Application pursuant to rule 52 (2) (a) of the Royal Court Civil Rules, 2007 for orders that the Plaintiff's Cause discloses no reasonable grounds for bringing the claim.

[2024]GRC006

IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)

Between:

LUCILLE HOLDINGS PTE LTD

Plaintiff

-and-

(1) HSBC MANAGEMENT (GUERNSEY) LIMITED

First Defendant

(2) HSBC ALTERNATIVE INVESTMENTS LIMITED

Second Defendant

Final Judgment handed down: 30 January 2024

Before: Jessica E Roland, Deputy Bailiff

Counsel for the Plaintiff: Advocate M Jones

Counsel for the Defendants: Advocate B de Verneuil-Smith

Cases, texts & legislation referred to:

Royal Court Civil Rules, 2007
Clerk & Lindsell on Torts (23rd ed)
Companies (Guernsey) Law, 2008

Morton v Paint (1996) 21 GLJ 36
IFS Investments v Manor Park (Guernsey) Limited [2003-04] GLR 308
Flightlease Holdings (Guernsey) Ltd v Flightlease (Ireland) Ltd [2009-2010] GLR 38
Helmot v Simon [2010] GRC 04
IFS v Manor Park 21/2010
Tranquility Holdings Ltd v Invista Real Estate Investment Management CI Limited [2015] (38/2015)
Jakob International v HSBC Private Bank C.I Limited [2016] GJ 26.2016
Carlyle Capital Corporation v Conway & others 38/2017
Highland CLO Funding v Joshua Terry [2020] GRC 040
Pilatus (PTC) Limited v RBC Trustees (Guernsey) Limited [2021] GRC 012
Robert Dorey and ors v Raymond Ashton [2023] GCA 008

Hedley Byrne Co Ltd v Heller and Partners Ltd [1964] AC 465
Caparo Industries Plc v Dickman [1995] 2 AC 605
First National Commercial Bank PLC v Loxleys [1997] PNLR 211
Williams and Natural Life Health Foods Ltd [1998] WLR 830
Bristol & West v Mothew [1998] Ch 1

Harris v Bolt Burdon [2000] L.T.L., February 2, 2000, CA
Bridgeman v McAlpine-Brown January 19, 2000, WL 363 (2000)
Electra Private Equity Partners v KPMG Peat Marwick [2001] 1 BCLC
Jafari-Fini v Skillglass Limited [2004] EWHC 3353
Royal Bank of Scotland v Bannerman Johnstone Maclay [2005] PNLR 43
JD Wetherspoon Plc v Van de Berg & Co Ltd [2009] EWHC 639 (Ch)
Soo-Kim v Young [2011]EWHC 1781(QB)
Jackson v Dear [2013] (GJ 10/2013)
Sharp v Black [2015] EWHC 3220 (Ch)
Playboy Club London Ltd v Banco Nazionale del Lavaro SpA [2018]
Glenn v Watson [2018] EWHC 2016 (Ch)
Sheikh Tahnoon Bin Saeed Bin Shakhboot Nehayan v Kent [2018] EWHC 333 (Comm)
N v Poole [2020] AC 780
Sevilleja v Marex Financial Ltd [2020] UKSC 31
Manchester Building Society v Grant Thornton UK LLP [2021] UKSC 20
Central Coast Council v Norcross [2021] NSWCA 75
JP SPC4 v Royal Bank of Scotland International Ltd [2022] UKPC 18

Introduction

1. This is an application by HSBC Management (Guernsey) Limited ("HMG") and HSBC Alternative Investments Limited ("HAIL"), the First and Second Defendants in this matter (together the "Defendants") dated 15 July 2022 (the "Application") pursuant to rule 52 (2) (a) of the Royal Court Civil Rules, 2007 (the "RCCR") for orders that the Plaintiff's Cause tabled on 22 April 2022 (the "Cause") discloses no reasonable grounds for bringing the claim. On 4 October 2022 further updated on the 26 October 2022, the Plaintiff served an Application to amend its Cause. For the purposes of this Application it was agreed that the draft amended Cause should be treated as the current pleadings (the "Amended Cause") (although the Defendants say it does not cure the fundamental defects in the Plaintiff's case).

2. The matter was placed inscrite on 22 April 2022. Defences were filed on 15 July 2022.

3. Affidavits sworn by Mr Alan Guok Ann Lee dated 8 September 2022 and by Advocate Alison Sarah Antill dated 9 September 2022 were filed in support of the Plaintiff's opposition to the Application.

4. The Affidavit of Margeaux Malherbe dated 14 July 2022 and the Affidavit of Russell Sykes dated 13 October 2022 were filed on behalf of the Defendants. The Plaintiff and the Defendants filed skeleton arguments which were augmented in a hearing over two days. After the handing down of the decision of the Guernsey Court of Appeal on 17 March 2023 in *Robert Dorey and ors v Raymond Ashton [2023] GCA 008*, the parties provided, at my request, submissions (of no more than two pages) on any relevant issues this case raised for my decision on this matter.

Background

5. The Plaintiff is a private company incorporated under the laws of Singapore. Its beneficial owners are the Lee family. Alan and Rodney Lee are directors of Lucille. Both the Plaintiff and the Lee family have had a long relationship with the HSBC group. The Plaintiff says that it was because of the Lee family's long-standing relationship with HSBC and HSBC Private Bank ("HSBCPB") in Singapore in particular, that they were considered important and special clients and offered investment opportunities not available to all clients. Mr Lee says that HSBCPB effectively acted as an introducer to the Second Defendant. He says that trust was placed in the Second Defendant by the Plaintiff because of the introduction by HSBCPB.

6. The claim against the Defendants revolves around an investment opportunity in a property in Washington D.C, known as 1350 Eye Street ("the Property"). The plan was that the Property would be acquired by a new Guernsey company via a complex tax efficient US onshore investment structure. The investment was forecasted, net of management fees, to provide a net average dividend return on equity of 6.5% over a seven year investment term (the "Investment Term") (five years plus two one year extensions at the First Defendant's discretion) (although the defences state that the term was not fixed and was a matter for HMG to determine). It was anticipated in a Property Investment Memorandum (the "PIM") that the Property would be sold in 2017 for USD 341.1 million. The HSBCPB Relationship Manager, Ms Evelyn Ow sent the original investment proposal to the Lee family. The proposed investment was one of several "*club deals*". These deals were apparently designed to provide a group of HSBC's ultra-high net worth private clients with opportunities to invest in global real estate.

7. 1350 Eye Street Limited ("the Company") was incorporated in Guernsey on 3 February 2010, with corporate registration number 51435. Its registered office was at Arnold House, St. Julian's Avenue, St. Peter Port, Guernsey.

8. HMG was the sole Director and Administrator of the Company, as well as Registrar and Managing Entity. HAIL, which is a company registered in England and Wales, was the Investment Adviser to the Company. Edge Funds Management LLC ("Edge") was appointed as Asset Manager on 19 May 2010, under an Asset Management Agreement between the Company, Edge and 1350 Investor LP, a Delaware limited partnership (part of the US Investment structure). Edge's role was to actively manage the real estate investment. It was also an investor in the Property (approximately 2% of the initial equity). HAIL appointed an investment committee (the "Investment Committee") to review the recommendations of Edge. In the PIM, it said that the Investment Committee, along with Edge, was obliged to continually monitor the performance of the Property and implement available measures to improve the value of the Property.

9. The Plaintiff applied for 50,000 shares in the Company at the price of USD 5,000,000. The total amount raised from investors (the "Investors") was USD 90,000,000. As the offer was oversubscribed, the Plaintiff's investment was scaled back and it was allotted 41,000 shares at the bid price of USD 4,100,000. The holder of the record of the shares is HSBC Private Bank (Suisse) SA Singapore Branch, ("HSBCPB Suisse") as the Plaintiff's nominee (as well as that of other investors). On 19 May 2010, 1350 Eye Street Holdings LLC acquired an 80% ownership interest in the property from Beacon Partners, including a secured promissory note. On 1 November 2010, the remaining 20% ownership interest in the Property was acquired. The total consideration for the Property was USD 208,745,107, funded by the Investors with the remainder being funded by an interest-only term loan facility of USD 129,666,717. This loan facility was a loan from Metropolitan Life Insurance company ("Met Life") at a fixed rate of 6.59%, maturing during July 2013. In February 2013, the property was refinanced and Met Life provided a new interest-only loan facility of USD 155,000,000 at a fixed rate of 3.33%, maturing on 5 February 2018.

10. The 2015 Annual Business Plan prepared by Edge stated its intention to recommend to the Investment Committee a one year extension of the investment term to 28 May 2016. On 31 December 2015, the value of the Property was said to be USD 294,000,000. The 2016 Annual Business Plan prepared by Edge stated that its intention was to recommend to the Investment Committee a second one year extension of the Investment Term to 28 May 2017. In a report, dated 31 December 2016 (issued by the First or Second Defendant to the Investors), it stated that the report had been independently valued as at 31 December 2016, at USD 284,000,000. On 10 January 2017, Edge recommended to the Defendants that the Investment Term be further extended to 23 May 2018. This proposal was approved. On 24 November 2017, Edge recommended to the Defendants that the Investment Term be further extended to the earlier of 23 May 2020, or the date upon which the "*HSBC Investor Interests can be marketed and sold (and the 1350 Investor entities are fully liquidated) after the Property reaches stabilized occupancy of 90% or greater, so that the Property can be refinanced and the Exit Strategy of the existing 1350 Investor can be managed to*

secure the highest possible price for the 1350 Investor Interests". This recommendation was approved on, or around, 5 February 2018. In the 2018 Annual Business Plan prepared by Edge, it was said that the value of the Property was USD 296,000,000, as at 31 December 2017. On 8 February 2018, the Property was further refinanced by Met Life in the form of a further 2 year interest-only USD 182,500,000 facility until 29 February 2020, with an option for a 1 year extension. This was at a rate of 3.5% over 30 day LIBOR with a LIBOR cap of 2%.

11. In a report issued to the Investors dated 31 December 2018, Edge stated that the Property had been independently valued as at 31 December 2018 at USD 232,000,000. In a report dated 31 December 2019 but issued to the Investors in or around June 2020, it was stated that the Property was independently valued as at 31 December 2019, at USD 221,000,000. The report also said that broker opinions of value obtained in January 2020 estimated the Property to be worth approximately USD 180,000,000. On 1 March 2020, the Met Life facility matured and on 26 February 2020 Met Life issued a Forbearance letter, which provided for an extension until 1 June 2020. In March 2020, a Sounding Document was issued to the Investors which sought additional recapitalisation funding of USD 40,000,000. The Investors declined to provide this additional funding. A further extension of the Met Life facility was granted until 1 September 2020. However, on 1 September 2020, the Company went into default on its loan position. A formal notice of default was issued on 10 March 2021. The Property was sold at auction for USD 120,000,500. On 14 July 2021, the Company's shareholders passed a special resolution to place the Company into voluntary liquidation and Alex Adam and Andy Wood were appointed as Joint Liquidators. The Company was dissolved on the 17 January 2023. No proceedings were brought by the Company against the First and Second Defendants.

12. The Amended Cause alleges that the First Defendant owed duties of care to the Company as its sole Director, Administrator and Managing entity. It is said that the First Defendant also owed those duties to the Investors, including the Plaintiff, who beneficially owned the shares in the Company but who are not shareholders of record, or members of the Company, as defined under the Companies (Guernsey) Law, 2008. Alternatively, it is said that the First Defendant owed the Investors, including the Plaintiff, fiduciary duties. It is said by the Plaintiff that the First Defendant has breached these duties, in numerous ways. In relation to the Second Defendant, the Plaintiff says that as the Company's Investment Advisor it owed the Investors, including the Plaintiff, duties to exercise reasonable skill and diligence in carrying out its duties and/or owed fiduciary duties in circumstances which gave rise to a relationship of trust and confidence and an expectation that the Second Defendant would not use its position in any way adverse to the Investors, and specifically the Plaintiff's interests. It is said that the Second Defendant has acted in numerous ways in breach of the duties it owed to the Investors and, specifically, to the Plaintiff. It also says the Second Defendant acted in breach of its duties to the Company.

The Law

13. Rule 52 provides:

> *"52. (1) In this rule, reference to a pleading includes reference to part of a pleading.*
>
> *(2) The Court may strike out a pleading if it appears to the Court-*
> *(a) that the pleading discloses no reasonable grounds for bringing or defending an action."*

14. The legal principles applicable to strike out are largely agreed between the parties. Although the Defendants' Application was for the entirety of the Amended Cause to be struck out, it was accepted by both parties that it is within the powers of the Court under rule 52 to strike out only part of the pleading if it discloses no reasonable grounds for bringing an action rather than the entire pleading.

15. Both parties agreed that the Amended Cause should be taken at its highest and I should assume that all factual allegations made by the Plaintiff are capable of being established at trial. The burden is on the Defendants to show that the matter should be struck out and the parties acknowledge that the burden is a high one. The summary of the principles in relation to strike out are set out in *Tranquility Holdings Limited v Invista Real Estate Investment Management (CI) Limited [2015] 38/2015 ("Tranquility Holdings Limited")* at paragraph 47, as follows:

> *"a) Claims which are suitable for striking out on ground (a) include those which raise an unwinnable case where continuance of the proceedings is without any possible benefit to the respondent and would waste resources on both sides (Harris v Bolt Burdon [2000] L.T.L., February 2, 2000, CA).*
>
> *b) The principal test is whether the party's case is "bound to fail", which creates a high threshold before a pleading, or a part thereof, will be struck out. Simply because a case might be weak is not sufficient to justify striking out.*
>
> *c) A statement of case is not suitable for striking out if it raises a serious issue of fact which can only be properly determined by hearing oral evidence (Bridgeman v McAlpine-Brown January 19, 2000, unrep, CA).*
>
> *d) Where a statement of case is found to be defective, the court should consider whether that defect might be cured by amendment and, if it might be, the court should refrain from striking it out without first giving the party concerned an opportunity to amend (In Soo-Kim v Young [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 Young [2011] EWHC 1781 (QB)).*
>
> *f) The purpose of the particulars of claim were explained by Moore-Bick LJ in Credit Suisse AG v Arabian Aircraft & Equipment Leasing Co [2014] CP Rep 4:*
>
> > *"Particulars of claim are intended to define the claim being made. They are a formal document prepared for the purposes of legal proceedings and can be expected to identify with care and precision the case the claimant is putting forward. They must set out the essential allegations of fact on which the claimant relies and which he will seek to prove at trial, but they should also state the nature of the case that is to be made in order to inform the defendant and the court of the basis on which it is said the facts give rise to a right to the remedy being claimed."*
>
> *g) It is not appropriate to strike out a claim in an area of developing jurisprudence, since, in such areas, decisions as to novel points of law should be based on actual findings of fact (Farah v British Airways, The Times, January 26, 2000,CA referring to Barrett v Enfield BC [1989] 3 W.L.R. 83, HL)."*

Submissions

16. The Defendants' first ground for the strike out of the Amended Cause is that in the claims set out therein, the Plaintiff is relying on the concept of reflective loss, which following the decision in *Pilatus (PTC) Limited v RBC Trustees (Guernsey) Limited [2021] GRC 012 ("Pilatus")* applying the majority reasoning *Sevilleja v Marex Financial Ltd [2020] UKSC 31* ("*Marex*") is not loss

recoverable in law in Guernsey. The Defendants rely on an admission that they say the Plaintiff made in correspondence on the 11 March 2022 that contrary to their submissions in the strike out application, the principle of reflective loss is part of Guernsey Law, where Counsel for the Plaintiff wrote "*Further, the applicability of the reflective loss principle in Guernsey is not disputed.*"

17. The principle is that a shareholder in a company cannot bring a claim in respect of a loss of value of his shareholding, or reduction in the distributions which he receives by virtue of his shareholding, if the loss suffered by the shareholder is as a consequence of the loss sustained by the company and the loss sustained by the company is a loss in respect of which the company has a causal action against the same wrongdoer. The rule against reflective loss applies even if a defendant's conduct also involves the commission of a wrong against the shareholder, and even if no proceedings have been brought by the company. As the shareholder has not suffered a loss, which is regarded in law, as being separate and distinct from the company's loss, the shareholder has no claim to recover it. (See paragraph 52 of *Pilatus (PTC) Limited v RBC Trustees (Guernsey) Limited (ibid)* referring to paragraph 83 in *Marex* (ibid).

18. The Defendants say that the loss for which the Plaintiff claims is a loss arising from the diminution in value of the Plaintiff's share in the Company, arising as a result of the sale of the Property for less than the sum owed under the Met Life loan. The losses the Plaintiff claims were sustained by the Company as the owner (via a complex corporate structure) of the Property. Therefore, the loss sustained by the Company is a loss in respect of which the Company may have had a cause of action against the Defendants. Where the Plaintiff contends that its shares ought to have been worth a sum reflecting the value of its initial investment of U.S.D 4,100,000 plus the return thereon, it is because the Property should have been sold for profit and thus, the value of the Company would have increased. The Defendants say this a classic claim for reflective loss, regardless of how the Plaintiff seeks to characterise it. If the amendment to paragraph 70 of the Amended Cause means that the Plaintiff now purports to seek its initial investment back rather than damages, this is not supported by any pleaded cause of action and should be struck out. Where the Plaintiff says it cannot know whether the Company would have a claim against HAIL because reliance may be placed on contractual exclusions or limitations of liability which may exist as between the Company and HAIL, the Second Defendant says that the Plaintiff has the Adviser Agreement dated 19 May 2010 (the "Adviser Agreement"). Further, and in any event, the Plaintiff's argument is still caught by the reflective loss principle. The Company has a prima facie cause of action against HAIL, if HAIL has breached its duties under the Adviser Agreement. Even if HAIL has a defence, whether in reliance on the indemnities and exclusions or otherwise, this does not mean that the Company did not have a claim and that it is the proper party to bring the claim.

19. The Defendants also say that regardless of the causes of action being negligence and/or breach of fiduciary duty against them, the nature of these claims do not justify a departure from the rule against reflective loss. The Plaintiff's complaint is effectively the failure of the First Defendant to oversee the management of the sale of the Property properly, amounted to a breach of its duties as Director to the Company but that it was also a breach of those same duties to the Plaintiff. Therefore, on the Plaintiff's case, the Company had an identical claim against the First Defendant for an identical loss. In relation to the Second Defendant, the Plaintiff pleads that the Second Defendant acted in breach of its duties owed to the Company and the Plaintiff. Therefore, it is the same claim.

20. The Plaintiff makes a distinction from the rule against reflective loss because the Plaintiff is a beneficial owner of shares, rather than the registered legal owner. However, the Defendants say this is a point of form not substance. Further, in relation to the causes of action themselves, the Plaintiff has attempted to circumvent the trust structure through which the shares are held, to bring a claim directly against the First Defendant for conduct in relation to the trust assets. The Plaintiff had all the remedies that a shareholder had open to it by pursuing them through the legal owner of the shares with whom, it says, it had a close relationship. As bare Trustee, HSBCPB Suisse would be expected to carry out the instructions of the Plaintiff relating the rights attaching to the shares.

It is not enough for the Plaintiff to simply say that this route is unreasonable. If HSBCPB Suisse had refused to do the Plaintiff's bidding, the Plaintiff could have commenced the derivative action and joined HSBCPB Suisse. The Defendants also rely on *Jafari-Fini v Skillglass Limited [2004] EWHC 3353* and the judgment of Rich J QC, where he found that the claimant in that case should not be excluded from bringing a derivative claim, although his interest was only beneficial. The Defendants also speculate that a reason why the Plaintiff might not have brought a derivative claim, or asked the liquidators to bring such a claim, is because any damages awarded would go to the Company which is insolvent, and therefore, for the benefit of the creditors before any investors.

21. In relation to the claim against HAIL, the difference between the case against HAIL and that against HMG relates to the manner in which the duties are articulated by the Plaintiff. Nevertheless, the Second Defendant says that the Plaintiff's claim against it for loss reflects the diminution in value of shares in the Company. Further, the duties which the Plaintiff says that the Second Defendant owes to it as Investment Adviser are derived from the duties that the Second Defendant owed to the Company as its Investment Advisor, such that the Company would (on the Plaintiff's case) also have a claim against the Second Defendant. In those circumstances, this is a claim for reflective loss and is not recoverable, therefore, the Second Defendant says the claim should be struck out. If the Defendants are successful in relation to their arguments on reflective loss then the Amended Cause should be struck out in its entirety, and it is not necessary for the Court to consider the second ground.

22. In relation to the second ground for strike out of the Amended Cause, the Defendants say that taking the factual case in the Amended Cause at its highest, none of the duties which the Plaintiff relies on are owed by the Defendants to the Plaintiff, and therefore, the Amended Cause should be struck out.

23. The Plaintiff alleges that HMG had a duty to act in a way that it considered in good faith would be most likely to promote the success of the Company, a duty to exercise independent judgement, a duty to exercise reasonable care, skill and diligence, a duty to act in a way it considered good faith to be in the Plaintiff's best interests and a duty not to place itself in a position where HMG's actions benefited the HSBC Group in conflict with the Plaintiff's interests. HMG says that the Plaintiff's claim lacks coherence. The First Defendant is said to owe all five duties to the Plaintiff, but that it also owed the first three of these duties independently to the Company, and all five duties to the wider body of Investors. It is based on the underlying assumption that the interests of the Company would be identical to the Plaintiff's interests, which were in turn identical to the interests of the wider Investors and each Investor to the other. Owing these duties concurrently to different parties, other than the Company, means that the First Defendant would be in a position of potential conflict and in potential breach of its duty as a Director to act for a proper purpose.

24. The First Defendant says in order to plead properly the claim in tort, the Plaintiff must plead that specific acts or statements emanated from the First Defendant, which would lead to the conclusion that there was a "*special relationship*" between the Plaintiff and the First Defendant over and above the usual relationship that any Director of a company has with its shareholders. It is then necessary to plead how the First Defendant had assumed a responsibility towards the Plaintiff to protect the Plaintiff from the Loss of which the Plaintiff now complains (see *Playboy Club London Ltd v Banco Nazionale del Lavaro SpA [2018] 1 WLR 4041* paragraphs 6 and 7). The test of whether the First Defendant had assumed responsibility was an objective one (*Williams v Natural Life [1998] WLR 830*). The Plaintiff would then need to show that the Plaintiff relied upon the First Defendant, in relation to the matters for which the First Defendant has been said to have assumed responsibility and that the Loss is of a type for which the First Defendant is said to have assumed responsibility. The relationship which the Plaintiff has, as set out in the pleadings and Mr Lee's affidavit was with HSBCPB or with the HSBC "brand" (which is not pleaded) and not with the Defendants who are separate corporate entities.

25. Contrary to the Amended Cause the distribution of Investor Updates does not give rise to any tortious or fiduciary duties by the First Defendant. The documents do not record any special relationship with or assumption of responsibility by the First Defendant to the Plaintiff. The First Defendant also relies on *Williams and Natural Life Health Foods Ltd (ibid)* page 835 paragraph B:

> *"Whether the principal is a company or a natural person, someone acting on his behalf may incur personal liability in tort, as well as imposing vicarious or attributed liability upon his principal. But in order to establish personal liability under the principle of Hedley Byrne, which requires the existence of a special relationship between plaintiff and tortfeaser, it is not sufficient that there should have been a special relationship with the principal. There must have been an assumption of responsibility such as to create a special relationship with the director or employee himself."*

26. With regard to the fiduciary duties said to be owed by the Defendants, the Defendants go back to the general description of a fiduciary by Millett LJ found in *Bristol & West v Mothew [1998] Ch 1*, as "*someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence*". The core obligation is one of loyalty and the principal is entitled to the single-minded loyalty of his fiduciary. Loyalty in this context means being guided solely by the interests of the principal and not by any consideration of the fiduciary's own interests. Fiduciaries are required to act openly and honestly and must not (without the informed consent of their principal) place themselves in a position where their own interests or their duty to another party may conflict with their duty to pursue the interests of their principal. In *Highland CLO Funding v Joshua Terry [2020] GRC 040* Sir Richard Collas sitting as Lieutenant Bailiff said:

> *"Where fiduciary duties are imposed, the fiduciary is expected to subordinate his interests and act solely in the interests of the principal. The expectation is assessed objectively and so fiduciary duties may be imposed, even where the fiduciary subjectively believes he does not owe such duties."*

27. The Defendants say the particulars in the Amended Cause do not support the finding of a fiduciary relationship. Furthermore, the Defendants say fiduciary duties owed to the Plaintiff by both HMG and HAIL would mean HMG and HAIL would be in conflict, due to their respective obligations of single-minded loyalty which each owes to the Company. With regard to HMG in particular, if the interests of the company and the shareholders and Investors are not aligned (and the Investors not aligned within the class) it would create an impossible situation. This is why Directors are not seen to have fiduciary relationships with shareholders, let alone with the beneficial owners of shares of a company of which they are Director. Likewise, HAIL's relationship is with the Company and not the Investors.

28. For a claim of a breach of fiduciary duty, the Plaintiff would need to show that the facts and matters had given rise to a "*truly special relationship of trust and confidence*" [1]between the Defendant and the Plaintiff, from which a court could conclude that the Defendant had undertaken to act for the Plaintiff in a manner which requires the Defendant to put the Plaintiff's interests first and above the interest of all others, including the interests of the Company. Thereafter, it would need to show that fiduciary duties arise from this special relationship of trust and confidence which reflect the manner in which the First Defendant has undertaken to act for the Plaintiff and that the loss is of a type for which the First Defendant is responsible in its capacity as fiduciary.

29. The First Defendant says that even taken at its highest the Amended Cause does not satisfy this burden. The Plaintiff simply asserts that there was a relationship of trust and confidence and an expectation that the First Defendant would not use its position in any way adverse to the Plaintiff's interests. The eight matters, or particulars, which the Plaintiff pleads in the Amended Cause do not

[1] See *JD Wetherspoon Plc v Van de Berg & Co Ltd [2009] EWHC 639 (Ch)* paragraph 77

demonstrate the basis of a claim which has a real prospect of success. Even taken at their highest, the particulars do not support the existence of a relationship of trust and confidence between the First Defendant and the Plaintiff. No relationship is pleaded between the Plaintiff and the First Defendant. The only relationship pleaded by the Plaintiff concerns HSBCPB, which is a separate legal entity and not a party to these proceedings. There is also a reference to the Corporate Division of HSBC in Singapore, again this entity is not a party to these proceedings. The fact that the First Defendant had wide powers in relation to the Company, by reason of its office as sole Director, does not support the existence of any duty to the underlying Investors in the Company's shares. The First Defendant owed contractual duties to a legal entity in which the Plaintiff invested but this does not, taken on its own, support the imposition of any duty by the First Defendant to the Plaintiff. The Investment Updates do not support the existence of a tortious or fiduciary duty. The communications issued by the First Defendant were sent for and on behalf of the Company, pursuant to the terms of the Shareholders' Agreement (an undated copy of which was handed up during the hearing). They are consistent with the Company (as opposed to the First Defendant) complying with its contractual duty to keep shareholders informed and not with the assumption of responsibility by the First Defendant to indemnify the Plaintiff against investment losses.

30. Where the Plaintiff pleads that the communication was from the First Defendant to or from Edge which either expressly or by implication recognised the duties owed by the First Defendant to the Investors, including the Plaintiff, the First Defendant says that a duty cannot be bought into existence solely by reason of a statement that such a duty exists (see *N v Poole [2020] AC 780)*

31. Further, the communications upon which the Plaintiff relies are all dated from 2019 onwards, which is 9 years after the Plaintiff made its investment in the Company and after the latest date which the Plaintiff alleges the property should have been sold[2]. The First Defendant also says that specific communications relied on by the Plaintiff do not, in any event, support the existence of the duties said to be owed by the First Defendant to the Plaintiff. The Plaintiff also seeks to rely on communications sent by Edge, which as they were not prepared or issued by the First Defendant does not create or evidence any duty owed by the First Defendant.

32. In relation to the claim against the Second Defendant, the Second Defendant says that the claims against it also lack coherence and could result in the Court having to find that the Second Defendant was in a position of conflict with the Company and wider Investors, which is misconceived. The Plaintiff cannot make out its claims in relation to the Second Defendant in tort or breach of fiduciary duty. The pleadings do not show any assumption of responsibility towards the Plaintiff by the Second Defendant or reliance by the Plaintiff on the Second Defendant or loss of the type for which the Second Defendant is said to have assumed responsibility. Further, there is no special relationship of trust and confidence between the Second Defendant and the Plaintiff. The Plaintiff simply asserts that a relationship of trust and confidence and sets out 9 particulars, which the Second Defendant says do not establish a claim with real prospects of success against the Second Defendant. Therefore, the Second Defendant says that the Court should strike out the pleadings.

33. The Defendants say the reason why there is not any precedent for the duties, which the Plaintiff says are present between the parties, being found, is because the arguments are not maintainable. This is a standard arrangement and the Court should not find that any of the duties between the Plaintiff and the Defendants exist. Further, the claims ignore the extensive risk warnings and disclaimers contained in the PIM, and the burden will be on the Plaintiff that the loss for which it claims damages, fall within the scope of each Defendant's duty of care (paragraph 11 *Manchester Building Society v Grant Thornton UK LLP [2021] UKSC 20*.

34. The Plaintiff says that both grounds upon which the Defendants seek to strike out the Plaintiff's claims involve complex and developing areas of law, and therefore, should be determined after a

[2] The Plaintiff pleads at paragraph 67 (viii) of the Amended Cause that the Property should have sold at the end of the initial or the extended investment term.

trial on the basis of actual rather than hypothetical facts *Tranquility Holdings Limited (ibid)* relying on *Farrah v British Airways The Times 26 January 2000*). The pleadings should not be struck out unless it is bound to fail. If there is any defect in the Amended Cause that is capable of being cured by amendment, then the Court should refrain from striking out unless it has afforded an opportunity to the party to amend the pleading. The Plaintiff says that neither of the Defendants has shown that either the whole or part of the Amended Cause should be struck out. The claim is arguable and the Defendants have a high hurdle to surmount and have not done so (see *IFS Investments v Manor Park (Guernsey) Limited [2003-04] GLR 308).* It is only in the clearest of cases that the Court should grant a strike out application (see *Jakob International Inc v HSBC Private Bank CI Ltd [2016] (GJ 26/2016)*). The Court should be particularly slow to accede to a strike out application where, as in this case, the application is being heard at a very early stage of the proceedings, before disclosure of documents, lodging of witness statements and exchange of experts' reports, after which much could change (see *Jackson v Dear [2013] (GJ* 10/2013) at paragraph 11). The Plaintiff relies on all of its particulars cumulatively and where relevant provided a very helpful cross reference to the documents relied on in evidence.

35. The Plaintiff points out that in *Tranquility Holdings Limited (ibid)* the cause was not struck out on the grounds that the Plaintiff had no realistic prospect of success of establishing the existence of the duty of care or that fiduciary duties were owed by the Defendant manager but for other reasons. If there is an issue of fact this *"ought properly to be determined by hearing oral evidence from all involved. Whether this is done at a trial, or as a separate issue, is another question.*." (see paragraph 24 *Bridgeman v McAlpine-Brown January 19, 2000, WL 363 (2000)*).

36. In relation to the tortious claims pleaded, the Plaintiff says that the starting point is that the list of situations giving rise to a duty of care is not fixed:

> "*As Lord Macmillan famously said: 'The grounds of action may be as various and manifold as human errancy; and the conception of legal responsibility may develop in adaptation to altering social conditions and standards. The criterion of judgment must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed',* Grant v Australian Knitting Mills *[1936] AC 85, 103. Parliament or the courts can create new duty situations. Duty is a dynamic concept.*"[3]

37. Further, the Plaintiff says that Defendants have only considered one test of establishing a tortious duty when there are two possible tests for the Court to consider, that is the assumption of responsibility test and the three stage test, as set out in *Caparo Industries Plc v Dickman [1990] 2 AC 605*. The Defendants' application of the principles in its skeleton argument is incorrect on the assumption of responsibility test and it does not deal at all with the three stage test. However, the Plaintiff's primary position is that regardless of the test applied the Plaintiff has shown that there is at least an arguable case that duties of care were owed to it by the Defendants. There is no previous case where the existence of a duty of care and fiduciary duties has arisen in the tripartite relationship which exists on the facts of the present case between the Defendants, the Company and the beneficial owners of shares in the Company (which included the Plaintiff). Second, the Court is dealing here with an area of developing jurisprudence (see *Farah v British Airways*) and the Court should not strike out a claim in those circumstances or before disclosure of documents and lodging of witness statements.

38. The Plaintiff says that its claims are not ones to which the risk warnings and disclaimers contained in the documents had relevance. None of the provisions relied on by the Defendants purport to exclude liability in negligence or for a breach of fiduciary duty. The absence of relevant disclaimers supports the Plaintiff's submission that the Defendants assumed responsibility[4]. Further, and in any

[3] Clerk & Lindsell on Torts (23rd ed) para. 7-07
[4] Royal Bank of Scotland v Bannerman Johnstone Maclay [2005] PNLR 43 at paragraph 63

event, relying on the English Court of Appeal judgment in *First National Commercial Bank PLC v Loxleys [1997] PNLR 211* and in particular the headnote:

> *"(1) whether or not a duty of care was owed could not be decided without reference to the disclaimer, and (2) whether or not the disclaimer was valid depended on all circumstances, and therefore was not capable of summary determination."*

39. However, to the extent they are relevant, the Plaintiff is not in a position to know what reliance may be placed on contractual exclusions or limitations of liability which may exist between the Company and the Second Defendant, under the contract dated 19 May 2010 (which also goes to its argument in relation to reflective loss that its claim is not the same as that of the Company).

40. The absence of a direct investment in the Property and a direct relationship between the Plaintiff and the Defendants does not rule out an arguable duty of care to the Plaintiff. The duty of care can exist co-extensively with a contractual relationship or where no contractual relationship is present, or where no direct contact may have been made, although the Plaintiff says there was contact here between representatives of the Second Defendant and the Plaintiff. Further, the Plaintiff is part of a defined class of persons, so there is no risk of indeterminate liability.

41. In relation to the claims based on fiduciary duties by the Plaintiff, the circumstances in which fiduciary duties may arise were considered by Leggatt LJ in *Sheikh Tahnoon Bin Saeed Bin Shakhboot Nehayan v Kent [2018] EWHC 333 (Comm)* starting at paragraph 158:

> *"158. Despite saying in the Mothew case that a fiduciary is defined by the obligations to which he is subject and not the other way round, Millett LJ did give a general description of a fiduciary as "someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence": see [1998] Ch 1, 18. This description has often since been cited with approval, including by the Supreme Court in FHR European Ventures LLP v Cedar Capital Partners LLC [2014] UKSC 45, [2015] AC 250, para 5. To similar effect, in another much quoted statement, Mason J in the High Court of Australia in Hospital Products Ltd v United States Surgical Corp (1984) 156 CLR 41, 96-97, said:*
>
> *"The critical feature of these relationships is that the fiduciary undertakes or agrees to act for, or on behalf of, or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore, one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person, who is accordingly vulnerable to abuse by the fiduciary of his position."*
>
> *159. Thus, fiduciary duties typically arise where one person undertakes and is entrusted with authority to manage the property or affairs of another and to make discretionary decisions on behalf of that person. (Such duties may also arise where the responsibility undertaken does not directly involve making decisions but involves the giving of advice in a context, for example that of solicitor and client, where the adviser has a substantial degree of power over the other party's decision-making: see Lionel Smith, "Fiduciary relationships: ensuring the loyal exercise of judgement on behalf of another" (2014) 130 LQR 608.) The essential idea is that a person in such a position is not permitted to use their position for their own private advantage but is required to act unselfishly in what they perceive to be the best interests of their principal. This is the core of the obligation of loyalty which Millett LJ in the Mothew case [1998] Ch 1 at 18, described as the "distinguishing obligation of a fiduciary". Loyalty in this context means being guided solely by the interests of the principal and not by any consideration of the*

fiduciary's own interests. To promote such decision making, fiduciaries are required to act openly and honestly and must not (without the informed consent of their principal) place themselves in a position where their own interests or their duty to another party may conflict with their duty to pursue the interests of their principal. They are also liable to account for any profit obtained for themselves as a result of their position."

42. The Plaintiff submits that the Defendants were legal persons who had undertaken to act for or on behalf of it, in circumstances which gave rise to a relationship of trust and confidence and in the absence of a contractual relationship. The fact that the relationship between the Plaintiff and the Defendants is not contractual means that a fiduciary duty will more readily be imposed on the Defendants than where a contractual relationship does exist. As set out in the pleadings, they undertook or agreed to act for or on behalf of, or in the interests of the Plaintiff in the exercise of a power or discretion which affected the Plaintiff's interests in at least a practical sense. The facts alleged, which must be assumed to be true at this time, and the nature of fiduciary obligations owed is a fact-sensitive inquiry and here the full facts are yet to be established. Further, in advancing its claims against the Defendants the Plaintiff relies on the collective and cumulative effect of the matters pleaded. The Defendants cherry picking individual particulars fails to take into account all the circumstances of the case. Further, the principles applicable to the duties owed by directors of a company to its shareholders are not germane, as the Plaintiff is not a shareholder, as the shareholder of record is HSBCPB Suisse.

43. With regards to reflective loss it is not disputed by the Plaintiff that as a matter of English law reflective loss is not recoverable. However, the Plaintiff says that *Pilatus (ibid)* did not decide clearly and unambiguously that the principle against the recoverability of reflective loss applies in Guernsey. The Plaintiff relies on *Central Coast Council v Norcross [2021 NSWCA 75,* which is a decision of the Court of Appeal of New South Wales, where it concluded that there was no reason for the reflective loss principle to apply where the Company has no cause of action to recover the loss. The Plaintiff says arguments about reflective loss are a very complex issue and not ones suitable for strike out. The Plaintiff says in this case, the Company would have no cause of action for the recovery of the cost of the Plaintiff's capital investment or the profit it would have made. Further, the interrelationship between HSBCPB Suisse and the Plaintiff may be a matter of Singaporean law, as the Plaintiff is a Singapore company, as will be the extent to which the Plaintiff could compel HSBCPB Suisse to undertake steps on its behalf. In oral submissions, the Plaintiff said this was another reason why reflective loss in this case should not be dealt with on a strike out application. Each case requires a specific factual enquiry and only then can reflective loss be determined. The Plaintiff also argues that this is an area of developing jurisprudence in this jurisdiction and therefore on the principles set out in *Tranquility Holdings Limited (ibid)* relying on *Farrah v British Airways*, that 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.

44. However, even if the principle against the recoverability of reflective loss is applicable in Guernsey, the Plaintiff says its claim is not caught by the principle. The Plaintiff's claim for the USD 4,100,000 paid by it to acquire the investment is not reflective loss suffered by the Company. Importantly, the Plaintiff is not a shareholder in the Company but merely the beneficial owner of shares held by HSBCPB Suisse, as the legal owner of the shares. This is a material distinction and an untested area of law, for which there is no previous authority and on a strike out application it cannot be said that the Plaintiff's position is unarguable. The Plaintiff says that its causes of action against the Defendants are distinct from any claims which the Company may have had, even if the Company has a right of action in respect of substantially the same loss. The Plaintiff cannot bring a derivative action against the Defendants or bring an unfair prejudice application and therefore is otherwise without a remedy.

Discussion

45. The Plaintiff is right to submit that this is a strike out application and not a preliminary issue (cf. *Robert Dorey and ors v Raymond Ashton* (*ibid)*). I consider the wording of the Deputy Bailiff (as he was then) in *Jakob International v HSBC Private Bank C.I Limited [2016] GJ 26.2016*, sets it out very clearly where he said in relation to strike outs "*in short, the question is whether the Plaintiff's claim is unarguable, to fail or unwinnable. I regard these terms as interchangeable. The burden of establishing that this is so rests on the Defendant"*.

46. The Plaintiff maintains in its skeleton argument that the case of *Pilatus (ibid)* did not decide that the principle against recoverability of reflective loss applies in Guernsey. The Plaintiff is correct that in line with the normal rules of precedent in this jurisdiction, the decision in *Pilatus* is not a binding decision[5]. However, having considered the detailed reasoning contained in the *Pilatus* judgment (which I shall not recite here), I am not persuaded that I should come to a different conclusion from the one the Deputy Bailiff (as he was then) did. In particular, I take into account his references at paragraph 44,

> "*pausing at this point given that the origins of Guernsey Company Law are found in developments in English Company Law, where the statutes have tended to be reviewed and, to the extent applicable, then enacted domestically, albeit with some adjustments to suit local circumstances, I share the view expressed in various other cases in this court that states that regard can sensibly be had to English authority to see whether developments in this jurisdiction are appropriate in Guernsey. The rule in Fosse v Harbottle is, so far as I understand it, accepted as part of Domestic Law. As Lord Read further explains in para 51 of his judgment, this position in which a shareholder stands in relation to the company is a critical part of the overall explanation. As a consequence, the extension of that rule into the reflective loss principle as stated in the Prudential case is likely to be uncontroversial development, which is why I take as my starting point such principle can properly be recognised as forming part of Guernsey's Domestic Law".*

47. Contrary to the arguments put forward by Counsel for the Plaintiff, I do not consider that this is an area where the Guernsey court needs to consider other jurisdictions' views on reflective loss given the firm basis of English Law for Guernsey Company Law. To quote the late Sir Richard Southwell sitting as Lieutenant Bailiff in *Flightlease Holdings (Guernsey) Ltd v Flightlease (Ireland) Ltd [2009 – 2010] GLR 38*

> *"the concept of a limited company was imported into Guernsey law from English law [and] … since its importation into Guernsey in the late 1880s, it has naturally been appropriate to look to English law to help in the solution of problems concerning companies which are not covered by Guernsey statutes or customary law."*

48. I do not agree with the Plaintiff's submission that it "*is beyond argument*" that the Plaintiff's claim for USD 4,100,000, which it paid to acquire its investment in the Company is not any sense of reflective loss. This is an amendment pleaded at paragraph 70 of the Amended Cause, however, no further particularisation is given in relation to this element, save that it says "*the Plaintiff's claims are founded on the cause of actions pleaded above*". If the Plaintiff is to be treated as shareholder, then in my view, this falls squarely within the parameters of reflective loss. The reduction in the value of USD 4,100,000 is a reduction in the value of the 4100 shares that the Plaintiff purchased in the Company. As Lord Reed said in *Marex* at paragraph 37:

> *"the effect of the rule in Foss v Harbottle, as the court said in Prudential at p 224, is that "[the shareholder] accepts the fact that the value of his investment follows the fortunes of the company". It is for that reason that the rule in Prudential has been said to recognise*

[5] See paragraph 56 of *Pilatus*.

"the unity of economic interests which bind a shareholder and his company": Townsing v Jenton Overseas Investment Pte Ltd [2008] 1LRC 231, para 77."

49. The Plaintiff also says that its claims are distinct from the Company, even if the Company has a right of action in respect of substantially the same loss. The Plaintiff also relies on distinction by Lord Read at paragraph of 79 of ***Marex***, where he says the following:

> "*summarising the discussion to this point, it is necessary to distinguish between i) cases where claims are brought by a shareholder in respect of loss which he has suffered in that capacity, in the form of a diminution in share value or in distributions, which is the consequence of loss sustained by the company in respect of which the company has a cause or action against the wrongdoer, and ii) cases where claims are brought, whether by a shareholder or by anyone else in respect of loss which does not fall within that description, but where the company has a right of action in respect of substantially the same loss*".

50. He then continues at paragraph 84…

> "*the position is different in cases of the second kind. One can take as an example cases where claims are brought in respect of loss suffered but in the capacity of a creditor of the company. The arguments which arise in the case of a shareholder have no application. There is no analogist relationship between a creditor and the company. There is no correlation between the value of the company's assets or profits and "value" of the creditors debt, analogist to the relationship on which a shareholder bases his claim for a fall in share value". The inverted commas "value" when applied to a debt reflect the fact that it is a different kind of entity to a share."*

51. The Plaintiff does not, in my view, fall into the second kind of loss. If it is treated as a shareholder the Plaintiff's losses are those suffered by the Company and the Company would have cause of action against the same wrong doers. It is not separate and distinct from the loss in the Company[6]. The loss occurred when the only asset of the Company, i.e. the Property was sold for substantially less than the amount the Company paid for it.

52. Lord Reed at paragraph 31 of Marex said:

> *"The starting point is the nature of a share, and the attributes which render it valuable. A share is not a proportionate part of a company's assets: Short v Treasury Comrs. Nor does it confer on the shareholder any legal or equitable interest in the company's assets: Macaura v Northern Assurance Co Ltd. As the court stated in Prudential, a share is a right of participation in the company on the terms of the articles of association. The articles normally confer on a shareholder a number of rights, including a right to vote on resolutions at general meetings, a right to participate in the distributions which the company makes out of its profits, and a right to share in its surplus assets in the event of its winding up."*

53. At paragraph 81 Lord Read says:

> "*the effect of the rule of Foss and Harbottle is that the shareholder has entrusted the management of a company's right of action to its decision-making organs, including, ultimately the majority of members voting in a general meeting. If such a decision is taking otherwise than in the proper exercise of the relevant powers, then the law provides the shareholder with several remedies, including a derivative action, an equitable relief from unfairly prejudicial conduct.*"

[6] See *Foss v Harbottle*

At paragraph 82 he says:

> "*the company's control over its cause of action would be comprised and the rule in Foss and Harbottle can be circumvented if a shareholder can bring a personal action for a fall in share value consequent on the company's loss, where the company has concurrent right of action in respect of its loss.*"

Then at paragraph 83,

> "*the critical point is that the shareholder has not suffered a loss which is regarded by the Law as being separate and distinct from the company's loss, and therefore has no claim to recover it. As a shareholder, (and unlike a creditor or an employee), he does, however, have a variety of other rights which may be relevant in a context of this kind*".

54. However, crucially for this Application, the Plaintiff is not a shareholder. The Defendants during the course of this dispute have been clear in their position that the Plaintiff is not a shareholder and does not have the same rights. They cannot have it both ways. The difference between the Plaintiff and the shareholder is demonstrated in the rights that the Plaintiff was entitled to when the Plaintiff requested a copy of the share register. The First Defendant responded that:

> *"The shares are held by the relevant HSBC Private Bank booking centre, through which they invested, as their nominee. As such Lucille Holdings Pte are not able to exercise the shareholders rights under either the shareholder agreement or mem and arts."*

55. Nor have the Defendants attempted to argue that the Plaintiff is bound by the arbitration clauses contained in the Shareholders' Agreement. The Plaintiff is the beneficial owner of the shares held by HSBCPB Suisse, as the legal owner of the shares. Despite some robust submissions from the Defendant on this point, I did not have before me any documentation in relation to the ownership (although I understand from the submissions made that the Plaintiff is one of a number of investors in this position) or arrangements that were put into place to govern the relationship between HSBCPB Suisse and the Plaintiff. I do not know to what extent Singapore Law (if that is the correct law governing the relationship between HSBCPB and the Plaintiff) will impact this argument. I do not know if the Plaintiff could have compelled HSBCPB to take action, particularly against a company within its own group. Whether or not the Plaintiff's status is a material distinction it is too early to say, nor can I say at this early stage whether it is "*form over substance*" in these circumstances. Nor did the case of *Jafari-Fini v Skillglass Ltd* (ibid) assist me which appears to have been a decision based very much on its facts where the Defendant was the legal owner of the Plaintiff's shares.

56. It is not generally appropriate to strike out a claim on assumed facts in an area of developing jurisprudence. Decisions as to novel points of law should be based on actual findings of fact: see *Farah v British Airways (The Times 26 January 2000, CA)*. Developments should be on the basis of facts ascertained at trial, rather than on a hypothetical basis of pleadings or assumed facts. I have come to the conclusion that for the reasons I have set out above, the Defendants have not shown that this claim should be struck out at this stage on the first ground of their Application.

57. In relation to the second ground relied on by the Defendants, I remind myself as Lieutenant Bailiff Talbot did in *Jackson v Dear (ibid)* that I should be careful not to conduct a mini-trial or to allow the application to become satellite litigation[7]. Further, the scope of bringing a matter to the end by strike out, under rule 52 of the RCCR is less than that found on a summary judgment application. Whilst the Plaintiff emphasised that this application was early on in the proceedings, and therefore, more relevant facts may come out after disclosure and witness statements, whether this in itself is sufficient for the Defendants to fail in its endeavour to strike out the Amended Cause must depend

[7] See paragraph 11 *Jackson v Dear (ibid)*

on the extent to which the issue of law is fact dependent and the relevance of the facts for the basis of the Application to strike out. Where all the relevant facts can be identified, there is no reason why an issue of law cannot be determined and, indeed, it will often be consistent with the overriding objective for that to be done, in the interest, in particular, of saving time and costs. Further, whilst the Plaintiff referred in submissions to the need for expert evidence on the loss of value of the Property, the issue of whether it was a fixed term investment or otherwise, whilst these are disputed facts, neither of these disputed elements go to the basis of the second ground of the strike out application.

58. Paragraph 31 of *JP SPC4 v Royal Bank of Scotland International Limited [2022] UKPC 18* sets out many precedents for decisions being reached, as to whether a duty of care can be established on the basis of assumed or pleaded facts rather than following a full trial, although it should be noted these are all cases in England & Wales rather than in this jurisdiction. As set out in *Morton v Paint* (1996) 21 GLJ 36 "*in relation to the law of torts it has been customary for the Guernsey Courts to adopt English common law as it has been developed*" but as clarified in *Helmot v Simon [2010] GRC 04 paragraph 180* "*English common law is persuasive but decisions of the English courts are not, and cannot be, binding on this jurisdiction*". It is on this basis that I have approached the authorities that were relied on by both parties.

59. The question in relation to the tortious claims is whether or not there is a duty of care owed by either or both of the Defendants to the Plaintiff. The parties in their original submissions and at the hearing did not agree on which was the right test in these circumstances (although both argued regardless of the test that their positions were made out). *JP SPC4 v Royal Bank of Scotland International Ltd (ibid)* was not cited to me in the original submissions or at the hearing but the parties through its reference in *Ashton v Dorey (ibid)* took the opportunity to provide additional submissions upon this case. Whilst the Plaintiff sought to persuade me that it was not relevant to the instant decision in *Ashton v Dorey* (ibid) the Guernsey Court of Appeal held at paragraph 82 that the Isle of Man Privy Council decision is compelling authority on the applicable test for finding a duty of care in tort, in a case of pure economic loss where there is no previous case establishing the duty. The Court of Appeal set out from paragraph 83:

> *83. We have explained already the context of the decision. That case, like the case before us, involved a claim in tort for negligence purely for economic damage in a context in which there is not yet an established duty of care. It is not sufficient to bring into existence a duty of care to avoid causing or to prevent such loss that the loss was foreseeable as a result of the actions or inaction of the person said to owe the duty. Foreseeability does not amount to proximity as a touchstone: proximity, to be established for the purpose of founding a duty of care, ordinarily needs more. Commonly this is to be found where the person to owe the duty of care is found to have assumed responsibility to the injured party to use reasonable care to avoid the harm.*
>
> *84. At paras [64] and [65] of the judgment in JP SPC4 the Privy Council explained:*
>
> > *"64. An examination of the case law indicates (see Clerk and Lindsell on Torts, 23rd ed (2021), paras 7-113 to 7-137) that the factors which have been of particular relevance in determining whether there is an assumption of responsibility in relation to a task or service undertaken include: (i) the purpose of the task or service and whether it is for the benefit of the claimant; (ii) the defendant's knowledge and whether it is or ought to be known that the claimant will be relying on the defendant's performance of the task or service with reasonable care; and (iii) the reasonableness of the claimant's reliance on the performance of the task or service by the defendant with reasonable care.*

> *65. In the present case no express assertion of an assumption of responsibility is made in the Amended Particulars of Claim and none of the relevant factors are alleged to be present on the facts. It is not alleged that the Bank undertook to perform any task or service for the Fund or that there were any exchanges crossing the line between them. The only service the Bank undertook to provide was for its customer, SIOM. The Fund and the Bank are not alleged to have dealt with each other at all."*

60. Having determined the test, the next step is to consider whether the Plaintiff has demonstrated in its pleadings (taking them at their highest) that there has been a voluntary assumption of responsibility by either of the Defendants. This is the application of an objective test. Lord Steyn in *Williams v Natural Life [1998] WLR 830* page 835:

> *"The touchstone of liability is not the state of mind of the defendant. An objective test means that the primary focus must be on things said or done by the defendant or on his behalf in dealings with the plaintiff. Obviously, the impact of what a defendant says or does must be judged in the light of the relevant contextual scene. Subject to this qualification the primary focus must be on exchanges (in which term I include statements and conduct) which cross the line between the defendant and the plaintiff.*

61. It is notable that in *Williams v Natural Life* it was a triangular relationship (in that case prospective franchisee, franchisor company and the Director) and Lord Steyn said (at page 835 paragraph G):

> *"In such a case where the personal liability of the director is in question the internal arrangements between a director and his company cannot be the foundation of a director's personal liability in tort. The inquiry must be whether the director, or anybody on his behalf, conveyed directly or indirectly to the prospective franchisees that the director assumed personal responsibility towards the prospective franchisees."*

and that at page 837 paragraph B:

> *"The test is not simply reliance in fact. The test is whether the plaintiff could reasonably rely on an assumption of personal responsibility by the individual who performed the services on behalf of the company."*

62. In *Hedley Byrne Co. Ltd v Heller &Partners Ltd [1964] AC 465* Lord Devlin focusing on the assumption of responsibility said (starting on page 528):

> *"... the categories of special relationships, which may give rise to a duty to take care in word as well as deed are not limited to contractual relationships or to relationships of fiduciary duty, but also include relationships which ... are 'equivalent to contract' that is, where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract."*

63. The Privy Council helpfully set out at paragraph 64 of *JP SPC 4 v Royal Bank of Scotland Ltd (ibid)*, an excerpt from Clerk and Lindsell on Torts, (23rd Ed.), paragraphs 7-113 to 7-137) identifying factors which have been of particular relevance in determining whether there is an assumption of responsibility in relation to a task or service undertaken include:

> *"(i) the purpose of the task or service and whether it is for the benefit of the claimant;*
> *(ii) the defendant's knowledge and whether it is or ought to be known that the claimant will be relying on the defendant's performance of the task or service with reasonable care; and*

(iii) the reasonableness of the claimant's reliance on the performance of the task or service by the defendant with reasonable care.".

64. In the Amended Cause, none of the particulars refer to the assumption of responsibility by either of the Defendants to the Plaintiff (and the Defendants in this case specifically deny that either of them assumed duties towards the individual investors who subscribed for shares in the Company). It is not fatal for the Amended Cause that this is not specifically pleaded if the Plaintiff has pleaded factors which may show whether, objectively, there is an assumption of responsibility. At paragraph 7-108 of Clerk and Lindsell refers to the case of *Electra Private Equity Partners v KPMG Peat Marwick [2001] 1 BCLC*, where the Court of Appeal reversed the decision of Carnwath J (as he was then) to strike out an action against the defendant because the judge had imposed too stringent a test when requiring evidence of conscious assumption of responsibility by the defendants.

65. In the original Cause, the pleadings referred to a "*special relationship of trust and confidence*". This was based on the Club Deals offered by the HBSC group to the Plaintiff and other specially selected investors. The same facts are relied on in the particulars in the Amended Cause, which although no longer referring to a "*special relationship*", pleads a "*relationship of trust and confidence*", which is also the backbone of the pleading for the fiduciary duties which the Plaintiff says were present. In relation to the Second Defendant, the Plaintiff expands on the substance of the relationship by referring to the meetings and relationship it had with the HSBCPB and also the Second Defendant's CEO, Chris Allen, its Head of Real Estate Fund Management, Paul Forshaw and its Head of Private Equity, Simon Jennings, who it is said were all in regular contact with the Plaintiff and its owning family. These particulars are supported by Mr Lee's affidavit. However, Mr Lee's affidavit only refers to the Second Defendant in this respect not to the First Defendant. The absence of reference to HMG in Mr Lee's affidavit makes the difference in the strength of the two claims acute. Whilst the evidence in relation to the Second Defendant is disputed (Mr Sykes's accepts in his affidavit that he does not have direct evidence of the meetings but he says these were informal and casual and do not denote a special relationship but usual business practice) and emphasis is placed by the Second Defendant on the references by the Plaintiff to the relationship with the HSBC group (or "*brand*" in the submissions), rather than HAIL, a strike out application is not the appropriate forum to decide disputes in evidence. What is clear is that there is evidence that the Second Defendant deliberately engaged with the Plaintiff in order to establish a relationship to, at the very least, encourage the Plaintiff to invest in the project. The Second Defendant appears to have consciously and proactively courted the Plaintiff, both in person and through its documentation. In the PIM, it is HAIL which seeks commitments from the Investors to the investment, as well as setting out that it provides a full investment advisory service. Whilst the Second Defendant says that this written commentary is more nuanced and is referring to its relationship with the Company, this is clearly an argument which is more properly for a trial with all the circumstances and evidence being tested rather than a strike out application. The Second Defendant relies on the disclaimers and risk warnings contained in the Investment Overview and the PIM. The Plaintiff disputes that they have the effect that the Second Defendant seeks to ascribe them. Not only will these need to be considered in relation to the effect on an established duty of care (if one is so determined) but also importantly before that, the Court will need to consider the role which these disclaimers might play in actually determining whether there had been an assumption of responsibility[8], which will be issues of fact and law to be decided having regard to all the circumstances of this case. The nature of the relationship between HAIL and the plaintiff and the assumption, or not, of responsibility (which will need to be assessed objectively) are all issues of fact and law which along with all the detailed circumstances of the case should be subjected to full scrutiny at a trial. A strike out under rule 52 (2) (a) should only be exercised in plain and obvious cases and this is not one of them.

[8] See *Royal Bank of Scotland v Bannerman Johnstone Maclay [2005] PNLR 43* and *First National Commercial Bank Plc v Loxleys [1997] PNLR 211* (pages 214-215)

66. As this is a fact sensitive case where the Plaintiff is seeking to establish a duty of care, where there is no previous obvious precedent in this jurisdiction and is a developing area of law, I do not consider that the Second Defendant has surmounted the high hurdle in showing that there is no realistic prospect of success for the Plaintiff. It does not mean that the Plaintiff will necessarily succeed at trial, but that is not the test. Even if the Plaintiff establishes a duty of care, it will still need to show how it works with the other duties owed by the Second Defendant, breach by the Second Defendant of that duty and that any damages fall within the scope of the duty established. As the Amended Cause is still in draft form, the Plaintiff may wish to consider (given the comments I make below) whether it takes the opportunity to amend the Amended Cause before the Second Defendant amends its defences to take into account the confirmation of the test to be used in cases of economic loss.

67. However, with regard to the First Defendant, I consider that even taking the Plaintiff's Amended Cause at its highest and assuming that all factual allegations made by the Plaintiff are capable of being established at trial, the Plaintiff's claim against the First Defendant on the basis of tortious duties, as currently pleaded in the Amended Cause, does not support the continuance of the action. Importantly, Mr Lee's affidavit details that the relationship with HAIL built on the longstanding relationship with HSBC, however, the only reference to HMG is limited to his evidence that the Plaintiff has its own relationship with HAIL and over and above HAIL's relationship with HMG. Although the authorities show that direct contact is not essential, the Plaintiff's claim does not articulate in the circumstances pleaded any grounds to base a relationship between HMG to the Plaintiff. The particulars relied on do not support a finding of a duty of care between these parties. The communications pleaded were not between HMG and the Plaintiff and date from 2019, many years after the initial investment and several years after the Plaintiff says the Property should have been sold. They refer to the "*HSBC parties*" owing "*fiduciary obligations*" to "*our investors*". This is not sufficient to maintain an arguable cause of action on tortious duties in their current form between the Plaintiff and the First Defendant. Further, the Plaintiff has not shown, or has not shown sufficiently in its pleadings that objectively HMG or anybody on its behalf, conveyed directly or indirectly, expressly or by its actions that it had assumed responsibility in relation to the deal, nor do the Plaintiff's pleadings articulate any reliance by the Plaintiff on an alleged assumption of responsibility (whether known or not by HMG) creating a special relationship between HMG and the Plaintiff[9]. I am not satisfied on the current pleadings (taking them cumulatively and at their highest) that the Plaintiff has shown that it believed that HMG was undertaking personal responsibility for it or the Investors as a whole. However, taking into account the Court of Appeal has confirmed the right test in this jurisdiction for economic loss after the Amended Cause had been settled, this has led me to the conclusion that even though the Plaintiff's submissions included arguments that regardless of which test, it had an arguable case (with which I have disagreed), the Plaintiff should be given the opportunity to amend the Cause in relation to allegations of tortious duties owed by the First Defendant focusing on the requirements of the binding authority and the direction given as to the relevant factors. It is likely to be an uphill task for the Plaintiff to show that an amendment in relation to this claim satisfies the real prospect of success test. If it does not, leave to amend will be refused.

68. Dealing now with the application to strike out in relation to fiduciary duties, alleged by the Plaintiff, the starting point is that a fiduciary duty arises when one person has undertaken to act on behalf of another in circumstances which give rise to a relationship of trust and confidence. As Lieutenant Bailiff Newman said in *IFS v Manor Park 21/2010*. It "*is a question of fact to be determined by examining the specific facts and circumstances surrounding the relationship".* The Plaintiff's case involves novel allegations of fiduciary duties. The categories of fiduciary relationship are not settled, as Sir Richard Collas acknowledged (sitting as Lieutenant Bailiff) citing Snell's Equity in *Highland Clo Funding Limited v Joshua Terry [2020] GRC 040*:

[9] See *Williams v Natural Life Ltd (ibid)* page 835

"It is acknowledged that fiduciary duties can exist and be imposed on the parties to what would otherwise be a purely commercial relationship. Snell's Equity at paragraph 7-005 cites agency as a clear example. It also says that fiduciary expectation may be appropriate in respect of part only of the duties of the arrangement between the parties. The categories of fiduciary relationship are not settled; it is a flexible concept where the duties will be imposed if the circumstances justify their imposition. In other words, it is fact-specific. Where fiduciary duties are imposed, the fiduciary is expected to subordinate his interests and act solely in the interests of the principal. The expectation is assessed objectively and so fiduciary duties may be imposed even where the fiduciary subjectively believes he does not owe such duties."

69. However, this does not mean that it will be common to find fiduciary duties outside of the usual category of fiduciary relationships. In *Al Nehayan v Kent [2018] EWHC 333 Comm* at paragraph 157 Leggatt LJ said "*it is exceptional for fiduciary duties to arise other than in certain settled categories of relationship*". At paragraph 163 he explained:

> *"163. But the existence of trust and confidence is not sufficient by itself to give rise to fiduciary obligations. In the first place, the question whether one party did in fact subjectively place trust in the other is not the test. As Dawson J said in the Hospital Products case (1984) 156 CLR 41 at 71:*
> *'A fiduciary relationship does not arise where, because one of the parties to a relationship has wrongly assessed the trustworthiness of another, he has reposed confidence in him which he would not have done had he known the true intentions of that other. In ordinary business affairs persons who have dealings with one another frequently have confidence in each other and sometimes that confidence is misplaced. That does not make the relationship a fiduciary one. A fiduciary relationship exists where one party is in a position of reliance upon the other because of the nature of the relationship and not because of a wrong assessment of character or reliability.'*
>
> *164. The inquiry, in other words, is an objective one involving the normative question whether the nature of the relationship is such that one party is entitled to repose trust and confidence in the other.*

70. Although the courts have been reluctant to define what a fiduciary is, fiduciary duties flow from relationships and as the authorities makes clear the imposition of a fiduciary duty outside the archetypal relationships will be fact sensitive[10]. As set out in *Mothew* at p 18c: *"[the fiduciary] is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary*".

71. Directors of a company owe fiduciary duties to the company. However, in general the Directors do not solely, by virtue of their office as director, owe fiduciary duties to the shareholders collectively or individually, nor similarly would they owe them to the beneficial owners of the shares if (as in this case) there were nominee shareholders. Lieutenant Bailiff Marshall said at paragraph 471 of *Carlyle Capital Corporation v Conway & others 38/2017*:

> *"Lastly, when considering any implications of this point, it needs to be firmly recollected that it is an aspect of the directors' fiduciary duties of good faith, which are duties which are owed to the company. They are not even owed to the shareholders as such, even though the company's best interests may be seen to be reflective of the shareholders' interests: see the detailed analysis by Owen J in Bell Group Ltd v Westpac Banking Corporation 70 ASCR 1 at [4396]- [4422."*

[10] See for example Wetherspoon where one director of the defendant company was found to have owed a fiduciary duty but not the other two.

72. Directors direct and control the affairs and assets of the company; they do not direct or control the affairs or assets of the members[11]. Nugee J (as he was then) in *Sharp v Black [2015] EWHC 3220 (Ch)* (which was a strike out application) refers to a number of judgments where judges have set out reasons why the imposition of such a duty could lead to unfortunate consequences:

> *"Handley JA also said that if the directors owed fiduciary duties to the shareholders they would be liable to harassing actions by minority shareholders, and exposed to a multiplicity of actions, each shareholder having his own personal claim. This latter point was also made by Mummery LJ in Peskin v Anderson (above) at [30] where he said that it was important that directors are not over-exposed to the risk of multiple legal actions by dissenting minority shareholders. At first instance in the same case Neuberger J said that to hold that a director owed some sort of general fiduciary duty to shareholders would involve placing an unfair, unrealistic and uncertain burden on a director, and would present him frequently with a position where his duty to shareholders would be in conflict with his undoubted duty to the company: [2000] B.C.C. 1110 at 1121. The idea of a potential conflict between the directors' duty to the company and their supposed duty to shareholders can also be found in Percival v Wright [1902] 2 Ch. 421, often regarded as the origin of this line of authority, where Swinfen Eady J referred to the fact that if directors owed a duty to disclose negotiations to shareholders it would place them in a most invidious position, as premature disclosure of negotiations might well be against the best interests of the company."*

73. Both parties agree that in relation to the finding of a fiduciary duty, I should be guided by English case law so these policy reasons must be equally applicable in this jurisdiction. Whilst the Plaintiff distinguishes its position from that of a shareholder, nevertheless, the principle that on the facts of the particular case there must be a "*special relationship*" between the Director and beneficial owner of the shares and that this special relationship must be something over and above the usual relationship that any Director of a company has with the beneficial owner of those shares must be right. If HMG is to be held to owe fiduciary duties to the Plaintiff, there must be something unusual in the nature of the relationship which gives rise to it. Moreover, a relationship of trust and confidence is not enough:

> *164. It is also necessary to identify more precisely the nature of the trust and confidence which is a feature of a fiduciary relationship. There plainly are many situations in which a party to a commercial transaction may legitimately repose trust and confidence in another without the other party owing any fiduciary duties.*[12]

74. As Nugee J says at paragraph 12 of *Sharp v Black (ibid):*

> *"That no doubt explains why the cases where such a duty has been held to exist mostly concern companies which are small and closely held, where there is often a family or other personal relationship between the parties, and where, in almost all cases, there is a particular transaction involved in which directors are dealing with the shareholders, from which the directors often stand to benefit personally. The imposition of a fiduciary duty in such circumstances reflects the fact that directors who have a close family or other personal relationship with shareholders, and are entering into transactions with them, may be tempted to exploit that relationship to take unfair advantage of the shareholders for their own benefit."*

[11] See *Sharp v Black (ibid).*
[12] Paragraph 164 Al Nehayan v Kent (ibid)

75. It is not a comparable situation here although that in itself it is not fatal for the Plaintiff in relation to its claim. In *Glenn v Watson [2018] EWHC 2016 (Ch)* Nugee J at paragraph 131 (6) sets out a number of cases where the court has found fiduciary duties and then at (7) concludes:

> *Without in any way attempting to define the circumstances in which fiduciary duties arise (something the courts have avoided doing), it seems to me that what all these citations have in common is the idea that A will be held to owe fiduciary duties to B if B is reliant or dependent on A to exercise rights or powers, or otherwise act, for the benefit of B in circumstances where B can reasonably expect A to put B's interests first. That may be because (as in the case of solicitor and client, or principal and agent) B has himself put his affairs in the hands of A; or it may be because (as in the case of trustee and beneficiary, or receivers, administrators and the like) A has agreed, and/or been appointed, to act for B's benefit. In each case however the nature of the relationship is such that B can expect A in colloquial language to be on his side. That is why the distinguishing obligation of a fiduciary is the obligation of loyalty, the principal being entitled to "the single-minded loyalty of his fiduciary" (Mothew at 18A): someone who has agreed to act in the interests of another has to put the interests of that other first. That means he must not make use of his position to benefit himself, or anyone else, without B's informed consent.*

76. Considering the Plaintiff's case taken at its highest, the particulars in relation to the First Defendant do not, in my judgment, demonstrate a relationship of trust and confidence giving rise to fiduciary duties being owed. Simply stating there was such a relationship does not make it so (outside the categories of relationship that it has been held to be the case). Neither does Mr Lee's affidavit give evidential support for this relationship. The relationship (whether as director, managing entity or administrator) of HMG with the Plaintiff is not one which comes close to a relationship where HMG appears to have undertaken to act for or on behalf of the Investors (whether as a collective or the Plaintiff individually) in such a way as to give rise to a duty of loyalty (as opposed to the Company), or has undertaken an obligation to put the interests of the Plaintiff or the Investors collectively first or where it has entering into transactions with the Plaintiff, or where there are any of the other hallmarks of a fiduciary relationship. The correspondence referred to in the pleadings which contains references to fiduciary duties being owed, which I have set out in more detail above, does not mean that such duties were present between HMG and the Plaintiff and nor can they be imposed in retrospect. Whilst the Plaintiff argues that there are likely to be other documents that have not been disclosed by the First Defendant at this stage, the Plaintiff's difficulty is that assuming all the factual allegations made by the Plaintiff are capable of being established at trial, these do not come close to amounting to a factual basis of an "*exceptional*" relationship upon which to base a fiduciary relationship. A court should exercise caution in the early stages of a case in striking out a claim, particularly in developing areas of law, however, here a distinction can be made between the circumstances of the cases against the First and Second Defendants. Although the Plaintiff has pleaded in relation to both Defendants that the Plaintiff had a relationship of trust and confidence and owed it fiduciary duties, in relation to the First Defendant I do not consider that the Plaintiff has demonstrated on a proper analysis of the law in this area a factual foundation for such a claim, even taking its pleadings at its highest. Nor am I persuaded that this kind of claim is one where I should give the Plaintiff an opportunity to amend the pleadings. This is not a matter where on the facts there is reason to believe that the Plaintiff will be able to put the deficit right. Even if the Plaintiff were to succeed in proving all the facts alleged, they will not be entitled to remedy on the basis of a fiduciary duty being owed to it by HMG.

77. In relation to the Second Defendant, however, because of the interactions between the beneficial owners of the Plaintiff and the Second Defendant, which I have set out in some detail above and will not repeat, I have come to the conclusion that it will take a trial to establish objectively whether the Second Defendant was for the Plaintiff "*someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and*

confidence"[13] and that it was "*the kind of trust and confidence characteristic of a fiduciary relationship*" i.e." *it is founded on the acceptance by one party of a role which requires exercising judgment and making discretionary decisions on behalf of another and constitutes trust and confidence in the loyalty of the decision maker to put aside his or her own interests and act solely in the interests of the principal."* To be clear, my conclusion is not that there is a fiduciary duty in the circumstances alleged by the Plaintiff but that it is arguable. The time to decide on whether there is a fiduciary duty between the parties in this case is once the facts are established. There will be many hurdles for the Plaintiff in relation to establishing the duty (including how it can exist concurrently with other fiduciary duties owed by the Second Defendant) and thereafter showing breach, damages and causation. However, for the purposes of the Application the Second Defendant has not shown that the Amended Cause discloses no cause of action in relation to fiduciary duties between the Plaintiff and the Second Defendant.

Conclusion

78. The Plaintiff acknowledged in its own skeleton argument its case against HAIL is stronger than against HMG and this is reflected in this judgment. In relation to the Second Defendant, I have found that it has been unsuccessful in striking out the claims against it on either the first or second ground. In relation to the First Defendant, I have found that it has been successful in striking out the claim based on a fiduciary duty. However, in relation to the allegation that the First Defendant has breached tortious duties owed to it, whilst I have found that the current pleadings do not disclose a reasonable cause of action, I have decided that due to the developments in this jurisdiction, the Plaintiff should be given an opportunity to amend its pleadings. In amending its pleadings, the Plaintiff should therefore, identify the facts which are alleged to amount to an assumption of responsibility and the scope and extent of the alleged duty. Put simply, it must identify clearly and concisely what it is said that the First Defendant has assumed responsibility for, and what facts are relied upon as establishing that the First Defendant has assumed that responsibility. The Plaintiff should also consider amending paragraph 70 of the Amended Cause, so that rather than relying simply on a reference to the "causes of action pleaded above" the basis of the claim is properly pleaded. Likewise, paragraph 63-66 should be reviewed so that it is clear what duties, if any, it is said are owed to the Company and also to the Plaintiff and other Investors.

79. In terms of the costs of this Application, if the parties can agree an appropriate order, they are invited to do so. If agreement cannot be reached, either party can list the matter before a suitable Interlocutory Court, with a view to making an application in respect of the costs of this Application.

[13] *See Bristol and West Building Society v Mothew (ibid)*