

Civil Procedure – Amendment of Pleadings – claim of negligence for purely economic damage – duty of Care – Assumption of Responsibility – reasonable reliance. Application refused. Claim against HMG struck out in its entirety. HMG removed as a party to the proceedings.

[2025]GRC056

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

Between:

LUCILLE HOLDINGS PTE LTD

Plaintiff

-and-

(1) HSBC MANAGEMENT (GUERNSEY) LIMITED

First Defendant

(2) HSBC ALTERNATIVE INVESTMENTS LIMITED

Second Defendant

Final Judgment handed down: 4 April 2025

Before: Jessica E Roland, Deputy Bailiff

Counsel for the Plaintiff: Advocate R Breckon

Counsel for the Defendants: Advocate B de Verneuil-Smith

Cases, texts & legislation referred to:

Tranquility Holdings Ltd v Invista Real Estate Investment Management CI Limited [2015] (38/2015)

Robert Dorey and ors v Raymond Ashton [2023] GCA 008

Lucille Holdings PTE Ltd v HSBC Management (Guernsey) Limited & HSBC Alternative Investments Limited [2024] GRC 006

Hedley Byrne Co Ltd v Heller and Partners Ltd [1964] AC 465

Williams and Natural Life Health Foods Ltd [1998] WLR 830

ED & F Man Liquid Products v Patel [2003] EWCA Civ 472

ICI Chemicals & Polymers v TTE Training Limited 2007 WL 1623328 (2007)

JP SPC4 v Royal Bank of Scotland International Ltd [2022] UKPC 18

Royal Court Civil Rules, 2007

Introduction

1. This is an application by Lucille Holdings PTE Limited (“Lucille”) to amend its pleadings in its claim against HSBC Management (Guernsey) Limited (“HMG”) and HSBC Alternative Investments Limited (“HAIL”), the First and Second Defendants in this matter (together the

“Defendants”) dated 8 May 2024 (the “Application”) following the handing down of my judgment dated 30 January 2024 (“January 2024 Judgment”) and the consequential Act of Court dated 28 February 2024. The relevant terms of the Act of Court were as follows:

1. *The Defendants' application to strike out the Plaintiff's claims against the Second Defendant is dismissed.*

2. *Pursuant to rule 52 (2) (a) of the RCCR, the Plaintiff's claim based on an alleged breach of fiduciary duty by the First Defendant is struck out and dismissed in its entirety forthwith (the Struck Out Claim);*

3. *The Plaintiff shall, within 42 (forty two) days of the date of this Act of Court, serve on the Defendants a draft amended Cause containing proposed amendments in the following respects:*

a. the deletion of the Struck Out Claim from the Cause in its entirety including any and all references to the Struck Out Claim throughout the Cause;

b. if so advised, the amendment of the Plaintiff's claim against the First Defendant based on an alleged breach of tortious duties by the First Defendant (the "D1 Tortious Duties Claim") (the "D1 Tortious Duties Claim Amendments");

c. if so advised, the amendment of paragraphs 63 to 66 and 70 of the Cause in the manners set out at paragraph 78 of the Judgment;

(collectively the "Proposed Amendments");

4. *The Defendants shall within 14 (fourteen) days of receipt of the Proposed Amendments, notify the Plaintiff in writing whether they oppose any portion of the Proposed Amendments;*

5. *In the event that the Defendants consent to the Proposed Amendments, the Plaintiff shall notify the Court accordingly enclosing a draft Act of Court for leave to amend the Cause in the form agreed;*

6. *To the extent that the Defendants oppose any portion of the Proposed Amendments, the Plaintiff shall, if so advised, within 14 (fourteen) days of such opposition serve and file an application to the Court pursuant to rule 59 of the RCCR and/or the inherent jurisdiction of this Court for leave to amend its Cause in respect of that portion of the Proposed Amendments which the Defendant has opposed (the "Amendment Application");*

7. *In the event that the Plaintiff makes the Amendment Application, the Plaintiff shall list a case management conference at Interlocutory Court within 7 (seven) days of the date of the service of the Amendment Application for further directions in respect of the conduct of the Amendment Application;*

8. *If, by the date set out in paragraph 3 above in this Act of Court, the Plaintiff fails to propose the D1 Tortious Duties Claim Amendments set out at paragraph 3(b) above, the D1 Tortious Duties Claim shall be struck out from the Cause in its entirety and the First Defendant shall be removed as a party to the Proceedings pursuant to rule 37(1)(a) of the RCCR;*

9. *If the Plaintiff fails to bring the Amendment Application in the circumstances described at paragraph 6 above, the D1 Tortious Duties Claim shall be struck out from the Cause in its entirety and the First Defendant shall be removed as a party to the Proceedings pursuant to rule 37(1)(a) of the RCCR;*

2. In accordance with those directions, Lucille served a draft amended Cause and HMG and HAIL indicated to Lucille that they opposed the amendments insofar as they related to the HMG claim (paragraphs 53, 55 (1)-(10) and 55A). The remainder of the amendments were not opposed.
3. No new evidence was filed on behalf of either party. Lucille relied on the affidavits of Mr Alan Guok Ann Lee sworn on 8 September 2022 and Advocate Antill sworn on 9 September 2022, both of which had been filed in support of the Defendants' application to strike out. Lucille and the Defendants filed skeleton arguments which were augmented in a hearing on 10 October 2024.
4. The full background of the matter is set out in my January 2024 Judgment. The claim against the Defendants revolves around an investment opportunity in a property in Washington D.C, known as 1350 Eye Street ("the Property"). The plan was that the Property would be acquired by a new Guernsey company via a complex tax efficient US onshore investment structure. The investment was forecasted, net of management fees, to provide a net average dividend return on equity of 6.5% over a seven year investment term (the "Investment Term") (five years plus two one year extensions at the First Defendant's discretion) (although the defences state that the term was not fixed and was a matter for HMG to determine). It was anticipated in a Property Investment Memorandum (the "PIM") that the Property would be sold in 2017 for USD 341.1 million. 1350 Eye Street Limited ("the Company") was incorporated in Guernsey on 3 February 2010, with corporate registration number 51435. HMG was the sole Director and Administrator of the Company, as well as Registrar and Managing Entity. HAIL, which is a company registered in England and Wales, was the Investment Adviser to the Company. Edge Funds Management LLC ("Edge") was appointed as Asset Manager on 19 May 2010, under an Asset Management Agreement between the Company, Edge and 1350 Investor LP, a Delaware limited partnership (part of the US Investment structure). Edge's role was to actively manage the real estate investment.
5. The beneficial owners of Lucille are the Lee family who are long-term customers of HSBC. The investment in the Property was offered to ultra-high network private clients including the Lee family as part of HSBC's "club deals".

The Law

6. The legal principles were not in dispute. Rule 59 of the Royal Court Civil Rules 2007 ("RCCR") provides: "No party to an action may amend his pleadings except with the consent of all other parties or by leave of the Court."
7. The legal principles on amending a pleading are as set out in *Jefcoate v Spread Trustee Company Limited* [2013] GLR 220:

- (a) The court has a wide discretion under the Royal Court Civil Rules, r.59 to permit amendments where one or more of the parties have not consented.*
- (b) The discretion must be exercised judicially having regard to legal principles.*
- (c) The overriding objective requires that cases be dealt with justly.*
- (d) What justice requires depends on the circumstances of the particular case but*

includes taking account of the matters particularized (sic) in the Royal Court Civil Rules, r.1(2), which will be of special importance when a late amendment is sought. (e) In general, amendments should be allowed so that the real dispute between the parties can be adjudicated, provided that any injustice to the other party can be compensated for in costs.

(f) In the ordinary course it will not be just to allow an amendment if it will defeat a defence of prescription that may otherwise be available.

(g) If a defence of prescription may be defeated, it is necessary to establish whether the proposed amendment seeks to introduce a new cause of action.

(h) What constitutes a new cause of action is not determined by the label attaching to the proposed claim but by the factual situation which is required to be proved to entitle the plaintiff's claim to succeed. If the new cause of action which is sought to be added or substituted arises out of the same facts or substantially the same facts as a cause of action already pleaded, the court will not normally regard it as a new cause of action and hence will have a discretion to allow it.

(i) However, even if the new cause of action arises from similar or substantially the same facts as already pleaded, the court will disallow the amendment if the justice of the situation so requires.

(j) Where a new cause of action may be prescribed, the effective date as to when the limitation period expired is the date of the application, although if the amendment is permitted, the effect is that it is deemed to date back to the date of the original proceedings.

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

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

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

8. In determining whether the Amended Cause has a realistic prospect of success (see paragraph (l)) from *Jefcoate* set out above, the Court should apply the test applicable to summary judgment under Rule 19 RCCR. Therefore, the principles to be considered are those set out by Lewison J (as he was then) in *Easyair Limited (t/a Openair) v Opal Telecom Limited* [2009] EWHC 339 (Ch) (at para. 15):

"i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 2 All ER 91;

ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];

iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*;

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];

v) However, in reaching its conclusions the court must take into account not only the evidence actually placed before it on the application for summary judgment, but

also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus, the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that it is determined the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725.”

Brief Summary of Submissions

9. Lucille submitted that the starting point for their task was as set out at paragraph 67 of my January 2024 Judgment:

“Further, the Plaintiff has not shown, or has not shown sufficiently in its pleadings that objectively HMG or anybody on its behalf, conveyed directly or indirectly, expressly or by its actions that it had assumed responsibility in relation to the deal, nor do the Plaintiff's pleadings articulate any reliance by the Plaintiff on an alleged assumption of responsibility (whether known or not by HMG) creating a special relationship between HMG and the Plaintiff”

10. In oral submissions, Advocate Breckon spent some time going through the correspondence and literature including the PIM that was supplied to the Lee family to encourage it and other ultra-high net worth investors to take part in the deal to acquire the Property. He emphasised the following paragraphs which are on the 5th page of the PIM:

“It is anticipated that the property will be held for a maximum period of 7 years to take advantage of both rental income and capital growth. The Asset Manager, Edge, will evaluate and advise on the feasibility and implementation of various refinance and exit strategies, however the final determination of any exit strategy shall rest with the Managing Entity as advised by the Investment Adviser, HAIL.

¹ See *Williams v Natural Life Ltd*[1998] WLR 830 page 835

At time of sale, value will be maximized by selling a 100% ownership interest in the real estate consolidated under a single owner and unencumbered by the current tax structure as the secured promissory note will be terminated. If we have not already acquired the 20% ownership interest by the time of our sale, the purchase option agreement states the 20% owner must sell to the same buyer under the same terms and conditions as our transaction.”

11. The Managing Entity referred to in these paragraphs is HMG (as well as being the Administrator and Registrar). Advocate Breckon said that the investment strategy was to buy semi-distressed real estate and sell the whole of it within 7 years. He said that the only reason to plan to sell the Property in the relatively short-term was to deliver a return for the investors. He argued that in the PIM, the HSBC Group conveyed to the investors that HMG would be responsible for, and central to, delivering on that strategy. Thus, HMG knew or ought to have known that from this statement in the PIM, it had placed itself at the centre of ensuring that the returns promised happened for the investors. Lucille relied on the words contained in the PIM and invested USD 4 million. Looking at the value of the Property over the 7 year period, if HMG had acted upon the 7 year exit strategy and exited in 2017, the investors would have received a return. Advocate Breckon further posed the rhetorical question, why is HMG mentioned in the PIM at all if it was not to convey that it would deliver the exit strategy from this short-term investment. Whilst it might have not been in the best interests of the Company to exit in 7 years it was what had been said in the PIM to the investors that HMG was going to deliver for them. Advocate Breckon submitted that the PIM is the key document where HMG promises to deliver and upon which Lucille relied, the later correspondence serves to reinforce this analysis and evidence the duty of care which had been assumed. For example, in 2015, there is a document from Edge to HAIL which is described as “Recommendation for Extension of Investment Term 1350 Eye Street Washington D.C. Memorandum”. This sets out the following:

“As more fully described in the CIM, each one (1) - year extension can be exercised by HSBC Management (Guernsey) Limited (“the Managing Entity”). In its sole discretion, after advise (sic) from Edge, acting as Asset Manager, and HAIL, as Investment Adviser. Absent an extension of the Investment Term by Managing Entity, the HAIL Investors would be required to dispose of or otherwise cause the liquidation of their interest in the Property on or before May 19, 2015.

The extensions to the Investment Term were provided so that Managing Entity could continue to execute the Investment strategy through adverse leasing sales or market conditions and to better manage the disposition and liquidation of the HAIL Investor economic Investment in the Property under favorable terms and conditions.

Based on the approved 2015 business plan for the Property, the findings and investment strategy (provided therein) support the decision to extend the Term of one (1) - year period to May 19, 2016. Current leasing efforts coupled with projected increased income and potential valuation over the 2015 to 2018 period support the forecast that the extension will permit the Managing Entity to maximize return to Investors.”

12. Lucille also relies on an update dated 14 June 2019 which was sent from HMG directly to the investors not the shareholders and a valuation update dated 30 June 2019 from HSBC which focuses on the investors, not the shareholders. In correspondence dated 11 November 2019 from HMG to Edge:

“the HSBC parties will not approve a transaction unless we are satisfied that the market has been appropriately tested, that the transaction is on arm’s length, market

terms and conditions, and in the case of a sale or recapitalization where Edge or its affiliates are involved on the buy or continuing ownership side, that the transaction value is not discounted due to the continued involvement of Edge as part of the new or reconstituted ownership. To be clear, we will not approve a recapitalization transaction involving Edge or its affiliates unless we are satisfied that you have duly considered all available Edge options and that such a transaction does not disadvantage our Investors over other available options.”

13. Lucille says that in this last document, which was 9 years after the initial investment, HMG is setting out duties it says it owes to the investors which are consistent with those duties having been assumed by it towards the investors, including Lucille in 2010. Again, in an email dated 20 December 2019 from Edge to the Defendants, which refers to “our investors”, Lucille says that this illustrates a pervading theme of duties being owed to the investors by HMG over and beyond those owed to the shareholders or the Company. Likewise, in March 2020 a sounding document for existing investors was issued and on 19 March 2020, a communication where HMG wrote to the investors not the shareholders. To further illustrate this, an undated document from HAIL it sets out: “HMG as corporate director of the company must act in the interests of the investors when making decisions in respect of 1350 Eye Street Limited and will act in this regard in making any future decisions.” Lucille says this must be by reference to the exit strategy set out in the PIM and the assumed duty of HMG towards the investors. HAIL further evidences this in September 2020 in an investor update where it says: “HMG will consider HAIL’s advice before making any decision and although they will act independently, they will do so having due regard to their fiduciary duty to the investors”.

14. Lucille says that there is a parallel between the facts of this case and Tranquility Holdings Ltd v Invista Real Estate Investment Management CI Limited [2015] (38/2015). In Tranquility Holdings at paragraph Bailiff Collas held that:

“It is, in my judgment, at least arguable that fiduciary duties and/or a duty of care may be owed by the Manager to the Plaintiff. Whether that is so involves a novel point of law as to the tripartite relationship that exists between the trustee, manger and unitholders of a unit trust on which, as yet, there is no conclusive judicial decision. Resolving such an important legal question is not a matter for applications of this matter and would require full consideration of the factual matrix of the relationships, after a full trial on the facts.”

15. Lucille says that similarly this is a tripartite relationship and as there is still not authoritative judgment in this area of law, thus the claim should be allowed to go forward to trial on this basis. Further, following the Dorey v Ashton judgment, the voluntary assumption of a duty is also a developing area of jurisprudence in this jurisdiction and this case ought to be permitted to proceed to allow further judicial consideration of this area at a full trial. The proposed amendments add further flesh to the current Cause by adding details and facts upon which Lucille intends to rely. The draft amendments also add further particulars and/or expand on those in the current Cause, in particular the assumption of responsibility by the First Defendant and the scope and extent of the duty which Lucille avers that the HMG assumed. This is a case where Lucille has shown that it has a realistic prospect of success and where a fuller investigation at trial following disclosure is required and therefore the amendments should be permitted.

16. In response, the Defendants say that the proposed amendments concerning HMG (at paragraphs 53, 55(1)-(10) and 55A) do not identify any new facts which can reasonably be construed to amount to an assumption of responsibility by HMG based on the legal test confirmed in Dorey v Ashton. Further, the Defendants submit that contrary to Rule 10 RCCR, many of the HMG

Amendments (especially in paragraph 55) amount to points of evidence and should not be allowed.

17. Paragraph 53 of the proposed amendments is a partly new paragraph. The additional parts to paragraph 53 include an averment of the alleged assumption of responsibility by HMG by reference to the duties HMG had as director, Administrator and Managing Entity to the Company and by reference to the alleged acknowledgment in the “*Response from [HAIL]*” by cross-reference to the draft amendment at paragraph 55 (9) (v). However, this is not a document from or on behalf of HMG. In any event this part of the pleading in this paragraph is found in paragraph 59 (vii) (e) of the current Cause and thus has already been decided upon. Paragraph 53 contains one entirely new factual allegation which is: “*The deliberate exclusion of the Plaintiff as a shareholder of record or “member” cannot have the effect of excusing the Defendants from liability to the Plaintiff itself*”. In paragraph 4 of its skeleton in reply dated 15 July 2024, Lucille says:

“Since HMG knew that Lucille was not the legal owner of shares (and that the legal owner was HSBCPB, part of the HSBC empire) and Lucille’s deliberate exclusion from being a shareholder of record,³ HMG must have also known that Lucille could not rely on the Company’s rights against it (or the rights of the legal owner of the shares by way of a derivative action, which would never happen since HSBCPB would not take proceedings against HMG). HMG must therefore have appreciated, that Lucille would rely on HMG to deal with reasonable care in respect of the matters complained of and, moreover, that it was reasonable for Lucille to have relied on HMG in that regard.”

18. The Defendants say the new allegation is vague and unsubstantiated. Further, it is not pleaded that Lucille relied on this to create an assumption of responsibility by HMG, nor has it been pleaded that it was because of this alleged act that Lucille relied on HMG. The Defendants say it would also seem bizarre that a sophisticated investor like Lucille would believe that by this alleged deliberate act of exclusion by HMG (an entity with which it had no direct dealings), HMG had assumed personal responsibility to Lucille. In any event, the court does not need to take at face value everything Lucille says, and this factual assertion is without substance. Further, the Defendants do not accept that Lucille had no remedies against HMG. Although Lucille has not relied on them it does not mean that they did not exist.
19. Save for paragraph 55 (3), the amendments proposed at paragraph 55(1)-(10) are a reordering of the same particulars that are found in the current Cause at paragraph 59. The court has already found at paragraph 67 of the January 2024 Judgment that these did not amount to a duty of care (and in the case of the 55(6) HMG also did not owe fiduciary duties to Lucille), did not convey any assumption of duty to Lucille by HMG and mostly are documents that were not sent by or on behalf of HMG. The additional wording of the draft amendment at paragraph 55(3) is new and refers to Lucille and others being a defined class of persons. However, this is by reference to the HSBC Group and not to HMG. Even if HMG knew that this was a defined class it does not mean HMG owed Lucille, or that defined class, a duty of care.
20. The proposed amendment at paragraph 55A goes to the scope and extent of the alleged duty of care owed to Lucille rather than whether a duty of care has arisen. The duties that Lucille describes in this paragraph as duties of care owed to it, were duties owed by HMG to the Company, in its capacity as its director and not for the benefit of, or because of duties owed, to Lucille or any of the underlying investors. The specific communication Lucille points to in paragraph 55A is the letter of 11 November 2019 which is set out at the proposed amended pleading at sub-paragraph 55(9) (i). This is not a new reference but is found at paragraph 59

(vii) (a) of the current Cause. Further, this was not sent by HMG to Lucille but was sent by HMG to Edge. It is a request by HMG to Edge to consider the interests of the Company rather than the interests of Edge (who was also an investor). Thus, the Defendants say Lucille cannot rely on this letter as evidence of an assumption of responsibility by HMG as (i) it was not sent to Lucille (ii) it was sent a long time after the original investment in 2010 (iii) it was after the period when Lucille says the Property should have been sold and (iv) refers only to fiduciary obligations. In taking any steps that it did, HMG was carrying out the duties it owed to the Company (which would have benefitted the shareholders) but it did not carry out the tasks, as a consequence of any alleged duties said to be owed to Lucille or other underlying investors. The Defendants say, even if the court took into account the tasks set out at paragraph 8 of Lucille's skeleton paragraphs 8 (i) (ii) and (iii) are not pleaded as being carried out for Lucille and, in any event, amount to tasks carried out by HMG as director for the benefit of the Company. Tasks (iv) and (v) were tasks undertaken for the Company and not having assumed responsibility to Lucille (or the other investors). HMG's own publications were sent out on behalf of the Company to keep the shareholders informed not because of any assumption of responsibility to the investors. The Defendants say that objectively the communications do not show that the tasks were for the direct benefit of Lucille or other investors.

21. The Defendant say that this is a matter where the court should grasp the nettle and not give leave for the amendments for paragraphs 53, 55 (1)-(10) and 55A such that Lucille's claim against HMG on the basis of a duty of care would fall away. This, in turn, would mean that no claims against HMG would subsist. Lucille has had plenty of opportunities to advance a claim against HMG but has not done so with a realistic prospect of success. The documents which Lucille says in its skeleton it needs do not go to the key tests of assumption of responsibility. The Defendants say that disclosure will not improve Lucille's position, as demonstrated by the illustrations of what disclosure might provide in Lucille's skeleton argument dated 15 July 2024. The first example goes to the date of authorisation by HMG of the extension of the investment in the Property which goes to an alleged breach (not to whether the duty of care existed in the first place). The second example given is interactions between HMG and third parties, other than Edge but again this does not go to dealings between HMG or someone on its behalf and Lucille and this cannot relate to an assumption of responsibility by HMG towards Lucille.
22. The Defendants agree that it is possible for a duty of care to be established if it can be demonstrated on the pleaded facts that relationship exists between a shareholder and a manager that give rise to assumption of responsibility, however, the amendments proposed do not meet that threshold required to establish this. Further, the Defendants do not accept that the relevant issues involve a developing or novel point of law because the assumption of responsibility test has been clearly articulated in a binding decision of the Court of Appeal. No further opportunity should be given to Lucille (this being their third attempt to perfect their pleadings) to amend the Cause in relation to HMG as the amendments cannot circumvent the fundamental requirements needed to establish a duty of care owed by HMG to Lucille. The Defendants submit that the court should refuse to allow the amendments in relation to the claim against HMG, strike out the claim against HMG in its entirety and remove HMG as a party to the proceedings.

Discussion

23. As I set out in my January 2024 Judgment, the Guernsey Court of Appeal held in *Dorey v Ashton* at paragraph 82 that *JP SPC 4 v Royal Bank of Scotland Ltd* is compelling authority on the applicable test for finding a duty of care in tort, in a case of pure economic loss where there is no previous case establishing the duty. The Court of Appeal set out from paragraph 83:

83. *We have explained already the context of the decision. That case, like the case before us, involved a claim in tort for negligence purely for economic damage in a context in which there is not yet an established duty of care. It is not sufficient to bring into existence a duty of care to avoid causing or to prevent such loss that the loss was foreseeable as a result of the actions or inaction of the person said to owe the duty. Foreseeability does not amount to proximity as a touchstone: proximity, to be established for the purpose of founding a duty of care, ordinarily needs more. Commonly this is to be found where the person to owe the duty of care is found to have assumed responsibility to the injured party to use reasonable care to avoid the harm.*

84. *At paras [64] and [65] of the judgment in JP SPC4 the Privy Council explained:*

“64. An examination of the case law indicates (see Clerk and Lindsell on Torts, 23rd ed (2021), paras 7-113 to 7-137) that the factors which have been of particular relevance in determining whether there is an assumption of responsibility in relation to a task or service undertaken include: (i) the purpose of the task or service and whether it is for the benefit of the claimant; (ii) the defendant's knowledge and whether it is or ought to be known that the claimant will be relying on the defendant's performance of the task or service with reasonable care; and (iii) the reasonableness of the claimant's reliance on the performance of the task or service by the defendant with reasonable care.

24. As I commented in the January 2024 Judgment, *Williams v Natural Life* (*ibid*) was a matter where there was a tripartite relationship. In that case Lord Steyn did not rule out the possibility of a director of a company having assumed a separate responsibility from that of the company (in that case prospective franchisee, franchisor company and the Director of the franchisor company) but a special relationship is required. Lord Steyn in his speech said starting at page 834:

First, in Henderson's case it was settled that the assumption of responsibility principle enunciated in Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. [1964] A.C. 465 is not confined to statements but may apply to any assumption of responsibility for the provision of services. The extended Hedley Byrne principle is the rationalisation or technique adopted by English law to provide a remedy for the recovery of damages in respect of economic loss caused by the negligent performance of services. Secondly, it was established that once a case is identified as falling within the extended Hedley Byrne principle, there is no need to embark on any further inquiry whether it is "fair, just and reasonable" to impose liability for economic loss: p. 181. Thirdly, and applying Hedley Byrne, it was made clear that "reliance upon [the assumption of responsibility] by the other party will be necessary to establish a cause of action (because otherwise the negligence will have no causative effect) . . . " (p. 180).

Fourthly, it was held that the existence of a contractual duty of care between the parties does not preclude the concurrence of a tort duty in the same respect.

“It will be recalled that Waite L.J. took the view that in the context of directors of companies the general principle must not “set at naught” the protection of limited liability. In Trevor Ivory Ltd. v. Anderson [1992] 2 N.Z.L.R. 517, 524, Cooke P. expressed a very similar view. It is clear what they meant. What matters is not that the liability of the shareholders of a company is limited but that a company is a separate entity, distinct from its directors, servants or other agents. The trader who incorporates

a company to which he transfers his business creates a legal person on whose behalf he may afterwards act as director. For present purposes, his position is the same as if he had sold his business to another individual and agreed to act on his behalf. Thus the issue in this case is not peculiar to companies. Whether the principal is a company or a natural person, someone acting on his behalf may incur personal liability in tort as well as imposing vicarious or attributed liability upon his principal. But in order to establish personal liability under the principle of Hedley Byrne, which requires the existence of a special relationship between plaintiff and tortfeasor, it is not sufficient that there should have been a special relationship with the principal. There must have been an assumption of responsibility such as to create a special relationship with the director or employee himself.

He then went on to say:

The touchstone of liability is not the state of mind of the defendant. An objective test means that the primary focus must be on things said or done by the defendant or on his behalf in dealings with the plaintiff. Obviously, the impact of what a defendant says or does must be judged in the light of the relevant contextual scene. Subject to this qualification the primary focus must be on exchanges (in which term I include statements and conduct) which cross the line between the defendant and the plaintiff. Sometimes such an issue arises in a simple bilateral relationship. In the present case a triangular position is under consideration: the prospective franchisees, the franchisor company, and the director. In such a case where the personal liability of the director is in question the internal arrangements between a director and his company cannot be the foundation of a director's personal liability in tort. The inquiry must be whether the director, or anybody on his behalf, conveyed directly or indirectly to the prospective franchisees that the director assumed personal responsibility towards the prospective franchisees.

Particularly relevant to this case on page 836 Lord Steyn goes on:

“That brings me to reliance by the plaintiff upon the assumption of personal responsibility. If reliance is not proved, it is not established that the assumption of personal responsibility had causative effect.”

And at 837 paragraph B:

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

25. This long excerpt from Lord Steyn’s leading speech in *Williams v Natural Life (ibid)* is a reminder that it is not enough to focus only on the Defendant’s role in the assumption of duty. It is necessary for Lucille to show, in this case, that it relied upon the assumption by the Defendant of personal responsibility.
26. The authorities make clear that in the context of summary judgment, the court is not barred from critically evaluating the evidence and concluding that there is no real (as opposed to fanciful) prospect of success. It is also right that the court will take into account not only the evidence before it but that which can reasonably be expected to be available at trial, which is likely to bear on the issues and it will avoid conducting a mini trial. As *Easyair* makes clear at paragraph (iv) by reference to paragraph 10 of *ED & F Man Liquid Products v Patel [2003] EWCA Civ 472*; this does not mean that the court must take at face value and without analysis

everything that a plaintiff says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents.

27. To satisfy the requirement that further relevant outstanding evidence “*can reasonably be expected*” to be available at trial, there needs to be some reason for expecting that evidence in support of the relevant case will, or at least reasonably might, be available at trial. A party resisting an application for summary judgment must put forward sufficient evidence to satisfy the court that it has a real prospect of succeeding at trial (especially if that evidence is, or can be expected to be, already within his/her possession). If the party wishes to rely on the likelihood that further evidence will be available at that stage, it must substantiate that assertion to a degree. The court may then be able to see that there is some substance in the point and that the party in question is not simply playing for time in the hope that something will turn up.
28. Advocate Breckon was clear in his oral submissions that Lucille’s case is put on the basis that the alleged duty of care arose from January 2010 when Lucille received the PIM. Lucille said that it derived from the section in the PIM where under the heading “*Exit Strategy*”, it says:

“The Asset Manager, Edge will evaluate and advise on the feasibility and implementation of various refinance exit strategies however the final determination of any exit strategy shall rest with the [HMG] as advised by the Investment Adviser HAIL.”

29. However, despite Advocate Breckon’s submissions, the proposed amended pleading does not refer to the PIM as the basis for this formation of the duty. The further difficulty Lucille faces in this case is that there is no evidence before the court that Lucille relied (whether reasonably or not) on the assumption of responsibility by HMG from the PIM or anywhere else. In Mr Lee’s affidavit there is not any reference to the beneficial owners of Lucille relying on duties said to be owed to it by HMG. The only references to HMG and/or the PIM which is now said to be the core document to support its case on the assumption of responsibility are:

At paragraph 22:

“From our prospect, we did not perceive HAIL to only have a relationship as investment adviser with HSBC Management (Guernsey) Limited (HMG the First Defendant) as the sole director of 1350 Eye Street Limited as is now being suggested by the Defendants. The PIM specifically describes HAIL as providing “a full investment advisory service enabling clients [i.e. investors in its Club Deals] to give exposure to real estate on a global basis.”(see page 27). The relationship between us and HAIL existed long before any relationship between HAIL and HMG.

At paragraph 25:

“We were subsequently provided with a more detailed “Confidential Property Investment Memorandum” (PIM) issued by HAIL.... The PIM provide a detailed proposal for an investment in 1350 Eye Street Washing DC (the Property). The PIM set out that HAIL was seeking commitments from a group of investors”...”

30. This evidence does not support Advocate Breckon’s submissions that it was the PIM that was key to the assumption of responsibility by HMG and the reliance of Lucille upon this. Crucially, it does not point to any dealings between Lucille, or its beneficial owners, and HMG directly or indirectly or at all. The focus in the affidavit is the relationship between Lucille (and the Lee family) and HAIL. Nor do I consider that, objectively, the reference in the PIM by HAIL to

the determination of the exit strategy by HMG in a document that Mr Lee describes as a proposal for investment from HAIL sent out to potential investors, and not by HMG, is sufficient to give rise to an assumption of responsibility by HMG. I am clear that this does not “cross the line” as Lord Steyn put it.

31. In the draft amended pleadings at paragraph 55 it says: “*in support of the existence of the First defendant’s assumption of responsibility towards the Plaintiff and the above duties owed by the first defendant and prior to the defendant’s disclosure the plaintiff will in particular rely on the following facts and matters...*” Lucille then sets out in 10 sub-paragraphs the facts it relies on with cross references to various documents. Save for paragraph 55(3) none of the sub-paragraphs in the proposed amended paragraph 55 are new. They are a reordering of current paragraph 59 of the Cause and the amendment at paragraph 55(3) which is by reference to the HSBC group and not to HMG does not support the existence of a special relationship between HMG and Lucille. I have already made clear that the current pleadings are insufficient to support the claim of a duty of care, re-ordering the same pleadings will not change this.
32. Paragraph 53 is a mix of redrafting and new pleading. The new averment contained in the amendment at paragraph 53 that Lucille had been deliberately excluded, is not supported by any evidence before the court. It is not dealt with at all in Mr Lee’s affidavit. Not only does Mr Lee not say that the arrangement that HSBCPB that was the named shareholder rather than Lucille was something that HSBC (let alone HMG) required, nor does he say that as a consequence of this Lucille relied on an assumption of responsibility by HMG. Nor does the pleading set out how it is that this would have the effect of an assumption of responsibility. Lucille has not pointed to any authority where a purported deliberate act of distancing the relationship between director and a plaintiff would have the effect of creating an assumption of responsibility.
33. At paragraph 59, Lucille tries to preserve its position in relation to the alleged duties by relying on disclosure, however, although Mr Lee says in his affidavit that he has not retained all of the correspondence between Lucille/the Lee family, neither his affidavit nor Lucille’s submissions identifies any disclosure that will be relevant to the relationship between HMG and Lucille in circumstances where Mr Lee’s affidavit failed to identify that Lucille relied on HMG at all nor that there was any relationship between them at all. Lucille has failed to provide sufficient (or any) evidence of the circumstances that would enable the court to see that if the relevant facts are established at trial they may have a bearing on the outcome. As Lord Justice Moore-Bick said in *ICI Chemicals & Polymers v TTE Training Limited* 2007 WL 1623328 (2007) at paragraph 14:

“ Sometimes it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial. In such a case it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up.... ”

34. Overall, I do not consider that with the amendments Lucille is seeking in relation to the alleged duty of care have improved its position from the current Cause which I dealt with in my January 2024 Judgment which failed to show a realistic prospect of success. I shall not repeat the entirety of what I said at paragraph 67 of that judgment, but I have come to the conclusion that the deficiencies I set out therein, remain. I am not satisfied on the draft amended Cause and from the evidence that is before me that Lucille has shown that it relied on HMG undertaking

personal responsibility for it or the investors as a whole nor that there was any relationship between it and HMG where HMG assumed such a responsibility towards it. In circumstances where Lucille has not established a realistic prospect on its own evidence of proving that it relied on HMG or had any sort of relationship let alone a special relationship, it would serve no useful purpose and be a waste of the court's resources to allow this part of Lucille's claim to continue to trial as an area of developing law.

Conclusion

35. In my January 2024 Judgment I found that Lucille had failed to disclose a reasonable cause of action against HMG. However, I decided that due to *Dorey v Ashton* confirming the assumption of responsibility test in this jurisdiction after Lucille had drafted its pleadings, Lucille should be given an opportunity to amend its pleadings on the basis of the settled law. Having taken that opportunity, Lucille has been unable to show that it does have a realistic prospect of success in relation to its draft amended pleadings at paragraphs 53, 55(1)-(10) and 55A. Taking into account this test and the overriding objective, I consider it would not be an appropriate exercise of my discretion to give leave to Lucille to amend the pleadings in the manner sought in the Application nor to give a further opportunity (number 4) to try again. This means that there are no subsisting claims by Lucille against HMG. In these circumstances, I have decided that the appropriate course of action is that I exercise my discretion to strike out the claim against HMG in its entirety and remove HMG as a party to the proceedings leaving HAIL as the sole defendant.
36. In terms of the costs of this Application, if the parties can agree an appropriate order, they are invited to do so. If agreement cannot be reached, either party can list the matter before a suitable Interlocutory Court, with a view to making an application in respect of the costs of this Application.