

Application for summary judgment of a counter claim and to strike out the defence of the counter claim.

[2023]GRC033

Civil Action  
No: 2407

**IN THE ROYAL COURT OF GUERNSEY**  
**ORDINARY DIVISION**

**Between:**

**(1) WOLFGANG JOACHIM ERICH LANDL AND  
ANDREA BRIITTA SCHAEERER LANDL**

**Plaintiffs**

**(2) KHKJ HOLDINGS LIMITED**

**(3) ALI HASAN MAHMOUD MOHAMED HUSAIN**

**(4) KULDEEP SINGH LAMBA AND GURVINDER SINGH  
LAMBA**

**(5) L'OEILLET LIMITED**

**(6) ANUPE DHORAJIWALA AND RUPAL TERAIYA**

**(7) RAJEN R. SHAH**

**(8) TEO STRUCTURED INVESTMENTS LIMITED**

**(9) JAMAL ALAMER**

**(10) FABRIZIO CERÈ**

**(11) MOHAMED NOORUDDIN**

**(12) EUGENIO BERENGA**

**(13) VELES MANAGEMENT CORP.**

**(14) CAREY AG (AS TRUSTEE OF THE MARRAKECH  
TRUST)**

**(15) VLADIMIR ISAKOV**

**(16) NAJAH HASAN ALAALI**

**(17) GIANCAROLO PAROLO**

**(18) LANSEND INVESTMENTS LIMITED**

**(19) YASSER JEIROUDI**

**(20) LUXX PCC LIMITED (IN LIQUIDATION)**

**-and-**

**(1) STEPHEN WILLIAM HOGG**

**Defendants**

**(2) STEPHEN WATTS**

**(3) IAN JAMES HENDERSON**

**(4) EFG PRIVATE BANK (CHANNEL ISLANDS) LIMITED**

**Applications for:**

- (i) Summary judgment on Counterclaim of Defendants (1) to (3); and**
- (ii) Strike-out the Defence to the Counterclaim of Plaintiff (20)**

**Case heard on 30<sup>th</sup> June, 2023,**

**Before: John Russell Finch, Esq, OBE, Lieutenant Bailiff**

**Counsel for Defendants (1) to (3): Advocate M P D Jones;  
Counsel for Plaintiffs (20): Advocate T J Bamford.**

**Legislation referred to in Decision**

The Protection of Investors (Bailiwick of Guernsey) Law, 1987, Sections 2, 10 and 35;  
The Protection of Investors (Bailiwick of Guernsey) Law, 2020, Section 10;  
The Companies (Guernsey) Law, 2008, Sections 157-159;  
The Royal Court Civil Rules, 2007, Rules 19 and 52;  
The Authorised Close-Ended Investment Scheme Rules, 2008, Rules 2.01, 3.01, and 4.02.

**Cases referred to in Decision**

Tranquility Holdings Limited v Invista Estate Management (C.I) Limited, Royal Court Judgment 38/2015;  
Invescap Holdings Ltd v Douglass, (Unreported, Royal Court, 30<sup>th</sup> July, 2014);  
SPL Guernsey Limited and its incorporated cells, and others v Robert Stephan Addison, Royal Court Judgment 19/2018

## Decision

### Application

1. This matter is part of a complex civil action where there are twenty Plaintiffs and four Defendants. The present application concerns three of the Defendants (“the Professional Directors”) and the twentieth Plaintiff, Luxx PCC Limited (“PCC”). (The 1<sup>st</sup> to 19<sup>th</sup> Plaintiffs are referred to in the papers as “the shareholders”). The documents relating to the main action are found in Bundle B in the case papers. The documents in respect of the present application are principally found in Bundle A. The hearing concerned the Professional Directors’ application (page A2) to:
  - (i) obtain summary judgment for their Counterclaim (at page B152) which seeks a declaration that they are entitled to be indemnified by PCC against claims by the shareholders; and
  - (ii) strike-out the Defence to the Counterclaim (at page B223) denying that the “*Professional Directors are entitled to be indemnified*”.

The summons in the main action is at pages B1 to B36 and seeks damages or compensation from the Professional Directors for “*breach of statutory duty*”, pursuant to Section 34 of the Protection of Investors (Bailiwick of Guernsey) Law, 1987 (“the POI Law”), which is at page A171 (now replaced by the 2020 Law). The power to give summary judgment is at Rule 19 of the Royal Court Civil Rules, 2007; and to strike out is at Rule 52. These are found at pages A174 to A176. It can be seen that the present matter is a part, though a significant one, in the large-scale main action, supported as it is by three voluminous bundles of documents. The decision in this part of the case is likely to be important, as it may well go to the root of the action. The issue is essentially between the Professional Directors and PCC, as mentioned above.

### Applicable Legal Principles

2. In relation to summary judgment helpful Guernsey authority is found at folio 13 of Bundle A: Tranquility Holdings Limited v Invista Estate Investment Management (C.I.) Limited, judgment 38/2015 of the Royal Court. There Sir Richard Collas, Bailiff, set out the relevant principles at paragraph 45, citing in full the careful analysis by the Deputy Bailiff in Invescap Holdings Limited v Douglass (unreported, 30<sup>th</sup> July, 2014). Rule 19(2) of the 2007 Rules is the backdrop and this provides that:

*“The grounds of the application for summary judgment shall be that –*  
*(a) the plaintiff has no real prospect of succeeding in the claim or issue, or*  
*(b) the defendant has no real prospect of successfully defending the claim or issue,*  
*and there is no other compelling reason why the claim or issue should be disposed of at a trial”.*

The Invescap judgment, cited with approval in the Tranquility case, reads as follows:

*“34. I have set out the approach I consider should be followed in a number of recent cases and Advocate Jones referred to the judgment from earlier this month in EFG Private Bank (Channel Islands) Limited v BC Capital Group SA (in liquidation) and others (unreported, 14 July 2014). Accordingly, as I have done before (see para. 33 of that judgment), I repeat the summary of the principles to apply given by Lewison J (as he then was) in Easyair Limited (t/a Openair) v Opal Telecom Limited [2009] EWHC 339 (Ch) (at para.15), which I find sets out the considerations in an understandable fashion:*

*“The correct approach on applications by defendants is, in my judgment, as follows:*

- i) The court must consider whether the claimant has a “realistic” as opposed to a “fanciful” prospect of success: Swain v Hillman [2001] 2 All ER 9;*
- ii) A “realistic” claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8]*
- iii) In reaching its conclusion the court must not conduct a “mini-trial”: Swain v Hillman*
- iv) This does not mean that the court must take a face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in actual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10]*
- v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;*
- vi) Although a case may turn out in trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63;*
- vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent’s*

*case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that it is determined in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725."*

35. The passage from para.24.2.5 of the commentary in *The White Book* quoted at para. 36 of that previous judgment also deserves to be repeated in the context of this Application:

*"If the applicant for summary judgment adduces credible evidence in support of their application, the respondent becomes subject to an evidential burden of proving some real prospect of success or some other reason for trial. The standard of proof required of the respondent is not high. It suffices merely to rebut the applicant's statement of belief. The language of r.24.2 ("no real prospect...no other reason...") indicates that, in determining the question, the court must apply a negative test. The respondent's case must carry some degree of conviction: the court is not required to accept without question any assertion they make: Britannia Building Society v Prangle June 12, 2000, unrep., Ch D..."*

3. In relation to striking-out the Tranquility case is also apposite. Sir Richard Collas also endorsed the approach in the Invescap case, which had regard to the commentary in the White Book. Rule 52(2) of the 2007 Rules provides that :

*"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 the action,*  
(b) *that the pleading is an abuse of the Court's process or otherwise likely to obstruct the just disposal of the proceedings, or*  
(c) *that there has been a failure to comply with a rule, practice direction, or Court order."*

Paragraph 47 of the Bailiff's judgment in the Tranquility case reads as follows:

*"47. The Rule is similar to rule 3.4 of the Civil Procedure Rules and the Guernsey Court is again guided by the approach of the English courts. In Invescap, when interpreting Rule 52(2), the Deputy Bailiff had regard to the commentary in paragraph 3.4.2 of the White Book and I gratefully adopt his analysis without reciting it in full. The principles I extract as being relevant to the present Application are:*

- 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, 200. 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, 200, unrep, CA).*
- d) *Where a statement of case is found to be defective, the court should consider whether the defect might be cured by amendment and, if it might be, the court should refrain from striking it out without first giving the party concerned an opportunity to amend (In Soo-Kim v Youg [2011] EWHC 1781 (QB)).*
- e) *The court may strike out, as an abuse of the court's process, particulars of claim which are so badly drafted that they fail to reveal to the defendant, or to the court, the case the defendant can expect to meet at trial. However, proof of bad drafting is not, by itself, sufficient. The court should not strike out the particulars without first giving the claimant an opportunity to amend (see In Soo-Kim v Youg [2011] EWHC 1781 (QB)).*
- f) *The purpose of the particulars of claim were explained by Moore-Bick LJ in Credit Suisse AG v Arabian Aircraft & Equipment Leasing Co [2014] CP Rep4:  
"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).*

4. As mentioned, the Application is at page A2. Summary Judgment on the Professional Directors' Counterclaim is sought on the ground that there is no real prospect of successfully defending it, and there is no other compelling reason why the Counterclaim should be disposed of at trial. The Defence to the Counterclaim should be, it is suggested, struck out on the grounds that it discloses no reasonable grounds for defending it. The actual issue between the parties can be described shortly as set-out at paragraphs 3 and 4 of the Professional Directors' skeleton:

3. *The Application gives rise to a short point of statutory construction, namely whether Section 10 of the Protection of Investors (Bailiwick of Guernsey) Law 1987 (“the POI Law”) has the effect of voiding the indemnities that are contained within the service contracts between the PCC and the Directors (“the Service Contracts”).*
4. *It is the Directors’ belief and submission that the PCC has no real prospect of successfully defending the Counterclaim and that there is no other compelling reason why the issue should be disposed of at a trial. The Directors therefore seek summary judgment and ask the Court to declare that the Directors are entitled to be indemnified by the PCC in respect of the Investors’ claim.*

The nub of the Directors’ Counterclaim is at page B152 and reads:

*“The PCC is liable to indemnify the Directors and each of them in respect of any and all of the Shareholders’ claims and for the Directors’ costs of dealing with such claims.”*

The Defence to the Counterclaim is at paragraphs 37 to 38 on page B223. It refers to paragraph 7 of the Réplique at pages B205 to 206. It is denied that the Professional Directors are entitled to be indemnified as alleged or at all, or to the relief claimed, or any relief.

5. As can be seen from these materials the issue at first blush seems a relatively clear and identifiable one. Section 10 of the POI law states:

*“Any provision of an authorised or registered collective investment scheme which would have the effect of exempting any person carrying on a restricted activity in relation to the scheme from liability for failure to exercise due care and diligence in discharge of his functions in respect of the scheme is void to that extent.”*

It is submitted that the Professional Directors “were at all material times carrying on restricted activities (as defined in Section 2 of the POI law) in relation to the fund, including the management of the fund.”

6. But the Directors have, it is submitted, a serious obstacle to overcome. In SPL Guernsey Ltd and its Incorporated Cells v Robert Stephan Addison, Judgment 19/2018 of the Royal Court, at paragraph 286 of the decision the Deputy Bailiff held as follows:

*“The indemnity on which Mr Addison relies is found in Article 49.1 of the Articles of Association of each Cell (and in similar form Article 37.1 of the Articles of Association of the ICC). In closing Mr Addison’s case, Advocate Williams acknowledged that the indemnity exists only “to the extent that due care and diligence has been exercised”. (This is also a requirement pursuant to section 10 of the Protection of Investors (Bailiwick of Guernsey) Law, 1987, as amended, because otherwise the provision exempting the person from liability would be void). Given the findings of the Jurats that Mr Addison did not comply with his duty to exercise the care, skill and diligence*

*required of him as a director of the Cells and ICC, it follows that he is unable to place reliance on the indemnity in those Articles to avoid the liability that otherwise attaches to him.”*

It was strongly submitted by Advocate Bamford that the SPL case is the only authority, and is not distinguishable from the present case and thus should be followed; unless this Court was convinced that it was wrong. Advocate Jones submitted that the SPL case was “*easily distinguishable*” it concerned a claim by a company against a former director, who set-up a form of indemnity in the Articles as a defence. This failed, but in the present matter the Plaintiffs are in a different position. Section 10, he added, is not relevant and affords no support to the Plaintiffs` position.

7. The text of Article 123 of PCC’s original Articles is found in C at page 1066. It reads as follows:

*“ The Professional Directors, secretary, other officers or employees and affiliates of the Company may be indemnified out of the assets of the company to the fullest extent permitted by the Companies Law from and against all actions, costs, charges, losses, damages and expenses which they or any of them may incur or sustain by reason of any contact entered into or any act done, concurred in or omitted, in or about the execution of their duty or supposed duty or in relation to it.”*

The relevant part of the indemnities (see pages C1005-C1006, C1010-C1011 and C1070 – C1072) provides that:

*“9.1 The Company and/or the Fund agrees to indemnify you and keep you indemnified subject to Clauses 9.2 and 9.4 from and against all claims or liabilities arising out of or in connection with your negligence, default or any breach by you or your fiduciary duties or the terms of this appointment (other than in the case of liabilities arising from any fraud or wilful default on your part)...*

*9.2 This indemnity will not include any liability that you may incur:-*

*9.2.1 to the Company or to the Fund or to an associated company...*

*9.2.4 in defending civil proceedings brought by the Company or the Fund...in which judgment is given against you.”*

8. The Professional Directors rely heavily on the provisions of sections 157-159 of the Companies (Guernsey) Law, 2008 (at pages A181-A185):

#### *Directors’ liabilities*

#### **Exempting directors from liabilities.**

**157.** (1) *Any provision that purports to exempt a director of a company (to any extent) from any liability that would otherwise attach to him in connection with any negligence, default, breach of duty or breach of trust in relation to the company is void.*

(2) *Any provision by which a company directly or indirectly provides an indemnity (to any extent) for a director of the company, or an associated company, [or a body corporate which is an overseas company and a subsidiary of the*

company,] against any liability attaching to him in connection with any negligence, default, breach of duty or breach of trust in relation to the company of which he is a director is void, except as is permitted by section 158 or 159.

(3) This section applies to any provision, whether contained in a company's memorandum or articles or in any contract with the company or otherwise.

(4) Nothing in this section prevents a company's memorandum or articles from making such provision as was, before the commencement of this Law, lawful for dealing with conflicts of interest.

#### **Provision of insurance for directors.**

**158.** Section 157(2) does not prevent a company from purchasing and maintain for a director of the company, or an associated company, insurance against any such liability as is mentioned in that subsection.

#### **Provision of qualifying third party indemnities for directors.**

**159.** (1) Section 157(2) does not apply to qualifying third party indemnity provision.

(2) Third party indemnity provision means provision for indemnity against liability incurred by a director to a person other than the company or an associated company; and such provision is qualifying third party indemnity provision if the requirements of subsection(3) are met.

(3) The provision must not provide any indemnity against –

(a) any liability of the director to pay –

(i) a fine imposed in criminal proceedings,

(ii) a sum payable to a regulatory authority by way of a penalty in respect of non-compliance with any requirement of a regulatory nature (however arising),  
or

(b) any liability incurred by the director –

(i) in defending criminal proceedings in which he is convicted,

(ii) in defending civil proceedings brought by the company, or an associated company, in which judgment is given against him, or

(iii) in connection with an application for relief under section 522 in which the Court refused to grant him relief.

(4) The references in subsection (3)(b) to a conviction, judgment or refusal of relief are to the final decision in the proceedings.

(5) For this purpose –

(a) a conviction, judgment or refusal or relief becomes final –

(i) if not appealed against, at the end of the period for bringing an appeal,

(ii) if appealed against, at the time when the appeal (or any further appeal) is disposed of, and

(b) an appeal is disposed of –

(i) if it is determined and the period for bringing any further appeal has ended, or

*(ii) if it is abandoned or otherwise ceases to have effect.*

9. Advocate Bamford submitted that the provisions are not inconsistent with or somehow cut down by Section 10 of the POI Law. Indeed that section is now in the new POI 2020 Law, so Section 10 has in no way been diminished. These Sections of the Companies Law make some forms of indemnity afforded by a company to its Directors void. As paragraph 51 of the skeleton puts it, these sections “*do not provide where such indemnities are generally permitted, they are necessarily valid and effective against or with respect to all forms of liability in every case, or in the face of another statutory provision, such as Section 10 of POI 1987, which provides otherwise in particular circumstances.*” In the present case it is suggested that the Professional Directors are personally liable for claims for damages being made directly by the investors who have suffered loss. As Section 34 of the POI Law states, the claim:

*“is actionable in the appropriate court as a breach of statutory duty by the person who has contravened that provision, as the suit of any person who has suffered loss or been otherwise adversely affected as a result of that contravention.”*

(The contravention alleged is under the Authorised Close-Ended Investment Schemes Rules, 2008, Rule 2.01 and 3.01 and 4.02. These are set-out in the original Summons at B23 to B25).

10. There was reference to public policy in the course of the hearing. Can the Directors of Authorised Collective Investments Schemes (ACIS’s), in effect, avoid personal liability arising under the POI legislation? Advocate Bamford submitted that if the Directors are entitled to be indemnified, that would be met out of funds originally contributed by investors to the ACIS. As paragraph 23 of the Plaintiffs’ skeleton concluded “*in effect paying the investors back with their own money, or the money of other investors.*” Advocate Jones submitted that it was both appropriate and permissible for Directors to be indemnified by a company against third party claims. PCC indemnities here do not extend to any liability of a Director to PCC. Advocate Bamford suggested that the interpretation urged by Advocate Jones would produce absurd results. But Advocate Jones in reply submitted that the question was not a novel or different point and neither the POI Law nor the Companies Law vitiate these indemnities. Section 10 of the POI Law is not relevant to Directors enforcing contractual rights against the company.

## **Observations**

11. The valuable and detailed guidance cited from the Guernsey cases is followed here. The observations of the then Deputy Bailiff in the SPL case at first glance seem, with respect, on point. On what has so far been put forward, it is not very easy to distinguish from the present case. The “public policy” argument is also relevant. If the Professional Directors’ view of the indemnities and their effectiveness is right, then it is feasible that a result which may not have been intended and not within the spirit of the legislation could ensue. For the avoidance of doubt, and keeping within the scope of the present proceedings, it is not suggested that the SPL case is indistinguishable from what is before the Court, but that there is a clearly respectable argument to suggest that it could be. Nor is it considered that the public policy submission is made-out, but it appears to be a “*realistic*” point, not “*merely arguable*”. Both these aspects of the

case are of importance in this area of financial practice and are pre-eminently worthy of full argument at trial, not summary disposal now.

12. Put very simply (and accept the risk of some over- simplification) the cases on summary judgment in Guernsey and England use the wording: does the Plaintiff have a “*realistic*” prospect of success; is it more than merely “*arguable*”? In connection with striking-out is the claim “*unwinnable*” or “*bound to fail*”? It is considered that neither of the Professional Directors’ applications falls within this wording. Putting it again rather simply, on what has been put forward the arguments raised against the Professional Directors’ submissions are neither weak, nor fanciful, nor bound to fail. A mini-trial is not desirable in the present circumstances, and a “fuller investigation” is called for.

### **Conclusion**

13. For these reasons the summary judgment and strike-out applications fail. The indemnification point is eminently suitable for resolution at a full trial, and the public policy considerations are, it is considered, sufficiently important to be fully argued in more detail at such a trial.

### **Costs**

14. The parties are invited to make written submissions within 14 days of the date the final judgment is issued in this application.

**J R Finch OBE**  
**Lieutenant Bailiff**

**8<sup>th</sup> August, 2023**