

The Royal Court of Guernsey dismissed Pilatus (PTC) Limited's claim against RBC Trustees (Jersey) Limited, finding that the key company (SOIL) was not a trust asset at the time of RBC's retirement in 2015, and thus no breach of trust occurred.

[2025]GRC043

IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)

Between **PILATUS (PTC) LIMITED** **Plaintiff**
-and-
RBC TRUSTEES (JERSEY) LIMITED **Defendant**

Hearing dates: 21 and 22 October 2024

Judgment handed down: 6 May 2025

Before: Sir Richard McMahon, Bailiff

Counsel for the Plaintiff: Advocate A M Davidson
Counsel for the Defendant: Advocate E R Gray

Cases, Texts & Legislation referred to:

The Companies (Jersey) Law 1991
R (Dutta) v General Medical Council [2020] EWHC 1974 (Admin)
Gestmin SGPS SA v Credit Suisse (UK) Ltd [2013] EWHC 3650 (Comm)
Lachaux v Lachaux [2017] EWHC 385 (Fam)
The Trusts (Guernsey) Law, 2007
The Royal Court Civil Rules, 2007
The Trusts (Guernsey) Law, 1989
The BVI Companies Act, 2004
The Companies Act 2001 (Mauritius)
Spread Trustee Co Ltd v Hutcheson [2012] 2 AC 194
Jefcoate v Spread Trustee Company Limited (unreported, 31 October 2014; 2014 GLR Note 10)
Freeman v Ansbacher [2009] JRC 003
Midland Bank Trust Company (Jersey) Limited v Federated Pension Services 1995 JLR 352
Investec Trust (Guernsey) Limited v Glenalla Properties Limited 2015 GLR 300
Khuller v First International Trustees Ltd [2020] GCA 051
Kazzaz v Standard Chartered Trust (Guernsey) Limited 2023 GLR 223
The Trusts (Amendment) (Guernsey) Law, 1990
The Trusts (Amendment) (Jersey) Law 1989
Armitage v Nurse [1998] Ch 241
Vandervell v Inland Revenue Commissioners [1967] 2 AC 291
The Interpretation and Standard Provisions (Bailiwick of Guernsey) Law, 2016

Introduction

1. The Plaintiff, Pilatus (PTC) Limited, is the current trustee of a settlement dated 21 December 1990 known as the Shallan Trust. This is a discretionary trust governed by Guernsey law. The Plaintiff has been the trustee since 28 June 2018. The Defendant was originally RBC Trustees (Guernsey) Limited, which had been a former trustee of the Shallan Trust, having retired from that office on 30 October 2015. Following a cross-border merger, by Consent Orders made in August and October 2023, the parties accepted that the Defendant should become RBC Trustees (Jersey) Limited, but without any need to change the pleadings. The effect of the relevant provision of the Companies (Jersey) Law 1991 is that proceedings survive such a merger and can still be pursued against the merged entity.
2. The Plaintiff's Cause was tabled on 21 September 2018. Les Defences were tabled on 16 November 2018. They included an *exception de fond* but, in any event, they deny that the Plaintiff is entitled to any relief. They also include *exceptions de forme*, which were answered on behalf of the Plaintiff in its Réplique dated 19 February 2019. Les Defences were subsequently Amended in May 2019 and Re-Amended in February 2023, with the Plaintiff's Réplique also being Amended thereafter. I will turn to the pleaded cases later in this judgment.
3. The Defendant's *exception de fond* was determined as a preliminary issue, with judgment being handed down on 14 May 2021 dismissing the *exception*. There was a second judgment, handed down on 22 December 2021, following the Defendant seeking to stay the action brought by the Plaintiff pending resolution of proceedings in other jurisdictions, which was also dismissed. Whilst I have set out some of the facts in those judgments, I will summarise the position again in this judgment and develop matters so as to put the parties' respective arguments into better context.
4. By a Consent Order I made on 8 April 2022, the parties agreed that there should be a trial on liability alone. The directions leading towards that trial included that the parties would prepare an agreed statement of facts and issues, which has been done. In March 2023, it was envisaged that this trial on liability would be heard in May 2023. However, there was some slippage for various reasons and the trial was eventually not held until October 2024.
5. By a further Consent Order I made on 11 June 2024, it was agreed that "*The written statements of the parties' respective witnesses shall stand as their evidence-in-chief and those witnesses shall not be required to give live evidence at trial*". It was also added that: "*For the avoidance of doubt, the parties shall retain the right to make submissions on the relevance, accuracy, reliability, probative value and weight to be afforded to any witness's evidence, by reference to the circumstances of the case and the documentary evidence contained in the trial bundle, as if the witnesses had given oral evidence at trial and/or been challenged in cross-examination.*"
6. In the event, there was no live evidence at the trial at which I had the benefit of a witness statement from Amit Thakrar, who has worked for the Somji family for many years, and a witness statement from Wayne Elliott, who is a director of the Plaintiff. I also had an Affidavit of Lisa Barnett, a director of RBC Trustees (Guernsey) Limited, sworn on 22 July 2022 on behalf of the Defendant. A further Affidavit was sworn after the hearing ended by Sarah Orton on 25 October 2024, by which she formally produced some of the documents that had been handed up during the course of the hearing.

7. Skeleton Arguments had been filed prior to the hearing, at which I heard submissions on behalf of the Plaintiff from Advocate Davidson and on behalf of the Defendant from Advocate Gray.
8. At the conclusion of the trial, I reserved judgment. It joined a list of other reserved judgments that I have since had to prioritise. This judgment now sets out my reasons for concluding that the Plaintiff's action on liability fails.

A preliminary point

9. One matter on which the Advocates largely agreed is that there are very few disputed facts. However, the events in question happened some time ago, and the witnesses had little or no direct knowledge of what took place at the time. As a result, it was suggested, relying on R (Dutta) v General Medical Council [2020] EWHC 1974 (Admin), that this was an appropriate case in which to have greater regard to the contemporaneous documents produced at the time.
10. Paragraph 39 of the judgment delivered by Warby J (as he then was) cites from a number of previous decisions, including what was distilled from Gestmin SGPS SA v Credit Suisse (UK) Ltd [2013] EWHC 3650 (Comm), which included that “*The best approach from a judge is to base factual findings on inferences drawn from documentary evidence and known or probable facts.*” Similarly, referring to Lachaux v Lachaux [2017] EWHC 385 (Fam), “*a witness, however honest, rarely persuades a judge that his present recollection is preferable to that which was taken down in writing immediately after the incident occurred.*” Drawing these threads together, in the following paragraph His Lordship set out that:

“This is not all new thinking, as the dates of the cases cited in the footnote makes clear [being 1968 and 1985]. Armagas v Mundogas, otherwise known as The Ocean Frost, has been routinely cited over the past 35 years. Lord Bingham’s paper on “The Judge as Juror” (Chapter 1 of The Business of Judging) is also familiar to many. Of the five methods of appraising a witness’s evidence, he identified the primary method as analysing the consistency of the evidence with what is agreed or clearly shown by other evidence to have occurred. The witness’s demeanour was listed last, and least of all.”

11. On the basis that the witnesses in this trial on liability have little or no direct evidence to give about the events that took place, I am persuaded that I should properly focus on the documents. To the extent that any witness seeks to explain what the document in question means, I have considered how accurate I consider that interpretation to be.

The pleadings

12. The Plaintiff's Cause sets out a claim for breach of trust. It refers in particular to a number of corporate entities.
13. Primefuels Investments Limited (referred to as “PIL”) is incorporated in the British Virgin Islands and is said to be a joint venture between the Somji family and Asif Abdulla. It was registered on 16 January 2007. The shares in PIL at the material time were held equally between Shallan Overseas Investments Limited (referred to as “SOIL”) on behalf of the Somji family and New Rodina Ltd, on behalf of Mr Abdulla, although that shareholding is now vested in Maxim Ventures Trading Corp (although in the Cause its name is given in full as “Corporation”). In the absence of unanimity within PIL, the structure created envisaged that there would be deadlock.
14. SOIL is said to be part of the trust fund of the Shallan Trust. It was a wholly owned subsidiary of Shallan Overseas Limited (referred to as “SOL”) until 20 December 2017, after which SOIL

was transferred to Losai Investments Limited, which in turn is owned by Shallan Group Holdings Limited, which is owned by the Shallan Trust.

15. From PIL’s incorporation until 30 October 2015, the secretary of PIL was RBC Corporate Services (CI) Limited (referred to as “RBC Corporate Services”). For the same period, the Defendant provided administrative services to PIL.
16. Mention is also made of Primefuels Holdings Limited (referred to as “PFHL”). This is a company incorporated in Mauritius, owned as to 85% by PIL and 15% by Fuel Transport Holdings Limited (referred to as “FTHL”) and subsequently that 15% shareholding was transferred to Mapplewell Global Group Limited. The directors of PFHL included RBC Directorship Services (CI) Limited (referred to as “RBC Directorship”) and RBC Corporate Services. Its constitution required a quorum of three directors. On 30 October 2015, two officers of the RBC Group held a meeting that was inquorate and purported to appoint new directors and to resign the two RBC entities from the board of the company.
17. Along with setting out other material facts, with which I will deal shortly, the Cause sets out a number of duties now found in the Trusts (Guernsey) Law, 2007. Paragraph 25 refers to section 22 of the 2007 Law, referring to the Defendant owing fiduciary duties and/or duties “*en bon père de famille*”. Paragraph 26 asserts that the Defendant “*owed a duty to preserve and protect the trust assets and a duty of care in the manner in which they did so*”. Paragraph 27 adds that the Defendant had a duty, as retiring trustee, “*to conduct an orderly handover, to preserve and protect the trust assets while they did so, and a duty of care in the manner in which they did so.*” There is a duty under section 43 of the 2007 Law to surrender property held by a retiring trustee or under its control (para. 28). Paragraph 29 states:

“In particular the Defendant was under a duty to:

- a. Protect and preserve trust assets during the retirement and until the new trustee was fully in control of them;*
- b. Ascertain the identity of a new regulated financial services firm to take over both the trusteeship and the directorship of PIL and ensure that they were properly appointed;*
- c. Procure the valid appointment of a new director, company secretary and administrator of PIL before permitting the retirement of its own nominees in order to preserve the equilibrium set out above.”*

18. As a result of the Defendant wishing to retire as trustee of the Shallan Trust in 2015, it is said that the steps taken breached these duties, as set out in para. 56 of the Cause:

“By reason of the matters aforesaid and grossly negligently, the Defendant was in breach of trust:

Particulars

- a. the Defendant failed to conduct an orderly handover of PIL and/or PFHL;*
- b. failed to preserve and protect the Shallan Trust’s interest in PIL and/or PFHL;*
- c. retired as trustee without preserving the balance of power in PIL and/or PFHL;*

- d. *retired as trustee on 30 October 2015 without having secured the appointment of appropriate replacements for the RBC entities as director, secretary and administrator of PIL and PFHL who would represent the Shallan Trust's interests;*
- e. *failed thereafter to secure the appointment of appropriate replacements for the RBC entities as director, secretary and administrator of PIL and PFHL who would represent the Shallan Trust's interests;*
- f. *caused, or failed to prevent, the resignation of RBC Directorship as director and RBC Corporate Services as director/secretary without suitable replacement;*
- g. *resigned as administrator of PIL and PFHL without putting in place a suitable replacement; and*
- h. *in the premises, failed to act en bon père de famille."*

19. These particulars constitute the allegations made against the Defendant alleging breach of its duties as trustee. The remainder of the Cause deals with loss, which is not engaged at this stage.
20. In the Defendant's Re-Amended Les Defences, there are various admissions of the facts pleaded in the Cause. There is no dispute that the Shallan Trust was declared on 21 December 1990 and that there were two shares held in Shallan Group Holdings Limited up to 30 October 2015, one of which was held by RBC Corporate Services as nominee for the Defendant, plus some cash. Similarly, there is no dispute about the shareholdings in each subsidiary, so that Shallan Group Holdings Limited owned all the shares in SOL, and in turn in SOIL (with one share being held by the Defendant as nominee for SOL) and that SOIL owned half the shares in PIL, which in turn owned 85% of the shares issued by PFHL, which itself owned a number of operating companies. PFHL had migrated from the British Virgin Islands to Mauritius in 2011. (There are various additional agreements referred to, which I will cover in more detail in the next section of this judgment.)
21. In relation to para. 5 of the Cause, which alleges that corporate services were provided by other RBC entities, such as RBC Directorship and RBC Corporate Services, which "*acted on [the Defendant's] instructions and acted as its agent*", this paragraph is denied. In particular, it is said that where RBC Directorship and RBC Corporate Services "*acted as officers of PIL and PFHL they acted in accordance with their duties to those companies.*"
22. Three additional paragraphs were inserted by the re-amendment. They relate to the provision of corporate services by RBC Directorship and RBC Corporate Services pursuant to the Private Client Fiduciary Services (Channel Islands) Terms and Conditions, in which "*PCFS Services*" are widely defined and which permitted resignation without giving any reason whatsoever. In any event those entities cannot be regarded as a single entity.
23. As regards the ownership of SOIL at the relevant times, SOL sold its shareholding to Hanif Somji in February 2011. As a result, it is denied that SOIL was an asset of the Shallan Trust at the date of the Defendant's resignation as trustee of the Shallan Trust. This meant that the Defendant owed no duty as trustee or otherwise in respect of SOIL. In any event, clause 26 of the trust instrument meant that the duty to preserve and protect trust assets did not apply, so para. 26 of the Cause is denied. The duty to act *en bon père de famille* is admitted, as is the duty under section 43 of the 2007 Law, but the other duties are mostly denied. Because there was a protector in office in 2015, Ameerali Kassamali Somji, it was his function to appoint a suitable replacement trustee.

24. It is denied that there was any breach of trust. However, if the Court considered there had been a breach of trust, it was not a gross negligent breach of trust. Further, within PFHL there was always scope for the majority of the other directors to outvote RBC Directorship and RBC Corporate Services, so the balance of power differed in that company.
25. In the Plaintiff's Amended Réplique responses to the *exceptions de forme* are provided, along with a number of the matters raised in Les Defences being admitted. The late addition through the re-amendment, referring to the Private Client Fiduciary Services (Channel Islands) Terms and Conditions, is not admitted.
26. The Plaintiff's responses to the *exceptions de forme* include a reply to a question relating to the balance of power in PIL:

“The Defendant was aware of the matters pleaded at paragraphs 10 to 14 of the Cause; that SOIL and New Rodina each held an equal number of shares in PIL; of the First and Second Voting Pool Agreements, their terms and effect; that PIL was bound by the said Voting Pool Agreements; that it was therefore critically important for SOIL's interests to be represented on the boards of both PIL and PFHL at all times in order to ensure that New Rodina and its representatives could not exercise independent control over PIL or the voting rights in PFHL attributable to PIL, that decisions could not be taken by the board of either PIL or PFHL without SOIL's knowledge and that SOIL and its shareholders had equal access with New Rodina to information concerning PIL and PFHL.”

27. As regards the element of the Cause about Mr Abdulla seeking to gain control of PIL or at least increase his influence over it, the response of the Plaintiff about how this arose is:

“(a) Alim Somji and Hanif Somji had the said concerns. Furthermore, it appears from an email dated 9 October 2013 from Paul Rogers to Mahmood Ahmed that by October 2013 RBC Trustees shared those concerns or had reason to believe that they were well-founded.

(b) The concerns arose from Asif Abdulla's stated ambition to exercise more control over the day-to-day operations of PFHL (which he gave as a reason for migrating the company to Mauritius and replacing RBC as the provider of administrative services to it) and from other steps taken by Mr Abdulla to realise this ambition as set out in (c) below.

(c) RBC Trustees was aware that Alim Somji and Hanif Somji were concerned (in 2009 and thereafter) that the appointment of George Machan to the board of PFHL and the migration of PFHL to Mauritius may strengthen Mr Abdulla's control of PFHL and (in 2010 and thereafter) that Mr Abdulla's representative on the board of PIL may dishonour the First and Second Voting Pool Agreement. RBC Trustees was also aware that in 2010 Mr Abdulla had sought the appointment of three representatives of New Rodina (including himself) to the Board of PFHL and that Mr Machan had threatened to take proceedings against RBC to secure those appointments. Furthermore, RBC Trustees was aware that in 2012 Mr Abdulla had proposed that he and Hanif Somji be appointed to replace the RBC entities on the board of PFHL. Finally, RBC Trustees was aware that in 2013 Aureos had sold all its interest in Fuel Transport Holdings Limited (which held 15% of the shares in PFHL) to Mapplewell; that Mapplewell had asked the board of PFHL to approve the appointment of a new director, Mr Richard Reynolds, as Mapplewell's representative on the board.”

28. As regards the particulars of breach of trust in para. 56 of the Cause, clarification was sought as to what para. (a) entailed beyond the allegations found in paragraphs (d) to (g). The Plaintiff's response is:

“In addition to the acts and omissions particularised at paragraphs 56(d) to 56(g) of the Cause, RBC Trustees was obliged to instruct or otherwise communicate to RBC Directorship and RBC Corporate Services that they should not resign as officers of PIL and PFHL without having first secured the appointment of suitable replacements on the board of directors and/or as a secretary to represent the Shallan Trust's interests, but failed to do so.”

Similar clarification was sought in respect of para. 56(b) and also para. 56(c) of the Cause, to which the response I have just set out is also given.

29. I have set out these responses because the inclusion of an *exception de forme* in the defences tabled is deemed to be a request for further information under the provisions of rule 60 by rule 16(7) of the Royal Court Civil Rules, 2007. As such, they form part of the party's pleaded case.

Issues to be determined

30. It is probably helpful to set out at this point the issues that the Advocates agreed fell to be determined, even if their submissions did not always follow what had been agreed. In relation to the chronology and the list of facts that are not substantially in dispute, I will deal with these in the next sections of this judgment.

31. Eight issues were identified as follows:

“1. Whether as trustee of the Shallan Trust the Defendant owed:

- a. A duty to preserve and protect the trust assets and a duty of care in the manner in which it did so and furthermore (and more specifically):*
- b. A duty when retiring as trustee to conduct an orderly handover of the trust assets;*
- c. A duty to protect and preserve trust assets during the retirement and until the new trustee was fully in control of them;*
- d. A duty to ascertain the identity of a new regulated financial services firm to take over both the trusteeship of the Shallan Trust and the directorship of PIL and ensure that they were properly appointed; and*
- e. A duty to procure the valid appointment of a new director, company secretary and administrators of PIL before permitting the retirement of its own nominees, in order to preserve the equilibrium on those boards.*

2. Whether, at the time of the Defendant's retirement as trustee of the Shallan Trust:

- a. SOIL and/or PIL and/or PFHL were an asset of the Shallan Trust; and/or*

- b. *The ultimate beneficial owner of SOIL and/or PIL and or/PFHL was Hanif Somji as a result of his acquisition of the legal and beneficial ownership of the shares of SOIL.*
3. *Whether at the time of the Defendant's retirement as trustee of the Shallan Trust, RBC Directorship and/or RBC Corporate Services acted as agents of the Defendant and/or on its instructions when acting as directors and/or company secretary of PIL and/or PFHL.*
4. *Whether, if the Defendant owed any of the alleged duties, what, if any, consequential effect do the following documents have on the Defendant's duties and/or liability:*
 - a. *the First Voting Pool Agreement and the Second Voting Pool Agreement;*
 - b. *the Operating Agreement; and*
 - c. *the New Constitution and PIL's Memorandum and Articles of Association.*
5. *The proper meaning and effect of the following provisions of the Trust Instrument on the Defendant's duties and/or liabilities:*
 - a. *clause 22, as construed in accordance with section 35(2) of the 2007 Law; and*
 - b. *clause 26, as construed in accordance with sections 83(4)(b) and 35(3) of the 2007 Law.*
6. *The proper meaning and effect (if any) on the Defendant's duties and/or abilities of such operative version of the RBC Private Client Fiduciary Services (Channel Islands) Terms and Conditions (the "RBC Terms and Conditions").*
7. *Whether the Defendant breached one of more of the above duties as a result of the resignations by RBC Directorship and RBC Corporate Services as officers of PIL and PFHL without replacement officers being appointed in their place.*
8. *Whether (if and so far as it is necessary to prove the same) any such breach of duty by the Defendant was grossly negligent."*

32. In his Skeleton Argument, Advocate Davidson suggested that the only real issue for the Court to determine is whether the Defendant had committed a grossly negligent breach of trust when it caused or allowed its subsidiaries to resign from PIL and PFHL. I agree that that is the core issue, but the steps towards such a conclusion are shown by some of the issues the Advocates have agreed. Advocate Gray, on the other hand, suggested in her Skeleton Argument that the Plaintiff's claim suffers from four fundamental problems. The first is that, when the Defendant resigned as trustee of the Shallan Trust, PIL and PFHL were not trust assets because the shares in SOIL had been transferred to Hanif Somji in 2011. In any event, RBC Directorship and RBC Corporate Services are separate legal persons and did not act in their capacities as officers of PIL and PFHL under instruction for the Defendant. Moreover, the terms and conditions under which those services were provided permitted resignation. Just because the individuals all worked for the RBC Group, it does not mean that they were acting on behalf of the Defendant

as trustee. Finally, there had been an attempt to secure successor appointments to PIL and PFHL but this was thwarted by the actions of George Machan.

33. In closing the Defendant's case, Advocate Gray provided a document identifying the places in the Defences and in her Skeleton Argument where each of the eight issues were dealt with. Advocate Davidson sought and was granted permission to produce a similar document identifying the places in the Plaintiff's pleadings and in his two Skeleton Arguments where each of these eight issues had been addressed. This was done on 25 October 2024.
34. I will address the issues listed, and the way they were developed by Counsel, after I set out the relevant facts as they apply to the set of issues. I will not set out in detail every word of every document to which I have had regard, but I can confirm that I have carefully considered all the material in the bundles placed before me.

Facts

35. I have had regard to the agreed chronology and also those facts that are said not to be substantially disputed. I have also considered the witness statements on behalf of the Plaintiff and the Affidavit lodged on behalf of the Defendant. As appropriate, I will expand on all these matters when setting out the facts as succinctly as I can.
36. By a declaration of trust dated 21 December 1990, Monument Trust Company Limited, by which name the Defendant was at that time known, settled the Shalan Trust as a discretionary Guernsey law trust for the benefit of members of the Somji family (see the class of Beneficiaries described in the Third Schedule to the instrument). By clause 14, if the trustee gave notice of a desire to withdraw and be discharged from the trusts, if there were a Protector in office, it was the Protector's function to appoint one or more new trustees (up to a maximum of four). Notice from the trustee desiring to withdraw would be given to the person with power to appoint a new trustee. Steps taken to vest the trust fund in the new trustee would be at the expense of the trust fund. Clause 27 provided for the first Protector to be those mentioned in the Sixth Schedule: Amirali Kassamali Somji and Shamsh Ud Deen Kassamali Somji (although there are variants on this name).
37. Clause 22 (trustee indemnity) of the instrument provides:

“IN the execution of the trusts and powers hereof no Trustee shall be liable for any loss to the Trust Fund arising in consequence of the failure depreciation or loss of any investments made in good faith or by reason of any mistake or omission made in good faith or of any other matter or thing except wilful and individual fraud and wrongdoing on the part of the Trustee who is sought to be made liable.”

38. Clause 26 (exclusions of Trust Law provisions) provides:

“It is hereby declared that Clauses 19, 22, 25, 34 and 57 of the Trusts (Guernsey) Law 1989 are excluded to the intent that they shall not be applicable to this Settlement.”

Although reference should have been made to sections of the Trusts (Guernsey) Law, 1989 rather than to clauses, I will treat this as a valid attempt to exclude the provisions mentioned. By virtue of section 83(4)(b) of the Trusts (Guernsey) Law, 2007, any reference in a trust instrument to a provision found in the 1989 Law is to be construed as a reference to the corresponding provision in the 2007 Law.

39. There appears to be no equivalent to section 57 of the 1989 Law in the 2007 Law. However, section 19 made provision that a trustee would *“ensure that the trust property is held by or*

vested in him or is otherwise under his control” and “preserve and enhance, so far as is reasonable, the value of the trust property.” This is now found in section 23 of the 2007 Law. Section 22 of the 1989 Law related to the duty on a trustee to give full and accurate information to a beneficiary requesting it. In broad terms, this duty is now found in section 26 of the 2007 Law. Section 25 of the 1989 Law related to impartiality and is now found in section 29 of the 2007 Law.

40. Section 34 of the 1989 Law related to breach of trust. The equivalent provision in the 2007 Law is section 39. There are some provisions in that section which had not appeared in the 1989 Law. Of particular relevance for the present action, subsections (7) and (8) provide:

“(7) The terms of a trust may not –

- (a) relieve a trustee of liability for a breach of trust arising from his own fraud, wilful misconduct or gross negligence, or*
- (b) grant him any indemnity against the trust property in respect of any such liability.*

(8) For the avoidance of doubt, and without prejudice to any other provision of this Law –

- (a) subsection (7) applies to a trust whenever created, and*
- (b) a term of a trust is invalid to the extent that it purports to –
 - (i) relieve a trustee of liability for a breach of trust arising from his own fraud, wilful misconduct or gross negligence, or*
 - (ii) grant him any indemnity against the trust property in respect of any such liability.”**

Because of the effect of these subsections, the Plaintiff has to bring its claim on the basis that there was gross negligence.

41. There was an instrument of variation dated 2 June 2006 which inserted an additional clause into the First Schedule containing additional powers of the trustee, referring to the capacity *“as trustees of the Trust and as shareholders of any company, the shares of which are directly or indirectly comprised in the Trust Fund”* to authorise payment of duties, fees or taxes payable, thereby supplementing clause 11 in the First Schedule.
42. There was a further instrument of variation dated 11 December 2007, by which time it appears that Shamsh Ud Deen Kassamali Somji had ceased to be a Protector and had been replaced by RBC Trustees (CI) Limited. By that instrument, changes were made to clause 27 of the trust instrument. However, it appears that by October 2015, RBC Trustees (CI) Limited must also have ceased to be a Protector because it was only the other Mr Somji who executed the instrument transferring the Shallan Trust to Novatrust Limited (although his first name is now spelt “Ameerali”). At that time, and indeed in the years beforehand, the assets held in the Shallan Trust are two shares in Shallan Group Holdings Limited and two accounts with the Royal Bank of Canada (Channel Islands) Limited.
43. On 2 November 1998 PFHL was incorporated in the British Virgin Islands. It was an international business company.

44. According to a structure chart exhibited to Amit Thakrar’s witness statement, PFHL had a number of subsidiary companies. The first had been incorporated prior to the incorporation of PFHL, Primefuels Kenya Limited. Even before then, Primefuels (UK) Limited had been incorporated, but this company was dissolved on 21 October 2008. Thereafter, Primefuels Tanzania Limited was incorporated on 19 March 1999, Primefuels Zambia Limited was incorporated on 20 November 2001 and Primefuels Uganda Limited was incorporated on 11 March 2008.
45. PIL was incorporated in the British Virgin Islands on 16 January 2007 pursuant to the BVI Companies Act, 2004. PIL represents a joint venture between the Somji family and Mr Abdulla. When PIL was incorporated, the shareholding was split equally between SOIL and New Rodina Limited (referred to as “New Rodina”). Mr Machan, a director of New Rodina, was appointed as a director of PIL on or about 21 December 2009, in place of RBC Corporate Services, from which time he and RBC Directorship were the directors. They represented New Rodina and the Shallan Trust respectively and this ensured each side of the joint venture had equal representation on PIL’s board. Until 30 October 2015, the secretary of PIL was RBC Corporate Services and the Defendant provided administrative services to PIL.
46. PIL was structured in such a way that the absence of unanimity led to deadlock as between the directors and as between the shareholders. Article 8.1 of the Articles of Association provides:

“The first directors of the Company shall be appointed by the first registered agent in accordance with the Act upon the incorporation of the Company; and thereafter, the directors shall be elected by Resolution of Shareholders or by Resolution of Directors for such term as the Shareholders or directors determine”.

Both types of Resolution are defined in Article 1.1 as requiring a majority vote. A Resolution of Directors was required by Article 12 to appoint a new secretary. For the purposes of the directors conducting matters, Article 10.6 provides that “*unless there are only 2 directors in which case the quorum is 2*”, ensuring both directors needed to be in attendance. Article 8.6 permits a director to resign from that office by written notice. Accordingly, New Rodina, which was ultimately owned or controlled by Mr Abdulla, could not effect any change to the board of directors of PIL, its company secretary or its administrator without agreement from the relevant entities within the RBC group.

47. At the time of PIL’s incorporation, Shallan Group Holdings Limited owned all the shares in SOL, which in turn owned all the shares in SOIL.
48. On 26 March 2007, SOIL, New Rodina and PIL entered into a voting pool agreement, under which SOIL and New Rodina agreed that PIL’s votes as shareholder at general meetings of PFHL and the votes of PIL’s nominated directors would be voted as a block as agreed between SOIL and New Rodina or, in the absence of agreement, against any motion. A copy of what has been termed as “*the First Voting Pool Agreement*” is exhibited to Amit Thakrar’s witness statement. It is governed by English law (clause 4). Clause 1 provides that the “*votes attributable under the Investment Agreement to*” PIL in PFHL would always be cast as one block as agreed in writing between SOIL and New Rodina. By clause 3, the Agreement would “*continue for as long as Shallan and Rodina or their connected parties are shareholders in PIL notwithstanding the termination of the Investment Agreement.*”
49. The investment agreement was then made on 30 March 2007 between Aureos East Africa Fund LLC (referred to as “Aureos”), Mr Abdulla, PIL and PFHL. In each case, the signatures on behalf of PFHL and PIL was by an officer of RBC Corporate Services (who appears to be Sarah-Jane Parker, acting under an authorisation to sign). Mr Abdulla is described therein as “the Sponsor”. It related to the intention of Aureos to invest US\$4 million into PFHL by way of share subscription and loan. Clause 10 provided that PFHL would have a board of a maximum

of nine directors, unless otherwise agreed by the shareholders, two of whom would be nominated by Aureos, six by PIL and one jointly by Aureos and PIL.

50. On 25 February 2011, SOL sold its shareholding in SOIL to Hanif Somji pursuant to a Share Sale Agreement governed by English law. Reference is made in clause 3 to the Completion Amount of US\$5.95 million, which might be adjusted in accordance with the terms of the agreement. Clause 3.2 refers to the amount of Consideration (as defined in clause 3.1) being “*left outstanding on loan at an annual rate of interest of 4.75%, compounded every six months*”, with that loan not being repayable “*until the last date upon which either of the Options may be exercised*”. Those Options are defined in clause 1.1 as “*the put option and the call option agreements to be entered into between the Vendor and the Purchaser on the terms set out in the memorandum of understanding in Schedule 6*”. Clause 3.3 provided that “*If the Options are not granted on or before one calendar month from the date hereof the loan referred to in clause 3.2 shall thereafter be repayable on demand*”. The Options were only granted on 25 July 2011.
51. Various warranties are found in Schedule 3 to the Share Sale Agreement, which SOL as Vendor confirmed by clause 6.1 to Hanif Somji “*are true and accurate in all material respects*”. They include that:
- “2.1 *The Vendor has full power and authority to enter into this agreement and all documents referred to in it and the provision of this agreement and each of the documents referred to in it will, when executed, constitute legal, valid and binding obligations on it, in accordance with their respective terms. ...*
- 2.3 *The Shares constitute the whole of the allotted and issued share capital of the Company and the Vendor and the Nominee are the sole legal owners of the Shares and the Vendor is the sole beneficial owner of the Shares. ...*
- 2.5 *The Company is the sole legal and beneficial owner of 50% of the issued share capital of the Subsidiary and such shares are fully paid up and free from all Encumbrances.*”

In clause 1.1, the Company is SOIL, the Subsidiary is PIL and “*Encumbrances*” is defined as “*any interest or equity of any person (including any right to acquire, option or right of pre-emption) of any mortgage, charge, security interest, pledge, lien, assignment, hypothecation, security, interest, title, retention or any other security agreement or arrangement*”. Further, the seventh warranty, under the heading “*ASSET MATTERS*” states that: “*The Company owned at the Last Accounts Date, and had good and marketable title to, all the assets included in the Last Accounts, and (except for current assets subsequently sold or realised in the normal course of business) still own and have good and marketable title to them and to all assets acquired since the Last Accounts Date.*”

52. Schedule 5 to the Share Sale Agreement contained an agreed form of equitable mortgage, to be entered into by Hanif Somji as Mortgagor in favour of SOL as Mortgagee charging all the shares in SOIL as security for the loan to him from SOL. Clause 1 of that deed described Hanif Somji as the “*beneficial owner with full title*”. By clause 4, it was confirmed that “*dividends on the Shares or such of them as shall for the time being remain unsold shall belong and be paid to the Mortgagor so long as there has been no default on the Loan payment by the Mortgagor*”. I understand that this equitable mortgage was also executed by the parties on 25 February 2011.
53. On 6 July 2011, PFHL migrated from the British Virgin Islands and became registered in Mauritius.

54. As I have already noted, SOL and Hanif Somji entered into a Put & Call Option Agreement on 25 July 2011 (referred to as “the Put and Call Option Agreement”). It is also governed by English law (clause 19). In accordance with clause 2.1, Hanif Somji granted SOL the right to purchase the shares in SOIL “for the Strike Price” as set out in clause 5 (“the Call Option”). This was to be the Consideration as defined in the Share Purchase (or Sale) Agreement executed on 25 February 2011 between the parties, although it might be adjusted. In return, SOL granted to Hanif Somji “an option to require the Buyer to purchase the Option Shares for the Strike Price and on the terms of the Put Option set out in this agreement” (clause 2.2). Such shares in SOIL were to be “sold with full title guarantee free from all liens, charges and encumbrances and with all rights attached to them at the date of Completion” (clause 2.3), and which was set out in clause 6. It was confirmed by clause 2.4 that “This agreement remains valid and the Strike Price is not to be reduced even if the Option Shares should lose value or become worthless because of liquidation and/or other reasons.”

55. Clause 3.1 provided that either of these options had to be exercised between 9 a.m. London time on 25 February 2015 and 5 p.m. London time on 25 February 2017. In the event that the Call Option was exercised, the Put Option would lapse or vice versa (clause 3.3). Clause 4 provided the mechanism by which either Option could be exercised. It required an Exercise Notice to be given to the other party in accordance with clause 15, which could not thereafter be revoked without the other party’s written consent. The Exercise Notice needed to include:

- “(a) the date on which the Exercise Notice is given;
- (b) a statement to the effect that the Seller or Buyer (as the case may be) is exercising the Option;
- (c) a date, which is no less than five and no more than 15 Business Days after the date of the Exercise Notice, on which Completion is to take place; and
- (d) a signature by or on behalf of the Seller or the Buyer (as the case may be).”

By clause 6, Completion would take place at the Seller’s solicitor’s office.

56. Clause 7 contained some protection for SOL because Hanif Somji agreed a number of matters:

“Until the earlier of Completion and Lapse of either of the Options, the Seller shall not without the prior written consent of the Buyer (such consent not to be unreasonably withheld):

- (a) sell, transfer or otherwise dispose of, or mortgage, charge, pledge or otherwise encumber its legal or beneficial interest in any of the Option Shares (or any interest in any of them); or
- (b) make any alteration to the Company’s articles of association; or
- (c) make any material change to the nature of its business.”

Clause 11 provided that the rights under the agreement were personal to the parties and could not be assigned by either without prior written consent of the other party. Clause 12 contained a whole agreement provision.

57. On 5 August 2011, the then Managing Director of the Defendant sent a letter to Hanif Somji relating to SOIL. That letter starts by referring to the interest held by the Shallan Trust in a company referred to as Primefuels Kenya Limited, with that interest being “held through

various holding companies owned by the trust, one of which is” SOIL. Because Primefuels Kenya Limited required funding, which was being obtained through Standard Chartered Bank in Kenya, and the apparent reluctance of the beneficiaries of the Shallan Trust for the Defendant to provide due diligence information, SOIL was sold to Hanif Somji, so that he could provide his KYC information, thereby avoiding the Defendant needing to provide such information on behalf of the beneficiaries. The letter continues:

“The sale was carried out on an arms length and commercial basis at fair market value. In order to protect the position of the trustees and indeed yourself, Shallan Overseas Limited agreed to enter into a Put and Call Option Agreement with you which grants Shallan Overseas Limited the right to repurchase the shares at effectively the same value at which they were sold to you and grants you the right to sell back to Shallan Overseas Limited the shares at the same value for which they were acquired. The options can be exercised at anytime after 25 February 2015 and before 25 February 2017. Effectively by putting the option contracts in place, the trustees will be in no different position than had they continued to have held Shallan Overseas Investments Limited within the Shallan Trust structure and you will be in no different position either.”

After explaining that there was the possibility that the shares in SOIL might decrease in value, the letter ends by asking for an indemnity against that outcome from the Shallan Trust’s principal beneficiaries.

58. I have seen some accounts in relation to the Shallan Trust and also some of the underlying companies. One set, dated 22 November 2013, relates to SOL. It shows that in 2011, there was a profit within SOL from the sale of a subsidiary company of US\$5,934,000. Within the notes to the financial statement, as one of the loans receivable by SOL reference is made in 2011 to Hanif Somji owing US\$6,090,151, which rose by the end of 2012 to US\$6,383,680. These and other documents were sent to Amit Thakrar, although it is unclear when they were sent.
59. On 24 June 2013, PFHL adopted a new constitution at a special meeting of the company convened in accordance with section 117 of the Companies Act 2001. This enabled the shares held by Aureos to be redesignated as ‘A’ Ordinary Shares. Consequentially, what was referred to as *“the Aureos Investment Agreement”* was terminated and an Operating Agreement was approved. The new constitution is dated 2 July 2013. Article 22.7 provides:

“Notwithstanding any limitation on the number of directors imposed in this Constitution, the ‘A’ Shareholder shall be entitled to nominate (and require the removal and replacement of) two (2) such directors from time to time (“A Directors”) and the Original Shareholder shall be entitled to nominate (and require the removal and replacement of) six (6) Directors from time to time. The ‘A’ Shareholder and the Original Shareholder may by joint notice to the Company be entitled to nominate (and require the removal and replacement of) one (1) other director, who shall be independent of such parties, to the Board.”

One of the consequences of this change to the constitution was that Mr Machan and Paul Baudet were appointed as directors of PFHL.

60. The Second Voting Pool Agreement was executed on 1 July 2013. It is governed by English law (clause 4). The signatures of Paul Rogers and Lindsay Ozanne were applied on behalf of SOIL and PIL. Mr Machan and Mr Baudet signed on behalf of New Rodina. Mr Machan also appears to have signed as a director of PIL. One of the differences between the First Voting Pool Agreement was, as set out in clause 1, that it would *“continue in full force and effect as though all references in it to the Investment Agreement are references to the Constitution and the Operating Agreement”*. As such, clause 1.1 confirmed that:

“the votes attributable under the Constitution and Operating Agreement (or either of them) to PIL in respect of PFHL (whether as shareholder or by virtue of the nominated director positions available to PIL in PFHL and its subsidiaries now or at any future time) shall always be cast as one block in one direction or the other (with no abstention) as may be agreed in writing between Shallan Overseas Investments Limited (“Shallan”) and New Rodina Limited (“Rodina”) and in the absence of agreement shall be cast as one block against the resolution under consideration at the board or shareholder meeting in question to the intent that whatever change or action or effect which the resolution under consideration seeks to achieve will not be approved and the status quo whatever it may be is maintained unless Shallan and Rodina have together agreed to proceed in favour.”

Clause 3 provides that:

“This Agreement shall continue for as long as Shallan and Rodina or their connected parties are shareholders in PIL notwithstanding the termination of the Investment Agreement or the Operating Agreement or any modification to the Constitution.”

61. The termination of the Investment Agreement that had been executed on 30 March 2007 was achieved by a document fully executed on 3 July 2013. (That date should have been inserted at the beginning of the termination agreement but instead appears from an annotation to the cover sheet.) It is also governed by English law (clause 9).
62. The Operating Agreement is undated. The version provided does not include any signature on behalf of Aureos. However, no one has suggested that it was ineffective and the chronology indicates that it was finalised on 5 July 2013. It is similarly governed by English law (clause 9.1). It was signed on behalf of PIL by Mr Rogers and Mrs Ozanne on behalf of RBC Directorship and by Mr Machan. On behalf of PFHL it was signed by Mr Rogers and Mrs Ozanne, each time on behalf of both RBC Directorship and RBC Corporate Services. One aspect covered by the Operating Agreement was to extend the provisions in the new constitution to each Subsidiary. It was also envisaged that all Group Companies would adopt uniform information reporting systems to be agreed by the parties to it. The overall aim appears to have been to work towards a Realisation (as that term was defined) as soon as reasonably practicable (clause 3.1 and Schedule 1).
63. On 16 July 2013, Aureos transferred its 15% shareholding in PFHL to its subsidiary, FTHL. At some point during August 2013, Aureos sold its shares in FTHL to Mapplewell Global Group Limited (“Mapplewell”). I understand that Mapplewell is an entity wholly or partly owned and controlled by Mr Abdulla. The purchase price was equivalent to US\$453.33 per share, which extrapolates to a value of PFHL of US\$45.33 million.
64. According to the chronology, on 18 September 2013, Richard Reynolds and Dourvesh Chuman were appointed as directors of PFHL. Mr Rogers sought advice on 9 October 2013 from Mahmood Ahmed about the appointment of Mr Reynolds to the board of PFHL.
65. By a letter dated 15 December 2014, the Defendant gave notice to the Protector, Amirali Somji of its intention to retire as trustee of the Shallan Trust. It was signed by Sarah-Jane Parker. That letter refers to clause 14(1) of the Deed of Settlement. It sets out that the “*decision was made following a recent review by RBC Wealth Management of the breadth of the products and services and the jurisdictions in which its provides its services to ensure that they are aligned to its overall business objectives.*” The letter promised that the trustee would “*continue to fulfil our responsibilities under the Deed of Settlement until the affairs of the Trust can be assumed by another trustee in an orderly manner.*” It further explained that there would be an orderly transfer to a new financial services provider of the Trust’s banking and/or investment relationships, referring to the relevant entities in the Trust structure as including PIL, PFHL,

SOL and SOIL, along with some other entities. The Protector was requested to provide a preferred trustee and financial services provider to take over responsibility of the Trust. It was appreciated that *“this may take some time to complete, but we hope to be able to work with you and your advisors over the coming months to ensure a smooth handover of responsibilities to the new trustee and applicable service providers as efficiently as possible.”* It is explained that the Defendant regretted *“that we are unable to continue to act as Trustee under the current arrangements and apologise for any inconvenience caused. We wish to assure you that this transition will be managed with care and respect and any termination fees usually charged by us will be waived.”*

66. That letter was followed up by another one dated 26 August 2015, also sent to the Protector, Amirali Somji, and which was provided to (and exhibited by) Amit Thakrar under cover of an e-mail sent by Sarah-Jane Parker a couple of days afterwards. The opening paragraphs state:

“We are writing further to our previous correspondence notifying you of our intention to retire as Trustee of The Shalan Trust (the “Trust”). Please will you let us know by return if you have identified an alternative financial services firm whom you wish us to consider appointing as replacement trustee as we will need to act quickly to ensure they are appointed before September 18, 2015.

If it appears that RBC will not have been replaced by an alternative firm by September 18, 2015, we will be taking steps to appoint a regulated financial services firm to take on Trustee responsibility from September 30, 2015. This will ensure the affairs of the Trust continue to be managed effectively after September 30, 2015 following RBC’s withdrawal of service. We will ensure we are satisfied that the firm is suitable to take over responsibility of the Trust and provide continuity of trusteeship upon RBC’s resignation. We will also work with the new Trustee to transfer legal title to the Trust assets and Trust documentation to them by October 31, 2015 to ensure the account is closed by that date.”

The letter ends with confirmation that the Defendant planned *“to complete the transfer of fiduciary responsibilities by September 30, 2015”*.

67. This led to a letter dated 10 September 2015 being sent by Ameerali Somji to Mrs Ozanne of the Defendant, which referred to the letter sent in December 2014 and the more recent letter. It was sent to Mrs Ozanne by Alim Somji by e-mail on 11 September 2015. It sought an extension of 60 days, until 30 November 2015, referring to the relationship spanning more than 25 years. Two reasons were given:

- “1) As you are aware, the Trustees are currently involved in finalising the exit of my brother’s side of the family (the S.K. Somji side of the family). Whereas a price and broad terms for this process has been agreed, the documentation is being finalised by Cary [sic] Olsen and will be circulated shortly. Given the highly sensitive nature of this process and RBC’s understanding of the situation, a move away from RBC prior to the completion of this would prolong the process and be detrimental to the beneficiaries.*
- 2) Post the completion of this, I will need to consider the options available to me including potentially winding up the existing trust and resettling a new one. As you can imagine, there are a number of complex tax and other considerations associated with this. Whilst I have taken professional advice and found alternate Trustees, I will need time to rationalise and give due consideration to all the relevant matters post the exit of my brother’s side of the family so as to decide on how to proceed. Thereafter, I would also like an*

orderly handover to the new trustees given RBC Trustees' long tenure of the Shallan Trust."

68. The response to this request was sent by Mrs Ozanne later the same day to Alim Somji, the Protector's son, indicating that there was a meeting during the afternoon at which the Protector's request would be considered. In Amit Thakrar's witness statement, he explains that he was unaware of any response to this request, whilst also referring to Alim Somji explaining that Mrs Ozanne had telephoned to say that the plan was still to complete their involvement by the end of October 2015. This is consistent with what happened next.
69. In a document dated 30 October 2015, Aventine (Secretaries) Limited accepted appointment as a director of PFHL. By a similar document also dated 30 October 2015, Chasseral (Directors) Limited accepted appointment as a director of PFHL. Both entities are part of the Stonehage Fleming group, which is headquartered in Switzerland and had been identified by the Somji family as suitable to replace the Defendant and its entities. A board meeting was held on that day with Mrs Ozanne and Sarah-Jane Parker present, each purporting to represent RBC Directorship and RBC Corporate Services. The minutes show that Chasseral (Directors) Limited and Aventine (Secretaries) Limited would be appointed as additional directors of PFHL with effect from the close of the meeting and that the resignations of RBC Corporate Services and RBC Directorship, also dated that day, would be accepted from the same time. Further, RBC Corporate Services resigned as secretary of PFHL and was replaced by Aventine (Secretaries) Limited from the close of the meeting. There was also a change of registered office agreed. Documents were signed giving effect to those decisions and dated 30 October 2015. It is accepted by the Defendant that this meeting was inquorate and so ineffective.
70. Also on 30 October 2015, the Defendant retired as trustee of the Shallan Trust and it was replaced by Novatrust Limited, a company based in Jersey. An instrument of retirement and appointment of trustee was executed referring to the Protector's power to appoint a new trustee. Schedule 2 to that instrument sets out that the trust assets were the two shares in Shallan Group Holdings Limited and two bank accounts at Royal Bank of Canada (Channel Islands) Limited.
71. Also on 30 October 2015, RBC Directorship sent a letter to the directors of PIL resigning as director. A similar letter was sent by RBC Corporate Services resigning as secretary. Each letter was signed on behalf of the respective corporate directors by Mrs Ozanne and Mr Rogers. A further letter, on headed paper referring to the then Defendant, was sent to PIL's directors indicating that the Defendant would no longer be providing administration services. A written resolution was also prepared in respect of PIL and signed and dated 30 October 2015 on behalf of RBC Directorship by Mrs Ozanne and Sarah-Jane Parker by which Chasseral (Directors) Limited was appointed as an additional director and for Aventine (Secretaries) Limited to replace RBC Corporate Services as secretary. The written resolution also changed the registered office and administration office and would close the bank account once a new account had been identified.
72. On 12 November 2015, Simon Goddard of the Defendant sent the written resolution to Mr Machan, asking him to countersign it. Within a matter of minutes, Mr Machan responded indicating that "*We are not happy with the proposed appointment and therefore will not be signing the resolution. To have a firm based in Switzerland administering when we are all based in the Channel Islands I cannot understand.*" This reply was sent by Mr Goddard later that day to Amit Thakrar, adding that Mr Machan had asked for sight of the "*RBC director resignation letters addressed to SOIL*". Within an hour, Amit Thakrar replied: "*Please do not act on this till I check and revert.*" He later told the Defendant that a Jersey based director was a possibility.
73. During the morning of 25 November 2015, Mr Machan had a number of follow up queries he asked be addressed by Mr Goddard. He requested copies of the resignation letters of RBC

Directorship as director of PIL and RBC Corporate Services as the secretary. He sought information about Chasseral (Directors) Limited and also about the proposed new secretary, Aventine (Secretaries) Limited. He queried some professional fees and costs he said had been improperly incurred on behalf of the company which should have been “*for Shallan’s, rather than PIL’s, account*”.

74. Mr Goddard replied later the same day, enclosing the documents requested, explaining that this had resulted from a review within RBC of all clients, where “*the structure headed up by Shallan Overseas Investments Limited was one that RBC decided not to continue with due to its relationship with Kenya*”. He also explained about the connection of the new companies with Stonehage Fleming SA, adding that “*the companies will be administered by their office in Jersey*”. He also explained that: “*This Company needed to be transferred by 31 October and therefore we are under pressure to get this transferred immediately.*”
75. On 10 December 2015, Mr Rogers asked Mr Machan whether he had had a response from Mr Goddard, who had been taken ill. Mr Machan first said he had received nothing, but then corrected himself the following day. He explained to Mr Rogers that he wondered whether the resignation letters would take effect when the relevant resolutions had been passed, about which he still had some matters to be resolved before “*these can reasonably be progressed*”. Mr Rogers forwarded Mr Machan’s e-mail to Mrs Ozanne, whose reply (exhibited by Mr Elliott) was that she “*did not want RBC to get caught up in these lengthy discussions with George particularly given we will not be paid!*”.
76. On 14 December 2015, Mr Rogers replied to Mr Machan as follows:
- “Please find attached copies of the resignation letters from RBC Directorship Services (CI) Ltd as Director, RBC Corporate Services (CI) Ltd as Secretary and RBC Trustees (Guernsey) Ltd as administrative office, all effective 30 October 2015, which I trust clarifies the situation regarding RBC’s position and the matter of the Directors resolution you were asked to sign.*
- As we are no longer involved with Primefuels Investment Limited and we have previously provided you with copies of Financial Statements and explanations of loan balances, we suggest that you contact the new Directors and administrators for the Company going forward.”*
77. By letter dated 12 January 2016, Mr Machan, acting as sole director of PIL, set out the sequence of events to which I have just referred and proceeded to accept the resignations of RBC Directorship and RBC Corporate Services and appointed Verite Secretaries Limited as the new secretary of PIL with effect from the date of the letter. He refused to agree that the administrative office be changed to Stonehage Fleming SA and resolved, as sole director, to change it to the registered address of Verite Secretaries Limited, which is part of the group that includes Verite Trust Company Limited, which administers New Rodina. He achieved this by way of a written resolution.
78. This letter was forwarded to Amit Thakrar by Mrs Ozanne on 19 January 2016 by e-mail. Her message suggests that an attempt had been made to resolve a complaint about fees charged by offering to reimburse PIL and PFHL certain amounts.
79. On 18 May 2016, PFHL resolved to accept the resignations of RBC Directorship and RBC Corporate Services with effect from 30 October 2015. The resolution was signed by Mr Machan, Mr Baudet and Mr Reynolds.
80. On 24 January 2017, SOL exercised its call option to purchase SOIL back from Hanif Somji.

81. On 7 August 2017, English solicitors, Evans Dodd (acting it seems by Mahmood Ahmed), wrote to Mr Machan challenging what had happened in respect of PIL and PFHL, pointing out that SOIL was able to nominate one director to the board of PIL and two directors to the board of PFHL.
82. On 27 November 2017, a director of RBC Directorship (which had since changed its name, which no longer referred to “(CI)”, which was replaced with “(Guernsey)”) wrote to the local administrator in Mauritius of PFHL pointing out that RBC Directorship still appeared as a director on the register of companies. The letter confirmed, in case the previous resignation was not effective, that RBC Directorship resigns as a director of PFHL and requested a copy of the register showing that the resignation had been effected.
83. On 20 December 2017, SOIL was transferred from being owned by SOL to Losai Investments Limited.
84. On 28 June 2018, Novatrust Limited retired as trustee of the Shalan Trust and was replaced by the Plaintiff.
85. I have taken these facts largely from the documents provided to the Court. Whilst I have considered the two witness statements provided on behalf of the Plaintiff, although Amit Thakrar has some recollection of events, it appears he has relied on those documents he exhibits to his witness statement, which in any event amount to an incomplete set. Mr Elliott offers little in addition on behalf of the Plaintiff. Further, the Affidavit of Lisa Barnett expressly states that she has “*no first-hand knowledge of the events in question*”. This is all the more reason to rely on the documents where there is no one who actually remembers what was taking place and why.

Gross negligence

86. Because of the need for the Plaintiff to establish that any negligence on the part of the Defendant was gross negligence, before turning to the parties’ arguments, I think it will assist to refer to the way the test was put. It was accepted by the parties that section 39(7)(a) of the 2007 Law means that the terms of a trust instrument cannot relieve a trustee of liability for breach of trust arising from gross negligence, as had been confirmed in *Spread Trustee Co Ltd v Hutcheson* [2012] 2 AC 194 (referring to the equivalent provision in the 1989 Law, on which see para. 20).
87. Advocate Davidson suggests that the way it was put in *Jefcoate v Spread Trustee Company Limited* (unreported, 31 October 2014) is helpful, showing that it means serious negligence. He refers to para. 328:

““Gross negligence” denotes negligence, but of a particularly serious order.

“The terms negligence and gross negligence differ only in the degree or seriousness of the want of due care they describe”

Spread Trustee v Hutcheson [2012] 2 AC 194 at [117].

A working test is, I think, whether as a matter of impression, the degree of negligence excites astonishment, or whether one has the feeling that, careless though it is, it is understandable, or readily explicable.”

88. He has also referred to a decision of the Royal Court of Jersey, *Freeman v Ansbacher Trustees (Jersey) Limited* [2009] JRC 003, in which para. 57 states:

“In Midland Bank Trust the Court of Appeal considered whether gross negligence, for the purposes of what is now Article 30(1) of the 1984 Law, involves any specific mental element. At page 393 Le Quesne JA said this:-

“In each of [these cases] the approach was to treat ‘gross negligence’ as meaning ‘very great negligence’, or flagrant or extreme negligence, or negligence consisting of ‘a very marked departure from the standards’ of responsible and competent people. In none of them was it suggested that ‘gross negligence’ involved ‘a certain mens rea’ or ‘an intentional disregard of danger’ or ‘recklessness’.

In our judgment, the direction to the Jurats in the present case as to the meaning of ‘gross negligence’ was erroneous. All that this phrase means is a serious or flagrant degree of negligence. It does not import any question of intentional or reckless fault.”

(I do not understand why Advocate Davidson did not refer to the case from which this passage was quoted, which has greater weight than a decision of the Royal Court of Jersey. The case cited is *Midland Bank Trust Company (Jersey) Limited v Federated Pension Services* 1995 JLR 352, in which the Jersey Court of Appeal considered that gross negligence involves “a serious or flagrant degree of negligence”.)

89. Whilst Advocate Gray does not disagree with these references, she draws attention to what the Guernsey Court of Appeal stated in *Investec Trust (Guernsey) Limited v Glenalla Properties Limited* 2015 GLR 300, as summarised at para. 51(i):

“Gross negligence is a most serious allegation and the former trustees were entitled to be informed with precision of the extent of the duty said to have been broken, how it had been broken, what should have been done instead, why the breach was said to have been gross and how the breach had given rise to the loss (see paras. 52-54 below).”

In the light of that expectation, she suggests that the case against the Defendant was inadequately particularised or pleaded. This issue is developed in para. 54 in which the Court of Appeal indicated it “would go further”, and which continues, having set out the points summarised in para. 51(i):

“The former trustees were entitled to expect that the case they had to meet in those respects would be set out in the pleadings; and they were entitled to expect that the Lieutenant Bailiff would determine the issues identified in the pleadings. Although it may be the case that courts are less inclined to hold parties to their pleadings than was the case in the past, pleadings still have an essential role to play in the identification of the issues in dispute and in enabling the parties to prepare their arguments and deal with evidential matters on a common footing. Too much of a departure from the pleaded cases may give rise to injustice by causing a party to be taken by surprise. Pleadings may, of course, be amended and, in the present case, the current trustee was permitted to amend its pleading at the end of the trial to reflect an aspect of the case that it had put in closing submissions. As amended, however, the pleadings provide the basic framework for the identification of the issues to be determined at trial on which, in the whole circumstances, the Lieutenant Bailiff was quite correct to concentrate.”

90. Although no direct reference was made to it, I have noted that para. 119 in that judgment offers another source for how to approach gross negligence, following what had been said in the previous paragraph was a “fairly general and practical approach”:

“That approach, we might add, seems to us consistent with the approach of Mance, J (as he then was) in Red Sea Tankers Ltd. v. Papachristidis (The Hellespont Ardent) (26), where he said ([1997] 2 Lloyd’s Rep. at 586):

“If the matter is viewed according to purely English principles of construction, I would reach the same conclusion. ‘Gross’ negligence is clearly intended to represent something more fundamental than failure to exercise proper skill and/or care constituting negligence. But, as a matter of ordinary language and general impression, the concept of gross negligence is capable of embracing not only conduct undertaken with actual appreciation of the risks involved, but also serious disregard of or indifference to an obvious risk.”

91. This is also consistent with another Court of Appeal case, which similarly binds this Court and to which Advocate Gray drew attention in her oral submissions, Khuller v First International Trustees Ltd [2020] GCA 051. She referred to para. 138, although there is fuller coverage of the applicable test earlier in the judgment, where the Court of Appeal did not demur as to the way in which the Jurats had been directed when the case was before this Court:

“32. The Royal Court’s judgment in the present case explained, at paragraphs [61] and [62], what negligence could be considered to qualify as gross negligence or as wilful misconduct and thus outside the scope of the exoneration provision relied on by the Respondent. This explanation, which has not been criticised on this appeal, is as follows:

“61 The parties cited a number of authorities to explain the definition of gross negligence and wilful misconduct. The Bailiff directed the Jurats to adopt the definition given in relation to gross negligence in Investec Trust (Guernsey) Limited and others v Glenalla Properties Ltd and Others [2015 GLR 300], at paragraph 118, where the Court of Appeal approved the Lieutenant Bailiff’s statement that “gross negligence means a serious or flagrant degree of negligence, not equating to reckless or intentional fault or the like”. The Court of Appeal held that was consistent with the approach of Mance J. (as he then was) in Red Sea Tankers Ltd v Papachristidis (The Hellespont Ardent) [1997] 2 Lloyd’s Report 547:

‘If the matter is viewed according to purely English principles of construction, I would reach the same conclusion. ‘Gross’ negligence is clearly intended to represent something more fundamental than failure to exercise proper skill and/or care constituting negligence. But, as a matter of ordinary language and general impression, the concept of gross negligence is capable of embracing not only conduct undertaken with actual appreciation of the risks involved, but also serious disregard of or indifference to an obvious risk.’

62 In relation to wilful misconduct, the Bailiff adopted the Plaintiff’s definition taken from the judgment of Millett L.J. in Armitage v Nurse [1998] Ch 241 citing Maugham J. in In Re Vickery [1931] 1 Ch. 572 that the trustee must be consciously doing the act, or omitting to do the act and “he is committing a breach of his duty if he is recklessly careless whether it is a breach of his duty or not”.

33. In the light of the explanation given by the Royal Court, we would summarise gross negligence as a serious or flagrant degree of negligence, more

fundamental than failure to exercise proper skill and/or care constituting negligence, and capable of embracing not only conduct undertaken with actual appreciation of the risks involved, but also serious disregard of or indifference to an obvious risk.”

92. In turn, this has since been adopted before this Court in directions given to the Jurats in Kazzaz v Standard Chartered Trust (Guernsey) Limited 2023 GLR 223 (at para. 262):

“The Lieutenant Bailiff advised the Jurats that for negligence to be “gross” it must strike them, as a matter of impression, as being:

“a serious or flagrant degree of negligence, more fundamental than failure to exercise proper skill and/or care constituting negligence, and capable of embracing not only conduct undertaken with actual appreciation of the risks involved, but also serious disregard of or indifference to an obvious risk”

(see Khuller v. First Intl. Trustees Ltd. (15) ([2020]GCA051, at para. 32)).”

(That cross-reference should have been to para. 33.)

93. As a result of considering these various cases relating to gross negligence, I take the view that the proper starting point must be the Spread Trustee Co Ltd v Hutcheson case. This was an appeal to the Judicial Committee of the Privy Council from this jurisdiction. As such, what it decides is binding on me in this Court. The members of the Board were split on certain aspects, but it is the majority view that binds.
94. By way of background, when the 1989 Law was enacted it prevented a trust relieving the trustee for breach of trust “*arising from his own fraud or wilful misconduct*”. The Trusts (Amendment) (Guernsey) Law, 1990 added the words “*or gross misconduct*”. One of the issues related to whether either piece of legislation, but particularly the 1990 Amendment Law, had retrospective effect. In this Court, Lieutenant Bailiff Sir de Vic Carey ordered that there be preliminary issues as to whether the Amendment Law applied before it was brought into force on 19 February 1991 and, if so, whether it applied to breaches of trust occurring before the 1989 Law had become effective on 22 April 1989. It was common ground before this Court (as recorded in para. 7 of the judgment of Lord Clarke of Stone-cum-Ebony JSC) that a trust instrument before the 1989 Law was effective could exclude liability for negligence or gross negligence, so the issue was whether the change in the Law precluded a trustee relying on clauses exonerating gross negligence in respect of breaches of trust occurring before the Amendment Law was effective. The Lieutenant Bailiff answered both issues affirmatively. In particular, the Lieutenant Bailiff highlighted that he considered that acting with gross negligence could not be compatible with acting *en bon père de famille*, which was declaratory of existing law. The Court of Appeal agreed, albeit for different reasons (see para. 11, which sets out the steps in the reasoning of the Court of Appeal). The Court of Appeal refused permission to appeal to the Privy Council, but permission was granted by the Judicial Committee.
95. Paragraph 20 of Lord Clarke’s judgment is frequently cited as applicable to the principle of acting *en bon père de famille*, which is worth repeating:

“In the context of the duty of a trustee, the Guernsey Court of Appeal held at para 31 that the duty to act en bon père de famille was a duty to act as a prudent man of business. It so held on the basis that no doubt the obligation so to act implies a standard of care similar to that required of trustees in England, citing Bartlett v Barclays Bank Trust Co Ltd (Nos 1 and 2) [1980] Ch 515. In short the duty is to act as a reasonable and prudent trustee would act, that is with reasonable care and skill. As Brightman J explained in Bartlett at p 534, in the case of a professional trustee that

means with the particular care and skill expected of such a person. The Board accepts that that is indeed a correct description of the nature of the duty imposed by section 18(1) of the Law.”

96. In para. 22, the Board expressly rejected the submission, agreeing with what the Court of Appeal had held, that under the Law it was not permissible to exclude liability for gross negligence, pointing out that the “*purpose of the Law was to replace the existing customary law and to clarify the rights and obligations of trustees in Guernsey*”, meaning that in the absence of anything in the Law making it impermissible to exclude liability for gross negligence, “*a term excluding gross negligence is lawful*”. The Board also expressly disagreed with the Court of Appeal’s conclusion that the omission had been a mistake, noting that there was “*no evidence to support that conclusion*” (para. 26), adding that it was “*also extremely unlikely that the States deliberately changed the pre-existing law in a way which was less favourable to beneficiaries than it had been before*” (para. 27). Instead, the decision was deliberate and supported “*the conclusion that they reflect the customary law in this regard*” (para. 27). The effect of the Amendment Law was to bring the position in line with what had been achieved in Jersey by its Trusts (Amendment) (Jersey) Law 1989. The Board also disagreed that what had previously been referred to covering fraud as extending to *culpa lata*. The conclusions were summarised in para. 37:

“There is no case or text before 1989 which assists in answering the question what was the customary law of Guernsey in any relevant respect. In these circumstances, the most valuable pointer to the correct answer to the question whether a term excluding gross negligence was contrary to Guernsey customary law before 1989 is the 1989 Law. The fact that section 34(7) of that Law only forbids terms excluding gross negligence is good evidence that that was the position under Guernsey law before that. There is no reason to think that that subsection was not carefully considered and, given, as both the courts below recognised, that the 1989 Law would be most unlikely to have introduced a provision less favourable to beneficiaries than before, the Board does not agree with the Court of Appeal that it was not permissible for a trust to include a term excluding liability for gross negligence as a matter of Guernsey customary law.”

97. Whilst this is all very interesting, it does not affect the position in the present case because what is alleged against the Defendant clearly post-dates the 1990 Amendment Law, as re-enacted in the 2007 Law. What matters more is any indication given about what gross negligence entails, but I considered that the other reasoning needed to be placed in context, especially when Lord Clarke comments in para. 40 that it is accepted “*that Guernsey looks to other jurisdictions for assistance in developing particular areas of the law*”, coupled with the view expressed in para. 45 that “*the Guernsey courts would be more likely to have looked at and followed English law than Scots law*”.
98. This led Lord Clarke to refer to *Armitage v Nurse* [1998] Ch 241, and to quote from the judgment given by Millett LJ (in para. 46), including this passage:

*“It is, of course, far too late to suggest that the exclusion in a contract of liability for ordinary negligence or want of care is contrary to public policy. What is true of a contract must be equally true of a settlement. It would be very surprising if our law drew the line between liability for ordinary negligence and liability for gross negligence. In this respect English law differs from civil law systems, for it has always drawn a sharp distinction between negligence, however gross, on the one hand and fraud, bad faith and wilful misconduct on the other. The doctrine of the common law is that: ‘Gross negligence may be evidence of mala fides but is not the same thing.’ see *Goodman v Harvey* (1836) 4 A & E 870, 876, per Lord Denman CJ. But while we regard the difference between fraud on the one hand and mere negligence, however gross, on the other as a difference in kind, we regard the difference between negligence*

and gross negligence as merely one of degree. English lawyers have always had a healthy disrespect for the latter distinction. In Hinton v Dibbin (1842) 2 QB 646, Lord Denman CJ doubted whether any intelligible distinction exists; while in Grill v General Iron Screw Collier Co (1866) LR 1 CP 600, 612 Willes J famously observed that gross negligence is ordinary negligence with a vituperative epithet. But civilian law systems draw the line in a different place. The doctrine is culpa lata dolo aequiparatur; and although the maxim itself is not Roman the principle is classical. There is no room for the maxim in the common law; it is not mentioned in Broom's Legal Maxims, 10th ed (1939)."

99. However, the Board then explained in para. 50 that Millett LJ had been wrong to say this was “merely one of degree”, continuing by offering some examples:

“A gratuitous bailee is only liable for gross negligence. A claimant for damages for wrongful arrest of a ship must prove that the arrest was malicious or the result of gross negligence or, in the old language crassa negligentia: see e g The Collingrove; The Numida (1885) 10 PD 158, 161. A mortgagee in possession of property was at one time not liable to the mortgagor for a loss in value caused by want of reasonable care but was liable for gross negligence. Alderson B put it thus in Wragg v Denham (1836) 2 Y & C Ex 117, 122: “It is not necessary to go to the length of shewing fraud in the mortgagee: gross negligence is sufficient.” The present position is different. A failure to take reasonable care is sufficient: see Fisher & Lightwood's Law of Mortgage, 12th ed (2006), pp 595-603. However, in Halsbury's Laws of England, 4th ed reissue, vol 16(2) (2003), para 569, it is stated that in a contest between an equitable incumbrancer and a legal mortgagee, the latter will not be postponed on the ground of his conduct unless he had been guilty of direct fraud or of such gross negligence as would render it unjust to deprive the prior incumbrancer of his priority. The concept of gross negligence also appears in section 2 of the Libel Act 1843 (6 & 7 Vict c 96). Finally, gross negligence is one of the bases upon which a person can be convicted of manslaughter: R v Adomako [1995] 1 AC 171.”

100. Whilst it is notable that nothing stated by Lord Clarke amounts to an attempt to set out what gross negligence is, the conclusion reached (in para. 57) on the question of what a Guernsey lawyer would have opined before 1989 looking at the position under English law, would have been to look at the cases to which Millett LJ referred “and would have reached the same conclusions as he did”.
101. Whilst I have carefully considered the judgment of Lord Mance JSC, it also does not offer any attempt to define gross negligence. His Lordship does, though, agree with Lord Clarke that the position in Guernsey would more likely follow English rather than Scots law.
102. Sir Robin Auld agreed with Lord Clarke and Lord Mance and disagreed with Baroness Hale and Lord Kerr, whereas the members of the Board were unanimous about the retrospective effect of the Amendment Law. However, Sir Robin Auld did set out more about gross negligence and I will cite the whole of para. 117 of his judgment, a short extract of which had been cited in the Jefcoate case:

“On the plain meaning of the words, and as a matter of logic and common sense, the terms “negligence” and “gross negligence” differ only in the degree or seriousness of the want of due care they describe. It is a difference of degree, not of kind, as stated by Millett LJ in Armitage v Nurse [1998] Ch 241. Gross negligence, like negligence not so qualified, may be committed in good faith and, therefore, without dishonesty or wilfulness. Indeed, dishonesty – an inherent ingredient of fraudulent or wilful misconduct – is the antithesis of negligence, an inadvertent falling short of a duty to

take reasonable care in all the circumstances. To describe such inadvertence, as “gross” does not turn it into fraudulent or wilful misconduct.”

103. Along with Lord Clarke and Lord Mance, Sir Robin Auld agreed that there was no mistake in the 1989 Law through omitting “*or gross negligence*”, with him agreeing that it was included in the Amendment Law “*as new law in line with the recent statutory change made in Jersey*” (para. 119). However, what he set out in para. 117 amounts to the best confirmation about what gross negligence entails.
104. Moving on to the dissenting judgments, Baroness Hale of Richmond JSC questioned why the Board would have decided a question that had not been addressed by the Supreme Court, instead relying on the decision in *Armitage v Nurse*, concluding that “*this Board should be slow to depart from the concurrent views of the courts of Guernsey as to what was the law of Guernsey in 1988 when to do so might be taken to pre-empt consideration of the issue in the courts of the United Kingdom*” (para. 129). Her Ladyship then suggested in para. 137 that the decision in *Armitage v Nurse* and in the *Midland Bank Trust Co* cases were “*open to serious question*” before adding in para. 140 that the Court of Appeal had:

“... concluded that, even if the premise that Guernsey law would have followed English law were correct, it had not been shown that English law would have allowed the exclusion of liability for gross negligence. They bolstered this conclusion by declining to accept that Guernsey law, with its mixed Norman and English law heritage, would have slavishly followed English law in any event. This, to my mind, is where it is right to emphasise the duty to act en bon père de famille – even though that is clearly equivalent to the duty adopted by English law to act as a prudent man of business, it is differently phrased and has its roots in Norman, and ultimately Roman, law. A law with those roots might well also have prohibited the exclusion of liability for gross negligence. As the Lieutenant Bailiff said, the responsibility of a paid trustee could not be less than that of a person appointed by the court as tuteur or guardian of a minor. Acting with gross negligence was incompatible with such duties. Indeed, I suspect that even an English lawyer would regard it as unacceptable that a guardian of the estate of a minor might be excused liability for gross negligence.”

As a result, Baroness Hale would have dismissed the appeal. However, there is nothing in her judgment attempting to define what amounts to gross negligence.

105. Finally, Lord Kerr of Tonaghmore JSC would also have dismissed the appeal. Whilst in para. 175 His Lordship appears to have agreed with the Court of Appeal’s conclusion, being its “*principal and primary finding ... that the fundamental obligation to act en bon père de famille was incompatible with the notion that a trustee could be exempted from gross negligence in the administration of a trust*”, a “*final conclusion on that question is not essential*”. Lord Kerr also drew attention to the fact that the duty under consideration in *Armitage v Nurse* was not fiduciary in nature, whereas the duty to act *en bon père de famille* clearly was, which is why consideration of the Scottish line of cases might be more beneficial. However, as with all those sitting except Sir Robin Auld, no attempt was made to set out any principles relating to gross negligence.
106. The outcome, therefore, is that only Sir Robin Auld sought to define what amounts to gross negligence. On the basis that none of the other members of the Board disagreed, I regard para. 117 in Sir Robin Auld’s judgment as the highest authority on this question. It is apparent that the distinction between “ordinary” negligence and gross negligence rests on “*the degree or seriousness of the want of care*” involved. Reliance is placed on the way it was put in *Armitage v Nurse*, and it is clear that there is no need to demonstrate dishonesty or wilfulness. Instead, whilst negligence, without qualification, is “*an inadvertent falling short of a duty to take*

reasonable case in all the circumstances”, gross negligence necessarily has to be something more serious.

107. Whilst this is a comment about gross negligence from the highest appellate Court, greater assistance is offered by the Court of Appeal decisions to which I have referred. They adopt as a matter of Guernsey law the way it was put in the *Red Sea Tankers* case. This is also consistent with the test applied in Jersey (see *Freeman v Ansbacher Trustees (Jersey) Limited*). To the extent that there is any difference in decisions in this Court (eg, between *Jefcoate* and *Kazzaz*), I prefer the test derived from the *Red Sea Tankers* case, as summarised in para. 33 of *Khuller*. Proving gross negligence requires “*a serious or flagrant degree of negligence, more fundamental than failure to exercise proper skill and/or care constituting negligence, and capable of embracing not only conduct undertaken with actual appreciation of the risks involved, but also serious disregard of or indifference to an obvious risk.*”

108. With that test in mind, I now turn to the arguments of both parties as to whether the Plaintiff has established a claim of gross negligence. In doing so, I will not necessarily follow the list of issues in the order presented.

Status of SOIL

109. The first of the fundamental problems identified by Advocate Gray is whether, at the time the Defendant retired as trustee of the Shallan Trust, SOIL, and so the companies lower down the structure, was an asset of that Trust. This is the second issue listed.

110. On the face of the Plaintiff’s Cause, para. 16 acknowledges that in 2011 SOL transferred its shareholding in SOIL to Hanif Somji, but refers to the Put and Call Option Agreement and its effect. Paragraph 17 adds that “*The effect of the Put and Call Option Agreement was to continue the Shallan Trust’s interest in PIL because any increase in value in PIL would increase the value of the trust fund while any decrease in value would cause loss to the trust fund.*” The letter from which I have already quoted dated 5 August 2011 is set out in para. 18. Paragraph 19 states that “*RBC remained as director, secretary and administrator of PIL.*” Paragraph 20 sets out when the option could be exercised and that it was exercised on 24 January 2017.

111. In the Re-Amended Les Defences, the terms of the agreement for the sale of the shares by SOL to Hanif Somji and a reference to the English law equitable mortgage are set out in paragraphs 19 to 21. Paragraph 23 refers to the Put and Call Option Agreement executed on 25 July 2011. Paragraph 34 responds to para. 9 of the Cause (“*SOIL is part of the trust fund of the Shallan trust. At all material times before 20 December 2017, SOIL was the wholly owned subsidiary of Shallan Overseas Limited (“SOL”). On 20 December 2017, SOIL was transferred by SOL to Losai Investments Limited (“Losai”). SOIL is the wholly owned subsidiary of Losai which is owned by Shallan Group Holdings Limited. Shallan Group Holdings Limited is owned by the Shallan Trust.*”) in the following terms:

“*As to paragraph 9:*

34.1 *It is denied that SOIL was an asset of the Shallan Trust. Paragraph 14 above is repeated;*

34.2 *It is denied that SOIL was wholly owned by SOL at all material times before 20 December 2017. As alleged at paragraph 19 above, on 25 February 2011, SOL sold its shares in SOIL to Hanif Somji who thereafter became the sole legal and beneficial owner of SOIL;*

34.3 *It is admitted that up until 30 October 2015, Shallan Group Holdings was held by the Defendant as set out at paragraph 14 above; and*

34.4 *Save as aforesaid, paragraph 9 is not admitted.”*

The reference to para. 14 is to the assertion about the assets of the Shallan Trust until the Defendant’s resignation on 30 October 2015, comprising one share in Shallan Group Holdings Limited registered in the Defendant’s name, one share held as nominee for the Defendant by RBC Corporate Services and cash in bank accounts.

112. Paragraphs 16 to 20 of the Plaintiff’s Cause are addressed in paragraphs 41 to 45. Aside from what had been included in paragraphs 19 to 21 and 23, to which I have just referred, para. 16 is denied, as is para. 17, with the Defendant repeating that *“Following the 2011 SPA, Hanif Somji became the legal and beneficial owner of all the issued shares in SOIL. This was unaffected by the Option Agreement.”* Paragraph 43 denied para. 18, save that the extract from the letter quoted was accurate, with the Defendant relying on the entirety of the letter at trial *“for its true meaning and legal effect”*. Paragraph 19 was admitted, although the reference to *“RBC”* in it did not refer to any entity with *“the Defendant, RBC Directorship and RBC Corporate Services”* continuing in their roles, cross-referring to para. 30, which responded to para. 5 of the Cause (*“The Defendant while acting as sole trustee of the Shallan Trust provided corporate services (including directors and administrative services) to the underlying companies owned by the Shallan Trust through RBC Directorship Services (CI) Limited (“RBC Directorship”) and RBC Corporate Services (CI) Limited (“RBC Corporate Services”) who acted on its instructions and acted as its agents.”*) as follows:

“Paragraph 5 is denied.

30.1 *At all material times until its resignation, RBC Directorship was a director of PIL and PFHL;*

30.2 *At all material times until its resignation, RBC Corporate Services was PIL’s company secretary and was a director of PFHL;*

30.3 *At all material times until 30 October 2015, the Defendant provided corporate administration services (but not in its capacity as trustee) to PIL;*

30.4 *RBC Directorship and RBC Corporate Services were not the Defendant’s agents nor did they act on its instructions. Where RBC Directorship and RBC Corporate Services acted as officers of PIL and PFHL they acted in accordance with their duties to those companies.”*

Finally, para. 20 is admitted, but the date of exercise of the option is not admitted.

113. It is, therefore, apparent that the Defendant put in issue the question about whether SOIL formed part of the assets of the Shallan Trust between 25 February 2011 and the Defendant’s resignation as trustee on 30 October 2015.

114. On behalf of the Plaintiff, Advocate Davidson submits that the Shallan Trust was indirectly invested in the Primefuels business, which operated in East Africa and was a joint venture between Mr Abdulla and the Somji family. In particular, in his initial Skeleton Argument, he explains that:

“SOL had the right and a potential obligation to repurchase all the shares in Shallan Overseas Investments Ltd (SOIL) from Hanif Somji under the terms of a put and call

*option agreement dated 25 July 2011 (the **Option Agreement**). On 25 February 2011, SOL had sold all the shares in SOIL to Hanif Somji for \$5.95 million, which was left outstanding with interest accruing at 4.75% p.a. The parties' rights under the Option Agreement could be exercised at any time between 25 February 2015 and 25 February 2017. The agreed strike price was the outstanding loan (\$5.95 million) plus the accrued interest, less any dividends paid to Hanif Somji from SOIL."*

115. In response, Advocate Gray refers to the 2007 Law to explain why the shares of SOIL were not an asset of the Shallan Trust from February 2011 until the Defendant ceased to be the trustee in October 2015. Because SOIL held half of the shares in PIL, which in turn held 85% of the shares in PFHL, once Hanif Somji became the legal and beneficial owner of SOIL, the Put and Call Option Agreement did not give SOL ownership of the shares in SOIL. As regards the Plaintiff's reliance on the letter sent to Hanif Somji dated 5 August 2011, it cannot be used to assist in how to construe the Put and Call Option Agreement. Accordingly, SOIL, and so also PIL and PFHL, were outside the Shallan Trust until the option was exercised in January 2017. (I will deal with the various authorities to which she also referred when discussing this issue.)
116. In Advocate Davidson's Reply Skeleton, he suggests that the Put and Call Option Agreement "*had no effect on the Trust's main asset, SOL, which prior to 25 February 2011 owned SOIL but by the time of RBC Trustees' retirement owned the rights under the Option Agreement*". He further suggests that the distinction the Defendant seeks to draw "*lacks reality*", relying on the letter sent dated 5 August 2011 that the Defendant considered it was "*in no different position*". At the material time, the Shallan Trust "*had a significant, albeit indirect, economic interest in PIL and PFHL (formerly through SOL and SOIL, but latterly through SOL, the Option Agreement and SOIL) and was represented on the boards of PIL and PFHL.*" As such, the Defendant was "*under a duty to maintain its representation on the boards of PIL and PFHL in order to protect the Trust's economic interest in them.*" The Plaintiff's case rests on the control that it had over these entities, as set out in paragraphs 5 and 6 of the Cause.

Discussion

117. I prefer the arguments of Advocate Gray on this issue to those of Advocate Davidson.

118. Section 1 of the 2007 Law provides that:

*"A trust exists if a person (a "**trustee**") holds or has vested in him, or is deemed to hold or have vested in him, property which does not form or which has ceased to form part of his own estate –*

*(a) for the benefit of another person (a "**beneficiary**"), whether or not yet ascertained or in existence, and / or*

(b) for any purpose, other than a purpose for the benefit only of the trustee."

In section 80(1) of the Law there is a definition of "*trust property*", which "*means property held on trust*".

119. It appears to be common ground that the assets of the Shallan Trust start with the two shares held in Shallan Group Holdings Limited. That company owns all the shares in SOL as a wholly owned subsidiary. As such, I am satisfied that SOL can be regarded as indirectly owned by the Shallan Trust. Prior to the sale of the shares in SOIL to Hanif Somji, SOIL was a wholly owned subsidiary of SOL and so also indirectly owned by the Trust. However, on the completion of the sale of the shares in SOIL by SOL to Hanif Somji, SOIL was no longer a wholly owned

subsidiary of SOL and so fell outside the terms of the Shallan Trust unless for some other reason SOIL was still considered to be within the definition in section 1 of the 2007 Law.

120. In order to fall within the definition in section 1 of the 2007 Law, the Defendant, as trustee of the Shallan Trust, would need to be “*deemed to hold or have vested in him*” the shares in SOIL. I am not persuaded that such deeming can be demonstrated. The Share Sale Agreement signed on 25 February 2011 provided that SOL was selling “*with full title*” the 16,000 registered shares. Although an attempt was made to explain the reasons for taking this action in the letter dated 5 August 2011, I do not consider that what was contained in that letter is entirely accurate.
121. The Share Sale Agreement confirms that Hanif Somji was acquiring “*the legal and all beneficial interests in the Shares*”. Although there was an equitable mortgage executed on the same date, I do not regard that agreement as affecting the ongoing legal title to the shares in SOIL, which had been “*sold and transferred*” to Hanif Somji. Further, the Put and Call Option Agreement meant that, unless clause 3.2 was engaged, which it was not because Hanif Somji did not die, either option was only capable of being exercised at the earliest from 9 am London time on 25 February 2015. One of the recitals to the Put and Call Option Agreement confirms that Hanif Somji “*is the legal and beneficial owner of the Option Shares*”. There is nothing in that agreement that affects that basic position. As a result, I regard the starting point as being that Hanif Somji owned SOIL from February 2011. He still owned SOIL in 2015. I am not persuaded that the Put and Call Option Agreement gave SOL any entitlement to act until the two-year period in which either option could be exercised arose.
122. To the extent that it is necessary to do so, I can apply the explanation given in the speech of Lord Upjohn in *Vandervell v Inland Revenue Commissioners* [1967] 2 AC 291 (starting at the bottom of page 314):

“The grantee of an option has not, in reality, an estate in the property. Of course, he has an interest in it which can be measured by saying that he can obtain an injunction preventing the grantor from parting with the property except subject to the option and in this case having regard to the express terms of clause 2 from parting with the property at all; and that he can enforce the option against all subsequent owners except purchasers for value without notice. Essentially, however, an option confers no more than a contractual right to acquire property on payment of a consideration, and that seems to me a very different thing from the ordinary case where the doctrine of a resulting trust has been applied.”

123. I do not find that the Put and Call Option Agreement is anything other than a chose in action. It was a contractual right to acquire (or require SOL to acquire) the shares in SOIL. Until clause 3 could be exercised, Hanif Somji was the legal and beneficial owner of SOIL and he remained as such until one of the options was exercised. Whilst it is apparent that the option was exercised in January 2017, the time during which it was capable of being exercised might have passed without either option being exercised. As such, Hanif Somji would have remained the owner of SOIL. Although Hanif Somji appears not to have made any changes to the board at SOIL, or in PIL or even PFHL, the Second Voting Pool Agreement dated 1 July 2013 continued to operate in respect of PIL, being an agreement between SOIL and New Rodina, even if SOIL was in different ownership, because there was no reference to any particular owner. I have noted that the owner of SOIL at that time and until the option was exercised by SOL in January 2017 was Hanif Somji.
124. The letter dated 5 August 2011 does not, in my view, affect this position. It appears to be based on a misunderstanding by the then Defendant’s Managing Director, Alan Pearce, as to the legal effect of the agreements that had been put in place. The final paragraph on the first page explains that “*The sale was carried out on an arms length and commercial basis at fair market value.*” The final sentence of that paragraph states that: “*Effectively by putting the option*

contracts in place, the trustees will be in no different position than had they continued to have held Shallan Overseas Investments Limited within the Shallan Trust structure and you will be in no different position either.” What I take from that sentence is that there was an acknowledgement that SOIL was outside the Shallan Trust structure rather than within it, although Mr Pearce considered that the trustees were in no different position, when legally they were. What he appears to have overlooked in what he wrote is the definition of what is a trust found in section 1 of the 2007 Law. Whilst it was reasonable of him to point out that the risk lay with both parties depending on whether the value of the shares in SOIL increased or decreased, it was apparent that the time at which either option could be exercised was between four and six years after the Share Sale Agreement. There is no reference in the Plaintiff’s Cause to there being any legitimate expectation produced by Hanif Somji being sent this letter in August 2011, nor was that the way in which Advocate Davidson addressed the issue. As a contractual right, I do not consider that it meant that SOL had any ownership interest in SOIL and I do not regard the Put and Call Option Agreement as creating the deemed vesting in SOL of the shares in SOIL. In short, the shares in SOIL were not “*trust property*”.

125. What I fail to understand, though, is why, following the letter sent by Sarah-Jane Parker to the Protector on 15 December 2014, which was before the start of the period during which the options could be exercised, no one within the beneficial class (noting that that letter was sent through Alim Somji) worked out that to get SOIL back into the Shallan Trust structure Hanif Somji could have exercised the Put Option to require SOL to buy the shares in SOIL (clause 2.2). Had that step been taken with completion taking place after 25 February 2015 but before the Defendant’s resignation towards the end of October 2015, the indirect holding of the shares in SOIL through SOL and Shallan Group Holdings Limited would have made SOIL, and so also SOIL’s interests in PIL and PFHL, part of the Shallan Trust structure again. Because the option was not exercised until January 2017, it follows that I cannot find that there was any breach of trust on the part of the Defendant because, at the time of its retirement, SOIL did not form a part of the Shallan Trust.

126. As I have stated, this issue was squarely raised by the Defendant’s pleading. Reverting to the Plaintiff’s Cause, the gross negligence alleged against the Defendant in para. 56 all relates to breaches involving PIL and/or PFHL. In respects of all the duties it is alleged the Defendant breached, these only apply in respect of property falling within “*property held on trust*”. The sale of SOIL to Hanif Somji in February 2011, without the option having been exercised to restore SOIL as part of the trust property before the retirement of the Defendant and so covering the consequences relating to PIL and/or PFHL is, in my judgment, sufficient to dismiss the action on liability. For the reasons I have given, I am not persuaded that the shares in SOIL in 2015 can be regarded as being deemed to be held or vested in the Defendant at that time. The shares in SOIL were held or vested in Hanif Somji instead and that means that they were not trust property.

127. As a result, the Plaintiff’s claim for gross negligent breach of trust has to be dismissed.

Other issues

128. In case I am wrong to reach that conclusion, I will deal as briefly as I can with the other seven issues in order to clarify what I would have found but for the outcome on the second issue.

129. I will start with the duties owed, as set out in the first issue. I am conscious that Advocate Gray suggests that there is only one allegation, found in para. 29(c) of the Cause, being advanced against the Defendant (being under a duty to “*Procure the valid appointment of a new director, company secretary and administrator of PIL before permitting the retirement of its own nominees in order to preserve the equilibrium set out above*”) and questions the relevance of the other duties alleged in paragraphs 25 to 28 of the Cause. However, I take the view that it is necessary to consider the breaches of trust particularised in para. 56. At the end of that

paragraph there is express reference to the Defendant failing to act *en bon père de famille*, which directly correlates to the duty referred to in para. 25. As a result, that duty and so that paragraph is, in my view, properly engaged.

130. I am not, however, persuaded that there was any breach alleged relating to section 43 of the 2007 Law requiring the Defendant to “*surrender all property held by him or under his control*” (para. 28) because I understand that steps were taken to transfer the assets of the Shallan Trust to the new trustee, but there are allegations in para. 56 about not conducting an orderly handover, particularly in respect of PIL and/or PFHL. This issue really seeks to address whether, beneath the transfer of the principal assets to the new trustee, the Defendant has responsibility for arrangements within the companies. For these purposes, I have to ignore that SOIL, and so by extension PIL and PFHL, were outside the Shallan Trust, so what follows assumes that SOIL (and PIL and PFHL) were all part of the assets of the Shallan Trust, where the duty to act *en bon père de famille* overlays any other specific duty pleaded.
131. In para. 26 of the Cause, the Plaintiff pleads that the Defendant owed a duty to preserve and protect the trust assets. Clause 26 of the trust instrument excludes what was section 19 in the 1989 Law (and is now section 23 in the 2007 Law) from applying to the Settlement. As a result, there was no duty placed on the Defendant to preserve or enhance the value of the trust property. I am satisfied, therefore, that this was effective to remove from the Defendant any such duty and that this meant that there was no corresponding duty of care in the manner of fulfilling that duty. I agree with Advocate Gray’s submissions on this issue, which forms an aspect of the fifth issue agreed by the Advocates. This duty is not engaged and so cannot have been breached.
132. Section 22 of the 2007 Law cannot be excluded. The duty to act *en bon père de famille* is one of the foundation stones of the customary law and was codified in the 1989 and 2007 Laws. As explained in para. 20 of Lord Clarke’s judgment in the *Spread Trustee Co Ltd v Hutcheson* case, “*the duty is to act as a reasonable and prudent trustee would act, that is with reasonable care and skill*”. I have further noted how the Privy Council in that case did not accept the approach of the Lieutenant Bailiff in this Court, but it is, in my view, possible for that overarching duty to be breached in such a way that it amounts to gross negligence, turning on the degree of the seriousness or flagrancy of the negligence involved.
133. In the Re-Amended Les Defences, it is accepted on behalf of the Defendant that convening an inquorate board meeting of PFHL on 30 October 2015 was negligent (para. 78.1), meaning the business purported to be conducted was ineffective. However, that document also denies that there was any gross negligence, something that Advocate Gray developed at the hearing. I disagree with those submissions, although it does not necessarily follow that this was a duty owed by the Defendant as trustee.
134. In a structure such as the Shallan Trust, where humans acted on behalf of the trustee and also as directors of companies within the structure, one of the key issues for those humans so acting is to familiarise themselves with the constitutional documents of any company in respect of which they act. Under the constitution of PFHL adopted in 2013, Article 27.4.1 fixed the quorum for a meeting of the Board at three directors, one of whom had to be an ‘A’ Director. By Article 27.4.2: “*No business may be transacted at a meeting of directors if a quorum is not present.*” Accordingly, for Mrs Ozanne and Sarah-Jane Parker to purport to meet as directors of PFHL on behalf of RBC Corporate Services and RBC Directorship on 30 October 2015, and without it appears having given any notice as required by Article 27.2, is, in my view, a sufficiently serious or flagrant breach of the constitution of PFHL to amount to gross negligence.
135. It appears that there was a rush within the Defendant, and so also within the entities acting as directors of the companies within the Shallan Trust, with which these actions are associated, to finalise matters before the end of October 2015. (I have noted that 30 October 2015 was a

Friday and assume no one wanted to work on a Saturday. Quite why the letter dated 26 August 2015 sent to the Protector referred to 31 October 2015 has not been answered in the evidence.) I have further noted that, within the exhibit to Sarah Orton's Affidavit, Mrs Ozanne chaired a meeting of the Defendant as trustee on 7 October 2015, at which the financial statements of the Shallan Trust for the year ending 31 December 2014 were approved, and so signed by her and Carl Ashplant. I consider it a reasonable inference to draw that this was all part of the process within the Defendant to be able to retire as trustee of the Shallan Trust by the end of that month.

136. Given that the Defendant's letter of 15 December 2014 had mentioned *inter alia* SOL, SOIL, PIL and PFHL and had promised that the transition to a new trustee "*will be managed with care and respect*", holding an inquorate meeting of PFHL, meaning the business conducted at it was ineffective, in my judgment amounts to gross negligence. The issue, therefore, will turn on whether this is a breach of duty on the part of the Defendant in its capacity as trustee.
137. Because I have touched on one aspect of the fifth issue agreed by the Advocates, I will deal briefly with the other aspect relating to clause 22 of the trust instrument. Although the Declaration of Trust was executed on 21 December 1990, and so before the registration on the records of the Island of the 1990 Amendment Law on 19 February 1991 (albeit that the Order in Council approving it is dated 19 December 1990, but I am not going to offer a view as to the date on which that Law became effective, because it is unnecessary to do so), as the 1989 Law, as amended, and also the 2007 Law re-enacting what had been section 34(7) of the 1989 Law, is always speaking (see section 10 of the Interpretation and Standard Provisions (Bailiwick of Guernsey) Law, 2016, there being no contrary intention that I can see) and because the events in question all arose later, there is, in my view, no question that the addition of "*gross negligence*" means that, as a matter of law, what is found in clause 22, referring only to "*wilful and individual fraud and wrongdoing on the part of the Trustee*", means that "*gross negligence*" must also be read into the terms of clause 22. As a matter of law, the effect of section 39(7)(a) of the 2007 Law means that proof of gross negligence will give rise to liability for breach of trust. That is sufficient to deal with the entirety of the fifth issue, where section 19, and now section 23 of the 2007 Law has been excluded, and so is of no relevance to this claim, but clause 22 needs to be read in accordance with the revised statutory language.
138. Reverting to the duties to which the Plaintiff refers in its Cause, para. 27 avers that the Defendant "*owed a continuing duty to conduct an orderly handover*", which is the first of the particulars as it relates to PIL and/or PFHL pleaded in para. 56. As I have just indicated, the particular aspects of what is said against the Defendant are swept up under the overarching duty to act *en bon père de famille* and I have also already dealt with the inquorate meeting of the directors of PFHL. Accordingly, in relation to that conduct and anything relating to PIL, to which reference is also made, the next stage is to determine whether this was a duty owed by the Defendant as trustee or whether, as Advocate Gray suggests, this was something different operating only at the corporate level.
139. Before I deal with that aspect, I can also address other aspects of the duties pleaded before also turning to another issue raised about whether RBC Directorship and/or RBC Corporate Services acted on instructions from the Defendant or as its agent (the third issue). I will also need to deal with the sixth issue about the Private Client Fiduciary Services (Channel Islands) Terms and Conditions (which are referred to as the "RBC Terms and Conditions" therein). Each of these issues appears to me to be inter-related, which is why I propose to deal with them at this point.
140. In relation to what was set out in para. 56 of the Cause, the responses of the Plaintiff to the *exceptions de forme* raised at the start of Les Defences also need to be incorporated at this point to understand the Plaintiff's pleaded case. As I have already set out, that response was that:

“In addition to the acts and omissions particularised at paragraphs 56(d) to 56(g) of the Cause, RBC Trustees was obliged to instruct or otherwise communicate to RBC Directorship and RBC Corporate Services that they should not resign as officers of PIL and PFHL without having first secured the appointment of suitable replacements on the board of directors and/or as a secretary to represent the Shallan Trust’s interests, but failed to do so.”

141. The Cause itself set out that the Defendant as trustee should have secured the appointment to the boards of PIL and PFHL of appropriate replacements, who would represent the interests of the Shallan Trust. Paragraph 56(e) appears to extend this obligation to the time after which the Defendant ceased to be the trustee of the Shallan Trust. However, by that time, I am not persuaded that this can amount to liability for breach of trust, where the Defendant had already left office. Any steps taken later might be a means of mitigating any losses sustained, but I do not think it can properly be actioned as a claim for breach of duty as a trustee. To that extent, I am not persuaded that the Defendant can be pursued for anything following its replacement as trustee of the Shallan Trust on 30 October 2015 as being a relevant particular of an alleged breach of trust.

142. Advocate Davidson suggests that it is common ground that the officers of the Defendant as trustee were also officers of RBC Directorship and RBC Corporate Services. It is apparent from the documents I have seen that these humans operated in that way. As a result, he further suggests that the Defendant had notice of all the matters known to both RBC Directorship and RBC Corporate Services. This is pleaded at para. 6 of the Cause, with specific reference to Mrs Ozanne.

143. In relation to agency, Advocate Davidson refers to *Smith, Stone and Knight Ltd v Lord Mayor, Aldermen and Citizens of the City of Birmingham* [1939] 4 All ER 116. In the course of his judgment, Atkinson J accepted that:

“It is well settled that the mere fact that a man holds all the shares in a company does not make the business carried on by that company his business, nor does it make the company his agents for the carrying on of the business. That proposition is just as true if the shareholder is itself a limited company. It is also well settled that there may be such an arrangement between the shareholders and a company as will constitute the company the shareholders’ agent for the purpose of carrying on the business and make the business the business of the shareholders.”

After referring to some decisions supporting those propositions, His Lordship continued: *“It seems therefore to be a question of fact in each case, and those cases indicate that the question is whether the subsidiary was carrying on the business as the company’s business or as its own.”* His Lordship also identified six points relevant to the determination of that question:

“Who was really carrying on the business? In all the cases, the question was whether the company, an English company here, could be taxed in respect of all the profits made by some other company, a subsidiary company, being carried on elsewhere. The first point was: Were the profits treated as the profits of the company? – when I say “the company” I mean the parent company – secondly, were the person conducting the business appointed by the parent company? Thirdly was the company the head and the brain of the trading venture? Fourthly, did the company govern the adventure, decide what should be done and what capital should be embarked on the venture? Fifthly, did the company make the profits by its skill and direction? Sixthly, was the company in effectual and constant control?”

144. At the hearing, Advocate Davidson pointed out that he did not need to make good any of these points to establish a relationship of agency because there were other factors that showed that

the Defendant was in breach of duty. As such, I do not need to determine whether this test applies and, if so, whether the factors listed were or were not present within PIL and PFHL. However, in case it becomes relevant, I will offer a provisional view (which is again predicated on my primary conclusion being wrong and SOIL being deemed to be held in the Shallan Trust).

145. I think it is worth remembering the corporate structure, but working upwards, rather than downwards. PFHL has a number of subsidiaries. The directors of those subsidiaries differ from the directors of PFHL. To that extent, the driving minds (ie, “*the head and the brain*”) of those subsidiaries are not the same as for PFHL or above. There has been no suggestion as to what happens to the profits of those subsidiaries, with the best indication being the financial statements for Shallan Group Holdings Limited and for SOL for the years ending 31 December 2012, both of which have the directors recommending no dividend for that year, which was consistent with the previous year. The inference I draw is that profits, if they exist, are more likely than not retained in the subsidiary companies rather than being paid out to a shareholder by way of any dividend. I regard this as a factor pointing away from any agency arrangement. Further, if the profits of those subsidiaries are not passed to a parent company, the arrangements within SOL, SOIL, PIL and PFHL may well not be engaged.
146. The shareholding that PIL has in PFHL is 85%, with Aureos owning the other 15%. Although PFHL is not a wholly owned subsidiary, the effect of the arrangements established by the various agreements is that a high degree of control appears capable of being exercised. However, within PIL, this is regarded as the joint venture entity between the Somji family and Mr Abdulla and the applicable agreements, particularly the Second Voting Pool Agreement which was operative at the time of the Defendant’s retirement as trustee of the Shallan Trust, was intended to preserve some balance between the two sides. Even allowing for the entities above PIL, being SOIL and SOL, having a direct connection to the Trust, I am not persuaded that the interposition of PIL means that there can have been an agency arrangement all the way up to the Defendant. If I adopt the factors I have listed, despite the power of the trustee to employ agents (see one of the additional powers mentioned in clause 5 of the First Schedule to the trust instrument), I would probably conclude that there was no agency arrangement, because the documents themselves do not demonstrate that.
147. I would also seek to draw a distinction between knowledge, or being on notice, and acting under instruction (as it is put in the response to the *exceptions de forme*). In the absence of clear evidence of there being some form of instruction, I do not think that directors of separate corporate entities, being RBC Directorship and RBC Corporate Services, will fulfil their duties to each of those companies by relying upon instructions as such. However, it is apparent that as humans, the persons taking decisions will be unable to “unknow” what they have learnt in any given capacity when fulfilling functions within the Shallan Trust or of any entity to which directorship or secretarial services are provided. I have further noted that administration services to those entities were also provided by the Defendant. By way of comparison, humans who act on behalf of a trustee of one trust are generally not affected by notice of matters in relation to a trust if the trustee obtained notice of that by reason of having acted for the purposes of another trust (see section 41(1) of the 2007 Law). Accordingly, in the absence of any apparent agency, I consider that the issue will turn more on notice of matters (para. 6, Cause) rather than on instructions (para. 5, Cause).
148. In its capacity as trustee of the Shallan Trust, I consider it less likely that the Defendant had any obligation, even by reference to acting *en bon père de famille*, to give any positive instruction to ensure that there were replacements appointed in advance of retiring as trustee. In exercising its powers as trustee, I have noted that clause 17(b) of the trust instrument states that any discretion to be exercised was exercisable by the trustee in its “*absolute and uncontrolled discretion*” and also that within the additional powers mentioned in the First Schedule to the trust instrument, there is the usual provision about the trustee not being bound or required to interfere in the management or conduct of the business of any company in which the Shallan

Trust has an interest. These are factors that I think I can properly take into account when deciding that there was no obligation on the Defendant to issue any instruction.

149. However, as I have already touched on, because of the manner in which the directorships appear to have been undertaken by officers within the RBC group of companies, those who acted at board level on behalf of the Defendant as trustee, also acted on behalf of RBC Directorship and RBC Corporate Services. Whilst in the capacities as corporate directors of the entities serving SOL, PIL, and PFHL, the humans acting on behalf of those corporate directors owed duties to whichever company it was (and for these purposes I am working on the assumption that the suite of duties owed would reflect either those found in the Companies Act 2006 or even those customary law duties applicable to a Guernsey company), if any of them became aware of some matter that potentially needed addressing, I think it is a reasonable inference that the knowledge gained in one capacity would be something that could be raised in a different capacity. As I have already pointed out, the impetus within the wider RBC group to complete the transfer of the trusteeship relating to the Shalan Trust by the end of October 2015 appears to have driven what was happening. This is apparent in the reference to “*pressure*” found in Mr Goddard’s message to Mr Machan on 25 November 2015 as well as what was set out in the 2006 instrument of variation, which referred in part to “*as shareholders of any company, the shares of which are directly or indirectly comprised in the Trust Fund*”.
150. In that regard, I take the view that it is permissible to go back to the source of the Defendant’s intention to resign, being the letter signed by Sarah-Jane Parker to the Protector dated 15 December 2014. That letter also referred to the relationships with “*relevant entities in the Trust structure*”, referring to PIL, PFHL, SOL and SOIL. What was promised on behalf of the Defendant was “*a smooth handover of responsibilities to the new trustee and applicable service providers*”. However, it is possible that the Protector did not take the need to identify a new trustee, with the ability also to replace entities such as RBC Directorship and RBC Corporate Services, with the degree of urgency that this letter encouraged. Indeed, having regard to the evidence of Amit Thakrar, whilst in para. 43 he mentions the Defendant’s wish to resign, he moves on thereafter to the receipt of an e-mail from Sarah-Jane Parker in late August 2015, by which time the position had become more pressing. It is unfortunate that the Protector’s request for a short extension from the Defendant (and so also its associated entities) appears to have elicited no response, but the function of appointing a new trustee for the Shalan Trust fell to the Protector and he really ought to have engaged with the Defendant and/or acted more quickly without waiting approaching eight months before addressing the need to identify a suitable new trustee.
151. The breaches of duty pleaded relate to the Defendant’s retirement as trustee and the steps that the Plaintiff says should have been taken before that happened; they do not relate to the timing of the resignation as trustee, save to the extent that the steps the Plaintiff says should have been taken could not then properly be taken within the short time-frame to which the Defendant was then working. However, although the “*smooth handover*” promise was not repeated in the letter sent to the Protector dated 26 August 2015, there was still a promise to work with whoever had been identified as the replacement trustee during October 2015 “*to transfer legal title to the Trust assets and Trust documentation*”, from which I am prepared to infer that the Defendant still intended that offer to work with the new trustee to extend to the entities for which it acted as director further down the structure. If nothing else, I take the view that this is implicit from what is stated at the top of the second page of that later letter: “*We will be in contact again to let you know how RBC’s resignation will be progressed. In preparation for the transfer of responsibilities to a new firm we will need to make information and documents relating to the affairs of the Trust and its connected persons available to them.*” I regard the reference to “*connected persons*” as referring to the entities within the trust structure (which for these purposes includes PIL and PFHL). It appears that this promise to communicate further was then ignored.

152. I have already referred to the meeting earlier in October 2015 at which decisions were being taken about how the Defendant and its associated entities would cease providing services to the Shallan Trust and the companies within the structure. I am satisfied that this forms the proximity in time nexus to what then happened on 30 October 2015. However, I also consider that, because the humans involved in fielding persons to act on behalf of the corporate directors were largely the same group of persons, each of those individuals can be regarded as having notice of the history of the structure and of the concerns that are pleaded in the Plaintiff's Cause. As such, I am satisfied that there was that level of notice obtained by each of them who acted, whether for the Defendant, or on behalf of RBC Directorship and RBC Corporate Services, that fixes each of them with the requisite level of notice of what was happening as the Defendant secured its exit from the trusteeship of the Shallan Trust.
153. By way of example, on 30 October 2015, acting on behalf of RBC Directorship as director of PIL, Mrs Ozanne and Sarah-Jane Parker signed a written resolution of PIL by which it was expected that Aventine (Secretaries) Limited would replace RBC Corporate Services as the secretary of PIL and Chasseral (Directors) Limited would replace RBC Directorship as a director. This may have been performed in the expectation that Mr Machan would be content to countersign the written resolution, but this was not then done by him. When Mr Machan received the written resolution on 12 November 2015 (and no explanation has been offered as to why it took almost a fortnight for this to be provided to him, nor why it had not been provided before the final working day on which the Defendant was going to be the trustee of the Shallan Trust), he queried it and ultimately did not sign the written resolution of PIL. However, resignation letters were also signed dated 30 October 2015, first by RBC Directorship tendering its resignation as director, signed by Mrs Ozanne and Mr Rogers, and by RBC Corporate Services resigning as secretary of PIL, also signed by Mrs Ozanne and Mr Rogers. I take the view that the level of understanding of Mrs Ozanne and even of Mr Rogers about the steps being taken was sufficient for their acts in signing these letters also to put the Defendant on notice that this was being done in respect of entities within the structure (again predicated on my primary conclusion being wrong).
154. I could analyse all the documentation that has been provided, as exhibited to the witness statements and to Lisa Barnett's Affidavit, but I do not think that this would be helpful because it is accepted in the Re-Amended Les Defences that para. 6 of the Cause is admitted. I also take the view that the Plaintiff's responses to the *exceptions de forme* can be accepted, meaning that the concerns to which I have referred about maintaining a level of balance within PIL were known to the humans so acting. Instead, without needing to address the documents in any further detail, this leads me to considering the way that the Defendant seeks to incorporate the RBC Terms and Conditions (para. 30A). Four versions are exhibited to the Affidavit of Lisa Barnett, although I am not sure that the final version, which appears to bear the date February 2016 and states that it took effect from 20 March 2016 (clause 1(d)(ii)), can properly be relied upon because this post-dates the Defendant's resignation and the termination of all the arrangements that were previously in place. I have, therefore, considered the previous three versions to see how these evolved.
155. The response of the Plaintiff to para. 30A of the Re-Amended Les Defences admits "*that there may have been a contractual framework incorporating T&Cs between the Defendant and RBC Directorship and RBC Corporate Services*" but otherwise "*paragraph 30A is not admitted*". To make good this point, Advocate Gray first relies on the wording in clause 23(2) of the trust instrument:

"Any Trustee for the time being hereof who shall be a company authorised to undertake trust business shall be entitled in addition to reimbursement of its proper expenses to remuneration for its services in accordance with such company's standard terms and conditions for trust business in force from time to time."

156. The earliest version of the RBC Terms and Conditions exhibited appears to be dated June 2007. In the preamble to those terms and conditions, it refers *inter alia* to RBC Trustees (Guernsey) Limited, ie, the original Defendant. It also refers to what is termed “RBC Jersey” and “RBC London”, with them being jointly referred to as “RBC”. That preamble continues that each one, as well as when they act jointly:

“... will provide the following private client fiduciary services:-

- i) *company administration services to a company or other body corporate (“the Company”); and/or*
- ii) *act as trustee of a settlement, declaration of trust or will trust, executor of a will, administrator of an estate or attorney administrator (“Trust”); and/or*
- iii) *act as nominee, administrator of a trust on behalf of other trustees or any of these functions in a prospective or consultative capacity (“Arrangement”).”*

157. By clause 2, “RBC, in providing the Services may, as regards its discretionary or other powers, act by its properly appointed officers.” In clause 1(xi), “Services” is defined as meaning “the Company Administration Services and the Trust Services or either of them as the context so requires”, where clause 1(v) defined “Company Administration Services” as meaning “the services provided by RBC to a Company” and clause 1(xii) defined “Trust Services” as meaning “the services provided by RBC in relation to a Trust or Arrangement”.

158. Clause 3(i) and (ii) then provided in respect of remuneration that:

- i) *RBC shall be entitled to its fee in accordance with the Scale of Fees and Charges as issued or varied from time to time by each of RBC Jersey, RBC Guernsey and/or RBC London, or as otherwise agreed in a Fee Agreement.*
- ii) *The remuneration payable to RBC shall be considered as a prior charge to the interests of the Beneficiaries and shall be exclusive of all costs, deductions and expenses properly incurred and payable in the administration or otherwise in connection with any Services provided in the relevant Managed Entity (including, but not limited to, legal costs, stamp and other taxes and duties and bank charges).”*

159. In clause 1(viii), “Managed Entity” is defined as including “any Company, Trust or Arrangement (each of which shall be a “Managed Entity”) and the term “Managed Entities” shall include all or any Companies, Trusts or Arrangements to whom RBC provides Company Administration Services or Trust Services”. Clause 1(xiv) explains that these terms and conditions took effect from 1 August 2007. The Shalan Trust itself clearly pre-dates that time and even in respect of PIL, which was incorporated in January 2007, these were not the terms and conditions that will have applied, but they can suffice for present purposes.

160. The second set of the RBC Terms and Conditions appears to be dated August 2011 and by clause 1(xxviii) is said to take effect from 30 September 2011. Mention is still made of the Defendant, but the overall definition of those entities covered by them has become “RBC PCFS”. Remuneration is now dealt with in clause 4, and in a slightly expanded form. Acting through its officers is also slightly expanded in clause 2.

161. One of the new matters contained in these new RBC Terms and Conditions is clause 20, which relates to termination, and which is the provision on which the Defendant relies. I will set it out in full:

- “i) *To the extent permitted by law, RBC PCFS may resign, but shall not be obliged to resign by any person from providing any Services at any time, without giving any reason whatsoever, and RBC PCFS will not enter into correspondence in these circumstances. Should the provision of any Services be withdrawn, RBC PCFS shall incur no liability for any direct or indirect loss or loss of profit that any Managed Entity, Client or Beneficiary may sustain.*

- ii) *Subject to the provisions of any trust instrument or agreement which may have alternative provisions in relation to termination, the Services may be terminated by either RBC PCFS or any other party at any time immediately on giving 90 days’ written notice effective on receipt (or at such later time as specified in the said notice).*

- iii) *RBC PCFS shall have the option to terminate the Services immediately in the event that:*
 - a) *the Managed Entity has a bankruptcy petition presented against him (if an individual) or suffers a receiver, judicial manager, administrative receiver, administrator or liquidator to be appointed over it or any of its assets (if a body corporate) or is subject to any other equivalent procedures in any jurisdiction (including, in the case of a trust, the making of an administration order in respect of the trust’s affairs); or*

 - b) *the Managed Entity is unable to pay its lawful debts as they fall due; or*

 - c) *a distress has been levied upon or other execution has been effected against the whole or any part of the property of the Managed Entity; or*

 - d) *the Managed Entity is adjudicated or found to be “en désastre”; or*

 - e) *the Managed Entity takes up residence or carries on any business in a country where RBC PCFS is not permitted or authorized to provide services to residents of that country.*

- iv) *Termination of the Services shall be without prejudice to the completion of any Services already in process. After the termination takes effect, RBC PCFS shall not accept any monies and will not arrange for any provision of any further Services.*

- v) *No penalty will be imposed on any Managed Entity or Beneficiary on termination of the Services but RBC PCFS shall be entitled to charge the Client:*
 - a) *any fees or expenses incurred by RBC PCFS in terminating the Services or directly attributable to the termination of the Services; and*

 - b) *any losses realized in settling or concluding outstanding Services to be provided.*

- vi) *To the extent permitted by law, clause 11 (Confidentiality) and clause 12 (Data Protection) will continue in full force and effect (together with any other*

provisions necessary to make clause 11 and clause 12 operable) despite termination of the Services.”

162. In order to understand clause 20, it is necessary to have regard to the definitions, some of which are modified (and some new definitions are introduced). Clause 1(xvi) defines “*Managed Entity*” as meaning “*any Company, Estate, Foundation or Trust to or in respect of which RBC PCFS provides any Service and together shall be referred to as “Managed Entities”*”. Clause 1(xxiii) contains an appropriately modified definition of “*Services*” (although the modifications do not, in my view, affect the earlier definition). However, “*Company Administration Services*” is defined more extensively in clause 1(x) as meaning “*all services provided by RBC PCFS in relation to a corporate arrangement, including the formation of a company, the provision of directors or company secretary (whether individual or corporate), registered office, registered agent and any other administrative functions, and all other planning and providing consultancy services in connection with the provision of Company Administration Services or any other corporate arrangements to be established*”. There is also a new definition of “*Holding Company*” and of “*Subsidiary*”, where this relates to “*a body corporate*”, which “*shall be determined in accordance with the laws of the place in which such body corporate is incorporated*”.
163. The third set of RBC Terms and Conditions appears to be dated January 2015, but clause 1(d)(ii) states that they took effect from 25 August 2014. It seems to me that the provisions at the time of the Defendant’s resignation were materially in the same form as under the August 2011 set. If only for completeness, I can also refer to clause 23 (which states that the governing law in relation to any Service “*shall be governed by and construed in accordance with the law of the jurisdiction from which the PCFS Services are provided*”) and the entire agreement provision found in clause 25(v), which provides that if there is a conflict with the trust instrument, that will prevail over the RBC Terms and Conditions. For the Trust Services, those are clearly governed by Guernsey law, whereas for some of the Services being provided to companies incorporated elsewhere it seems arguable that the services are provided in accordance with the laws of those jurisdictions.
164. Against that summary of the provisions, and returning to clause 23(2) of the trust instrument, it is only remuneration that is referred to therein and not any wider provision of services. The remuneration issue is not directly impacted in this action. Indeed, there has been no evidence of the applicable remuneration regime in place with the Defendant from time to time. To that extent, it might be said that the rest of the RBC Terms and Conditions are not incorporated into the Shallan Trust. However, because of the breadth of what is contained in the later versions of the RBC Terms and Conditions, I am prepared to accept that the terms were incorporated as “*Trust Services*”, which cover “*all services provided by RBC PCFS in respect of any Trust arrangement*”, which I regard as sufficiently wide to cover the entities in which the Shallan Trust had a direct or indirect interest, being referred to as the “*Managed Entities*”. In other words, I am satisfied to the requisite civil standard that the non-admission in the Amended Réplique has been overcome by the Defendant.
165. Looking at clause 20 on termination, it is not entirely clear to me that the Defendant complied with its terms. On the one hand, having given advanced notice of its wish to retire as trustee of the Shallan Trust in December 2014, by the time of its actual retirement in October 2015, it had given 90 days’ written notice. However, that initial letter did not specify when the retirement would be effective, whereas the letter sent to the Protector on 26 August 2015 gave insufficient notice, mentioning appointment of a new trustee by 18 September 2015, for the purposes of clause 20(ii). Clause 20(ii) enables the Defendant to extend the period but does not permit it to shorten it. This was not raised by the Advocates and so I offer this view in passing because it is possible that putting the Defendant to strict proof (as it is put at para. 10 of the Amended Réplique) means that complying with the terms of clause 20 (which is how the sixth issue is addressed) engages this point. If so, I might well have concluded that the Defendant failed to

comply with the notice requirement in August 2015, meaning that reliance could not be placed on clause 20, at least insofar as it affects RBC Directorship and RBC Corporate Services as ancillary to the Trust Services being provided by the Defendant.

166. If there is non-compliance with clause 20(ii), I take the view that it would also follow that it means that the absence of any particular reason for the purposes of clause 20(i) is also ineffective because insufficient notice was given, as required by clause 20(ii). The only basis on which sufficient notice was given would be to read the two letters together. As a matter of construction, I think this would be possible, so on the civil standard I may well have accepted that the minimum 90 days' notice was given, effective from December 2014, but this is finely balanced because of the principle of construing an agreement *contra proferentem*. The best that can be said about the letter dated 26 August 2015 is that it refers to being "*further to our previous correspondence*", but without stating which correspondence that was. I have assumed that this is a reference to the letter dated 15 December 2014, rather than anything later than that. If so, it is likely that I would conclude that the RBC Terms and Conditions enabled the Defendant to resign "*without giving any reason whatsoever*" (clause 20(i)), meaning that the sixth issue would be decided in favour of the Defendant and result in the action on liability being dismissed.
167. Subject to that provisional conclusion, I can also explain what I think about the manner in which the Defendant acted. I take the view that it stopped acting properly *en bon père de famille* in its desire to complete the termination of all of its services by the end of October 2015. Focusing on the breaches pleaded, I take the view that, even with the benefit of clause 20(i), holding an inquorate meeting of the board of directors of PFHL amounts to gross negligence. Further, by virtue of the incorporation of the RBC Terms and Conditions, as a Managed Entity (and I repeat that I am assuming that my primary finding is wrong), this amounts to gross negligence of the Defendant as trustee of the Shallan Trust. As I have already noted, the humans involved must be taken to have the knowledge that they acquired through involvement in other aspects of the structure of the Shallan Trust. That step of holding an inquorate meeting left open the possibility of other directors then not approving the replacement entities, which is what happened. Far greater thought should have been given by Mrs Ozanne and Sarah-Jane Parker about what steps properly needed to be taken in order to secure the replacements for PFHL. As such, I would have found the Defendant liable in this regard in respect of PFHL (in accordance with the seventh and eighth issues).
168. The position in respect of PIL is potentially different, although for the brief reasons that follow I have concluded that it is not. I consider that the humans involved on behalf of PIL, being humans associated with the Defendant as trustee of the Shallan Trust, acted shoddily. The Articles of Association of PIL (which is an aspect of the fourth issue) enable written resolutions to be adopted (Article 10.9). However, given that it must have been known sufficiently early to have given the required notice (as required by Article 10.4) to the other directors, it would have been safer and more expedient to have held a meeting, even if the directors had been present, as permitted, by electronic means (Article 10.3). It seems to me that the rush to complete everything by the Defendant's self-imposed deadline of the end of October 2015, however much "*pressure*" was being brought to bear, possibly by a superior authority within the RBC Group, it meant that insufficient time was taken to plot the most appropriate way forward to ensure that the entities associated with Stonehage Fleming were properly appointed. In accordance with Article 10.9, if the counterparts were signed at different times, the written resolution would only take effect on the date when the last director signed. Because the written resolution was not even provided to Mr Machan until 12 November 2015, which was after the resignations relating to PIL signed by Mrs Ozanne and Mr Rogers had taken effect, it created a situation in which Mr Machan could withhold his signature, meaning that the replacements sought to be achieved by the written resolution were ineffective.

169. I consider that this also amounts to negligence and, for these purposes, I am also satisfied that this can properly be categorised as gross negligence in respect of PIL. In reaching that conclusion, I am satisfied that this was a form of serious or flagrant negligence when set against the position within the joint venture represented by PIL. It is apparent that the humans who served from time to time as directors of PIL through RBC Directorship and RBC Corporate Services were aware that there was a balance of power on the board of PIL. That was something about which they had notice, especially in light of their years of dealing with the entities held through Shallan Group Holdings Limited. Accordingly, to resign from PIL (as with PFHL) without first effecting replacements by entities associated with the new trustee was, as has proved to be the case, to have serious ramifications for SOIL. I take the view that this is inconsistent with the promise made to effect a smooth handover. By resigning and providing copies of those resignation letters to Mr Machan, thereby enabling him to accept the resignations but not to approve the proposed written resolution, all on the last working day, being the day the new trustee of the Shallan Trust was being appointed, in my view, constitutes gross negligence.
170. I also take the view that the incorporation of the RBC Terms and Conditions applies to the provision of the Trust Services to which I have just referred as much in relation to PIL as it does in relation to PFHL. It does, therefore, enable resignation as directors without needing to give any reason, but this is still governed overall by the Defendant's obligation to act *en bon père de famille* in relation to the Shallan Trust and so also those entities in which that Trust was invested, and I am not persuaded that this overarching obligation had been fully thought through by reference to PIL's Article of Association. It seems to me that the focus turned more pressing on completing the Defendant's extraction, including those entities offering services as Managed Entities under the RBC Terms and Conditions, by the deadline on which the Defendant was fixed, which meant that insufficient planning was undertaken about how to achieve that objective. In the light of the consequences, I remain satisfied that this amounts to gross negligence and so would have engaged the seventh and eighth issues had my primary conclusion not been that SOIL was not a trust asset at this time.
171. Returning very briefly to the remainder of the fourth issue (and it has been easier to take the issues in a slightly different order for this purpose), I take the view that the Second Voting Pool Agreement dated 1 July 2013 had superseded the First Voting Pool Agreement and that this agreement remained operative at the time of the resignations in October 2015. It remained operative and is part of the background known to the humans acting on behalf of the corporate directors about how to operate within PFHL. Although SOIL was at that time owned by Hanif Somji, clause 3 of the Second Voting Pool Agreement demonstrates that it remained operative because the main parties to it continued to hold the shares in PIL equally. I accept that the intention of the Second Voting Pool Agreement was to maintain the balance between the Somji family, through their interest in the Shallan Trust, and Mr Abdulla. The problem arose when the directorships were resigned without having first secured replacements. However, I do not regard the Second Voting Pool Agreement as being of direct relevance, but it does, in my view, form part of the factual matrix against which to assess the actions of those who performed functions on behalf of any entity within the Shallan Trust structure in October 2015. However, there is nothing on the face of this agreement about directorships and, once the resignations were to take effect, this related more to how to deal with voting at a shareholder meeting. I do not consider that the Second Voting Pool Agreement affects the conclusion that I would otherwise have reached and would continue to apply at any meeting of the shareholders. However, I do not believe that there was any evidence about how the Second Voting Pool Agreement has affected any such shareholder meeting because the focus in this action is about pursuing a breach of trust action against the Defendant.
172. In respect of the Operating Agreement, also executed in 2013, I am similarly not persuaded that it has any direct bearing on the conclusion I would have reached. In particular, I have noted that clause 9.3 of it suggests that any dispute should be referred to arbitration in accordance

with the Rules of The London Court of International Arbitration. I am not aware that any dispute about the operation of the Operating Agreement has arisen and been dealt with in that manner. However, it does also form part of the suite of documents relating to PIL and PFHL to which the respective corporate directors should have had regard when planning the manner of the Defendant's retirement. It has a bearing, but I think that the key documents each time are PFHL's Constitution and PIL's Memorandum and Articles of Association, because these are where the steps taken have left open the adverse position in which SOIL and so PIL and PFHL now find themselves. It is the gross negligence that would have been found but for the conclusion that SOIL, and so both of the other entities, was outside the trust structure at that time. Had I found differently, I would then have proceeded to conclude that the Defendant had acted in breach of trust, given the manner in which the RBC Terms and Conditions operate.

173. As a result, I am not persuaded that the conclusion I might otherwise have reached in respect of the fourth issue would be affected by either of the Voting Pool Agreements or the Operating Agreement. When balanced with the knowledge that those acting on behalf of RBC Directorship and RBC Corporate Services had gained from acting for the Defendant as trustee of the Shallan Trust, I am satisfied that there was a sufficiently serious or flagrant breach of what was expected of the Defendant, particularly in light of the RBC Terms and Conditions, for there to have been a finding of gross negligence.

174. As a result, if I had not concluded that Hanif Somji's ownership of SOIL at the time of the Defendant's resignation as trustee means that there can be no breach of trust for the matters pleaded by the Plaintiff, I would probably have found that there was gross negligence and directed that there be a further hearing to determine the extent of the Defendant's liability.

Conclusion

175. For the reasons I have given, my decision on liability rests on the second issue the Advocates agreed fell to be determined. Although the Put and Call Option Agreement meant that the shares in SOIL might be re-acquired by SOL from Hanif Somji, and this was possible after notice of retirement as trustee was given by the Defendant to the Protector, but not exercised until some time later, at the end of October 2015 I am satisfied that there could be no breach of trust claim against the Defendant in respect of SOIL's interests in PIL and PFHL, which is the basis for claiming gross negligence in the Cause. Having regard to the 2007 Law, SOIL was not a trust asset at the time the Defendant retired and so it follows there can be no breach of trust claim, however poorly I consider the officers of the Defendant acted. As a result, the trial on liability fails and the Plaintiff's claim will be dismissed.

176. Had I not reached that conclusion, then I was more likely than not to have concluded that there was gross negligence on the part of the Defendant for the reasons I have also summarised in the event I am wrong to reach my primary conclusion. The case is stronger in relation to PFHL than it is in relation to PIL because I take the view that it is fundamental to any corporate structure in respect of which the Defendant was acting that the constitutional documents are properly reviewed, so that holding an inquorate meeting amounts to gross negligence. However, I would also have reached that conclusion about PIL as well, although with less certainty. Whilst I have accepted that the RBC Terms and Conditions appear to have been incorporated because of the manner in which "*Trust Services*" are defined, I have questioned whether there is adequate evidence of proper steps being taken under clause 20 of the operative set but, in any event, I do not consider that the RBC Terms and Conditions are sufficient to provide the Defendant with complete exoneration for the manner in which it failed to address what needed to be addressed in a timely manner, all in accordance with its duty to act *en bon père de famille*. Had I not reached my primary conclusion, the action would have moved on to consider what quantum of compensation should be paid or whether to grant any of the other relief pursued by the Plaintiff.

177. In respect of the costs of the action (save for those already determined), my provisional view is that costs are likely to follow the event and would be awarded on the recoverable basis. However, should that outcome not be agreed between the parties, an application can be made for a different order, which can either be dealt with at a subsequent hearing or possibly by written submissions following determination on the papers.