edwards submits that this is simply wrong and there is no basis for finding either alleged manifestation of such duty to be contained in the Rules, upon their true construction.

133. As to the False Statements Duty he first points out that the first part of Rule 4.02 (not included in the above quotation) expressly states that it is

> "***the directors*** *or the general partner or the trustee* [who] *are to be treated as responsible for the information particulars…*" (emphasis added),

and this does not include EFG, who was the "designated manager" of the Fund and not appointed to any of those specified roles.

134. He submits, therefore, that if it were intended that the entity with the role of designated manager should bear responsibility for the truth and accuracy or the contents of the OM, then that would have been stated expressly and directly in Rule 4.02, which is concerned with underpinning the truth and accuracy of such information particulars - but it was not. Since such responsibility is thus not expressly imposed on the designated manager, but on others, this clearly shows that there is no intention to make that entity responsible for the truth and accuracy of the "*information particulars*", ie the OM.

135. By the same token, if it were intended to impose such responsibility indirectly, ie by imposing a duty on the designated manager to "ensure" that the directors did not commit a breach of their own duty to ensure the truth and accuracy of the contents of an OM, such intention would have had to be shown by clear and words - but once again it is not. By way of contrasting example, Rule 3.01 imposes an express duty on directors to

> "*take all reasonable steps to ensure that there is no breach of* [conflicts of interest duties] *by* ***any relevant person***" (emphasis added).

The draftsman was thus well aware of the concept of imposing responsibility for compliance in such an indirect way, and did so when this was intended. This again shows that it cannot be the intention to impose any such responsibility as the Shareholders contend for by a backdoor route.

136. Moreover the approach that it is the *directors* (or their equivalent where the Scheme is not a company) who bear the responsibility for the scheme operating in compliance with the Rules is reinforced by consideration of Rule 2.02, which states that,

> *" 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 the information particulars or these rules."*

Thus it is the directors on whom the central and ultimate responsibility for the company's compliance with "*these rules*" rests, especially as other persons, such as (relevantly here) the designated manager, are recognised, and indeed directed by the Rules themselves, to carry out their functions

> *"subject to any proper directions from time to time given by the directors";*

see eg Rules 2.01(d) and 2.01(3).

137. This approach is reinforced by considering EFG's role and function as "designated manager". This is/was purely administrative in nature, ie secretarial and "back office" type functions; it had no responsibility for commercial or operational decisions or activities. Indeed, it is notable that Rule 2.01, the fundamental plank of the Plaintiffs' case, is contained in Part 2 of the 2008 Rules, which regulates **"Administration and Custody**", and that Rule 2.01 itself is expressly making provisions as to the "*Administration* of the Authorised Closed-Ended Investment Scheme" (emphasis added). Consistently with all this, "*Administration*" is defined in the PoI Law itself (through s 1(3)(c) and Schedule 2), as the function of providing any

> "*administration, secretarial or clerical services in relation to an investment, including …* [(a) general accountancy and booking services but not auditing, and (b) the ongoing valuation of investments].

138. The fact that the duties of a "designated manager" (and thus of EFG in this case), upon the true construction of the 2008 Rules, relate to administrative matters only, and not management in the commercial, or operational, sense, is also indicated by the fact that, when the PoI Law 1987 was updated and replaced by the *Protection of Investors (Bailiwick of Guernsey) Law 2020,* the term "Designated Manager" was replaced with the term "Designated Administrator", as a result of experience and consultations which showed that the term "Designated Manager" in the 1987 Law and the 2008 Rules created misunderstandings by the public as to the function of a so-called "Designated Manager" under that Law, on exactly the point just mentioned.

139. Advocate Edwards also submits that the fact that EFG bears no responsibility for the contents of the OM is borne out by the terms of the OM itself, under which it is the directors who acknowledge to investors that they accept responsibility for its material truth, accuracy and completeness.

140. He further submits that in order to find that EFG's (accepted) duty as designated manager, to "administer*"* the Fund (the Scheme) in accordance with the 2008 Rules, included a duty to ensure the truth and accuracy of the OM (the information particulars under the Rules), it would be necessary to hold that "*administration*" of the Fund "*according to such Rules*" imports such specific duty from elsewhere in the Rules by reference. If the Rules do not contain such a duty, then EFG's "administration" in accordance with those Rules does not extend to, or create, such a duty. The admitted duty of EFG under Rule 2.01 of the 2008 Rules does not expressly impose a duty to ensure the truth and accuracy of the OM, and having any input into its contents was not part of EFG's function, nor part of its responsibility, either in theory or in fact; that responsibility lay entirely, and only, on the directors of LPCC and thus of the Fund.

141. In summary, the duty imposed by the Rules to take responsibility for the truth and accuracy of the contents of the OM is not expressly imposed on a designated manager by any Rule, and the terms of Rule 4.02 clearly show that it is not imposed on a "designated manager" at all, but on the directors. It does not become inferentially imposed on a designated manager through the scope of that entity's functions as such, because that scope is simply administrative - as the 2008 Rules clearly envisage and intend (and indeed as the OM itself stated and intended.) The Plaintiffs' case that such a duty is imposed on EFG thus requires acceptance of the proposition that EFG, though

being intended to be (and in practice being) simply the administrator of the Fund, was nonetheless subject to a statutory duty to ensure that the Fund's directors themselves did not breach their own primary duties of responsibility for the truth and accuracy of the OM. The Rules simply do not bear that construction, and it is inconsistent with the clear and obvious scheme of the Rules. Thus, EFG owed no such duty; it does not exist as a matter of law.

142. As to the Supervision Duty, EFG makes similar submissions, ie that the duty imposed by Rule 2.01 (including, therefore, Rule 2.01 (c) which is the provision relied on in this regard) is aimed at, and confined to, performing the functions of a company administrator in respect of the Fund's affairs and is plainly not intended to extend into the sphere of the Fund's commercial or operational activities. Those latter are the functions and responsibility of the directors (or general partner, or trustee, as appropriate) of the relevant entity whose enterprise is the Scheme, they being the persons responsible for the way in which that enterprise is managed, in the normal commercial way, for the benefit of its general body of shareholders.

143. There is no provision in the OM itself laying down that the Fund's "designated manager" shall have any responsibility for the operational management of the Fund's business. That is plainly and expressly the sphere or its directors and, indeed, the OM itself states that

> *"The Administrator is not responsible for any failure by the Fund to adhere to any investment objective, policies or investment restrictions set out in this Memorandum"*

Thus, the designated manager (EFG) fulfils its duty under Rule 2.01(c) to administer the Fund in accordance with the information particulars by administering in accordance with the terms in the OM which include that the Administrator (ie EFG itself) has no such responsibility.

144. Once again, it is only if some separate duty to supervise the directors' operation of the Fund's business were laid down in the OM that the duty of EFG as the Fund's designated manager could extend to carrying out any such supervisory function as part of its statutory duty under Rule 2.01(c) of the Rules. There is no such separate duty. EFG's function and duties are confined to administrative matters only. The necessary "Authorised Fund Duties" required to support this purported cause of action on the part of the Shareholders can thus similarly be seen not to exist, as a matter of law.

1st - 22nd Plaintiffs' (Shareholders') submissions

145. LPCC does not make any claim against EFG (see para 101 of the Amended Cause) and this cause of action is pursued solely by the Shareholders..

146. The Shareholders' submissions in opposition to EFG's Application on this point (ie the contention that the asserted Authorised Fund Duties do not exist), are advanced on their behalf by Advocate Bamford. They are first based on the broad proposition, of general application to the claims made in the Cause, that all issues of construction and statutory interpretation, (of which this is one) should go to trial together, and be determined only after a full trial, because

i. being concerned with the construction and effect of the PoI Law and the 2008 Rules, they *ipso facto* raise matters of public importance which, it is submitted, are only appropriately dealt with at a full trial;

ii. Lt-Bailiff Finch reached the above conclusion in refusing summary judgment on the issues raised in the Directors' Counterclaim (see [55] above), and there should be consistency of approach;

iii. these issues should be determined together with the Counterclaim and all other such issues, only after the "*full factual and legal context in which these issues arise has been established"* at a full trial, because to do otherwise would be to decide them "*piecemeal*" and "*out of the context of the Claims advanced in the Cause as a whole*"; and

iv. to do otherwise (ie to give summary judgment or strike out relief) would tend to lead to further applications and interlocutory appeals, causing the Plaintiffs delay and subjecting them to further unfair costs pressures.

147. As to EFG's arguments specifically directed to the False Statements Claim, Advocate Bamford submits that it is "*at least plainly arguable*" that the general duty imposed on EFG as "designated manager" by Rule 2.01 of the 2008 Rules, to administer the Fund "*in accordance with……these rules*" and "*in accordance with … the most recently published information particulars*" is sufficient to found the two duties which the Shareholders assert. It is not, (he submits) necessary to find the expression of a separate specific duty on a "designated manager" elsewhere in the Rules, or in the OM, to give rise to such a statutory duty, as Advocate Edwards suggests. Advocate Bamford submits that the words of the duty imposed expressly on a designated manager by Rule 2.01, simply (in effect) in the context of the other requirements of the Rules, are sufficient to impose responsibility on the designated manager to see that those other requirements or duties are complied with.

148. On any basis he submits that this argument is not fanciful, and has enough of a realistic prospect of success, that it must survive an application for summary judgment or to strike it out.

149. He submits further that Advocate Edwards' invocation, in places, of the terms of the OM itself, in support of the assertion that EFG's interpretation of the 2008 Rules is correct, is impermissible. The terms of the OM cannot affect the true construction and effect of the 2008 Rules, as these latter are statutory.

Discussion

150. I accept Advocate Bamford's submission on this last point, namely that the terms of the OM cannot affect the true construction of the 2008 Rules themselves.

151. First, the terms of the OM are entirely irrelevant to the question of construction of the 2008 Rules as to the question on whom they impose a responsibility for ensuring the truth and accuracy of the statements contained in the OM. The Rules lay down the imposition of responsibility and the terms of the OM could not override, vary, or otherwise affect this - unless the Rules themselves provided for some such contracting out, which they do not. As to the alleged "Supervision Duty", the terms of the OM

are not entirely irrelevant, since the duty contended for is a duty to ensure that the Fund is administered in accordance with the terms of the OM, and so those terms must be examined for the detailed content of any duty and therefore they do assume some relevance. That relevance, though, is as to possible content and not existence.

152. However, on the essential question, namely whether the terms of Rule 2.01 are apt to impose the duties which the Shareholders assert as the basis for their case against EFG, I have come to the firm conclusion that Advocate Edwards' arguments are not only to be preferred, but are so clearly correct that I should grant summary judgment to EFG on this point and strike out the Shareholders' claims against EFG on the grounds that they disclose no reasonable cause of action.

153. My reasons are, basically, that I find the other points made in Advocate Edwards' submissions, noted above, totally compelling as a matter of argument, to the point where I consider that the counter-argument is actually fanciful. Advocate Bamford's submission amounts to a submission that Rule 2.01 should be construed, not as a positive obligation to do something (ie to "administer" the scheme in accordance with these Rules, or in accordance with the most recently published information particulars) which is what Rule 2.01 actually says, but in effect as an obligation to ensure or procure that something is done, ie that the content of the most recently published OM is true and accurate and that the business of the scheme is conducted in accordance with the Rules and thus with the content of the OM. This not only extends the notion of "administration" into other fields of activity, (operation and management) as Advocate Edwards argues, but it turns the duty into an obligation to procure a result, rather than a simple duty to perform an act or acts.

154. Not only does it change the nature of the obligation expressly imposed in a rather fundamental and material way, but it extends it, in effect to a duty of strict liability, for the acts of others. This would be a remarkable extension to find in secondary legislation merely by inference. It contrasts with the structure of Rule 3.01, which imposes only a duty to "*take all reasonable steps*" to ensure a result, rather than making the duty absolute. It also contrasts with the primary duty which is imposed on the directors in Rule 4.02, and which would here be being imposed only indirectly on EFG.

155. Lastly, to construe the Rules as contended for by Advocate Bamford simply overlooks the rather important question of <u>how</u> a designated manager could be expected to perform the postulated duty in practical fact. It is highly unlikely that a statutory duty would be being imposed without regard to the practicality of its being performed. The designated manager has no control or power over the executive of the scheme (ie the board of directors), and the Rules expressly envisages that a designated manager acts in a role which is subordinate to that of the directors, as the executive body running the Fund's business (see rule 2.01(2) and 2.03, above). The designated manager therefore has no power to procure the result which the duty contended for by the Shareholders would impose upon it. If the designated manager was just ignored, or was met with non-co-operation from the directors whose acts or omissions were effecting the substantive breach of the Rules, there is nothing it can do. Even if it be suggested that such non-co-operation would give EFG the right to terminate its Administration Agreement with the Fund, that still would not ensure the result for which EFG would (on this hypothesis) be being held responsible, and in any event, the argument that EFG would have such a right to terminate the Agreement is circular.

156. For the above reasons, in my judgment Advocate Bamford's construction of Rule 2.01, whether read alone or in the context of any other rule, is a construction which Rule 2.01 simply will not bear. If Rule 2.01 is said to be capable to two meanings, either the narrow one contended for by Advocate Edwards or the wider one contended for by Advocate Bamford I find and hold that the true meaning is unquestionably the former. I consider the latter interpretation to be weak and wishful to the point of being fanciful.

157. Furthermore, this is a simple, discrete and (I find) clear point of statutory construction. I see no reason why it should need to be progressed further and taken to a fullscale trial. I am entirely unsatisfied that any further factual evidence, or determination of factual disputes, could or would have any material bearing on the point. The "legal context" of the point is perfectly sufficiently apparent at this stage and I cannot see how it could be elaborated or improved upon in any way which might have a material bearing on it, but which is not apparent now, or has not been perfectly available for argument on this dispute, once it was identified, at this interlocutory stage.

158. I reject the argument that just because the point of construction may raise issues of public importance the matter should be sent to a full trial when the point itself is sufficiently identifiable and identified, and is effectively determinative of the action. There is no reason why a defendant (EFG) should be put to the time, trouble, expense and stress or inconvenience of having to prepare for and conduct a full trial of all issues raised against it when there is a single issue upon which, in my judgment, it is bound to succeed ultimately, just because that issue is a point which can be said to be of public importance.

159. I also reject the argument that the whole matter should be allowed to go to trial for "consistency of approach". The decision of Lt-Bailiff Finch in refusing summary judgment on the counterclaim of the Directors in this action is of no relevance, even procedurally, to the approach which I should be taking with regard to EFG's defence to an entirely different cause of action, asserted against it. In the interests of efficient case management, an unsustainable claim ought to be removed from the proceedings at the earliest fair opportunity. This is not "*piecemeal*" determination, of the dispute, but the proper streamlining of the issues in the action. The fact that an interlocutory decision may lead to appeals is also not a reason for not making, or implementing, a decision which the Court views as clearly correct on the merits.

160. For all the above reasons, therefore, I will grant EFG's application and I consider that the appropriate disposal is to grant summary judgment to EFG, on the grounds that the Cause discloses no reasonable cause of action against it in that it discloses no case that the statutory duty purportedly relied upon exists.

B. Do the Authorised Fund Duties claims fail against EFG on the pleaded facts in any event?

161. In view of my findings above, this question is academic. Since the issues which it raises would largely duplicate matters which arise more significantly in relation to the claims made against the Directors, it will be more convenient to consider the above question, insofar as appropriate, later.

(2) <u>The Directors' Application</u>

162. I therefore now turn to consider the Directors' Application. I will take the points raised in what I consider to be the most convenient order for clarity and simplicity, having regard to the combination of claims pleaded, and the varying application of different arguments made in relation to these.

163. Claims stated in the Amended Cause to be made against the Directors are contained in both Paras 100 and 101.

    i. Under Para 100 they purport to comprise claims made by Shareholders in respect of breach of statutory duty pursuant to s 34 of the PoI Law, ie, once again, "Authorised Funds Duties", but this time being founded upon the duties imposed by the Rules on directors of a regulated scheme. The duties pleaded are those found in Rules 2.01(2) and 4.02.

    ii. Under Para 101, they purport to comprise claims made by LPCC, ie against its own directors, for damages for "*negligence or for breach of the statutory or common law duties of directors*".

Identifying LPCC's claim

164. The latter claim, LPCC's asserted claim, does not expressly identify the "*statutory duties… of directors*" there being referred to, as Para 100 does in respect of the Shareholders' claim. The "*negligence*" and the "*common law duties of director*s" can be identified as referring to the "Directors' Duties" pleaded at paras 81 and 82 of the Amended Cause. It would therefore appear that the statutory duties can only be a further reference to s 34 of the PoI Law, and the eventual claim thus appears to encompass an assertion that LPCC as an entity has a cause of action for breach of Authorised Funds Duties, maintainable against its own directors. However, the body of the pleading of "Causation Loss and Damage" at Section E of the Cause pleads losses caused to LPCC only in Paras 97 and 98, and the losses there pleaded are pleaded only in relation to claimed breaches of "the Directors' Duties" (see para 97(a)).

165. It is therefore difficult to see that there is, on examination, any plea actually asserted by LPCC of a separate cause of action against the Directors in respect of breach of statutory duty within the substantive pleading of the Amended Cause, at all, despite the reference to breach of "*statutory duties*" in Para 101. (This makes me wonder if the pleading was drafted with the assistance of English counsel, the duties of company directors in England having been now enshrined in statute, when they have not been in Guernsey.) It is also difficult to see what any such claim might ever be potentially capable of adding to any cause of action for breach of the ordinary company law duties of directors arising from the same facts in any event. The measure of damage or compensation awarded under s 34 of the PoI Law is loss suffered *"as a result of that contravention*", and that must be the same as the measure of damage for breach of the ordinary company law duties of directors, which is the loss or damage suffered as a result of such breach. I can see no reason at all to think that the quantification of damage under s 34 might be intended to be made on any different principles. Viewed from the perspective of the company itself (this is important), Rule 2.01(2) seems effectively to reinforce what would implicitly be the ordinary duty of a company director, in this situation, in any event, and it just does not appear to add anything further. In practice, therefore, Rule 2.01(2), the terms of the OM, and the scope of company directors' ordinary duties of care skill and diligence are, it seems to me, all

consistent and entirely in harmony in this respect.

166. In respect of Misrepresentation/False Statements Claims depending on Rule 4.02, whilst these can plainly be made by the Shareholders, it is difficult, even impossible, to see how any such claim could be made by LPCC itself as a matter of logic in any event. Furthermore, the only reliance upon the OM pleaded in the Amended Cause is pleaded to have been that of the Shareholders (see Para 93), not the LPCC. I therefore infer that no such claim is made, or intended to be made, by LPCC - and if it is, I would regarded it as appropriate to strike out any such claim until its basis was pleaded.

167. Based on the above analysis, I thus proceed on the footing that the claims which can actually be found in the Amended Cause are that

    (i) the Shareholders are claiming against the Directors in respect of breaches of Authorised Fund Duties constituted by

        (a) alleged misrepresentations/false statements in the OM (Rule 4.02), and

        (b) failing to run the business of LPCC in accordance with the OM, and (insofar as this has any independent effect) with the Rules (namely Rule 2.01(2)), and

    (ii) LPCC is claiming against the Directors on the basis of the ordinary company law duties of company directors as pleaded.

    The facts pleaded to support the above claims again divide into the two distinct factual areas of (i) misrepresentations in the OM and (ii) conduct of the Fund's business. Because of this clear division, it is convenient to consider them in that order.

(1). The Misrepresentation Claims – Para 88 of the Amended Cause

168. This is a claim with regard to allegedly false statements in the OM, for which the Directors are prima facie made responsible, under Rule 4.02 of the Rules (although, as Advocate Jones points out, this is not an absolute responsibility but only an obligation to take "reasonable steps" towards ensuring that any such misrepresentations do not happen). It is a Shareholders' claim, and only a Shareholders' claim (see above).

169. The Directors challenge that the Cause or the Amended Cause discloses any reasonable cause of action in this respect on several grounds, both general and in relation to specific alleged grounds of complaint. One such general objection relates to an inadequate pleading of reliance, and I deal with that here. The other general objection is part of a more broadly framed complaint as to the confusion, misconception or just plain inadequacy of the Shareholders' case as to causation and quantification of their claimed loss and I deal with that later.

A. General objections - (i) Reliance

Directors' submissions

170. On behalf of the Directors, Advocate Jones first makes the general objection that this claim should be struck out because there is no sufficient pleading of any reliance placed

on the alleged misrepresentations in the OM to support the case which the Plaintiffs must make out. Rule 4.02 imposes responsibility for the truth and accuracy of the statements contained in the OM, on the directors. *Prima facie*, that duty is contravened by the directors if there is a false statement in the OM (subject to any defence of "reasonable steps" which is not relevant here). A cause of action is given to "*any person who has suffered loss … as a result of that contravention*" by s 34 of the PoI Law, and this is therefore a claim in respect of loss suffered through reliance on a misrepresentation.

171. The fact that reliance is a necessary component of this cause of action is recognised by the Cause because Para 93 pleads that

> "*The Shareholders were induced to invest in the Fund by the [OM] and relied, reasonably upon the [OM] when deciding to invest in the Fund.*"

172. However, the "person" in whom any such cause of action is vested is an individual person, ie the investor. It is not "the Shareholders" as a body or as any lesser cross-section of the investors. The Shareholders have separate individual causes of action in respect of their own particular investments, and each will have to prove individual reliance on the misrepresentation. There are in fact 19 such separately alleged causes of action contained in the Amended Cause. The Directors are entitled to know the facts alleged to constitute such reliance in relation to each of the 19 separate investments relied upon. These may well differ, and in view of the Directors' understanding that many of these investments were made through placement agents associated with the First and/or the Third Plaintiffs, there are potentially very real issues as to the extent to which any individual investor actually did place the reliance alleged on the matters alleged. The Directors are entitled to know, therefore, what the individual Shareholder's factual case on reliance actually is, and in sufficient detail to enable them to consider, contest or probe such allegation of reliance. The Cause lacks any such sufficient detail, and the proposed amendments have not cured this.

Shareholders' submissions

173. In response to this objection, Advocate Bamford for the Plaintiffs submits that at this stage of the proceedings "*clearly pleaded matters, such as reliance by the Shareholders on the OM*" do not impose any obligation on them to support that allegation by evidence. The Plaintiffs characterise the Directors' request for this further information, therefore, as a request for evidence, with which the Plaintiffs are not obliged to comply. He submits that the allegation that investors in a regulated collective investment fund were entitled to and did rely on the OM is "*plainly arguable as a matter of fact and of law*". He submits that the Shareholders' case that they relied on the OM as a whole is sufficient to support their case and to justify that it should go to trial and not be struck out; further detail will be revealed in the future (no doubt in the process of disclosure and witness statements) and that is (he submits) the proper procedural place for it.

174. He rejects any submission that the terms of the Subscription Agreement, whereby the investors warranted that they had relied upon their own enquiries, researches and judgements, and not on any representations made to them, could enable the Directors to contract out of their obligations under Rule 4.02 of the Rules.

175. Lastly and in any event, he relies, once again, on the proposition that issues of reliance

on the OM, and the interrelationship of the duties imposed by the Rules, the Offering Memorandum and the Subscription Agreement entered into by investors are themselves matters of public importance which should therefore be allowed go to trial in untrammeled terms, in the public interest.

Discussion and decision

176. I accept Advocate Bamford's submission that the terms of the Subscription Agreement could not override the statutory obligations imposed by Rule 4.02 in the absence of any provision in the legislation itself (and there is none) permitting contracting out. That does not necessarily mean, though, that the terms of the Subscription Agreement are entirely irrelevant, as they are clearly part of the circumstances surrounding the whole matter, and are therefore relevant as evidence. If a Plaintiff's claim to have suffered recoverable loss and damage necessarily depends on his having acted in reliance on a misstatement contained in the OM, then the question whether there was actual reliance is plainly material, and the terms of the Subscription Agreement are capable of being evidence relevant to the assessment, whether inference or actual finding of fact, of whether such reliance occurred. However, that is, indeed, a point of evidence and I fully accept that its weight is not so decisive that it could suffice for a successful strike out application. The terms of the Subscription Agreement are therefore not a point which influences my decision here in any way.

177. I note, however, that Advocate Bamford does not suggest that reliance is not required to be proved as part of the Shareholders' cases, whether what is required is reliance on the OM as a whole (as he suggests) or reliance on any particular false statement (as Advocate Jones suggests). He submits, rather, that Para 93 is a sufficient pleading of any such reliance, at any rate at this early stage of the proceedings.

178. I entirely disagree. 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.

179. I reject Advocate Bamford's submission that a general pleading of multiple "Shareholders'" reliance is an adequate pleading in the circumstances, inconvenient for the Shareholders though this may be. I entirely accept Advocate Jones' point that the circumstances relating to each Plaintiff will be different, possibly even at a basic level. I note, also, that there are at least three instances where a Plaintiff is suing in right of an assignment made by an original investor. The terms and time of the assignment may well, therefore, be material. The Directors are entitled to know what case of reliance is being made against them, on the actual relevant facts, by any and every particular Plaintiff, so that that they can assess the strength and indeed the likely value of the claims they are facing. That is not just a matter of evidence; it is a matter

of substance.

180. I am therefore not prepared to allow this claim, ie the Shareholders' Misrepresentation Claim, to proceed in the absence of such particulars being properly pleaded.

181. Advocate Jones submits that the failure of the Plaintiffs to make such an obviously required amendment to their case, but to seek to argue that it is not necessary at this stage, is an indication that they or their advocates are in fact unable, conscientiously, to plead facts demonstrating such reliance, because it did not happen, and that therefore this claim should be simply struck out without the further opportunity to remedy the defect by further amendment. I will not accede to this submission, but I leave consideration of what order I should actually make to be dealt with in the ultimate context of the whole matter.

An evidential point

182. Before leaving the area of this general objection, though, I make one point of procedural relevance which this current topic highlights.

183. Advocate Bamford argues several times that Advocate Jones' submission that his clients have "produced no evidence" of their assertions contained in the Cause is irrelevant and ill-founded, because there is no obligation on a plaintiff to produce his/its evidence at the stage of mere pleadings; that is a matter for later in the course of trial, and therefore it is not a ground on which the court can strike out a pleading or an allegation.

184. The case of *Pantelli Associates Ltd v Corporate City Developments No Two Ltd* [2011] PNLR 12 was cited by Advocate Jones in support of his proposition that evidence in support of many of the allegations made by the Plaintiffs would be required, and therefore ought to have been obtained before the relevant allegations were pleaded and ought therefore to be capable of production, as justification for such pleading. Advocate Bamford counter-cited *ACD Landscape Architects Limited v Overall* [EWHC] 2012 100 (TCC) to demonstrate that this principle was limited and not a rule, even in professional negligence cases.

185. In *Pantelli*, it was indeed said by Coulson J that a counterclaim should be struck out because the counterclaimant had no expert evidence to support making it. However, it was an extreme case where the pleaded counterclaim amounted to no more than taking each obligation recited in the quantity surveyor's contract and inserting "failed to" before it, with the pleader admitting that that was exactly what he had done, because he had no instructions as to any specific matters of such failures. Coulson J was making the point, however, that counsel are obliged to ensure that they have evidence capable of supporting a cause of action before it is proper for them to plead it, and in the case of a professional negligence action, that probably requires (save in the case of lawyers) expert evidence to show that the client actually has a case at all. Moreover, the counterclaim was being made in the context of various English pre-action protocols, which do not apply in Guernsey. I also accept that, as Advocate Bamford pointed out, *ACD Landscapes* decided that *Pantelli* did not lay down any rule.

186. However, whilst Advocate Bamford's proposition is correct in regard to what is generally required to be inserted in a pleading, it does not support his consequential assertion that, in considering whether or not to strike out a cause of action, the question whether there is evidence to support it does not require to be considered. This is because, at the mere pleading stage, the question whether a factual assertion can be made out has not been put in immediate issue, although in my judgment it is still the case that the pleader of the plaintiff's case cannot properly put the case forward on a purely speculative basis, without honestly believing that evidence shown to him is some evidence of the plaintiff's case and simply hoping that something will turn up.

187. If a defendant does choose to take issue with the question whether the plaintiff actually can adduce any sufficient evidence to support a necessary averment of fact, then the existence, or potential existence, of at least some evidence which could have that effect does become in issue. That is what occurs when a Defendant seeks to strike out a claim or an allegation on the basis that it stands no reasonable prospect of being successfully made out on the facts. Therefore, if such a challenge is made, it is material to the determination of that challenge, whether or not the Plaintiff can adduce, or has adduced, any evidence which could support the assertions of fact - always accepting the point that "comparatively little" will be required of a plaintiff in order successfully to resist such a challenge (see [61] above). This approach is supported by the commentary in the English CPR at [2023] Vol 1 para 17.3.6, that it is necessary to have evidence in order to justify being permitted to make an amendment to a pleading, where that is opposed (see [65] above). The mere assertion that evidence is not required at the stage of pleading a Cause because it does not have to be pleaded is therefore not an answer to any challenge to the justification for such pleading, if such challenge is made.

General objections - (ii) Causation and quantification

188. I mention this only briefly here for its specific materiality to the Misrepresentation Claim, because it is in fact part of a broader general complaint made by the Directors as to the confusion and unsatisfactory lack of precision created by the Plaintiffs' general pleading of causation loss and damage, in the context of the variety of claims contained in this single Cause document.

189. The essential point is that where loss and damage is claimed by a plaintiff for having invested in some project in reliance on a misrepresentation, the measure of damage is the measure which compensates the plaintiff for losses caused by his entering into that investment (subject to any limitations imposed as a matter of remoteness of damage, or by reference to the scope of the duty of care which was fairly imposed on the representor, neither of which are relevant to this point here). This is because the counterfactual scenario for comparison is that the misrepresentation had not been made, and the logic is that if the misrepresentation had not been made then the investment would not have been made. Assessing relevant damage therefore requires a comparison between the financial position in which the plaintiff now finds himself and the financial position in which he would have been if he had not invested at all.

190. The measure of damage is not a comparison between the financial position in which the plaintiff now finds himself and the position in which he would have been if the representation had been true. That is the contractual measure of damage, as opposed to the tortious measure. Still less is the measure of damage for misrepresentation the

measure produced by a comparison of the financial position in which the plaintiff now finds himself and the position in which he would have been if the investment had lived up to any expressed targets or expectations, or otherwise have "come good". The defendant's duty and obligation in this context was: not to make untrue representations; it was not: to fulfil any representations actually made.

191. Whilst the loss and damage pleaded by the Shareholders in Paras 93-96 is specifically (and correctly) pleaded at Para 94 as being the "*loss occasioned by the Shareholders investing in the Fund on the basis of that misleading Offering Memorandum*", the translation of this into the ways in which the Shareholders are apparently alleging that their damages should be quantified, appearing in Paras 95 and 96 (confusingly headed as being "*Further or alternatively*" to Para 94), set out various propositions as to how the Shareholders' loss and damage should be calculated, with several (Paras 95 (b) and (c) and Paras 96(c) and (d)) asserting that they are to be calculated on the counter-factual basis that if the Defendants had performed their duties, the "Original Projected Outcome" of the Fund (the Plaintiffs' definition, and asserted at to be "an approximate 200% return" on the initial investment capital) would have been achieved, or that there was a substantial chance that it would have been achieved.

192. As regards the Misrepresentation Claim, these suggested quantifications of material loss are clearly unmaintainable in law. They are demurrable. They ought not therefore to be pleaded as apparently (on the way this Cause has been constructed) a part of such a claimed cause of action. A competent and proper pleading should not contain confused or unmaintainable assertions, even if this has come about because of a global pleading of possible quantification made in respect of multiple different claims against multiple different defendants, which is what I suspect has happened.

193. On any basis, therefore, I will not allow the Cause to proceed upon terms which apparently include as a possibility the pursuit of a demonstrably unmaintainable claim of loss in respect of the individual Misrepresentation Claims of Shareholders as causes of action. A defendant should not be exposed to having to contest such an unmaintainable argument, and it must be removed, although I accept that this is a defect which is possibly capable of being cured by more meticulous and competent drafting. Once again, the effect of this on the order I eventually make I will leave to be dealt with later, in the context of the whole matter.

B. Specific objections

194. I turn now to the more specific objections of "no reasonable cause of action" made by the Directors as regards particular matters supporting the Shareholders' Misrepresentation Claims. There are three and they are conveniently referred to as the "False Track Record" representation, the "Inadequate/Misleading Warnings" misrepresentation and the "Key Man Insurance" representation.

(a) The False Track Record representation

195. This is found in Para 88 (a) of the Cause/Amended Cause. It is pleaded against "the Defendants" generally because, of course, it was also part of the claim pleaded against EFG, which I have considered and rejected above. Since I am now concerned only with the Director Defendants, it is more natural to refer to the allegations as being made against "the Directors" in the following discussion, and I therefore do so. However,

where Advocate Edwards has made submissions on behalf of EFG that those allegations failed against EFG as a matter of substance, I refer to these, also, where appropriate.

196. Para 88(a) pleads the asserted breach of Rule 4.02 of the Rules in relation to the contents of the OM, already described. Originally this sub-paragraph alleged merely that, to the Directors' actual or constructive knowledge, the OM "*contained false statements regarding the track record of"* the Development Manager (ie LEDL) and the Property Adviser (ie LLIL), but it gave no particulars of what the falsity was said to be. Unsurprisingly, the Directors took issue with this. However, it was not remedied despite their objections. The Directors have therefore contended that this paragraph should be struck out for being embarrassing, or for being an abuse, for lack of required particularity.

197. The Shareholders have, somewhat belatedly, sought to remedy this by seeking leave to amend the Cause by adding new allegations in Paras 12(f), and 26A and fleshing out para 88(a) in the Amended Cause, all as already mentioned.

Directors' submissions

198. On behalf of the Directors, Advocate Jones contends that, whilst the amendments now proposed by the Shareholders would supply adequate particularity to the False Track Record claim as a matter of form, the amendments still plead a case which stands no real prospect of success in actual practice. Leave to amend should therefore be refused (see para (l) of the Jefcoate Principles, at [63] above) and the claim based on this allegation should be struck out. The basis of his submission is that the facts now pleaded cannot be realistically (ie other than fancifully) argued to disclose that there has been any material misrepresentation or false statement on this point in the OM, at all.

199. The misrepresentation pleaded (quoted at [29] above) is as to LEDL, the Development Manager, already having proven experience of delivering 650 units of such residential developments before the launch of the Fund, and that LLIL, the Property Advisor, shared that experience: see the proposed Para 12 (f) of the Amended Cause. The pleaded misrepresentation is that this was untrue because LEDL, having been incorporated on 1 September 2014, only 16 days before the formation of LPCC itself, had never delivered any such units and had no experience for LLIL to share: see proposed Para 26A. The elaboration of Para 88(a) pleads the literal falsity of the representation and that the experience actually possessed by Mr Becherini or those employed in the business of LEDL and LLIL is, in effect, irrelevant to this falsity, with the alleged materiality being (a) the creation of a false impression of the experience and competence of LEDL and LLIL, and (b) contributing to another complaint - a second and further misrepresentation later pleaded against the Directors - namely failure to reveal the "*over-reliance*" of the Fund on Mr Becherini and the "*particular risks*" associated with this.

200. Advocate Jones submits, first, that the fact that no details of this allegedly "highly material" falsity were given earlier, despite the point being drawn to the Plaintiffs' attention, justifies the clear inference that no such falsity was actually perceived or relied on at all at the time, and that therefore the Court should disallow the proposed amendment, and strike out the basic allegations. He submits that the Shareholders'

assertions of reliance on the literal falsity rings entirely hollow, in that, since they themselves pleaded the date of incorporation of LEDL in the original Cause, the basis for this so "highly material" falsity was clearly known to them at the time of initiating the cause in November 2021, and yet it took their team nearly two years (until July 2023) to identify it and put it forward. This casts extreme doubt on any assertion that this falsity had any actual influence on the Shareholders at the time.

201. Although not a point which Advocate Jones stresses, Advocate Edwards submitted, in support of similar arguments on behalf of EFG, that, even as amended, this allegation stands no reasonable prospect of success because it would have been obvious to any sensible reader of the OM, and especially to a sophisticated Qualified Investor (as the Shareholders were, and were required to warrant themselves to be), that the references to the Development Manager's and Property Adviser's experience was to the experience of their personnel, and in particular Mr Becherini. First, this is what, in practical terms, would be of interest to any investor. Second, this is what was effectively said on page 26 of the OM, where the very same experience was re-iterated as the experience of the "board", "team" and "personnel" of the Property Adviser, and this therefore resolved any possible lack of clarity, or the effects of any infelicitous wording, as to what experience the OM was talking about. Thus whilst there may have been a literal falsity it was not material; the actual meaning would have been perfectly clear from the OM itself, as to the only respects which would have been material for any investor. Third the subsequent passages in the OM themselves do make it clear that it was the experience of, centrally, Mr Becherini which was being referred to rather than any abstract "corporate experience", (whatever that might mean).

202. In effect, therefore, the Defendants submit that the assertion that there was a material misrepresentation as to the relevant experience being brought to the Fund is so sufficiently contrary to common sense, and so sufficiently at odds with, or contradicted by, other contemporaneous documents, and indeed is so inconsistent with the Shareholders' own behaviour, that it can be seen, even at this stage, to stand no reasonable prospect of succeeding. There is no reason to think that any further evidence might emerge which would put a different light on this and therefore no reason why any claim founded on this assertion should be permitted to go to a trial.

Shareholders' submissions

203. In answer to the above, Advocate Bamford relies on the accepted literal falsity of the statement in the OM, and submits that, in effect, once that literal falsity has been conceded there is a sufficient case raised that the matter must go to trial on any question of "debate" as to how the position would reasonably have been understood by any investor. In other words, the contention that the statement was not "materially" false is a matter which can only be decided after a full trial.

Discussion

204. I unhesitatingly prefer Advocate Jones' and Advocate Edwards' submissions on this point. As a matter of impression, I find it perfectly obvious that in the context of the Fund project which was being described, the experience which was being referred to in the OM was that of the executive personnel of the Development Manager and the Property Adviser, and on the documents, quite obviously, the central such experience was that of Mr Becherini, and to a degree Mr Hill. I simply do not see how anyone

could have reasonably interpreted the statement about the expertise of the Development Manager in any other way. I take that view simply on the wording of the OM itself and without regard to extraneous facts (although these do not appear to be disputed) that it was Mr Becherini who was meeting potential investors and thus underlining his central role as the driving brain of the Property Adviser and the Development Manager. This simply reinforces the overwhelming tenor of the OM.

205. Neither do I see how anyone could have considered it a matter of importance to an investment decision that the actual corporate entity which was the Development Manager should have been the actual corporate vehicle for the literally professed depth of experience. Plainly what would matter to an investor was that the Development Manager and the Property Adviser could and would be bringing personnel with the relevant depth of experience to conduct the project efficiently and thus (hopefully) successfully. There is no suggestion made as to why the actual track record of the corporate entity itself, as distinguished from its personnel, should be a matter of any importance.

206. I consider that this point is strong and obvious. Any argument to the contrary has to be an argument that the actual "newness" of the Development Manager as a corporate body and having no such long experience was a material factor to the decision of an investor, and to investors of the sophisticated calibre relevant in this case, so as to influence his decision whether or not to subscribe to the relevant fund. I consider the obviousness of the true and material meaning to be so strong and obvious that I do not regard any such counter-argument as having any real, as opposed to fanciful, chance of success. This is all the more so when the Plaintiffs have not, apparently, been able to produce a Shareholder who is prepared to state, in supporting evidence, that s/he did place reliance on that fact, despite the point having been clearly raised to the Plaintiffs. This allegation has more the ring of being a fortuitous discovery, after the event when possible grounds for making claims were being looked into. If it had been a real point, one would have expected it to be so important that it would have been raised, from the outset of dispute, by indignant, reliant, investors.

207. I cannot see how any evidence could be expected to emerge later in the pre-trial process, which would or could affect this point, or my view. I will not, therefore, permit the amendments introducing Paras 12 (f) and 26A and amending Para 88(a) to be made, and I will strike out Para 88(a) itself.

(b) The "Inadequate/Misleading Warnings" representation

208. This is found in Paras 88 (b) and (c) of the Cause. The allegation is effectively one of omission, ie that particular material risks associated with the Fund and therefore with the investors' decisions to invest, were not disclosed in the OM and therefore rendered such warnings as were given there inadequate and misleading. As previously recorded, the particular omitted warnings are stated to be

    i. of the "*highly unusual*" degree of reliance of the Fund on Mr Becherini personally, and that if "*for any reason*" he was unavailable to continue his multiple roles during the life of the Fund there was a material risk that it would not be successful,

    ii. of the intention that Mr Becherini would give personal guarantees to support

the borrowings of the SPVs *"if this was so",* and

iii. of the intention that Mr Becherini's death would be an event of default under the SPVs' loan agreements *"if this was so".*

209. What is pleaded as to the material effect of these omissions (see Para 88(c)) is that they failed to warn of the "*particular*" risks associated with Mr Becherini's "*unusual*" role and the Fund's corresponding "*unusually high level of dependence*" upon him, the warnings actually given in the OM being simply general and generic, and therefore being no different from those which would apply to "any" investment. The "particular" major risk referred to is the first risk noted above, namely that if Mr Becherini were unavailable to perform those roles (through incapacity or death) during the Fund's development period there was a serious material risk that the Fund would not be successful.

The submissions

210. Advocate Jones' submission in this regard on behalf of the Directors is that the warnings given in the OM, viewed in the context of the whole of the OM, were perfectly adequate to convey sufficient warning of the central importance of the roles of Mr Becherini in the project and the likely serious risk, therefore, of its failing to deliver its targeted returns and even to lose money if he were unable to fulfil these. He submits that the contrary assertion is simply not sustainable, and is sufficiently clearly bound to fail that this allegation can, and should, be struck out now. He submits that this is so whether the complaint is viewed as a complaint that the warnings actually given were somehow inaccurate in themselves, or as a complaint that other more specifically worded warnings (whether as to the extent of Mr Becherini's roles, or as to the likely consequences of his being unable to fulfil them) were not expressly given.

211. He submits that when one looks at the description of Mr Becherini's roles and his position as the Founder and CEO of the Property Adviser (page 26 of the OM) and his being noted in a lengthy section as being among its "key personnel" together with his track record of experience (page 27 of the OM), coupled with the very clear and sustained warnings that the Fund and the Directors were entirely reliant on the advice of the Property Adviser, and the success of the Fund would be tied to the Property Adviser's retaining the services of its key personnel (page 13 of the OM), the situation was made quite sufficiently clear to anyone who studied the terms of the OM with reasonable attention, care and thought. It cannot be realistically argued that investors were in any way misled or uninformed about the real position or were not put on proper notice of the risks it entailed and the true extent of these.

212. For the Shareholders, Advocate Bamford in effect submits simply that the case which they make is clearly arguable, and cannot properly be struck out, because its validity can only be determined properly in all the factual context, which means after a full trial, and not summarily.

Discussion and decision

213. I have found this argument difficult. I think that the Shareholders' case is weak. The

warnings do appear to me to be major and emphatic, and to point clearly to the Fund's having major dependence on Mr Becherini - and it does not take much imagination to appreciate the potential for the whole enterprise to be prejudiced, and very likely in a major way, if he were to die or be incapacitated. Furthermore, his importance is underscored by the amendment made to the Insurance Amendment to the OM made in January 2016, to state that the Property Advisor would take out Key Man Insurance upon him and Mr Hill, to protect the Fund from losses. (It is to be noted that we are concerned here with the impression conveyed by the terms of the OM and not whether that warranty was fulfilled.) However, although Mr Becherini's position as CEO of the Property Adviser is expressly stated, his involvement with the Development Manager is not stated so obviously, if at all.

214. The issue is whether the warnings which were given in the OM were sufficiently strong to warn of the true extent and significance of the part being played by Mr Becherini in the whole Fund project insofar as that would be unusual and hence not automatically appreciated by a reasonable investor. Having read the OM and considered the matter generally, although with much hesitation, I find myself unable to say that this point is not arguable, and I could not satisfy myself that it was unarguable without delving more deeply into the facts, and arguably embarking on the illegitimate exercise of conducting a mini-trial on the point. I would therefore not, quite, be prepared to strike out the Shareholders' claim on this basis for standing no better than a fanciful prospect of success, even though I consider the case weak.

215. However, this decision comes with two observations. The first is the obvious one that it says nothing about any other deficiencies in the pleading of the Misrepresentation Claim which may justifiably found an argument that it discloses no reasonable cause of action *in toto*, or that it is pleaded in an embarrassing way or should not, for some other reason, be permitted to continue; it says nothing about issues of reliance, or causation, or quantification of loss, for example, and these may pass the test for summary judgment/strike out.

216. The second observation is that I have considered this discrete grounds for alleging misrepresentation/breach of statutory duty only with regard to the complaint about inadequate warnings of the Fund's allegedly unusually high degree of dependence on Mr Becherini's continuing involvement contained in Para 88 (b) (i). There are two other aspects of complaint as to alleged inaccuracy/inadequacy of the material disclosure in the OM pleaded in Para 88 (b), being (b)(ii) and (b)(iii). The first of these is that Mr Becherini was intended to give personal guarantees to lending banks in respect of development finance loaned to the relevant SPV, and the second is that it was intended that Mr Becherini's death would be an "event of default" specified in relation to such loans, but each such allegation is qualified by the phrase "(if so intended)".

217. These latter allegations were not given much attention in argument, but having had to consider them in the context of all the other submissions made, I do regard the pleading of these two particular complaints as insufficient to found a reasonable cause of action for Misrepresentation/False Statements, and I will therefore strike them out in this Para 88. This is for several reasons. The first is that it is not explained, either in the pleading or anywhere else (so far as I can see), why either the fact of Mr Becherini giving such personal guarantees, or the fact that his death might or would be required to be an "event of default" in loan agreements entered into by lending banks and the

SPVs, would be such a singular and extraordinary matter that it would have any material bearing on a Fund investor's willingness to invest. This is all the more so when warnings about the "Risks associated with development financing" (page16 of the OM) showed quite clearly that the terms of loan financing would be a matter of commercial negotiation, and warned that terms offered might not always be "favourable" to the Fund. I am unable to conceive any reason why any possibility of Mr Becherini's becoming involved in the ways asserted to import risk to the Fund should be of such risk or detriment to the Fund that it would reasonably affect an investor's reaction to the attractiveness of the proposed investment. This proposition appears to be no more than unsupported assertion.

218. Second, and perhaps linking from this latter point, the complaint made involves descending to a level of detail as regards the terms of potential commercial arrangements to be entered into as part of the Fund's eventual future operations, by specially created subsidiary companies, the proposal for which was disclosed in the OM, that I find it quite unrealistic to argue that an obligation to disclose possibilities as to such minutiae of anticipated financing arrangements was required, and had to be set out in the OM on pain of culpability, or that failing to do so would or could be regarded as rendering more generalized statements made in the OM misleading.

219. Third, the complaint assumes that any such detailed intention as to these terms, as there expressly alluded to, could, or would, reasonably have been formed at the time of the OM, before any development finance had come anywhere near to being required. Again, this assumption appears to be mere assertion, and with no obvious reason or sense to support it.

220. Fourth, the very complaint is only made "if such were intended". This conditional pleading plainly suggests that there is/was no evidence available to suggest that this was an actual intention held at the time, in any event. The complaint is thereby reduced in force to a complaint that the mere possibility of this was serious enough to require disclosure in the OM. At each consideration, the complaint becomes more and more far-fetched, and underlines my general impression that these complaints depend on an assumption that an entirely unrealistic degree of detail would be required in order for the OM to pass an "accuracy" test.

221. Fifth, these two complaints are again of alleged omission, and there is not even the beginning of an explanation in this instance (as contrasted with the "unusually high dependence on Mr Becherini" complaint, above) as to how it is contended that any such omission rendered any other express representation in the OM inaccurate or misleading.

222. For the above reasons I conclude that these two assertions really go nowhere in terms of supporting any reasonable cause of action on the part of the Shareholders for misrepresentation, and I am not prepared to allow them to go forward in the pleading of this case.

(c) The "Key Man Insurance" representation

223. The pleading of this alleged misrepresentation, in Para 88 (d) and (e), needs careful examination. The statement made in the OM (in fact by the Insurance Amendment in January 2016 but nothing turns on this) was that

"*The Property Adviser will obtain suitable key man insurance cover to protect the fund from financial losses in the event of the death or extended incapacitation of Mr Becherini or Mr Hill".*

I have set out above, at [95(d) and (e)] the complaint that is then made, in Para 88 (d) and (e) of the Amended Cause, but which I outline again here for convenience. It is that the OM thereby represented that it would be possible for the Property Advisor to obtain, and that it would obtain, insurance to protect the Fund "*against all losses caused by Mr Becherini's death*" when the Defendant's knew or should have known that this would be (in summary)

i. impossible, or

ii. only obtainable at an uneconomic cost, or a cost which would have required amendment of the Fund's investment strategy or projected returns, or,

iii. if available at reasonable cost, only on terms giving very limited (if any) protection against all the losses which might be expected to flow from Mr Becherini's death, or

iv. that the wording of the OM was therefore unacceptably imprecise, because it would convey to investors the mistaken impression that such insurance would be readily available and would protect the Fund from "*the financial consequences*" of Mr Becherini's death.

224. Two aspects of this plea are important. First, it is not advanced as a breach of warranty claim, ie a warranty that something would happen; it is advanced as a claim for breach of the Directors' Rule 4.02 duty to

> *"take all reasonable steps to ensure that* [the OM particulars] *do not contain any false or misleading statements or omit facts which would make misleading any statement in the* [OM]"

which is effectively a misrepresentation claim, ie a claim that the statement being made was not true. The statement actually being made, however, is a statement as to the current intention of the Property Adviser. Therefore, it was the Directors' duty to take all reasonable steps to assure themselves that the Property Adviser had the relevant intention. It therefore boils down to a representation that the Directors honestly believed, on reasonable grounds, that the Property Adviser had such intention at the time of the OM being produced to potential investors. To render this representation false, it would therefore be necessary to show that the Directors did not have that reasonable belief.

225. The pleading recognises this, because it then seeks to support this by assertions that the Directors could not have had any such reasonable belief, on the basis of factual circumstances (ie the matters in sub-paragraphs i – iv). However, to support this assertion, the pleading misrepresents the belief actually being stated to be held, so as then to contest the possibility of that (mis)stated alleged belief being reasonably held. This is the second important aspect of the plea. The statement in the Amendment to the Memorandum is changed in the pleading from being insurance "*to protect the fund from losses…"* to being insurance *"to protect the Fund from* ***all*** *losses…",* and it is this

latter statement which the pleader then asserts could not have been a belief held by the Directors, for the reasons given.

The submissions

226. Advocate Jones for the Directors submits that the pleaded case based on this alleged misrepresentation is unsustainable because the tenor of the misstatement pleaded is simply wrong, and is an interpretation which the actual statement will not bear. For that reason the pleaded cause of action cannot succeed and should be struck out.

227. Advocate Bamford for the Shareholders submits that the pleaded tenor of the statement is clearly arguable, and that in any event this is, once again, a matter that can only be decided at a full trial. In particular evidence of the Directors' state of mind, and the reasons for actually making the Amendment to the OM are not apparent on the evidence at the time, are highly material, and can only be ascertained at a trial.

Discussion and decision

228. There is no proposal to amend the matters pleaded at Paras 88(d) and (e) of the Cause, and I can only, therefore, consider the Defendants' submission that this allegation should be struck out on the basis of what is actually pleaded there. On that basis, I unhesitatingly prefer Advocate Jones' submission. I hold that the Shareholders' cause of action alleged to be maintainable on the basis that the statement in the Insurance Amendment was false in the way particularised in Para 88 of the Cause stands no reasonable prospect of success. This is because that plea is made on the basis, and only on the basis, that the Insurance Addendum meant what the Shareholders contend, and have pleaded, and in my judgment that is simply unarguable.

229. First, it is not what the Addendum actually says. The words used are "*to protect the Fund against losses caused…*" and not "*to protect the Fund against <u>all</u> losses caused….*". Advocate Bamford first argued that the mere word "losses" necessarily meant "all losses". He subsequently modified this to submit that this meaning was at least arguable. I disagree with both propositions.

230. First, as to the literal meaning, use of the mere word "losses" can be just as apt to refer to "some losses" as to refer to "all" or "any" losses. It does not inevitably mean the latter, and the true intended meaning must be taken from the context. When that is considered it becomes, in my judgment, perfectly obvious that the word "losses" as used here did not mean absolutely "all losses" but "some losses" and is referring to such losses as it would be appropriate to protect against, according to the judgment of the Property Adviser. As a matter of immediate context, the words "*protect the Fund from losses*" do not mean that such "protection" is necessarily going to cover all possible losses. The word used is "protect" not "indemnify". One still "protects" against losses if one takes steps to mitigate, reduce or avoid them, even if such protection may not be total, or completely absolute.

231. As a matter of wider context, that this interpretation is the only reasonable and sensible meaning of the statement (ie that the Property Adviser would consider and take out such insurance as appeared suitable to effect reasonable protection of the Fund from loss, even if not a complete indemnity in every possible eventuality) becomes clear when one considers the practicalities of obtaining any such insurance as the

Shareholders' interpretation would have. This is actually illustrated by the very objections made by the Shareholders as part of their case that an intention to protect from *all* losses could not have been reasonably held, because obtaining insurance to such an unlimited extent would not have been possible or practicable. Common sense says that this is correct; the amount of cover required would not only have to be extremely large, but would be entirely unpredictable. The risk involved, whilst possibly regarded as small in terms of incidence if Mr Becherini's death were thought to be unlikely, would nevertheless be so large in quantum that such totally comprehensive insurance would either be unobtainable or, indeed, likely to be obtainable only at a completely impracticable and uneconomic premium.

232. In practice, in my judgment, this representation could only reasonably be taken to mean that the Property Adviser intended, at a time judged appropriate in the future, to take out Key Man insurance to protect the Fund from losses which might be caused by the death or extended incapacitation of Mr Becherini or Mr Hill to such extent and on such terms as the Property Adviser judged reasonable, as a matter of cost-effectiveness in the then circumstances, to reduce or mitigate any losses which might otherwise be likely to result to the Fund from such death or incapacitation. It is that representation to which the Shareholders would have to give the lie in order to succeed in an action against the Directors for breach of statutory duty based on this statement in the OM – but that is not the case they have actually pleaded, and the cause of action pleaded ("protect from ***all*** losses") is, in my judgment, hopeless. I do not see how the statement actually made in the Insurance Addendum could reasonably be interpreted in any other way from that which I have set out, and I reject the assertion at Para 88 (d) iv that the Insurance Addendum did or could reasonably have conveyed, to any reasonable investor, the meaning there contended for.

233. As I have said, I reach this conclusion based on the precise terms of the pleading, but I then have to consider whether it appears that there is a reasonable prospect that this defect could be cured by amendment, ie an amendment which acknowledge the scope of the insurance representation which I have found, but could still contain a material falsity. However, I see no reason to think that it can.

234. Whether the Insurance Amendment is viewed as a warranty or a mere representation, it is effectively a statement of intention (on the part of the Property Adviser) and a belief that such intention is held by the Property Adviser (on the part of the Directors). Any assertion that a statement of belief or intention is false necessarily amounts to an assertion of dishonesty. To mount a case against the Directors on this basis, the Shareholders would have to prove that they did not honestly believe (effectively, that they had no grounds for believing) that the Property Adviser genuinely had the professed intention. Quite apart from this being a very serious allegation to make, and one that could not be pleaded casually, without evidence to justify doing so, the factual hurdle would appear to be extremely high, given that Mr Becherini was, by common consent, not only the directing mind and virtual *alter ego* of the Property Adviser, but was also, at that time, the fourth director of LPCC itself, and therefore party to and responsible for the making of the relevant representation.

235. I can see no reason, in the materials before the court, to think that the Shareholders can properly make a plausible amendment to the Cause asserting a reasonable cause of action based on the Key Man Insurance Amendment representation, and I would be very circumspect about giving any further opportunity to cure, by attempted further

amendment, the defect in the Cause which I have identified.

236. I must emphasise, though, the narrowness of the actual decision which I am required to make here, as it is only as to the pleading of this particular claim in misrepresentation. My above decision does not mean that the issue of taking out Key Man Insurance, and the facts surrounding it, is irrelevant, and it may be very relevant to other causes of action which the Plaintiffs may have reasonable cause to mount against the Directors. The only question I decide here is that this particular cause of action in alleged misrepresentation, as it has been pleaded, stands no reasonable prospect of success, and does not appear to be curable in this respect by any plausible amendment.

Combination of representations?

237. Advocate Bamford has emphasised, at times in his submissions, that the Shareholders' Misrepresentation, or False Statements, Claim is brought on the basis of their having relied on the OM as a whole, and thus, if necessary, on an accumulation, or combination, of the individual alleged false representations which have been pleaded.

238. I have been considering the Directors' strike-out/summary judgment application from the perspective of the factual situations pleaded to support these, and this has to be done individually. I have concluded that four of these are unarguable, and one is weak, but not so clearly unarguable that it would be right to strike it out. For completeness, I should confirm, therefore, that I reject any submission that the Shareholders' pleaded case gains any strength from the fact of the combination of such factual assertions being made, such that a case based on such general accumulation of allegations should, despite my individual findings, be allowed to proceed. This is not a case of several rather weak pleaded allegations assuming sufficient weight, when combined to make a more reasonable and robust total case. To hold otherwise would be to allow that a defendant can reasonably be pursued in respect of an allegation which in itself is fanciful, by virtue of this being pursued in combination with an allegation which manages to surmount the "real prospect" test, to some degree.

239. In my judgment that is not an appropriate approach to case management, except, perhaps, in a case where the facts underpinning the fanciful plea are substantially the same facts as those underpinning the other, reasonable, plea. That is not the situation in this case. The factual basis for each of the five discrete pleas of misrepresentation made by the Shareholders which I have considered are separate and distinct. In the circumstances, therefore, this is not an argument which can avail the Shareholders.

Conclusion as to the Shareholders' Misrepresentation Claims

240. In summary, I have concluded, as to the Misrepresentation Claims that:

    a. The Shareholders' claims are individual claims and they all fall to be struck out on the present pleading of the Cause, and the Amended Cause, for failing to plead the necessary fact of any such individual's reliance on any of the misrepresentations subsequently alleged, when this is required to found each and any such cause of action; I have not identified which paragraphs or phrases of the Cause actually fall to be struck out to implement this, although it obviously includes Paragraph 88. This defect might be susceptible to being cured by possible appropriate amendment, but it results in the entire claim being

otherwise struck out.

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.

c. The particulars of damage claimed in respect of such misrepresentation claims should, in any event, be struck out insofar as they plead a contractual rather than a tortious measure of damage, because the former is not, in law, a maintainable basis of quantification of loss in respect of the misrepresentation claim, if otherwise valid. I find the result to be that the allegations at Para 95 and Para 96(c) and (d) of the Cause must be struck out. Those defects are not susceptible to cure by possible amendment.

(2) <u>The "Mismanagement" Claims – Paras 89 - 92</u>

241. I use this heading, now, to refer to the remaining claims contained in the Cause, and it is first important to identify what these now are, recalling that I have struck out the Shareholders' claims against EFG, and I have dealt separately with the Shareholders' claims against the Directors for misrepresentation/false statements in the OM.

242. The remaining claims, not yet examined on these Applications, comprise claims by two different classes of Plaintiff, one being the Shareholders and the other being LPCC itself, and they are also made on the basis of different causes of action. The Shareholders' remaining claim is framed as being for breach of statutory duty ("Authorised Funds Duties") under the PoI Law: see Para 100 of the Cause. LPCC's claim is stated to be "*for negligence or for breach of the statutory or common law duties of directors*": see Para 101 of the Cause. However, in the way the Cause has been structured, both these types of claim found on the one set of factual circumstances, namely criticisms of the Directors' conduct of the business of LPCC/the Fund from its commencement until it foundered and effectively ceased in late 2019/early 2020. The relevant criticisms are to be found in Paras 89-92 of the Cause.

243. It is the fact that these causes of action are all founded on the one set of facts in general which *prima facie* justifies bringing them together in one cause, but they are, in legal analysis, distinct causes of action, even if they may be parallel. Different legal considerations may therefore apply to each of them. Any decisions at a trial would have to be made on that basis, and therefore any question of strike out must be considered on the same basis.

244. I have described the contents of these Paras 89 - 92 in my review of the pleadings at [96] – [100] above, and will have to look at some of the detail later, but for present purposes it is useful to note the structure of these allegations, as they now apply to the remaining claims mounted against the Director defendants.

a. The distinguishing feature of Para 89 is that it pleads the acts of <u>other people</u>; it

pleads the Directors' failures to ensure that other people (the Property Adviser, the Development Manager, the SPVs) acted in a particular way – sc. in accordance with the OM. The overarching description of the complaints made in Para 89 is in language appropriate to the claim for breach of statutory duty, although as faults of the Directors they are pleaded as breaches of both Authorised Funds Duties and Directors' Duties;

b. Para 90 pleads the Directors' own acts, in relation to matters prior to the death of Mr Becherini, and the matters of complaint are particularised within that Paragraph. The overarching description of the complaints is that appropriate to directors' general duties, although the complaint is still pleaded as breaches of both Authorised Funds Duties and Directors' Duties, in that order.

c. Paras 91 and 92 can be taken together, because the latter is pleaded as particulars of the former. They again plead the Directors' own acts, but in relation to matters subsequent to the death of Mr Becherini. The overarching description in Para 91 is again in terms applicable to Directors' Duties, but the complaint is still pleaded as breaches of both Authorised Funds Duties and Directors' Duties, although now in the reverse order.

Examining challenges as to the reasonableness of the claimed causes of action relying on these paragraphs will therefore, unfortunately, require extracting and examining the relevant pleaded allegations from the above structure, as they relate to each species of claim, separately.

(a) The Shareholders' Mismanagement Claim.

Observations

245. As stated above, the Shareholders' "Mismanagement" Claim is pleaded to be founded on s 34 of the PoI Law. It is therefore a claim that the relevant plaintiffs (here the Shareholders) have suffered loss through a contravention of the relevant statutory duty for which a right of action is conferred under s 34. In this context, that duty must be capable of being found within the Rules, they being "*made under this Law*" as referred to in s 34.

246. It is notable, therefore, that this is not (and cannot be) a claim made by reference to the duties of directors imposed by general company law. This would seem to be a correct and proper recognition of the "rule against reflective loss", which would *prima facie* prevent any such claim being made by the Shareholders against the Directors at all. That rule, as ultimately formulated by the UK Supreme Court in in *Sevilleja v Marex Financial Limited* [2020] UKSC 31, when reviewing the development of the line of English company law authorities commencing with *Prudential Assurance Co Ltd v Newman Industries Limited* [1982] Ch 204, lays down that because of the principle of corporate law which gives a company a separate legal personality, the proper plaintiff for a wrong done to a company, including a wrong committed by its own directors, is the company itself, and a shareholder does not have a personal, separate, direct cause of action against the wrongdoer for any loss in the value of his shares brought about by the wrongdoing. This is because the shareholder's loss is merely a "reflection" of the loss suffered by the company itself. It is a rule of substance and not simply a rule to prevent double recovery (ie by shareholder and by company) although it in fact does

so. Moreover, the shareholder's loss will be effectively made good if the loss caused to the company is made good upon a successful claim made by the company. That rule would thus preclude the Shareholders from making any direct claim against the Directors for breach of their ordinary duties of skill and care as directors of LPCC or (effectively) the Fund. Those ordinary duties are not owed to individual shareholders.

247. The duty in respect of which the Shareholders can and do complain therefore has to be found in the Rules. The Rules pleaded in the Cause are Rules 2.01 and 4.02. Rule 4.02 relates only to a director's responsibility for the contents of the "information particulars" (principally, in this case, the OM) and does not provide a basis for a claim based on the subject matter here. Rule 2.01(1) applies to the Designated Manager and not to the directors and again is not relevant. It is Rule 2.01(2) which relates to directors and upon which, therefore, the Shareholders' claim is necessarily based. For ease of reference, this Rule reads

> *"…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."*

248. The factual assertions alleged to constitute a contravention of statutory duty, and thus necessarily of Rule 2.01(2) are those pleaded in Paras 89-92.

Rule 2.01(2) – General arguments

Directors' submissions

249. Advocate Jones' arguments with regard to <u>all</u> "the Mismanagement Claims" against his clients, the Directors, are contained in paras 153 – 185 of his Written Submissions. They are initially and principally made in relation to the substance of all the mismanagement criticisms, focusing upon whether they are realistically sustainable as complaints at all, and they concentrate on the principles of directors' duties. He deals with the general question of whether the pleaded claims can fall within the terms of Rule 2.01(2) only in the final paras 176 - 185 of this section of his written submissions, and he only does so on broad principles. It is convenient to deal with this broader approach first.

250. His first submission is the general one that the Cause does not competently allege any breach of Rule 2.01(2) in Paras 89-92, at all. This is because Rule 2.01(2) lays down duties not to commit positive acts (not to "*give directions*", not to "*exercise*" powers duties or discretions) identified by the potential for causing the company "*to operate…*" (again a positive action) *"…otherwise than in accordance with…*" [the OM]. Thus, it does not, he submits, apply to omissions, or failures to act, or failures to operate appropriately not caused by some positive action, at all. However, he submits that it is only this latter kind of allegation which is what is pleaded in the Cause.

251. He submits that the pleadings at Paras 89-92 are all framed, either expressly or by examination of the gravamen of the accusations, in terms of inaction, ie omissions, or failures to act. The accusations are such as that the Directors "*failed*" to do something (Para 89: preamble to entire paragraph, Paras 90, 91, 92 (c) (d), (e), (f) (g)), or in terms such as "*took no steps*" "*took no action*" or the passive "*allowed*" or "*continued*" and

such like, throughout these paragraphs. Where the word "*relied"* is used in a small number of places, the effect is actually simply to reinforce an allegation of lack of action, rather than taking an offending positive step, and it is the latter which is required to found a contravention of Rule 2.01(2). As these paragraphs all allege a failure to do something, which cannot amount to a breach of Rule 2.01(2) according to its terms, that is sufficient, on its own, to strike out any claim based on that Rule.

252. Second, Advocate Jones makes more specific objections to Paras 90 and 91, namely that these are framed, in the preamble specifically in terms of failing to "*exercise independent judgement and/or proper care skill and diligence…"* and/or *"failing to act in the interests of the Fund*" which are not contraventions of the statutory duty imposed by Rule 2.01(2), and nor are they capable of being related to the terms of the OM.

253. His third submission is that the terms of Rule 2.01(2) provide only that doing things which are contrary to the terms of the OM are not to be permitted; they do not provide that doing things not expressly contemplated by the OM equates to allowing the company to operate "otherwise" than in accordance with the OM. Put another way, he submits that the OM does not, itself, say that the only things which the company can do are those set out in the OM. It is not the case, therefore, that simply doing something which is not expressly authorised in the OM is acting "*otherwise than in accordance with*" the OM so as to be a deviation from the OM. Thus, as I understand this submission, he says that to be a contravention of the duty not to cause the company to act "*otherwise than in accordance with*" the OM requires causing the company to do an act which is necessarily incompatible with the functions or activities of the company described in the OM.

254. His submits, therefore, that even if it could be said that at least some of the allegations made in Paragraphs 89-92 could, contrary to his first submission, be classed as allegations of positive action by "causing" the company to do something, those matters would still not be contraventions of Rule 2.01(2) because they would not be causing the company to act "otherwise" than in accordance with the OM, because the matters singled out for complaint were neither forbidden by, nor in conflict or opposition to, anything laid down by the OM. They created no discord with the OM.

Shareholders' submissions

255. On behalf of the Shareholders, Advocate Bamford argues that the broad submission that Rule 2.01(2) encompasses only positive acts and that therefore "failures" or "omissions" or a complaint of inaction are incapable of being a breach of Rule 2.01(2), is an argument which is inappropriate for summary decision, and must go to trial. He submits that the case made on behalf of the Shareholders is neither weak nor fanciful nor bound to fail, and that the issues raised merit further investigation.

256. He also prays in aid consistency with the grounds which underpinned Lt-Bailiff Finch's decision in relation to the Directors' failed application for summary judgment on their Counterclaim.

257. He stresses that a full trial is all the more necessary in a situation where what is required to be construed is an important statute (the precise statute has been repealed, but I understand that equivalent provisions have been re-enacted in the later consolidating legislation) and the situation is devoid of authority.

258. He further submits that the Directors' suggested construction of Rule 2.01(2) as being narrowly applicable only to failures or omissions to act is also inherently unlikely, because (he submits) it would absolve persons in charge of collective investment schemes from liability for being slothful and inattentive, imposing liability only on directors who were actively incompetent rather than merely passively so.

259. He submits that Advocate Jones' third submission, that Rule 2.01(2) is narrowly confined to cover acts which are positively inconsistent or incompatible with the OM, such that anything not expressly or impliedly forbidden by the OM could incur no liability, would strip the Rule of any real meaning.

260. He finally submits that it is "self-evident" that the Directors owed the duties referred to in Advocate Jones' second submission noted above (at [252]) and that what is alleged against them is clearly capable of amounting to breaches of such duties.

Discussion

261. In order to make the three Applications before the court judicially manageable, I have had to break them down to consider particular claims in turn. At this point, I am considering *only* the Shareholders' Mismanagement Claim against the Directors, which, I have held can be based only on an allegation of breach of Rule 2.01(2) as a matter of law, and I have also found that, when the Cause is linguistically dissected, it actually has been pleaded to be based only on such a breach, in practice. The initial question here, therefore, is whether the matters pleaded in the Cause, but which are also pleaded as the basis of a different cause of action (namely LPCC's claim against the three of its Directors who have been made Defendants), do, or can, found a reasonable cause of action by the Shareholders for breach of statutory duty, based on Rule 2.01(2) of the Rules.

262. Advocate Jones makes two similar arguments of a general nature that the whole of this Shareholders' Mismanagement Claim (ie the pleaded matters going to support it) should be struck out because it is unsustainable on the true construction of Rule 2.01(2), that the contrary is effectively unarguable, and that this is sufficiently clear that it can be decided now, and neither requires, nor indeed admits of, any further evidence which might possibly be adduced at a full trial.

263. I have recited his first argument (his first submission above) as to the Cause containing only complaints of omission, whereas the Rule is framed to cover only complaints of commission. His second general argument relevant to this construction point (his third submission) is, effectively that all that is not prohibited is permitted, and, again, that the Cause does not allege anything expressly, or even necessarily impliedly, prohibited by the OM. He submits that any counter-argument to these points is unsustainable such that this submission can and should be decided in the Directors' favour as a strike out point.

264. These arguments certainly have force. As to the first, it is notable that the wording of Rule 2.01(2) is couched in terms which do not replicate or paraphrase the essential duties of a company director - those being, very broadly, to make and implement loyal, careful, skillful and responsible decisions with a view to best achieving the objectives of the company which its general body of shareholders have signed up to, and to seek to ensure that the directors and the company comply with any statutory duties imposed

upon them or the company by extraneous laws. The wording of Rule 2.01(2) thus appears to be aimed at something somewhat different. In essence the provisions of Rule 2.01 appear to be aimed at protecting investors from the relevant authorised investment scheme's being operated, either administratively (Rule 2.01(1)), or substantively (Rule 2.01(2)), otherwise than in accordance with the scheme described in the OM, which they have signed up to. Rule 2.01(2) does this by imposing a duty on the directors not to use their company law powers to deviate from or to extend the scheme's operations outside that which has been represented in the OM to be the enterprise which will be carried on. That is not quite the same thing as running the enterprise itself loyally, carefully, skillfully and responsibly.

265. Whether this difference of expression deliberately reflects a recognition of the company law principle of "no recovery for reflective loss" for a wrong done to the company, is not clear, but the existence of that principle emphasises, to my mind, the obvious point that for a breach of the relevant statutory duty to be found, any conduct of a director of which complaint is validly made must be conduct which falls fairly within the wording of Rule 2.01(2). It is quite apparent that Rule 2.01(2) is capable of conferring a cause of action for breach of statutory duty on a shareholder such as the Shareholders here as a matter of language, but how far it actually does so, or is intended to be affected by, or even possibly to abrogate or overrule, the principle of company law as to "no recovery of reflective loss" by shareholders seems to me to be a matter of potentially sophisticated legal argument about its true construction, which I would regard as quite unsuited to be decided solely on the basis of abstract principle. In my judgment it would require the assistance of factual context, in an actual case, in order for it to be determined correctly and appropriately.

266. I do accept Advocate Jones' effective submission that the duty under Rule 2.01(2) is couched in the language of not <u>doing</u> things, namely things which would or might have the particular effect specified in the Rule. I do not accept, however, that this means that an allegation that a director "failed" or "omitted" to act in a particular way can *ipso facto,* be struck out as not being capable of falling within the meaning of Rule 2.01(2). This is because that point is a matter simply of language, and what is in issue in applying Rule 2.01(2) must be the substance of the director's conduct. The language used to express any complaint may therefore not be decisive. For example, the "exercise" of a power or of a discretion may conceivably be said to be carried out by a decision not to do something, just as much as by a decision to do something. Similarly, if the aim of Rule 2.01(2) is to prohibit directors from "*caus[ing] the company to act otherwise than in accordance with*" the OM, an issue can arise as to how far "cause" extends, and does it extend to "allow" or even just to "suffer". I do not think such arguments can be decided upon an application to strike out.

267. Advocate Jones submits that facts are not required in order to arrive at the correct construction of a statute, but I do not think that is always so, and in any event, they are certainly required in order to arrive at a correct determination of its application. However, and for the same reason, it also does seem to me that any claimed matter of contravention relied on in a pleading must be pleaded in a manner which enables the director concerned to understand how it is alleged that any particular complaint made against him is argued to amount to a contravention of Rule 2.01(2), in terms. He must also be entitled to argue, if appropriate, that the particular complaint does not fall within those terms and does not disclose a reasonable cause of action.

268. I take the same view as to the necessity for factual context regarding Advocate Jones' other broadly directed argument, ie his third submission above. This is whether "*otherwise than in accordance with*…" limits contraventions to matters which are expressly prohibited by, or are plainly incompatible with, an OM, so that anything which is not so incompatible is permissible, and is not a contravention. Once again, I consider that this point is potentially fact specific to individual complaints, and is not an argument on the basis of which I could strike out the Shareholders' Mismanagement claim in its entirety as pleaded.

269. In summary, therefore, in my judgment, the application of Rule 2.01(2) upon its true construction is likely to be fact specific, and to a degree which I consider makes this claim inappropriate for determination as a matter of a general argument of construction in a factual vacuum. I therefore cannot accede to Advocate Jones' arguments of general application as a basis for striking out the Shareholders' Mismanagement Claim as not capable of falling within Rule 2.01(2). This means that the individual matters of complaint must be looked at.

270. However, Advocate Jones' second submission above is that the pleading in Paras 90 and 91 is framed in terms which are not the terms of Rule 2.01(2) at all, and which therefore cannot be allowed to stand as support for a purported claim for breach of that Rule. I do accept this argument.

271. The terminology used in those Paragraphs is that of directors' duties in company law. They are not the duties contained in Rule 2.01(2), and they cannot be sucked into being part of so-defined "Authorised Funds Duties" simply by asserting them in a pleading which asserts both such types of duty with reference to the same factual matters but without making it clear to whom asserted different duties are being alleged to have been owed. Not doing that is confusing and therefore embarrassing. This lack of clarity arises from the Plaintiffs' having amalgamated all their claimed causes of action in the one Cause despite their differing component parts, and it requires to be remedied.

272. Those references must therefore be struck out as part of any Shareholders' Mismanagement Claim. They would, of course, remain perfectly proper in principle, in the pleading of LPCC's Mismanagement Claim, but I am not dealing with that here.

Rule 2.01(2) – allegation specific arguments

273. The above does not dispose of this aspect of the Directors' Application, because I have only decided that I cannot and should not strike out the Shareholders' Mismanagement Claim in its entirety in a summary fashion based on general arguments of construction. It does not mean that no further arguments in support of striking out of particular allegations can be entertained, where these are made on the grounds that individual complaints must "fail on the facts" (or alternatively where they are sought to be introduced by amendment, that such amendment should not be allowed, for various reasons).

274. This means, therefore, that I can and should, look at the individual allegations made, and consider them in relation to the language and obvious meaning of Rule 2.01(2), and if I conclude that any particular allegation simply cannot realistically be argued to come within the meaning of Rule 2.01(2), *on its own facts,* I can (and should) strike out that particular allegation. The effect of my previous finding is simply that I would not take

that view simply on the grounds of the language of the allegation, but only if it seems to me that, in substance, the allegation simply cannot realistically (ie more than fancifully) be argued to come within the words and meaning of Rule 2.01(2).

275. Certain allegations originally included in the Cause or its subsequent iterations (namely complaints at (i) Mr Becherini's giving cost overruns guarantees in respect of the projects and (ii) alleged breaches of the LTV borrowing ratio set out in the OM) have been withdrawn and deleted from the Cause. For the Directors, Advocate Jones divides the allegations which then actually remain in Paras 89 – 92 of the Amended Cause into three individual topics, which he groups, in his written submissions as follows

    a. Mr Becherini's illness

    b. Obtaining Key Man Insurance

    c. Matters argued to be within the Directors' commercial judgment namely

        i. Improper delegation to Mr Becherini

        ii. Failing to appoint an architect or quantity surveyor to each development project

        iii. Making improper/excessive payments to LEDL (the Development Manager)

        iv. Other matters of commercial judgment.

276. However, this is not the basis on which I have found it convenient to analyse the allegations in the Cause for present purposes, as I need to review what is actually pleaded or intended to be pleaded in the Cause or proposed Amended Cause in relation to the Shareholders' Mismanagement Claim, and the arguments in Advocate Jones' written submissions deal with the specific factual allegations in the Cause by reference to directors' duties rather than Rule 2.01(2), as noted above.

277. The Plaintiffs have, unsurprisingly, simply responded to his submissions on the same basis, and have been content simply to contend that their Cause is adequately pleaded and the issues raised and assertions made are sufficiently substantial that they ought to be allowed to go to trial, if necessary as elaborated by the amendments they propose to make in their Amendment Application. Where any new causes of action are suggested to have been introduced in their proposed Amendments, they submit that these arise out of the same or substantially the same facts as already pleaded and ought to be permitted.

278. However, Advocate Edwards' arguments for EFG did address the allegations in the (now) Para 89 with some individuality on the facts, in dealing with the "Supervision" Claim made against his clients. This has been of assistance.

279. I have otherwise, therefore, reviewed these matters according to my own assessment, with such assistance as I can glean from arguments made by the Advocates generally throughout the hearing in relation to these allegations. Since I am having to distil the constituent elements of a possible Shareholders' Mismanagement Claim from the pleaded allegations, I think it clearest to do this paragraph by paragraph.

Paragraph 89

280. As noted above, Para 89 invokes the conduct of persons other than the Directors themselves and its preamble clearly has Rule 20.1 duties in mind, because of its reference to "*in accordance with*" the terms of the OM. It is phrased as a complaint that the Defendants (originally, of course, including both EFG and the Directors)

> "…*failed to take reasonable steps to ensure that the Property Adviser* [ie LLIL], *and/or the Development Manager* [ie LEDL], *and/or the SPVs* ***acted*** *in accordance with the terms of the OM*….".

This preamble qualifies all the individual complaints subsequently made in Para 89 so that those parts must be read together.

(i) Amendment to Para 89 – main preamble

281. There is then an insertion into the preamble, by proposed amendment, of the phrase

> "*(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).*"

282. Advocate Jones contends that this is a new cause of action, alleging a hitherto unpleaded breach of duty by the Directors in failing to include such a term in the contracts appointing LLIL and LEDL, but as these contracts were made more than 6 years before July 2023 (in September 2014, but certainly before 9 November 2015 when the OM of the Fund was approved), any cause of action based upon this assertion was time-barred when the Application to Amend was made, in July 2023. The additional cause of action pleaded does not arise out of the same or substantially the same set of facts as matters already pleaded, because it alleges, and would require investigation of, facts surrounding the entering into of these contracts, investigations not previously necessary and of matters which happened many years ago. He further submits that the amendment is hopelessly vague and unclear as to exactly what the content of the supposed required contractual term could be, in any event.

283. Advocate Bamford argues in his submissions that the amendment is simply an example of the steps which the Directors failed to take and which they should have taken, by "*making it clear to*" LLIL and LEDL that if they did not abide by the terms of the OM their appointments would be terminated. By implication he argues that this is thus not a new cause of action at all but (I think) part of the cause of action already alleged in the original Cause, and in any event that it all arises out of the same or substantially the same facts, such that the amendment sought ought to be permitted.

284. I will not allow this amendment for two reasons. First, it is not clear whether it alleges a claimed deficiency in the terms of the original contracts of appointment of LLIL and LEDL, or whether it alleges a continuing obligation of the directors during the tenure of those contracts of appointment, although Advocate Jones treated it as the former and Advocate Bamford did not, so far as I can see, take any issue with this as being his intended interpretation.

285. If it is the former, then I accept Advocate Jones' argument that it is time-barred as a

cause of action, and that it should not be allowed as a matter of the court's discretion, because it will involve the investigation, long after the event, of matters which were not relevant at the time the Cause was originally served on the Directors. My view that it should not be allowed is also reinforced by the absence of any pleading as to what would actually have taken place any differently if any such alleged term had been included in such contracts of appointment, always assuming in favour of the Plaintiffs that it actually was not. (The terms of these contracts have not been examined). There is therefore a gap between the matter alleged in the amendment, and any assertion of consequent loss, arising from such matter.

286. If it was the latter, ie a general complaint that the absence of any such term was a continuing contravention of Rule 2.01(2) during the whole currency of the relevant contracts of appointment, then I cannot see that it actually adds anything to the allegations of contravention which are specifically made elsewhere.

287. Either way, it seems to me that this amendment is not an amendment which ought to be now allowed to be made in the circumstances.

288. I also have difficulty discerning the gravamen of this amendment anyway, since there is no subsequent clear allusion to any consequence of this alleged contravention of statutory duty. If, therefore, there were to be any attempt to reintroduce such a proposed amendment by re-drafting it (because it is thought to have some importance which has escaped me) then I would expect any such re-draft to take account of such objections, and make perfectly clear just what it is alleged the Directors (as, here, defendants to a claim for breach of statutory duty) should actually have done to comply with such duty.

(ii) Para 89 (a) and 89 (b)

289. The complaints here are sufficiently similar that they can be taken together. In Para 89 (a) it is that Mr Becherini gave personal guarantees to support the SPVs' borrowings when this was not provided for in the OM and it "*subjected the Fund to additional risk of which the investors were not aware when investing"* and when the need for it called the viability of the Fund's investment strategy into question. In Para 89(b) it is that Mr Becherini agreed terms with the lenders to the SPVs which made his death an event of default under the loan agreements rendering the loans repayable in full, when this was not provided for in the OM, and likewise *subjected the Fund to additional risk of which the investors were not aware when investing"* and when it was not in the interests of the Fund.

290. Remembering that this is in the context of the general preamble to Para 89, these complaints have to provide arguable particulars of an allegation that the Directors failed to take reasonable steps to ensure that one of LLIL, LEDL or the individual SPVs (who, it will be remembered, each had their own individual Board of directors) did not act so as to cause the Fund to "*operate otherwise than in accordance with the OM*", as well as that the failures of the Directors could be said to be the exercise of the Directors' powers, duties or discretions.

291. In my judgment it is simply unarguable that these matters constituted a breach of the substance of Rule 2.01(2), by being an operation of the Fund "*otherwise than in accordance with* [the OM]".

292. First, neither matter is expressly forbidden by the OM. Second, neither matter is impliedly forbidden by being necessarily inconsistent with the matters which are expressly described in the OM as being the intended *modus operandi* of the Fund's enterprise. Each relates to the terms of commercial borrowings by the SPVs, which, it was expressly explained, would be the method by which part of the Funds' required funding would be obtained. The OM gave no express principle, or limitation or qualification of the terms upon which such borrowings would be obtained. Indeed, it would not be expected that a document describing an enterprise at the level of detail which would be appropriate here would or should descend to the granular level of laying down what precise terms or conditions might be included within the terms of necessary contractual engagements, such as financing agreements to obtain funds on acceptable commercial terms from commercial banks. (I accept that specific limiting parameters for the operation of the business, if of major strategic significance, might be included in an OM, that that is not this case.) The necessary implication was plainly that the terms of such borrowings would be in the discretionary judgment of those properly charged with the obtaining of such finance, according to the scheme of the enterprise described in the OM.

293. It is not suggested that a term as to the giving of a personal guarantee of relevant borrowings by a third party, or making the death of the main executive driving force of the enterprise being funded an "event of default" for protection of the lender would be an unusual term of commercial borrowings, still less that it would be so unusual a term that it could be viewed as being outside the ambit of what investors could reasonably expect to be within the proper and reasonable exercise of executive powers of those who were charged with conducting the Fund's enterprise.

294. The assertion that these matters were not provided for in the OM therefore does, not suffice to make this a reasonably arguable contravention of Rule 2.01(2) in fact, and I do not consider that the additional assertion that either of these "*subjected the Fund to additional risk of which the investors were unaware*" makes any sufficient difference. The substance of this asserted consequence is not explained. The proposition that it was material necessarily assumes that the absence of a mention of such particular matters of detail of likely borrowing terms would have been viewed by investors as equivalent to a positive assertion that they would not be entered into which I regard as fanciful. The practical reality of such "additional risk" is simply not identified, and an allegation which is merely theoretical does not stand a reasonable prospect of succeeding in practice.

295. The assertion that any requirement for a personal guarantee by Mr Becherini "*called the viability of the Fund's investment strategy into question*" appears to be nothing more than assertion. Its justification is simply not explained, and is very far from being self-evident. The assertion that allowing Mr Becherini's death to be an event of default within a loan agreement was "*not in the interests of the Fund*" is, likewise, nothing but unsubstantiated assertion, and is in fact questionable even in theory, since it would influence the Fund's (or more accurately the SPVs') ability to obtain finance on acceptable terms.

296. Neither, I find, are the deficiencies in these allegations potentially remediable by amendments, because the substance of a possibly successful allegation just is not there. (As a matter purely of pleading, also, the allegation at 89 (b) is framed as an act of Mr Becherini, which is not within the preamble to Para 89 at all, but whilst that could very

possibly be cured by amendment, it does not cure the essential deficiency in the allegation itself.)

297. It follows that I regard each of these allegations as so flimsy that I do not think they stand any real prospect of successfully founding a cause of action on behalf of any Shareholder, against any Director, for breach of the statutory duty specified by Rule 2.01(2), and in my judgment these allegations should be struck out of any Shareholder's Mismanagement Claim.

(iii) Para 89 (c)

298. The allegations here is that the Property Adviser (LLIL) failed to obtain Key Man Insurance in accordance with the Insurance Amendment to the OM. That is plainly well arguable as being operating otherwise than in accordance with the OM. The individual further sub-paragraphs in the pleading recite what happened after this. Sub-paragraph (i) relates directly to the default of the Property Adviser (LLIL). The remaining sub-paragraphs recite what happened at Board level in LPCC itself, albeit with specific references to Mr Becherini, who was, of course, the personification of the Property Adviser in practice, and was also a director of LPCC along with the Directors who have actually been sued.

299. The question whether the above pleading discloses a reasonable cause of action on the part of the Shareholders directly against the Directors for contravention of statutory duty depends, therefore, on whether the conduct of the Directors falls within the meaning of the phrase "*exercise their powers duties or discretions"* in Rule 2.01(2). This is a matter which I consider does require to be decided at a full trial, and with argument properly focused on this point. I would not, therefore, strike out this allegation.

300. The particulars in sub-sub-paragraphs (ii) –(vi) may not be directly relevant to LLIL's failure to operate the business of the Fund in accordance with the terms of the OM, as contrasted with complaints against the Directors as directors of LPCC itself, but I do not consider their inclusion so inconvenient that they ought to be struck out of any Shareholders' Mismanagement Claim; the contents might well have some relevance. In addition, those allegations are plainly relevant to any claim by LPCC as to breach of directors' duties, which may ultimately finish up being conveniently tried together with the Shareholders' Mismanagement Claim. Para 89(c) therefore survives.

(iv) Para 89 (d)

301. The express allegation here is that subsequently listed complaints, four in the original Cause and one sought to be added by amendment, were breaches of the duties of the Development Manager (LEDL) and of the Property Advisor (LLIL) and of the Fund (LPCC). To bring this under a Shareholders' Mismanagement Claim against the Directors for breach of statutory duty under Rule 2.01(2), the first question is therefore whether it is reasonably arguable that any/each of those five matters constituted the Fund's "*operating otherwise than in accordance with* [the OM]", and the second question is whether it is reasonably arguable that any such incompatibility was brought about by the Directors' exercising their powers duties or discretions.

302. The complaints made are as follows:

i. Para 89 (d) (i) complains, indiscriminately, that the Fund or LLIL or LEDL or the SPVs failed to appoint a full time architect to each of the development projects. (I observer that as each SPV was running a separate development project, it would seem that only the SPV could have had any such direct duty; as regards the other entities it would depend whether they had any control over the SPV's action - and as regards the Directors, their control over any suggested "duty" of LLIL, LEDL or an SPV to act as suggested is removed even further).

ii. Para 89 (d) (ii) complains, equally indiscriminately, that no steps were taken by any of the above to respond to, or manage, the potential consequences of Mr Becherini's apparent ill-health in or from 17 July 2017.

iii. Para 89 (d) (iii) complains against the Fund or the SPVs that improper payments (excessive or in respect of work which had not been done) were made to LEDL (when, is not specified), and that no independent quantity surveyor had been engaged to supervise these.

iv. Paragraph 89 (d) (iv) complains against the Fund or the SPVs that no sufficient steps were taken later, after the intervention by DML, to recover these improper payments.

v. Paragraph 89 (d) (v) is sought to be added by amendment and complains that the terms of LEDL's professional indemnity insurance under the JCT contracts for NHG and BB "*wrongfully excluded*" claims by the relevant SPV or the Fund (although the legal basis for the allegation of wrongfulness is not stated).

303. Advocate Jones deals with these allegations as allegations of breaches of directors' duties, which is not the issue under the Shareholders' Mismanagement Claim Advocate Edwards submits, (though in fact dealing with the claim against EFG alleging contraventions of Rule 2.01(c), but on the similar point of a duty to administer "*in accordance with"* the OM) that the short point in relation to an allegation of non-compliance with the OM is that there is no term in the OM which imposes any duty as alleged in any of these paragraphs on anyone (although I am, of course, here concerned with such an allegation levelled at the Directors). Advocate Bamford deals with the matter in response to Advocate Edwards' points simply by asserting, in familiar fashion, that these are clearly reasonably arguable, and are not points which can or should be decided summarily, and that to hold in favour of the Defendants would be to frustrate the objective of the PoI, to protect investors.

304. Once again emphasising that I am here considering the maintainability of a Shareholders' Mismanagement Claim, I take the view that these allegations, which necessarily in this context have the function of an alleged contravention of Rule 2.01(2), can only survive if their basic premise is reasonably arguable, namely that the OM did impose the relevant obligation upon someone. This is because the cause of action would depend upon there being a contravention of that obligation which the Directors had arguably caused in turn by the exercise of their own powers duties or discretions. But the question is whether we ever get to that, and I agree with Advocate Edwards' submission that no such obligations as are here suggested to have been breached are imposed, either expressly or even by necessary implication, in the OM.

305. I reach this conclusion without any hesitation as regards the allegations in sub-paragraphs (i), and (v), and with virtually no hesitation as regards the allegations in sub-paragraphs (ii) and (iv) but only because it might be faintly more arguable that these activities are ancillary to the processes of machinery mentioned in the OM. I also reach the same conclusion with regard to (iii) even if with more thought, since the allegation there (which I have to assume to be true, for present purposes) is of impropriety, and that fact might more plausibly be argued to take the matter outside the ambit of operation "*in accordance with*" the OM.

306. However, I am considering these allegations in the context of what I discern as the fundamental purpose of the duty imposed on directors by Rule 2.01(2), namely 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. In that context, I conclude that these allegations simply do not bring the matters complained of within the ambit of what could be held to be operating "*otherwise than in accordance with* [the OM]" within the meaning of the Rule. They constitute complaints about the way in which an operation in accordance with the OM was carried out, rather than a complaint that such operation strayed outside the scope of the enterprise described and set out by the OM. I am reinforced in my conclusion that this kind of allegation is not within the intended scope of Rule 2.01(2) by the fact that, as I keep emphasising, if it is proven, it is likely to be well within the scope of a claim by the company itself for breach of directors' duties, such that any damage caused would be remedied by recoveries made under that claim. The necessity for any such claim to be available to shareholders separately would therefore disappear.

307. For the avoidance of doubt, I have also considered whether my conclusion on this point is one which ought to be allowed to proceed for argument at a full trial, either because the contrary argument is merely weak, but stronger than fanciful, or because it is sufficiently convenient to do so as a matter of discretion, because of other arguments which may properly have to go to a full trial. However, I have concluded that such considerations do not override my view that these allegations just do not stand any real prospect of supporting a Shareholders' Mismanagement Claim founded on a breach of Rule 2.01(2), and therefore constitute no sufficient "other reason" why there ought to be a trial.

Paragraph 90

308. The allegations here relate to the Directors' conduct before the death of Mr Becherini in July 2018.

309. Although prefaced with an allegation of breach of Authorised Funds Duties (ie a claim under s 34, and in turn, therefore, predicated here on a contravention of Rule 2.01(2)) as well as being a breach of the Directors' Duties, Para 90 expressly asserts failures by the Directors to

> "*exercise independent judgment and/or proper care, skill and diligence in relation to the operations of the Fund…"*,

with the particulars given being particulars of the shortcomings alleged in this regard. These allegations themselves therefore do not assert any causing of the Fund to "*operate otherwise than in accordance with the OM*" in identifiable ways. These

allegations cannot therefore succeed as allegations of a contravention of Rule 2.01(2) unless by way of an argument that for the Fund to "operate in accordance with the OM" requires that its directors do not breach their directors' duties to the Fund. This is such a highly strained interpretation of Rule 2.01(2) that I consider it to be fanciful.

310. The actual allegations, moreover, are duplicative, in substance of allegations previously made in Para 89, albeit now made by reference to the Directors' own actions, rather than by reference to their allegedly acting or failing to act so as to cause the same occurrences or mishaps by other people's actions. Thus, Para 90 (a) alleges, in effect, improper abdication of responsible decision making to Mr Becherini and Para 90 (b) (c) and (d) allege (and seek to elaborate, by amendment) culpably inadequate steps taken by the Directors to protect the Fund against the death or incapacity of Mr Becherini, whether by insurance, or by making other contingency arrangements.

311. In my judgment, these allegations should not be permitted to appear in any Shareholders Mismanagement Claim which requires to make out a contravention of Rule 2.01(2) as its basis, unless and until a plausible explanation is pleaded of the Shareholders' case as to how it is reasoned that they disclose an arguable contravention of Rule 2.01(2). As pleaded, I do not consider that they do. The allegations pleaded are plainly formulated as breaches of the Directors' Duties as company directors of LPCC. No doubt they are intended to form part of LPCC's claim in that respect, but that is a different matter.

312. It may be that the allegations made in Para 90 are not intended to amount to an allegation that the Shareholders, as well as LPCC, have a cause of action for breach of statutory duty against the Directors, based on these same matters. It may possibly be that the reference to "Authorised Funds Duties" in Para 90 was included in support of the Shareholders' claim against EFG, which I have struck out (although as the subsequent allegations are of the Directors' conduct rather than EFG's this might be thought unlikely). But on any basis, if the pleading of Para 90 is not intended to assert that the then following matters confer a cause of action under s 34 upon Shareholders against the Directors, it does not make that clear, and it implies the opposite.

313. If it is not the intention, (ie not the intention to plead that the Para 90 matters are asserted as constituent elements of a Mismanagement Claim, being a claim for breach of statutory duty, pursued by the Shareholders against the Directors) then as a matter simply of pleading, this can probably be addressed just by striking out the words "*of the Authorised Fund Duties and of*" in the first line, which would then effectively confine the subject matter of Para 90 to being part of the claim by LPCC.

314. If asserting such a cause of action is the intention, then the legal analysis which the Shareholders rely on to bring the facts subsequently alleged in Para 90 within the terms of the relevant statutory duty, and demonstrate its contravention, is totally opaque.

315. My conclusion, therefore, is that, as regards Shareholders' Mismanagement Claims, Paragraph 90 should be struck out, either for disclosing no reasonable such cause of action, or for being embarrassing for failing to plead the nature of any such alleged cause of action with sufficient clarity to enable its reasonableness to be assessed. How that is given effect to in the context the pleadings in the action as a whole is something to be dealt with later.

Paragraphs 91 and 92

316. These allegations relate to the conduct of the Directors after the death of Mr Becherini in July 2018, up to June 2019.

317. They are again prefaced with an allegation that they are relied on as breaches of Authorised Funds Duties, as well as Directors' Duties, although this time the Directors' Duties are pleaded first, which underlines the impression that they are here viewed as being the more important. Once again, though, the preamble text refers to the pleaded breaches as being the Directors' failures to

> "*act in the interests of the Fund, or to exercise independent judgment and/or proper care, skill and diligence in relation to the Fund*",

which are recitals of the principles of directors' duties in company law, and not referable to any duty laid down in the Rules. Para 91 pleads further contextual background for the subsequent allegations, being the Directors' knowledge of the importance of Mr Becherini to the enterprise from their knowledge of the structure of LLIL and LEDL, and the fact that Mr Becherini had advised that insurance should be taken out, at a cost of up to £1.8m, for the costs of replacing him in the event of his death.

318. Particular complaints about what the Directors did, or (mostly) did not do, are listed in Para 92 (a)-(i), as originally pleaded but expanded in one respect by a proposed amendment to insert a new Para 92 (g). I have listed the essence of these complaints in [100] above and I need not repeat them here. Having looked at them with care, none of them, in my judgment, can be said to disclose a supportable allegation that the Fund was being operated by the Directors "*otherwise than in accordance with [the OM]*" – indeed many of the allegations seem rather to be in the nature of allegations that it continued to be operated in accordance with the OM when emergency circumstances dictated that it should not have been.

319. In short, the same reasoning applies to Paras 91 and 92 as applies to Para 90. If it is intended to allege a Shareholders' Mismanagement Claim against the Directors under s 34 of the PoI in reliance on the matters there pleaded, then that is not itself clear, but if it is so intended, then the analysis by which it is asserted that the facts disclose both the application of a statutory duty under the Rules, and a contravention by the Directors of such duty, is far from obvious and is not sufficiently clearly pleaded.

320. I again conclude that as regards the Shareholders' Mismanagement Claims, Paras 91 and 92 should be struck out.

Conclusion on Shareholders' Mismanagement Claim

321. The upshot of the above is that the only allegation which I am willing to allow to go forward as a Shareholders' claim for breach of statutory duty under s 34 of the PoI as pleaded, at present, is that contained in Para 89 (c) of the Cause (as to which there is a proposal to amend a date in Para 89(c)(vi), which is obviously unobjectionable and which I will allow).

322. I am aware that I have tended to refer to the Shareholders' Mismanagement Claims as

a single "Mismanagement Claim" in places above, even though it is once again a set of individual claims being advanced by Shareholders on the basis of their individual investments. However unlike the Misrepresentation/False Statements Claim, reliance is not a necessary ingredient, and as the allegations of all component parts of the claim (a duty owed and a breach of that duty) apply similarly and equally to all Shareholders, and the quantification of any loss which might ultimately be held to have been sustained would seem to have to be quantified as a proportionate part of any loss to the Fund itself, the question of requiring any pleading of such a claim to deal with individual plaintiffs' circumstances does not arise.

323. The issue of correctly pleading the possible principles or bases for the quantification of recoverable losses upon Shareholder claims under s 34 might arise, however, and not least because its inter-relationship with the "no reflective loss" principle of company law may well have to be analysed, argued and established. However, I have not heard argument on this point as a matter of acceptable pleading, in the context of the effects of the substantive decision I have just made. (The potential difficult point seems to me to arise as regards conduct which would simultaneously be a contravention in terms of Rule 2.01(2) and also a breach of directors' ordinary duties to the company in company law – which I have found not to arise under this Cause as it is pleaded.) This will therefore be more conveniently left in abeyance to be argued if necessary, at a later time.

324. I would observe, though, that even if the Shareholders establish a cause of action for breach of statutory duty against the Directors, the question whether they can maintain that they have suffered loss as a result of this contravention may well be dependent on whether or how far LPCC succeeds in its claim against the Directors, since that would, obviously, affect the quantification of any such loss. This point may be relevant to case management issues.

325. Lastly, the question arises as to whether the aspects of the Shareholders' Mismanagement Claims which I have struck out are capable of being cured by possible plausible amendment. Part of my decision is that if the Shareholders are intending to assert any cause of action under s. 34 other than based on the central fact that the Fund operated without the benefit of any Key Man Insurance as promised in the OM, then the basis of any such further claim is simply not clear. It may be that on reflection, a clear and disciplined pleading of any such further claim could be formulated, and the Shareholders wish to do this.

326. If so, I consider that it would, in those circumstances, be appropriate to give leave for such an attempt to be made, even if I have my doubts as to the strength of any such claim, and my eventual order will deal with this.

(b) The <u>Company's</u> (LPCC's) Mismanagement Claim

327. I have examined the basis of LPCC's Mismanagement Claim as pleaded above, at [164] *et seq* and concluded that

    i. as actually pleaded, it is solely a claim for breach of the ordinary duties of company directors under company law,

    ii. the pleading does not in fact, allege any claim by LPCC against the Directors

for breach of statutory duty, but that even if it did:

iii. this would largely duplicate, but could only be narrower than, the claim for breach of ordinary directors' duties; it would not make relevant any factual allegations which would not be admissible as part of such a claim and it would not enlarge the scope of any recoverable losses.

A claim argued on the basis of statutory duty would therefore have added nothing of material effect to the claims based on the asserted ordinary duties of company directors, defined in the pleading as the "Directors' Duties", in any event. In the circumstances, therefore, I need only examine Paras 89 – 92 to consider whether these disclose a reasonable cause of action for breach of the pleaded Directors' Duties.

Approach

328. However, I do have to approach this claim by examining, again, what is actually pleaded, since that is the text on which LPCC now rests its case, and hence its assertion that its pleadings do disclose a reasonable cause of action and the Directors' Strike Out Application should be dismissed. I previously examined Paras 89 – 92 as support for a claim (the Shareholders' Mismanagement Claim) that they disclose a reasonable cause of action for breach of statutory duty to the Shareholders. This was an elaborate exercise, because the breach of statutory duty claim is not a common and familiar action, and required examination of facts to see if they arguably fell within the elaborate and quite nuanced parameters for such a cause of action. Such exercise was achievable, albeit regrettably laboriously. Breach of company directors' duties of skill and care is a far more familiar concept. Consequently, even though LPCC's claim for breach of Directors' Duties relies expressly on the matters alleged in the same Paras 89-92 of the Cause (see Paras 97(a), 98 and 101 of the Cause and [165] – [166] above), it is easier to evaluate the viability of the pleading of any such claim and this does not require to be analysed (and indeed should not be) at such a level of detail.

329. Therefore I now proceed to review the allegations at Para 89-92 and 97-98 to determine whether, as pleaded, they disclose a reasonable such cause of action on the above basis, but before I do so, it is convenient to make two procedural points.

Pleading point – Amendment or Réplique?

330. The first is a pleading point which has generated a good deal of controversy. In response to the Directors' complaints as to imprecision or lack of clarity about their pleaded case, the Plaintiffs made further factual allegations in their Réplique, and have subsequently contended that this is sufficient to cure the matter, if it requires curing. The Defendants object to this, on the grounds that if such matters are necessary (as the Plaintiffs apparently accept) to found the Plaintiffs' actual claims, then they can only be properly introduced as such by being pleaded in the Cause itself, and it is neither appropriate, nor good enough, to plead them in a Réplique; a Réplique is only a necessary reply to the Defences, and is not part of the Plaintiffs' cause of action. The Plaintiffs contest this, saying that these further assertions have only been raised in answer to the Defences, and if the relevant facts are pleaded somewhere then their cause of action is sufficiently pleaded, enough to go forward to trial.

331. Although this may seem pedantic, in my judgment, the Defendants are correct.

Defendants are entitled to have all the pleaded facts upon which the claimed cause of action against them is asserted to depend included in the Cause itself, all in one place, so they can answer them in Defences. Although nowadays this correct approach is often not adhered to, and in many instances this causes no practical problem, in a complex case such as this it can do so - and it certainly makes it difficult to consider and manage the pleadings if relevant assertions are not all to be found in the Cause. Answers to *Exceptions de Forme* will be read into the Cause and can conveniently be looked at beside the Cause, but having relevant averments elsewhere, in a Réplique, is not convenient, at all.

332. The function of the Cause is to set out all the facts relied on in support of the Plaintiffs' case. The function of the Defences is to define where those facts are admitted, denied, or not admitted (or cannot be pleaded to) and to assert any further facts upon which the Defendants' defences depend. With all the allegations in the Cause being responded to in the Defences as they should be, in a straightforward case the issues can all be identified after the Defences, by comparison of the two documents, and no Réplique is needed.

333. However, in some instances the Defendant asserts a fact in the Defences which the Plaintiff admits, but denies that it provides a defence because of some other fact not yet pleaded, on which the Plaintiff does not rely in support of his own primary case, but only to refute a matter of defence. This is known as "confessing and avoiding" and is virtually the only useful purpose of a Réplique (any averment in Defences which is not met by averments in the Plaintiff's Cause is in issue, which means it is treated as being denied). Consequently, a Réplique should be a short document. A Réplique should not be used for emphasising or elaborating the Plaintiff's case, or for pointedly "noting" statements made in Defences. Facts which are required to fill a gap in the Plaintiff's operative case should be, and indeed must be, pleaded in the Cause, by amendment if necessary. If facts which are required to fill a gap in the Plaintiff's case are pleaded in a Réplique then the Defendant has to refute these in a Duplique and the pleadings get unwieldy. Moreover, if the Plaintiff is allowed to plead in a Réplique facts upon which he has decided, belatedly, he needs to rely for his case, this can disguise the possibility that this may amount to a new cause of action which is prescribed, and should therefore not be allowed to be pleaded at all.

334. In the present case, after initial objections, the Plaintiffs gave way and produced proposed amendments to their original Cause in the draft Amended Cause which re-pleaded material they had previously put in their Réplique and to which the Defendants objected. That is the correct way of proceeding. It also means that I am concerned only with striking out the Cause, or elements of it, as should be the case, and I do not have to consider any question of striking out assertions in a Réplique.

Paragraph 89 – language

335. The second point is a preliminary point on the actual pleading of Paragraph 89. The overarching complaint in Para 89 is framed as being that,

> "*in breach of the Directors' Duties, the Directors failed to take reasonable steps to ensure that the Property Adviser, the Development Manager and the SPVs acted in accordance with the terms of [the OM*]"

with the subsequent sub-paragraphs being relied on as particulars of that assertion; they are introduced by the phrase *"in that…"*. Thus, as this paragraph is actually pleaded, syntactically, the subsequent assertions are relied upon as breaches of the requirements of the OM (but which the Directors owed an alleged duty to LPCC to prevent), rather than as being in themselves breaches of the Directors' Duties of care etc to LPCC.

336. If Para 89 is interpreted in that way, then the test is the same test here as I have already applied to that paragraph in relation to the Shareholder's Mismanagement Claim (see above) and would have the same result, ie that I would strike out all those sub-paragraphs except for 89 (c) for the reasons there given.

337. However I strongly suspect that Para 89 is not expected to be read in that fashion, but is intending to assert that the various matters alleged in sub-paragraphs (a)-(e) were, in themselves, direct breaches of the Directors' Duties owed to LPCC, without any intervening additional qualification that they were also being asserted to be "otherwise than in accordance with the OM" which is required if they are related to the statutory duty in Rule 2.01(2). I have therefore reviewed these allegations on the basis of the "direct breach" interpretation, and in the light of the submissions made variously in the case. I consider this to be entirely justified both as a matter of a practical and pragmatic approach to this pleading and also because the underlying matters alleged in Para 89 would, it seems to me, quite naturally be pleaded to form part of any complaint about direct breach of the Directors' Duties, in principle.

338. I note, in fact, that at one stage the Plaintiffs proposed to include in what is now Para 90 (but was then 91), a repetition of the matters now alleged in Para 89 (a) – (e) (which was then Para 90 (a)-(e)) but they subsequently thought better of this and deleted it. This is presumably because they thought it was not necessary. This reinforces my view as to the intention of Para 89, even though I consider that, as a technical matter of precise language, this may not have been achieved.

339. I now turn to my general approach to LPCC's Claim, as mentioned in [329] above.

Paragraphs 89 – 92 - general

Directors' submissions

340. Since the nature of a claim for breach of directors' duties of care, skill and diligence is well recognisable and understood, I can take the arguments raised by Advocate Jones as to why this claim by LPCC should be struck out quite broadly.

341. Advocate Jones' first general argument on behalf of the Directors contesting LPCC's claim for breach of Directors' Duties is that the Cause is simply unacceptably vague and imprecise, such that the Directors cannot reasonably tell exactly what factual allegations they are expected to defend themselves against under this claimed cause of action. He makes this general submission in two respects.

(i) Cause unacceptably vague and imprecise.

342. First he submits that the allegations of fault (effectively, therefore, Paras 89 - 92) are replete with generality, alleging breach of duty at a high level, without making clear and specific statements as to

a. what it is alleged the Directors actually did (or did not do), and when, which constituted the claimed breach(es) of their duties, and also

b. what it is alleged they ought rather to have done, and then

c. what it is alleged the counterfactual outcome would have been, as a result.

343. This deficiency was brought to LPCC's attention, through such complaints to the Plaintiffs generally, but that has not, he submits, produced any proper remedying of it. Such elaboration or examples as have ever been given, either originally or extracted subsequently, are, again, largely just general assertion. They are not located in point of time; they do not properly explain as a matter of practical fact rather than general rhetoric (eg *"drastic action to avoid disaster"*: Para 92(a)) the basis on which it is averred that certain actions were required; they do not explain how it is claimed that asserted failures by entities other than the Directors (such as the Development Manager, the Property Adviser, or the SPVs) are also asserted to constitute breaches of duty by the Directors themselves, etc, etc. They do not explain the complaints with sufficient precision to enable the Directors to identify what it is claimed they should, instead, have done at any particular time or juncture.

344. The Directors thus do not really know what charges they are actually facing. They therefore cannot compose properly focused witness evidence and it is not fair or correct that LPCC, through its Joint Liquidators, should simply throw out general allegations, refuse to provide any detail of the complaints made, and simply demand that the Directors respond by giving a blanket account of all their conduct so as to counter general, unfocused criticisms, which account the Joint Liquidators can then try to pick holes in.

345. He submits that this approach is abusive, and that it is even more so in this case, when the extent of the early voluntary disclosure (about 1,400 pages) which the Directors have given is taken into account. This provides a record of what the Directors, and others, actually did, consisting of what are believed to be complete Board minutes, the minutes of the Advisory Committee of the Property Adviser, communications by LPCC to the Investors, communications between two foremost investors (Open Funds and Kroma) to other Investors, as well as a record of the decisions taken by the Board of LPCC.

346. He submits that in the light of this material – and remembering also that all LPCC's records are available to the Joint Liquidators anyway – if LPCC cannot come up with a more precise account of what it asserts happened which was a breach of the Directors' Duties, and a specific case as to what it is asserting should actually have happened, and how this would have produced a quantifiably better financial outcome for LPCC in the end, the clear inference must be that LPCC does not have a sustainable case to plead; it is simply stonewalling when challenged, trying to keep the claim "on life support" as long as possible in the hope that something will turn up (or a settlement will be offered). Its complaint that there is no "factual context" available at the moment, (ie before disclosure and witness statements) which is made in Mitchell (2), is bare assertion, is not borne out by the facts, and does not identify any kind of factual context which could now emerge later, if the matter proceeded to trial.

(ii) No sustainable plea of causation or loss

347. Advocate Jones' second broad submission, although it leads on from the first, is that LPCC's pleading of claimed consequent loss and damage, in Paras 97 and 98 is not merely inadequate for not relating the loss and damage there described to the actual effects of alleged breaches, but pleads a basis for quantification of damage which is simply unmaintainable in law.

348. The pleading, (in fact repetitively in both Para 97 (b)) and (c) and 98 (a) and (b)) is that LPCC's loss is correctly quantified as being the difference between the professed targeted achievement of the Fund (asserted to be a 200% return after five years) which is then self-servingly defined as the "Original Projected Outcome", and the outcome now projected as being likely (ie loss of 90% of investor capital). The proposition is thus that if the Directors had performed their duties, instead of breaching them in the manners complained of, the company *would have* achieved that result. Alternatively, but only slightly less ambitiously, it is averred that there would have been a "substantial chance" - which is not defined – that it would have done so, or that a better outcome than the Current Projected Outcome would have been achieved - which is so vague as to be little better.

349. Advocate Jones argues that this method of claimed calculation of resulting loss by comparison with the designated "Original Projected Outcome" is simply unarguable as a matter of law, because it fails to identify any causal connection between the breaches alleged and the losses claimed, and does not even attempt to identify what losses were caused by the matters of claimed default. This approach has been justified in correspondence on the basis that the Plaintiffs' case is that

> "*the effect of the Professional Directors' breaches of duty taken together was to cause the Fund to fail with the loss of 90% of investors' funds and that the various negative impacts of those breaches interacted with each other to a material extent to produce that disastrous result"* (Plaintiffs' Response 14A *Exceptions de Forme*).

350. Advocate Jones submits, however, that that is simply not a maintainable plea of loss and damage; it could only be so if LPCC were accepting that its claim can only succeed if <u>all</u> the matters of breach which are alleged are proved, so as to justify that alleged consequence, but LPCC are obviously not accepting that.

351. Since LPCC has thus pleaded no coherent case as to loss and damage actually suffered as a result of the various alleged breaches of duty, it has (Advocate Jones submits) pleaded no reasonable case on causation, at all. With this being despite LPCC's having been invited to do so previously, he submits that therefore the claim by LPCC should be struck out.

352. He also criticises the pleading of causation and loss at a more detailed level. As examples, he points out that the Cause pleads (in particular in Para 90) various inconsistent general courses of non-negligent action, which would obviously themselves have had different and inconsistent potential effects on the financial outcome of the matter - quite apart from the fact that they would in no way have preserved the achievement of the "Original Projected Outcome" which is the only basis of the loss and damage claimed. He gives, as examples, the plea in Para 90 (h) of breach of duty by taking no sufficient or timely steps to

"*establish and seek investor approval for a revised investment strategy by which the developments (or some of them) could be proceeded with"*

in contrast to the plea in Para 90 (i) of breach of duty by not taking timely action to

"terminate the Fund … and to liquidate its assets so as to limit losses."

353. Neither of these courses could have produced the Original Projected Outcome, and they are mutually inconsistent. He further points out that assertions that no proper steps were taken to prevent, or subsequently to recover, improper payments made to the Development Manager refer *prima facie* to the activities of the relevant SPV, which had its own Board, and would still have a relevant cause of action itself, and it is not explained how this matter is thus argued to entail breaches of the duties of the Directors as directors of LPCC.

LPCC's submissions

(i) Adequacy of pleaded Cause

354. For LPCC, Advocate Bamford submits, in effect, that the Directors' professed difficulties are exaggerated for the purpose of pursuing a campaign to defeat the Plaintiffs' claims (including LPCC's therefore) procedurally before a trial, and are to be discounted on that account. Because the facts of the matter are "*relatively complex*" he submits that the interaction of the different problems affecting the developments will be a matter of expert evidence in due course, and LPCC should not be required to predict the content of such evidence in their pleadings, provided the general facts relied upon, and how they may be said to give rise to the claims made, are sufficiently clearly shown, which he submits they are.

355. He submits that (contrary to Advocate Jones' submission) in a claim such as this it <u>will</u> be necessary for the court 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."

356. I must say here, that I find this a startling proposition, in fact so startling that I thought at first that there might be a typographical error with the word "not" having been omitted in the preface. 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.

357. If this submission is intended to be that once some arguably negligent act or acts are pleaded against the Directors by LPCC, then the Court will embark on a roving inquiry to examine all that went on with regard to management of the Fund's enterprise and determine and give judgment on what fault may be revealed then it is emphatically wrong. If all that is meant is that any allegations of misconduct by the Directors will require to be evaluated in context, which will mean some examination of the history and surrounding circumstances, then it is probably unexceptionable, if unhelpfully dramatic. But the point is that any such examination, even if extensive, will still be anchored to the particular allegations of misconduct which have been previously

identified as being in dispute and requiring examination, and will not be a general enquiry. Of course it may be impractical, in a complex case to set out all the different counterfactual scenarios which various findings of fact might produce, so as to calculate their consequences in a vacuum, before the trial is held. But that does not mean that either the Plaintiff can, or the Court does, go into the trial simply to find out whether anything culpable happened. The principle remains that a Defendant is entitled to know, with a reasonable degree of particularity, what factual assertions and consequent charges he is going to have to contend with at trial, so that he can prepare his case and his evidence, pertinently and effectively, and it is not good enough for a Plaintiff to make general allegations of breach of duty and then object that requests for reasonable clarification are requests for evidence which will emerge in due course.

(ii) Adequacy of pleading of causation and loss

358. As regards the criticism of the pleas of causation and loss, Advocate Bamford simply submits in effect, that the present formulation of loss and damage is adequate for the present stage of the pleadings. It is not necessary to "disentangle" the precise effects of particular breaches of duty, for the purpose of quantifying loss, when these will have interacted, making this practically impossible. He summarises LPCC's position as being that it is plainly arguable that "but for" the breaches of duty, alleged and which must be here assumed to be provable, the performance of the Fund would have been substantially better, and the pleading of loss and damage, as it stands is sufficient to cover such an averment.

359. I thus understand him to mean that any more precise quantification of the loss claimed by LPCC can be made at a later stage of the proceedings, so that a demand that it be done now is unnecessary and unreasonable, and also that, in any event, the "*loss of chance of achieving the Original Projected Outcome*" plea, at the least, is an adequate pleading now, in all the circumstances. The question whether any other, closer or more precise method of quantifying loss might be more appropriate does not reasonably need to be considered or advanced by LPCC until after future consideration of facts which may be revealed up to or at the trial itself.

Discussion and conclusions

(i) Adequacy of pleaded causation/quantification of loss - Paras 97 and 98

360. It is simpler and more convenient to deal first with the question of the Directors' challenge to the adequacy (or otherwise) of the plea of causation and loss, set out in Paras 97 and 98 of the Cause. The basic question is whether these paragraphs plead a "reasonable cause of action" as regards this essential element for a successful claim for damages for breach of duty.

361. As to this I broadly accept Advocate Jones' arguments. I do not consider that the present pleading does assert a properly maintainable cause of action and, insofar as it may potentially do, it is embarrassing for lack of reasonable particulars.

362. The allegation of loss and damage in Paras 97(b) and 98(a) first pleads LPCC's primary assertion that "but for" the breaches of duty alleged in the Cause, the Fund (which is here effectively equated to LPCC) "*would have*" achieved the ambitious rate of return of "*approximately 200 % on capital invested in the fund*" (which I prefer to call "**the**

aspirational return" rather than the tendentious "Original Projected Outcome"). This is implicitly, therefore, notwithstanding the death of Mr Becherini. In my judgment, this proposition fails, whether it is regarded as an assertion of causation, or an assertion of appropriate quantification of actual losses suffered. It is neither.

363. As an assertion of causation, it is entirely speculative, and has no foundation in reality. Taking what is clearly the most substantial potential criticism of what happened with the enterprise, namely the lack of Key Man insurance, if this came about as a result of a culpable failure by the Directors, then to ascertain what (if any) loss this failure caused to LPCC one would need to examine what would most likely have happened if appropriately careful insurance had been obtained - but insurance protects against losses; it does not (except perhaps in highly exceptional, costly and specific instances) guarantee profits. Furthermore the aspirational return for the enterprise, which is relied on as a basis for calculation of supposed loss, plainly did not depend solely on Mr Becherini's personal flair and expertise, but also on matters outside the control of Mr Becherini or the Directors, such as the availability of opportunities in practice, the trouble free execution of construction contracts, the vagaries of the high-end residential market in London, and even, a degree of luck. The suggestion therefore, that the Directors' alleged breaches of duty caused the Fund not to achieve the whole of its aspirational return, or even that it is "*likely*" that it caused the Fund not to achieve this return is, in my judgment, unarguable because it is simply fanciful, and it must be struck out.

364. The second "*alternative*" pleading of such loss and damage, in Paras 97(c) and 98(b), is put as being only the "*loss of a substantial chance*" that the Fund would have achieved this aspirational return. Looked at one way, this is simply the repetition of the previous averment that the breaches of duty were the "likely" cause of the Fund's failing to fail to do so, already considered. Looked at another way it is attempting to shift the assessment into a "loss of chance" quantification exercise, and suggest that the comparison between the aspirational "Original Projected Outcome" figure, and the "Current Projected Outcome" figures should be taken, but then discounted by an appropriate factor to reflect that the achievement of the aspirational return was only the subject of a substantial chance by reflecting the degree of such alleged "substantialness" mathematically.

365. Whether this could ever be an appropriate method of quantifying damages here is highly questionable. True "loss of chance" assessments are appropriately made where there is a definable opportunity, ie an actual chance, of which the Defendant's impugned conduct has deprived the Plaintiff. The value of the potential fruits of that opportunity can be ascertained and then discounted to reflect the likelihood of the Plaintiff's ever gaining those fruits in practice. The paradigm example is the defendant's negligence causing the plaintiff to lose the opportunity to compete in a beauty contest where her "loss of chance" damages were assessed as the value of the prize discounted to reflect the odds of her not winning*: Chaplin v Hicks* [1911] 2 KB 786. The "loss of chance" damages thus reflected the loss of the value of the chance itself. That is a very different situation from the present, and I refer, as I did in *Carlyle Capital Corporation Limited v Conway* (2017) Guernsey Judgment 38/2017 at [2564], to the helpful passage from Patten LJ's judgment in *Vasiliou v Hajigeorgiou* [2010] EWCA Civ 1475 at [25] that

"*Where the quantification of loss depends upon an assessment of events which did not happen the judge is left to assess the chances of the alternative scenario he is presented with. This has nothing to do with the loss of chance as such. It is simply the judge making a realistic and reasoned assessment of a variety of circumstances in order to determine what the level of loss has been."*

366. The assessment of damages in this case is quite obviously of this latter kind, which is why I question whether it is even viable for LPCC to contend that an assessment should take place on the basis of the "substantial chance" exercise here suggested. Moreover, even taking this at its face value, as pleaded, it appears to me to be only weakly arguable on any basis. "*Substantial*" is an imprecise word, but it plainly connotes something sizeable and weighty, even if short of 100% It must, in my view, connote something more than 50%, because over 50% merely connotes that it would be "more probable than not" that "but for" the alleged breaches of duty (and despite the death of Mr Becherini) the Fund would have achieved the aspirational level of return. Even this appears to be a highly ambitious assertion and anything below a 50% likelihood could scarcely be regarded as "*substantial*" and would really descend simply to the level of wishful thinking or speculation.

367. That is not, though, the end of the matter, because Paras 97(c) and 98 (b) contain a third proposed argument of causation and quantification, by sliding in the alternative that the calculation should be assessed, not on the basis of a chance that the Original Projected Outcome would have been achieved, but only on the basis that "*a better outcome than the Current Projected Outcome would have been achieved"*. (In Para 98 (b) this is relaxed still more, to being that a better outcome than the Current Projected Outcome "*could*" have been achieved.)

368. That method of assessment, whether or not prefaced by a reference to a "*a substantial chance*", is actually invoking the conventional approach to causation and quantifying damages in any event. It invites comparison between the actual outcome and an assessment of how much better this would have been but for the alleged breaches. The "how much better" is the equivalent of "how much losses would not have been made". But this is the amount of losses caused by the breaches, which is the conventional assessment of damages.

369. The upshot of the above, in my view, is as follows. LPCC's averment of causation and quantification of damage in Para 97(b) and 98(a) is unmaintainable because it is fanciful. Paras 97(b) and 98(a) will therefore be struck out. If that were the only plea of causation and measure of damage, then the whole claim would fall as a result. However it is not.

370. LPCC's averment of causation and quantification in Paras 97(c) and 98 (b) is extremely weak as to the assertion of a "*substantial*" chance of the Original Projected Outcome being achieved "but for" the directors' alleged breached of duty, but I would hold that LPCC ought not to be prevented from advancing such a claim provided it gave proper particulars as to what was meant by the word "substantial", and it would then, in addition, be properly confined to making its case based only on the assertion actually made - namely that LPCC had indeed had such "*substantial*" (as defined and/or explained) chance of achieving the Original Projected Outcome "but for" the Directors' alleged breaches of duty; LPCC would not be permitted to argue for any other basis of causation, or assessment on the basis of such an averment.

371. As to the further, alternative assertion of the loss of chance of merely achieving a "*better outcome than the Current Projected Outcome*", that averment does disclose a "reasonable cause of action" in principle, because it actually avers only standard principles of determining causation and assessing the loss, or degree of loss, actually caused by the breaches of duty in question. It is, however, unreasonable and embarrassing as deployed in this case, for being entirely devoid of particulars as to how it is proposed to be asserted or argued that such a "better" outcome would have occurred, or the best particulars which can be given of the kind of level of damage contended for.

372. Based on the above, therefore, Paras 97(c) and 98 (b) will be struck out, but potentially with leave to attempt to amend and re-plead such sub-paragraphs so as to disclose or explain the case which LPCC will advance, on either separate basis, with sufficient particularity.

(ii) Adequacy of pleaded breaches of duty - Paras 89 - 92

373. As stated above, I consider it appropriate to stand back and take a less granular approach in considering strike out of LPCC's claim than was appropriate in dealing with the Shareholders' Mismanagement Claim.

374. To cut straight to my conclusions on this aspect, I hold that, in general principle, LPCC does disclose a reasonable cause of action (ie one which is arguable with more than a fanciful prospect of success) in respect of directors' duties with regard to many of the matters pleaded in Paras 89 - 92, provided these are properly particularised. In explaining my reasoning I can review the allegations as grouped under the headings identified as arising in the Cause by Advocate Jones in his written submissions.

(a) Absence of Key Man insurance.

375. In fact, this seems to me to be the central and most substantial issue in the whole case.

376. In my judgment it is undeniable that there is potentially a reasonable cause of action in this point. It is plainly arguable that the holding of appropriate Key Man Insurance (i) would be a matter of importance for the interests of an enterprise such as LPCC/the Fund in all the circumstances pertaining, and (ii) that this would be something of sufficient significance to require consideration or monitoring at Board level. Its absence therefore does raise, in my view, potential criticisms or questions to be answered, such that this issue could found a reasonable cause of action against the Directors.

377. Moreover, this is entirely independent of the question of the representation in the OM that Key Man Insurance would be obtained (even if by the Property Adviser), although the fact of such representation tends to reinforce the importance of this matter. The question is whether Key Man Insurance needed to be taken out for the protection of the interests of the enterprise, in any event, by some means, and that question is entirely separate from any question of whether this had been promised to shareholders in promotional documentation.

378. Having become aware of my concerns regarding the insurance aspects at the hearing, Advocate Jones submitted a further note to address these, and maintain his submissions

as to why the claims should be struck out, with particular regard to arguments raised in relation to Key Man insurance. However, this note was inevitably related to all the claims to which Key Man Insurance was relevant, and thus included both the Shareholders' Misrepresentation Claim, the claim that the Directors incurred liability (to someone) for the failure by the Property Adviser to obtain Key Man Insurance, and the later claim, apparently sought to be made by amendment to the Cause (but having previously been referred to in material contained in the Plaintiffs' Réplique) that the Directors ought to have caused LPCC to obtain Key Man Insurance.

379. I will not deal individually with the points which he makes here. Some were plainly directed only at the Shareholders' Mismanagement Claim, and could only be so directed. None of the remainder of his substantive arguments satisfied me that I could and should strike out LPCC's claim in this regard for standing no real prospect of success. They only convinced me, in fact, that they were points which could only be properly decided at a trial. I should just mention three points here, though.

380. The first is that he laid great significance on the fact that the Directors were "all non-executives", as a factor tending to absolve them from any duty to consider the question of Key Man Insurance, because that would have been "micro-managing" the duties of the Property Adviser. It does not seem to me that this was necessarily the case at all. Even Non-Executive Directors have duties of general oversight of the company's interests, and an irreducible minimum obligation to use their skill and care to check and ensure that those interests are suitably considered and protected by those exercising executive functions. Quite what being a "Non-Executive" director entailed in this case is also not clear, as Mr Becherini himself was also described as such in the OM (p 26).

381. Second and linked to this, Advocate Jones appeared to go so far as to suggest that, with the structure of the Fund being that of individual developments being carried out in separate SPVs, it was difficult to see that LPCC would have needed a key man policy of its own. Again, I do not see that this assertion is at all self-evident, as the losses eventually suffered by LPCC and the Fund would rather tend to show. Moreover, the Property Adviser's own personal interest in Key Man Insurance *for itself* would really be entirely different from the interest of the Fund in having such Key Man Insurance in place to benefit the Fund's interests. On any basis, though, this all confirms my view that these points are not matters capable of founding any summary judgment or strike out.

382. Third, although he noted that there was a distinction between the question of the Property Adviser's obtaining Key Man Insurance as asserted in the original Cause (Para 89) and the allegation that this should have been obtained for itself by LPCC, which was sought to be inserted by amendment (Para 90 (d)) in the Amended Cause, I did not understand Advocate Jones to argue that this amendment should not be permitted because it raised a new cause of action which was prescribed. For the avoidance of doubt, this was, in my judgment, correct. In my judgment any such allegation certainly arises sufficiently from the same or substantially the same set of facts as those underlying the original Cause that I would have had no hesitation in permitting this new allegation to be made, even if it might be argued that it constituted a new cause of action.

(b) Failure to recognise and pay requisite attention to Mr Becherini's state of

health

383. This point is obviously linked to the question of taking out Key Man Insurance, and the factual situations necessary for the consideration of both points will substantially overlap. However, it also covers, independently, any question of precautionary measures other than the taking out of insurance, to protect the Fund against possible adverse consequences in the event of Mr Becherini's death.

384. The Directors argue that this claim is weak, rather ridiculing the notion that the Directors could reasonably have discerned, in advance, that Mr Becherini was ill and perhaps likely to die. They emphasise considerations of personal privacy and the singularity of the attempt to insert by amendment (Para 51(c)) that by July 2017 Mr Becherini was "*displaying an unhealthy pallor*" - without particularising to where and to whom this was supposedly displayed - as the basis for assertions that the Directors were thus on notice that he was at a heightened risk of death.

385. Whilst I have formed the impression that this claim is not strong, I cannot go so far as to deem it to be unarguable, and I consider that it may well be appropriate that it should go to trial. It raises questions of how far co-directors have a duty to monitor, independently, the state of health of a co-director. This highlights, incidentally, a feature of this case which I have found increasingly bizarre, namely that Mr Becherini is treated as if he were an independent third party, when he was in fact the fourth Director of LPCC, at the relevant time, and one might think that the state of health of a director was, first and foremost, his own responsibility to take into account. It also raises the question, how far, as part of his duty of care, a co-director is obliged to second guess statements made by a fellow director about his own health - and this in turn highlights the fact, which might be thought strange, that neither Mr Becherini's estate, nor indeed Mr Hill, is involved in this action, (although it is, of course, not my function to speculate on any reasons for this; my only function is to assess the claims actually being made).

386. In conclusion, I consider that the matters alleged in the Cause going to this complaint by LPCC do disclose a possible cause of action which, though probably far from strong, is not unarguable, and should potentially be permitted to proceed.

(c) Other matters are all "business judgments"

387. Advocate Jones' final group of allegations which he says do not meet the "more than fanciful" test for being permitted to proceed as an arguable cause of action are various allegations as to what the Directors did or did not do, principally after the death of Mr Becherini, which he submits are plainly "matters of business judgment", well within the range of reasonable decisions which could be arrived at without negligence in the particular situation - plainly a rather extreme and singular situation, having been brought about by the unexpected death of the central executive directing mind concerned in the Fund's business - and therefore not matters which could, on fair examination, be seen to be capable of founding a cause of action for breach of the Directors' Duties of skill care and diligence. The allegations are such as

- failing to ensure that no improper (fraudulent or excessive) payments were made to the Development Manager, eg by appointing a supervising quantity surveyor;

- failing to take steps to recover any such improper payments
- relying on Savills' initial report when this should have been seen to be superficially based;
- relying on Mr Hill when he had no sufficient competence or knowledge;
- failing to appoint a replacement project manager for the developments;
- failing to expedite the approval of an alternative investment strategy;
- failing to wind up the Fund expeditiously and efficiently.

388. Advocate Jones, for the Directors, submits that not only are these all matter which are unacceptably vague allegations, but they are all, also, obviously matters simply of business judgment in difficult circumstances, and plainly not as extreme as to be reasonably held to be negligence. He points to the approximately 1400 pages of advance disclosure by the Directors as demonstrating this, and that they have nothing to hide and that everything they did was reasonably careful and skillful and diligent.

389. I have looked through these documents. Whilst they might suggest that the claims are weak I find it impossible to say that these documents demonstrate that they are fanciful claims, without doing what I am emphatically not permitted to do, which is to conduct a mini-trial of these issues (or, and probably worse, on some only of these issues) on an interlocutory application.

390. The matters raised in these allegations also raise questions of how far directors of a holding company (here LPCC) are responsible for what goes on in an independent subsidiary company (here, the SPVs). Quite apart from any questions of the legal principles, the application of these will be very much fact and case specific, as issues about the proper extent of directors' responsibilities will always be, since they depend so much on the individual company management structures involved.

391. I conclude, therefore, that these various and miscellaneous allegations are potentially capable of supporting a reasonable cause of action by LPCC against the Directors for breach of duty, so long as they are properly particularised.

392. Pulling together the arguments as to the cause of action by LPCC against the Directors being unacceptably vague and generalised, Advocate Jones finally argues that if those claims have not, by this stage, been sufficiently particularised to enable his clients to be able to glean, clearly, what case LPCC requires the Directors to meet, both in fact and legal principal, then this shows that those allegations actually cannot be adequately particularised, because they are mere assertion. They should, therefore, be struck out, at this stage, and without any permission to attempt to rescue them by amendment.

393. I disagree, but not without hesitation. My hesitation is brought about by the very way in which the claims in the Cause have been both drafted and pursued, in all the circumstances. Several allegations have had to be withdrawn for being accepted to be in error and unsustainable. Others (such as the extraordinary allegations of

quantification of damages) I have found to be grossly exaggerated and unsustainable. This has left me uneasy about the extent to which the allegations made on the part of LPCC are the product of a true belief that a cause of action against the Directors exists or are, rather, proceedings launched on a flimsy basis, by disappointed investors looking for ways of recovering their losses from somewhere, in the hope that their complaints may be strengthened subsequently if they can be kept going, or may be sufficiently burdensome to the opponents to elicit an offer of settlement. However, and benevolently, I will ascribe that impression of inefficiency and confusion to the problems that have been created by the Cause overreaching (in my view) its appropriate ambit, and I will assume that it is possible that when the claims of LPCC against the Directors are focused on this cause of action alone, there may be a properly justiciable claim and I have also concluded that LPCC should be given the opportunity of making such claim, if it can.

394. In permitting this, and in the disposal which I am going to direct, I do bear in mind that the Joint Liquidators have not only had all the early voluntary disclosure materials which the Directors have produced to them, but also have access to all of LPCC's own records and documents. If, therefore, there really is a properly maintainable case which LPCC can bring against the Directors, then I am sure there is sufficient material available to enable it to be adequately pleaded. This may well require some disciplined and diligent work on LPCC's behalf, but so be it.

Conclusion

395. My ultimate conclusion, therefore, as to the Directors' application to strike out LPCC's Mismanagement Claim is 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. In principle I will give directions to enable the matters pleaded at Paras 89-92, and 97(b) and (c) and 98 (b) to be amended, if they can be, to set out a sufficiently particularised case, but this is subject to three further matters, which I think demand particular treatment at this stage.

Paragraphs 89 – 92 – Specifics

396. These topics are (i) matters which I consider do not disclose a reasonably arguable cause of action at all, (ii) matters which I consider are so poorly made out as to be embarrassing and (iii) proposed amendments which appear to allege fresh causes of action which had become prescribed by the time of the Plaintiffs' Application to Amend.

(i) Allegations not arguable

397. I have formed the view that certain allegations in the Cause are simply not arguable as breaches of the Directors' Duties, and that they should therefore be struck out in any event. They are the following:

Para 89 (a)

398. The essence of this allegation is that Mr Becherini's giving personal guarantees in respect of loans made by banks to the relevant subsidiary development company SPVs was detrimental to the interests of LPCC and the Fund, and it was negligent of the Directors to allow this to happen.

399. Viewed simply as an allegation that it was a breach of the Directors' Duties to LPCC, in respect of their conduct of LPCC's business generally, to permit Mr Becherini to give a personal guarantee in respect of the envisaged loans made by banks to the SPVs I consider this allegation to be unarguable. (This question is not quite the same as any duty not to act so as to cause that business to operate otherwise than in accordance with the OM, which I have previously considered.)

400. No circumstances are pleaded which begin to suggest that this would be detrimental to the interests of the business of LPCC (or the Fund). The only pleaded allegation that there was any potential detriment to LPCC is the wholly unparticularised and unsupported assertion that the "*apparent need*" for this "*called the viability of the Fund's investment strategy into question*". The material in the Réplique does not go any further and does not suggest that this allegation might be capable of being rendered arguable by amendment. In the absence of any pleaded fact showing why there should be any reason for the Directors of LPCC to have any financial concern for LPCC at Mr Becherini's giving such a guarantee (and even ignoring the proposition that it would be perfectly normal practice for him to do so, which seems reasonable but could possibly be disputed) I conclude that this assertion is without pleadable foundation, and stands no real prospect of success.

401. That is quite apart from the further obvious, but linked, point that there is no pleading of how any loss to the Fund occurred, could have occurred, or even could have been expected to occur, as a result of Mr Becherini's giving such personal guarantees. (I cannot see that the Réplique made any attempt to deal with this point.)

402. I should add that even if the Directors had not specifically turned their mind to the point, it would be necessary for LPCC then to make out the case that if they had done so, they would have had to take steps (though, again, quite what steps they could or should have taken is not clear) to prevent Mr Becherini's giving personal guarantees because no reasonable Board could have come to the decision that it was not necessary to act. Again, this is, I find, unarguable.

403. For all the above reasons, I will therefore strike out this sub-paragraph as a foundation for a claim of breach of Directors' Duties by LPCC, and I will not allow it to be re-introduced by any amendment.

Para 89 (b)

404. The essence of this allegation is that "allowing" Mr Becherini's death to be an event of default in connection with the bank loans taken by the SPVs was a breach of the Directors' Duties to LPCC.

405. Once again, as an assertion that it was a breach of the Directors' Duties to permit, or not to take steps to prevent, this, I find it to be unarguable. (I note that there is dispute in any event, about whether this happened with all three SPVs, rather than simply BG but I leave that out of account.)

406. There is, once again, no factual plea but merely assertion, that doing so was contrary to the Fund's interests and could not reasonably have been seen to be otherwise. I consider that assertion to be fanciful. The only aspect which begins to have some weight is a plea contained only in the Réplique (at para 14 (c)) that it was a breach of duty to permit Mr Becherini's death to be an event of default under loan agreements *without obtaining insurance for the benefit of the Fund or the SPV* (presumably against Mr Becherini's death) but that is a different matter, and actually resolves into the allegation that the Directors' conduct with regard to there being no insurance was negligent, which I have accepted would be an appropriate claim to proceed, in principle.

407. I will therefore, again, strike out this sub-paragraph as a foundation for a claim of breach of Directors' Duties by LPCC.

Para 89 (d) (i)

408. The essence of this allegation is that the Directors were negligent in not ensuring/procuring that a full-time architect was appointed for each project rather than engaging them "piecemeal", thereby, it is asserted, causing hindrance and damage to the design process and ultimately failures in the ultimate projects. There is no time frame pleaded for this allegation, although by implication it dates from the inception of any project to the time of failure of the enterprise.

409. To sustain this argument as a breach of the Directors' duties to LPCC it would be necessary for LPCC to satisfy the court that the only reasonably careful and skillful decision for the Directors to have taken was to make, or (somehow, and it is not suggested how) to insist on the SPVs making, such full-time appointments. If doing so were only a possible reasonable way of proceeding, then this course was a matter of business judgment only by the Directors and as such it would not be a breach of their Directors' Duties. Once again, even if the Directors had not actually turned their mind to this point but it could be argued that they should have done, it would still be necessary to prove that had they done so, their only reasonable decision would have had to be to ensure such an appointment.

410. For LPCC, Advocate Bamford argues that this is an allegation which should go to trial. For the Directors, Advocate Jones argues that it is one of (he says many) points which complain at what were obviously perfectly possible reasonable business judgment decisions at the time, and that it should be struck out.

411. In my judgment, this allegation cannot stand as an allegation of breach of the Directors' Duties which has any real prospect of success. Whether or not I would have come to that conclusion absent any factors tending to weigh in the opposite direction I do not know, but I note that, firstly, the OM itself does not state any such procedure as being envisaged as the *modus operandi* for the Fund, and second that the very obvious recognition of the extensive practical involvement of Mr Becherini in itself suggests that it was expected and understood that he would himself be playing the role of supervising architect even though others might be appointed to assist.

412. In consequence I just do not see that it is arguable that the enterprise so vitally required the appointment of a full-time architect to each of the development projects that it was negligent of the Directors of LPCC not to appreciate this and to put it into practice, as

the only reasonable course to adopt. I do not think that the Directors should, therefore, be troubled with having to defend this allegation, which I consider to be without merit.

Decision

413. I will not, therefore, allow the above three sub-paragraph allegations to proceed and I will strike them out. I have concluded that there are no other specific allegations within Paragraphs 89-92 which I regard as so sufficiently fanciful that I should strike them out completely.

(ii) Allegations which are embarrassing - Paragraph 89 (d) (v)

414. A proposed amendment to Paragraph 89 (d) seeks to insert a new sub-paragraph (v). The basic complaint in this is that the Development Manager's Professional Indemnity Insurance contained in the JCT construction contracts with the SPVs in relation to NHG and BB "*wrongfully*" excluded any liability for any claims made by LPCC itself, or the SPVs. This allegation is syntactically pleaded as a breach of the duties of the Development Manager under the OM (see preamble to Paragraph 89 (d)). However, it is alleged that the Directors knew or should have known this "*at all material times*" (not specified), which is presumably the foundation for an allegation that this situation constituted a breach of the Directors' own duties, to LPCC.

415. I have already pointed out that the entire Para 89 appears strictly to be pleaded as a breach of the Directors' statutory duties under s 34 of the PoI and Rule 2.01(2), but that I would ignore any limiting implications of this for the purpose of considering whether the substantive matters alleged disclosed any reasonable cause of action by LPCC for breach of Directors' Duties (see [337] above). However, the whole structure of this pleading creates confusion, on any basis, as to exactly how it is being argued that the substance of the complaint gives rise to a breach of the Directors' Duties, at all.

416. Advocate Jones challenges this paragraph largely on the basis that it is prescribed. He first submits that this pleading is clearly a new claim, (because nothing previously alleged has required investigation of the terms of the Development Manger's professional indemnity insurance, and possibly not even the detailed terms of the JCT construction contracts entered into by the SPVs), and that it is so confused and imprecise that it should not be given the benefit of any doubt as to whether it could be said to fall within the ambit of any existing claims, or whether or not it is time-barred. Furthermore, there is no allegation of causation or of any resulting damage.

417. He also points out that the JCT contract for NHG was entered into on 7 November 2016, which is more than 6 years prior to the Plaintiffs' Application to amend, so that if that is the relevant date, the claim is time-barred, and he submits that it is therefore a new claim which ought not to be permitted to be raised, in the circumstances.

418. I will not allow this amendment to be made, certainly not in this form. I deal with this paragraph here because my primary reason for doing so is the deficiencies of the allegation as a matter of proper pleading, although I am also inclined to agree with Advocate Jones' submissions with regard to prescription.

419. I consider the terms of the pleading to be embarrassing, for being unacceptably vague

and completely unfocused as to, at least,

- what exactly are the terms of the Development Manager's agreements with the SPVs or its agreements with its insurers which are relied on;
- what was the default as to which it is being alleged that LPCC or the SPVs would and should have had a claim on such insurance;
- what it is actually alleged the Directors should have done or not done, or (and this may be the same thing)
- how it is alleged that the matters complained of, being acts between others, are argued to give rise to a claim by LPCC in respect of its own Directors' Duties;
- what are the actual "material times" which are prayed in aid; and
- what loss it is alleged that LPCC suffered as a result of any such breach.

I would therefore strike out this charge on the above grounds.

420. In the absence of any plea of actual facts which could finally complete a good claim for a cause of action in negligence in this respect, even if one were otherwise made out, I would also disallow this claim for not disclosing an arguable cause of action.

421. Lastly, this would, in my view, certainly be a new cause of action. Its subject matter is distinct from that of any claim or allegation already pleaded. I agree that if the relevant date for prescription purposes is that of the relevant JCT contract then the cause of action would be time-barred. This would apply to any claim in respect of NHG and I would therefore certainly disallow the new pleading in relation to this on prescription grounds. I suspect it does not apply to BB (as the date of the JCT contract would have been later) but I still would not allow this new claim in respect of BB, because its lack of focus renders it incomplete and totally confusing on any basis. It is not raised in respect of BHG.

422. I will not, therefore, allow this amendment to be inserted into any amended form of the Cause. If it is believed by the Plaintiffs that the set of facts founding this paragraph can be formulated into an arguable case which is not prescribed, then they must make a separate application.

(iii) Allegations which are prescribed

423. I have dealt above with the Plaintiffs' Application to Amend where this has been necessary in the context of considering the Defendants' Applications for Summary Judgment/Strike out, and I am otherwise treating the draft Amended Cause as if this is the pleaded Cause upon which I need to make my eventual directions. However, there are certain amendments sought in the draft Amended Cause which the Directors submit should not be permitted because they raise new causes of action which were prescribed by the time of the Plaintiffs' Application to Amend, although they might not have been prescribed at the time of the original issue of the Cause, and they ought not to be permitted for that reason. The amendments so challenged by Advocate Jones are three.

Preamble to Paragraph 89

424. The first was the amendment sought to be made to the preamble to Para 89 of the Cause, to introduce a claim that the Directors ought to have inserted termination clauses into the terms of the Property Adviser's and Development Manager's appointments.

425. I have already considered this above at [281] – [288] and have determined that this amendment does introduce a new cause of action after it has become time-barred and it will not to be permitted.

Paragraph 89 (d) (v)

426. I have dealt with this above, at [414]-[422], as my preferred grounds for disallowing this amendment are the embarrassing nature of the pleading.

Paragraphs 90(d) and 51A(b)

427. Para 90(d) seeks to amend the Cause by inserting a new paragraph containing an allegation that it was a breach of the Directors' Duties not to obtain Key Man Insurance in relation to Mr Becherini directly for LPCC itself ie distinctly from the Key Man Insurance which the Property Adviser was supposed to have instituted, as foreshadowed in the OM. Part of the facts relied on are recited in a new Paragraph 51A(b).

428. Advocate Jones submits that this is an allegation of a new cause of action (because of the difference in the insured party). He submits that it is not clear from the amendment what LPCC's case is supposed to be as to when such insurance ought to have been taken out, but that any such cause of action is potentially time-barred because it relies, at least, on matters which were noted and raised at Board Meetings in August 2017, and that as the previous allegations did not require any investigation of what steps the Directors ought to have taken in obtaining a policy for LPCC itself, or what terms might have been available, this allegation does not arise out of the same or substantially the same set of facts as claims previously pleaded, and as the Directors have an arguable prescription defence the amendment ought not to be allowed .

429. If it is correct that the cause of action accrued on 17 August 2017, then, in my judgment, the allegation is not, in fact, time-barred, because the Plaintiffs' Application to Amend was made on 11 July 2023, and that is the relevant date for considering the position, not the later date of any hearing.

430. However, I have also come to the conclusion that I should allow this amendment in principle, whether or not the cause of action might technically have become prescribed by 11 July 2023, because it does arise out of the same, or sufficiently substantially the same, set of facts as facts already pleaded. The matter of Key Man Insurance – insurance on Mr Becherini's life – for the benefit of the Fund (effectively LPCC) and its absence, has always been a major issue, probably the major issue, in the pleaded case, even if it was initially considered and raised on the basis that it would be obtained by the Property Adviser. But the purpose was obviously, always, to obtain it for the benefit of the enterprise. Indeed, the Insurance Amendment itself stated that the Property Adviser would obtain such insurance "*to protect the fund from financial*

losses".

431. The question of the absence of such insurance for the benefit of the Fund has therefore always been a central component of the complaints being raised in this action, and I do not consider that the fact that it was initially envisaged that it would be obtained through the Property Adviser to be that crucial. It is certainly, I consider, not so crucial or significant a point that it makes the complaint that no insurance was obtained by LPCC itself so very different, that it would be unfair or unreasonable to allow that way of advancing what is effectively one and the same claim, to be permitted.

432. I will, therefore, permit the amendments to Paragraphs 90(d) and 51A(b).

Conclusion on LPCC's Mismanagement Claim

433. My conclusion is that LPCC's claim does raise arguable cause(s) of action, but that there are deficiencies in the pleadings (whether treated as the existing Cause or the draft Amended Cause) which mean that (i) some parts are struck out on a final basis (or the amendment applied for is not allowed) and (ii) some parts are struck out but permission will be given to seek to re-plead these in an acceptable form.

434. I should also make clear, though, that as to any remaining parts of this claim which have not been struck out when my surgical interventions have been analysed, the fact that they have not been struck out does not mean that I would accept that they are necessarily immune from any form of challenge. I would listen sympathetically to any further submissions on behalf of the Directors as to requests for further and better particulars of any allegations which they still feel do not provide a fair and proper basis of the case against them, sufficient to enable them to plead properly and efficiently to those allegations or to understand the case which they have to meet.

435. By the time one gets to this position, however, the excisions which I have made to the current Cause are so extensive that I do not regard it as a document which it is convenient to use as a basis for proceeding, by making further amendments directly to it. The question therefore arises as to how I should therefore deal with the totality of the matter, as it has been brought before the court.

II Plaintiffs' Application to Amend

436. For the avoidance of doubt, I therefore consider that I have now dealt with matters of any contention arising upon the Plaintiffs' Application to Amend as well. Where I have not directly considered any such proposed amendments (ie, the residue of any "blue" colouring on the draft Amended Cause) I consider that they would not be objectionable in principle, and I would be minded to allow them.

Review of conclusions, and the position at this point

437. I must review the position, in order to determine the way ahead. First, I recap and summarise my conclusions:-

438. (1) **The Shareholders' Claim against EFG** is struck out finally, and without leave to attempt to replead. The appropriate disposal of this is therefore that to give summary judgment to EFG against the Shareholders, which I will do, with costs.

For avoidance of doubt, in case the matter goes further, if my decision that EFG owed no duty to the Shareholders as pleaded is wrong then the claim against EFG, being a claim for (alleged) breach of statutory duty pursuant to s 34 of the PoI law and based on Rule 2.01(1) of the 2008 Rules (consisting, therefore, of a duty on EFG to ensure that the Directors did not breach their own directors' duties under Rule 2.01(2) and Rule 4.02), would still be subject to challenge on the adequacy or otherwise of the facts pleaded in support of those matters in the Shareholders' Misrepresentation Claim and the Shareholders' Mismanagement Claim against the Directors. I would therefore treat this claim in the same way. As this does not arise, I do not try to set that out here; if necessary it can be deduced from other parts of this judgment.

439. (2) **The Shareholders' Misrepresentation Claim** is struck out, but may be capable of being validly re-pleaded so long as (a) individual reliances and (b) proper causation and basis for assessment of damage are pleaded. Furthermore, this can be only in respect of claims which I have found to be arguable in substance. Such re-pleading is therefore limited to the claims made under Para 88(b), and possibly para 88 (c) if this rests on a plausibly arguable scope of insurance.

440. (3) **The Shareholders Mismanagement Claim** is struck out for disclosing no reasonable cause of action properly related, as a matter of pleading, to the duty upon which reliance is purporting to be placed. It may be that, on consideration of this judgment, the Shareholders (or certain of them) consider that the claim is capable of being repleaded because it can be coherently expressed and properly particularised, and if so, the Shareholders should have that opportunity.

441. (4) **LPCC's Mismanagement claim** is partially struck out in that the plea of damage caused/quantification of loss is struck out, except in respect of one minor (and probably unlikely) respect, although it may be capable of being validly re-pleaded as to another (that of "some better outcome…") if LPCC condescends to sufficient particulars. The remainder of the claim, resting on matters pleaded in Paragraphs 89 – 92, is struck out in substantial respects, some of which may be being capable of repleaded, and subject to leave to the Directors to bring to the court (if not agreed) any request for further particulars which they may reasonably require to be given.

442. Before indicating how I propose to implement the above result as a matter of convenient case management, I need to say something about the pleadings, and the previous conduct and composition of this action, as a whole.

The Pleadings

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

444. 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.

445. Indeed I consider that the course which I am about to take, which will be to strike out the Cause entirely, is 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.

446. The confusion and difficulty is regrettably compounded here by the Defences of the main Defendants. Defendants have more excuse for their pleadings because they are obliged to plead to the Cause, which may itself have shortcomings, but they still need to exercise discipline This Cause had 102 paragraphs. EFG's Defences, are a creditably business-like and efficient pleading to the Cause insofar as it applied to EFG. However, the Defences of the First to Third Defendant amount to 329 paragraphs, many with numerous sub-paragraphs, but with little eye for pleading methodically and succinctly to the allegations made in the Cause. After a 34 sub-paragraph "summary of defences" which tells the story and refutes the claim at a general, but somewhat discursive level, the Defences deal with the averments in the Cause by reference more to topics than as sequential responses to paragraphs in the Cause. This has resulted in the jumping around of references to paragraphs in the Cause making it difficult and frustrating to try to find the Defendants' responses to particular allegations in the Cause – and I speak from bitter experience. A prolix style does not make defences easily penetrable or readily assimilable.

447. Denials are better made by reference to the assertion ("Paragraph x is denied.") rather than by repeating the content of paragraph x, which just makes the pleading longer and excites suspicion that the defensive pleader is being literal for tactical reasons. Also, a defence should plead only to what is actually asserted. Pleadings such as "if it were to be alleged that (x) then this would be denied" are unhelpful. If (x) <u>is</u> alleged then deny it. If (x) is <u>not</u> alleged then do not plead to it. If it is not clear whether (x) is alleged or not then, raise an *Exception de Forme*. The point is that the reader should be able to identify what facts are common ground and what are disputed, from comparison of Cause and Defences. Of course it may be necessary to "tell the defendant's story" separately, at some point, if this cannot be conveniently done by simply pleading methodically to the Plaintiff's allegations, but if necessary, this can be done either before or after such a methodical response. It is no substitute.

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".

449. If a Réplique is required, it should be short. If a pleader feels the urge to make a Réplique a long document then it is either because s/he is succumbing to the temptation to be prolix or argumentative, or because the Cause needs amending.

450. This brings me, therefore, to how I propose to deal with the future conduct of such causes of action as may now potentially survive or be resuscitable under this unwieldy Cause, with my having finally struck out the claim against the Fourth Defendant.

Disposal

Shareholders' Claim against EFG

451. As to the Shareholders' claims against EFG, I will strike those out and give summary judgment for EFG, with costs.

Remaining Claims – Shareholders' Misrepresentation Claim; Shareholders' Mismanagement Claim; LPCC's Mismanagement Claim

452. As to the three remaining claims:

    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.

455. It is also possible that it may eventually be convenient to try any such claims together (in particular the Shareholders' Mismanagement Claim and LPCC's claim) or even consecutively (all three claims) but that is a matter for later case management decisions, when the shape of any individual case is clearer.

456. It is also possible that further directions as to the convenient trial of these matters may be mandated in due course. For example, it appears to me that it may be sensible to consider split trials on the question of liability and the question of loss. Moreover, since the Shareholders' Mismanagement Claim appears to depend very much on the same factual allegations as LPCC's Mismanagement Claim, but the quantification of any individual shareholder's loss depends also on the extent of any recoveries under LPCC's Mismanagement Claim, it may be sensible that the former claim be stayed pending the conclusion of the latter. However, all these are matters for future case management consideration, once the claims being made in this matter have been reduced to a properly manageable form.

457. In order to relate any such individual re-pleaded claim properly back to the Cause by which it has originated, re-pleading should be based on applying a "blue pencil" test to the facts and matters already pleaded in the initial paragraphs (Paras 1-86) of the Amended Cause to extract only the facts reasonably material to the individual claims, but making any necessary additions and particulars, and then by basing further pleadings on the parts of the following paragraphs relevant to the particular claim, regarding alleged breach, causation and loss, in order to produce a Cause in each case which contains a reasonable cause or causes of action.

    (1) In the case of the Shareholders' Misrepresentation Claim these would *prima* facie be Paragraphs 87, 88, 93-96 and 99-100,

    (2) In the case of the Shareholders' Mismanagement Claim, these would *prima facie* seem to be Paragraphs 87, 89-92, 95-96 and 99-100.

    (3) In the case of LPCC's Mismanagement Claim, these would *prima facie* seem to be Paragraphs 87, 89-92, 97-98, 99 and 101.

458. For the avoidance of doubt,

    (1) the leave to apply to amend by re-pleading the individual claims as separate causes is confined to amendment in respect of the causes of action inchoately pleaded in the existing Cause and which I have indicated I regard as potentially capable of founding an arguable cause of action;

    (2) Paragraphs, sub-paragraphs or phrases which I have struck out finally amongst those Paragraphs or elsewhere are not to be resuscitated;

    (3) Moreover, the leave to re-plead does not extend to pleading any new causes of action, not considered in relation to these Applications.

Miscellaneous

459. Insofar as any dispute arises as to whether any attempt to amend and re-plead any cause of action exceeds the leave given or goes beyond the scope of causes of action already effectively pleaded, this will have to be decided by the Court if not agreed.

460. The effect of all the above is that the previous Defences of the Directors and the subsequent Réplique will simply fall away, and will have to be re-pleaded themselves.

461. I believe this judgment now deals with all the necessary matters of substance which this four day hearing raised, and which have required to be determined between the parties at this stage. I will, however, hear any further argument as to the exact orders required to effect the disposal which I have indicated I propose to make, if counsel require.

Hazel Marshall KC
Lieutenant Bailiff

23 February 2024