Dorothy Audrey Brakspear v Nedgroup Trust (Jersey) Ltd

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Grime, Thomas
Judgment Date:	05 July 2018
Neutral Citation:	[2018] JRC 121
Reported In:	[2018] JRC 121
Court:	Royal Court
Date:	05 July 2018

Text

Between
Dorothy Audrey Brakspear
First Plaintiff

and

Alison Shane Bowler
Second Plaintiff

and

Ian Donald Brakspear
Third Plaintiff
and
Nedgroup Trust (Jersey) Limited
Defendant

[2018] JRC 121

Before:

J. A. Clyde-Smith, **Esq., Commissioner, and** Jurats Grime **and** Thomas.

ROYAL COURT

(Samedi)

Trusts — application by the defendant to strike out the whole or parts of the Order of Justice of the plaintiffs dated 20th November, 2017

Authorities

Bankers' Books Evidence (Jersey) Law 1986.

Royal Court Rules 2004.

Lapidus v Le Blancq [2013] 2 JLR 308.

Holmes v Linguard [2015] JRC 226.

Re Wooley [1991] JLR Note 11 C.

Classic Herd Limited v Jersey Milk Marketing Board [2014] 2 JLR Note 4.

Trusts (Jersey) Law 1984.

Law Reform (Miscellaneous Provisions) (Jersey) Law 1960.

Makarenko v CIS Emerging Growth Limited [2001] JLR 348.

Armitage v Nurse [1998] Ch 241, at p. 254.

Spread Trustee Co Ltd v Hutcheson [2012] 2 AC 194, at p. 200.

In the matter of II [2018] JRC 031

In the matter of II [2016] JRC 116

Three Rivers DC v Bank of England (No 3) [2003] 2 AC 1

JSC Bank of Moscow v Kekhman [2015] EWHC 3073 (Comm)

Abbar v Saudi Econimic & Development Company Real Estate [2010] EWHC 2132 (Ch)

Foley v Lord Ashcroft [2012] EWHC 1710 QB

Dubai Islamic Bank v Ridley [2016] JRC 102

Virgin Atlantic Airlines Limited v Zodiac Seats UK Limited [2014] AC 160

A v B (Family) [2015] JRC 262

Carl Zeiss Stiftung v Rayner & Keeler Ltd and Others No 2 [1967] 1 AC 853

House of Spring Gardens Limited v Waite [1991] QB 241

Halsbury's Laws of England Volume 12A

Stephenson v Garnett [1898] 1 QB 677 CA

Johnson v Gore Wood [2002] 2 AC 1, at 31D-E

Kotonou v Nat West [2015] EWCA 1106

Re Lart [1896] 2 Ch 788

Esteem [2003] JLR 188

MacKinnon v Regent Trust Company Limited [2005] JLR 198

Law Society Code of Conduct.

Dorothy Audrey Breakspear was present in person.

Advocate M. H. D. Taylor **for the defendant**

Advocate J.S. Dickinson **appeared as** *Amicus Curiae*

THE COMMISSIONER:

1 This is an application by the defendant to strike out the whole or parts of the Order of Justice of the plaintiffs dated 20 th November, 2017.

2 In essence, the defendant alleges that the plaintiffs are seeking by their Order of Justice to re-litigate issues which it says are either prescribed or which have already been finally determined by the courts of South Africa. It is necessary, therefore, for the Court to go into some detail as to the background.

The background

3 The defendant and the three associated companies that played a role in this matter all form part of a group that has undergone changes in its name over the period in question, so that in the case of the defendant, it started as Gerrard Trust (Jersey) Limited, and then changed to Fairbairn Trust Limited and finally, to Nedgroup Trust (Jersey) Limited. For convenience, we are going to refer to the four Nedgroup companies concerned as “the Jersey Trust Company”, “the Jersey Bank”, “the Guernsey Trust Company” and “the Isle of Man Bank”.

4 In 2003, the first plaintiff, Mrs Brakspear, and her daughter, the second plaintiff, Mrs Bowler, were trapped in Zimbabwe in a worsening situation in which they feared that their personal security and wellbeing was under threat. Mrs Brakspear's son, and Mrs Bowler's brother, the third plaintiff, Mr Brakspear, lived in South Africa.

5 The family had a connection with the Guernsey Trust Company in that Mrs Brakspear's late husband had established a discretionary trust there ("the J Trust") of which Mrs Brakspear, Mrs Bowler (and her children) and Mr Brakspear were beneficiaries. As we understand it, the J Trust then had assets of some £1.5 million.

6 Mr Brakspear put forward a proposal for an investment in a farm in South Africa as a means by which his mother and sister could migrate there. It is unnecessary for the purposes of this judgment to explain how that process would work. He liaised with a number of advisers as to the structure to be put in place to hold that investment. The documentation we have seen shows Mr Brakspear as taking a leading role in this project.

7 The arrangement ultimately resolved upon was the creation of a trust structure for the benefit of Mrs Brakspear and Mrs Bowler, whereby a new trust, to be called "the Westley Trust", would incorporate a wholly owned BVI company Westley Holdings BVI Limited ("Westley Holdings") which would acquire a South African company, Moneybox Investments 0012 (Pty) Ltd ("Moneybox"), which in turn would hold a 60% interest in another South African company West Dunes Properties 5 Pty Ltd ("West Dunes") which in turn would own the farm in South Africa. The remaining 40% of West Dunes was held through South African companies in which Mr Brakspear's business partner held an interest.

8 The Westley Trust was created by declaration by the Jersey Trust Company on 5 th May, 2004, over an initial £10. The named beneficiaries were Mrs Brakspear and Mrs Bowler, and it is a discretionary settlement in standard form, governed by Jersey law.

9 The purchase price of the farm, ZAR20,900,000 (South African Rands), was funded from two sources, namely the J Trust and a loan from FirstRand Bank Limited ("FirstRand") in South Africa and it was structured in this way:-

(i) FirstRand lent West Dunes ZAR17.5 million secured as a first charge over the farm and by a personal guarantee from Mr Brakspear. Interest was to be rolled up for two years.

(ii) The Jersey Bank issued a guarantee in favour of FirstRand in the sum of £550,000.

(iii) The Jersey Bank lent the Jersey Trust Company as trustee of the Westley Trust the sterling equivalent of ZAR4 million (approximately £340,000). The bulk of that

was on-lent by the trustee to Westley Holdings which in turn was used to acquire the capital of Moneybox, although the monies were paid directly to the lawyers of the vendor of the farm on the instructions of Mr Brakspear.

(iv) The liabilities of the Jersey Bank both in respect of the guarantee in favour of FirstRand and the loan to the Westley Trust were secured by a guarantee issued by the Guernsey Trust Company as trustee of the J Trust, secured over a deposit of £900,000 held by the Guernsey Trust Company with the Isle of Man Bank.

(v) In addition, the Jersey Trust Company as trustee of the Westley Trust gave the Jersey Bank a counter indemnity in respect of the above facilities granted by the Jersey Bank at its request.

These arrangements were put in place in May 2004 and it can be seen that rather than use the J Trust to directly fund the purchase of the farm, monies within the J Trust were used by way of security for the financing of the acquisition.

10 It is relevant to note that Mr Brakspear was the sole director of the two South African companies, Moneybox and West Dunes, and in control, therefore, of all of the Westley Trust assets in South Africa and in particular the operation of the farm.

11 Subsequently, Mr Brakspear discovered that West Dunes had been defrauded by his South African business partner and through a prolonged process the whole interest in the farm came within the Westley Trust structure.

12 At the expiration of two years from the grant of the FirstRand loan, Mr Brakspear negotiated an extension until September 2007, but with the interest now being paid monthly. The bank guarantee from the Jersey Bank was reduced to £500,000, the loan from the Jersey Bank to the Westley Trust increased to £415,000 and the security provided by the J Trust increased to £915,000; with security documentation being re-issued accordingly.

13 West Dunes fell behind in its repayments under the facility with FirstRand and on 3 rd July, 2007, FirstRand called in the bank guarantee given to it by the Jersey Bank. On 5 th July, 2007, the Jersey Bank paid FirstRand £500,000, pursuant to the bank guarantee and enforced its security against the J Trust for that amount.

14 On 28 th November, 2007, FirstRand obtained judgment against West Dunes and Mr Brakspear in the sum loaned to West Dunes, namely ZAR12.5 million (reduced by the calling in of the guarantee by the Jersey bank), together with an order for immediate execution over the farm. At the request of the Jersey Trust Company, the Jersey Bank postponed repayment of the loan made to the Westley Trust.

15 The farm was sold at public auction on 13 th June, 2008, to Zambrotti Investments 35 (Pty)

Ltd (“Zambrotti”), but completion was delayed due to problems with squatters.

16 On 29 th July, 2008, the Jersey Bank formally demanded repayment of the loan to the Westley Trust and enforced the security given by the Guernsey Trust Company. The J Trust therefore lost the whole of the £915,000 provided by way of security.

17 On 19 th December, 2008, the Jersey Trust Company presented a winding up petition in respect of West Dunes to the court in South Africa. The claim upon which the petition was based was the £500,000 paid by the Jersey Bank to FirstRand, which was described in the petition as an advance by the Westley Trust to West Dunes.

18 Initially, West Dunes, acting through Mr Brakspear as sole director, opposed the application, asserting in his affidavit of 22 nd December, 2008, that this liability of £500,000 was due to the J Trust and not to the Westley Trust.

19 However, when it became clear that a liquidation of West Dunes would enable liquidators appointed by the Court to apply to have the sale to Zambrotti set aside and to sell at a much higher price to another interested purchaser known as Applemint Properties 99 (Pty) Ltd (“Applemint”), namely for the sum of ZAR25 million, West Dunes, represented by South African counsel, agreed to withdraw its opposition. A provisional order winding up West Dunes and appointing two liquidators was made on the 23 rd December, 2008, and a final order on 5 th February, 2009.

20 On 9 th February, 2009, the liquidators applied to terminate the sale to Zambrotti and for authority to sell the farm to Applemint. The application was opposed by Zambrotti. Mr Brakspear intervened in that application to support the liquidators. In his affidavit, he said that he brought his application to intervene with the support of Mrs Brakspear and Mrs Bowler, who likewise supported the application.

21 On 13 th February, 2009, the court granted the relief sought by the liquidators, and the farm was sold to Applemint for a price of ZAR25.2 million.

22 On 14 th May, 2009, the South African court made an order, on the application of the joint liquidators, for a commission of inquiry into the affairs of West Dunes. Mr Brakspear failed to attend the session of inquiry which was specifically convened for his attendance on 7 th August, 2009. He also failed to lodge a statement of affairs and to attend the first or second meetings of creditors. The Commissioner appointed to conduct the inquiry reported on 19 th March, 2010, (at paragraph 40) that Mr Brakspear had failed to cooperate with liquidators and had refused to give evidence at the inquiry. The Commissioner stated (at paragraph 157) that failure to attend at the commission was a criminal offence, as was Mr Brakspear's failure to attend the first or second meetings of the members and creditors of West Dunes. It

had not been possible to cross-examine Mr Brakspear due to his refusal to cooperate.

23 The Jersey Trust Company sought to prove in the liquidation the sum of £500,000 arising from the payment by the Jersey Bank under the bank guarantee and at a later point Westley Holdings sought to prove in the amount of the loan made by it, and both claims were admitted. However, the liquidators rejected a claim by Mr Brakspear for an alleged personal debt.

24 On 8 th June, 2009, Mrs Brakspear e-mailed the Jersey Trust Company saying that she held a power of attorney from Mrs Bowler, and demanding that both the Jersey Trust Company and the Guernsey Trust Company should resign with immediate effect from the Westley Trust and the J Trust respectively in favour of another trust company. The Jersey Trust Company (and we believe the Guernsey Trust Company) declined to accede to this request.

25 On 17 th November, 2009, Mr Brakspear sent a letter to the Master of the South African court objecting to the Jersey Trust Company's claim (and to the claim by Westley Holdings) which he said was fraudulent. In that letter, he said that he was fully supported by the beneficiaries of the Westley Trust, namely Mr Brakspear and Mrs Bowler, from both of whom he had powers of attorney. On 9 th May, 2011, the Master rejected his objections.

26 On 12 th October, 2011, Mrs Brakspear and Mrs Bowler, as beneficiaries of the Westley Trust, issued a representation before this Court, in which they sought the removal of the Jersey Trust Company as trustee of the Westley Trust, and the appointment of another Jersey trust company in its place. The representation is important in the context of prescription in that it sets out a number of their complaints about the conduct of the Jersey Trust Company as trustee. Following the filing of an answer that representation was discontinued by consent on 13 th November, 2012.

27 In the meantime, in 2011, there was correspondence between lawyers acting for the Guernsey Trust Company and lawyers acting for the Jersey Trust Company, in which the Guernsey Trust Company, as trustee of the J Trust, sought confirmation as to its claims against the Jersey Trust Company as trustee of the Westley Trust, in the wake of the failure of the farm investment, the enforcement of security by the Jersey Bank and the liquidation of West Dunes.

28 On 21 st June, 2011, the Jersey lawyers acting for the Jersey Trust Company wrote to the Jersey lawyers acting for Mrs Brakspear and Mrs Bowler, informing them of the claim by the Guernsey Trust Company and stating that they had taken legal advice in respect of the claim and had been advised that on balance there was no merit in defending. They therefore intended to make arrangements to settle the claim, subject to any alternative proposals that Mrs Brakspear and Mrs Bowler would like to make, none of which were

forthcoming.

29 On 13 th September, 2012, the Guernsey Trust Company issued proceedings against the Jersey Trust Company before this Court, claiming £946,649.29p plus interest, on the basis of the subrogation of the Jersey Bank's rights against the Jersey Trust Company following the Jersey Bank's enforcement of the charge in respect of the bank guarantee payment as to £500,000 and the Westley loan as to £446,649.29p. On 18 th September, 2012, the Jersey Trust Company informed Mrs Brakspear and Mrs Bowler that it had decided on advice not to defend the proceedings, and informed them that they could apply to join the action to defend them, but they did not take any steps to do so.

30 On 21 st September, 2012, the Jersey Trust Company, as trustee, submitted to judgment in favour of the Guernsey Trust Company as trustees of the J Trust in the full sum claimed, and paid over to the Guernsey Trust Company the remaining cash held by it as trustee of the Westley Trust, and assigned to it any future proceeds from the liquidation of West Dunes. With the assignment of the remaining assets of the Westley Trust to the Guernsey Trust as trustee of the J Trust, the Westley Trust terminated and Westley Holdings was liquidated.

31 On 11 th June, 2013, Mr Brakspear applied to the South African High Court to have the winding up of West Dunes declared void *ab initio* for fraud, this being some 4 $^{1}/_{2}$ years after the provisional order had been made. Essentially, there were three grounds for his application:-

(i) The Jersey Trust Company's claim to £500,000 was fictitious and based on a fraud and on manufactured/tampered evidence.

(ii) There had been no hearing on 23 rd December, 2008, when the provisional winding-up order was made. He asserted that the order of the court was a forgery and the result of a conspiracy involving counsel and court officials.

(iii) The payment of £500,000 by the Jersey Bank to FirstRand was a distribution from the J Trust to him.

32 After an eight day hearing, Kgomo J handed down the judgment of the High Court of South Africa. It is important and we therefore go into the judgment in some detail.

South African Judgment

33 . According to the judgment, the evidence of West Dunes's South African attorney, Fiona Scott, was that Mr Brakspear's knowledge of his functions and duties as a director of West Dunes and what the same entailed was *"disturbingly lacking"*. It was clear to her, and from

her discussions, that West Dunes was insolvent- *"It did not even have a bank account and there was an ostensible traces of a muddling of finances between the applicant [Mr Brakspear] personally, his wife's bank account and West Dunes Properties' finances.* It was also clear that the applicant's modus operandi was bound to lead to a failure on his part to comply with his statutory duties and obligations as a director, which prima facie appeared to have been either ignored or disregarded by the applicant."

34 The judgment recites that when it became clear to Fiona Scott that Mr Brakspear did not fully comprehend what a liquidation process entailed, she invited an independent liquidator, Attorney Graham Perry, to give Mr Brakspear advice and indeed he later became a third joint liquidator of West Dunes. Quoting from paragraphs 28 and 29 of the judgment:-

> ***"[28] According to Fiona Scott's affidavit further it was explained to [Mr Brakspear] that if the liquidation proceedings are allowed to proceed unopposed, the entire process could actually be used to the advantage of West Dunes Properties because if there was a liquidation, the liquidators would have the statutory powers to decide whether to uphold or cancel the sale to Zambrotti as transfer had not yet been effected.*** This translated to the fact that, since the Rupert Family was prepared to purchase the farm for amounts ranging between R25 million and R30 million, [Mr Brakspear] could be benefiting if the liquidator decides to cancel the R18 million deal and go for the more lucrative Rupert Family one .
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> ***[29] After [Mr Brakspear] had consulted with Graham Perry, all of them, including [Mr Brakspear] and Graham Perry ("Perry") brain-stormed the matter and arrived at a conclusion that, although an answering affidavit would still be filed in opposition to the winding-up application, at court counsel (Adv Alberts) would nevertheless consent to a provisional order being granted.*** This would be in keeping with counsel and Perry's advice and recommendation that the provisional liquidation or winding-up order would be allowed to be obtained subject to the proviso that they would not be agreeing to the cause as raised by [the Jersey Trust Company] .
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> ***[30] [Mr Brakspear] fully agreed with the advice and gave instructions that the plan be implemented on 23 December 2006 according to Fiona Scott as corroborated by Adv Alberts in a confirmatory affidavit."***

35 Moving on to paragraphs 46 and 47 of the judgment in relation to Mr Brakspear's allegations over the order made on 23 rd December, 2008:-

> ***"[46] [Mr Brakspear's] founding affidavit spans some forty-four pages.*** I will not mention all the allegations and accusation therein contained at this stage. If need be, material parts thereof would be dealt with when the evidence is analysed after viva voce evidence leading has been completed. Suffice to state that [Mr Brakspear] avers that his own attorney and his counsel never appeared in court on 23 December 2008 to oppose the application for the

granting of a provisional winding-up order of West Dunes Properties; the attorneys and/or counsel for the applicant at that application allegedly equally never appeared in court to move for that application; the court order being bandied around as being one that was granted by Balton J on that date is a forgery or the result of a conspiracy by the abovementioned officials or officers of the court aimed at depriving him, unlawfully and fraudulently, of his ***control and/or ownership over his company, i.e. West Dunes Properties 5 (Pty) Ltd*** .

[47] To add 'insult to injury' [Mr Brakspear's] affidavit(s) are also resplendent with allegations that there were no valid grounds for the liquidation proceedings to be launched in the first place; that resulted in the respondents herein correspondingly tendering evidence that according to them tended to show and prove that the liquidation process was justified."

36 Kgomo J said this about the applicant's case under cross-examination by counsel for the joint liquidators:-

"[83] throughout the cross-examination, [Mr Brakspear's] case has always been –

'I was the only person who had the authority to bind West Dunes to any contractual obligation. I had no knowledge of this (R7 000 000) loan, and West Dunes made no request for this loan, made no board resolution to authorise any borrowings or enter into a loan contract and absolutely did not sign any loan contract. These are the documents I have been asking to see for five years, plus proof of payment and bank statements depicting payment of this loan. To date I have received nothing. Zilch'

[84] After reading through all the papers filed in this application, [Mr Brakspear's] above standpoint, which was the high-water mark of his case, is too simplistic and does not appreciate the intricate mini-plots that collapsed into one another with 'domino-effect' until West Dunes investments was called upon to cough up the £500,000 paid on its behalf via various guarantees. There is no doubt, as counsel for the respondent (the joint liquidators) demonstrated to the court and proved to [Mr Brakspear] who in turn did not offer anything to contradict it, that [FirstRand] indeed was entitled to call up a guarantee of £500,000 (R7,000,000) on 5 July 2007 when West Dunes failed to carry out its obligations in terms of the mortgage bond granted to it. [The Jersey bank] was obliged to pay [FirstRand] because it stood surety for Westley Trust. Westley Trust had no money of its own to pay. Through the intricate relationships created by guarantees [the J Trust] became liable to 'carry the can'. After [the Jersey Bank] paid the R7,000,000 to [FirstRand], it called on its guarantee [the J trust] of which [Mr Brakspear] as well as his mother and sister among others were beneficiaries was the next entity to pay in terms of the terms of the applicable guarantees or security .

[85] [Mr Brakspear] had a problem with this as he averred that his liability to pay should be underpinned by a loan agreement to be valid. Adv Hartzenberg painstakingly took [Mr Brakspear] through the paper trail up to the point where the liability landed on West Dunes Investments. He demonstrated to him how it came about that the R7,000,000 be paid out of the distribution amounts in respect of [the J Trust], especially the distribution that stood to his credit therein. It is this amount, which was 7,000,000 in South African Rands, that was debited where it was on the books of [the Jersey Bank] to replace the same amount that [the Jersey bank] had paid to [First Rand] .

[86] This process was explained again and in more detail when Adv Woodlands SC cross-examined [Mr Brakspear] on behalf of the intervening party, being [the Jersey Trust Company] .

[87] Adv Woodlands SC continued to ask [Mr Brakspear] pertinent and pointed questions that clearly proved that [Mr Brakspear] was an untruthful as well as unreliable witness when he vehemently denied having anything to do with the decision to circumvent the sale of the farm to Zambrotti Investments by consenting to the winding-up of West Dunes Investments. It emerged that up to and until the second half of 2010, [Mr Brakspear] was a knowing and willing participant in the liquidation processes relating to West Dunes Investments."

37 Turning to Mr Brakspear's cross-examination by counsel for the Jersey Trust Company (as the intervening party) Kgomo J said this at paragraph 101:-

"[101] Counsel firstly allowed [Mr Brakspear] to respond to what his case appeared to be in the papers and in his evidence-in-chief. [Mr Brakspear] confirmed that it was his case that –

101.1 There was a fictitious loan by Westley Trust to West Dunes Investments in the amount of R7,000,000;

101.2 Mr Nico Botha ("Nico Botha") asserted a fraudulent claim against West Dunes Investment, which was the causa causans for its liquidation;

101.3 Nico Botha falsified his credentials when he deposed and averred that he was the chairperson of BOE Trust Limited which later changed names to Nedgroup Trust Limited;

101.4 Westley Trust did not have any power or authority to solicit for loans for itself or give out loans;

101.5 Several legal representatives on both sides of this matter inclusive of Leonard Katz, Ms Fiona Scott, Adv Sydney Alberts and Adv Manca for the Intervening Party hatched and participated in a conspiracy to defraud the High Court;

101.6 Nedgroup companies, among them Nedgroup Trust (Jersey) Ltd promoted a fraudulent agenda in the affairs that led to the liquidation of West Dunes Investments and had put in a fraudulent or false claim;

101.7 The application for the provisional winding-up of West Dunes Investments never served before a judge in the High Court in Durban on 23 December 2008, be it in open court or in chambers;

101.8 The matter was not dealt with by Balton J on 23 December 2008;

101.9 The matter was never on the motion court roll for 23 December 2008; and

101.10 Even if it can be found that it was on the roll and did serve before Balton J, there was no requisite certificate of urgency that would have qualified it to be dealt with in the Urgent Court among others."

38 All of the allegations against Mr Botha, chairman of one of the companies in the Nedgroup, were proved to be baseless; quoting from paragraph 122 of the judgment:-

> ***"[122] All of [Mr Brakspear's] allegations and accusations against Nico Botha were proven to be baseless.*** [Mr Brakspear] was occasioned to admit to his folly step by step during cross-examination. The empowering documents were there. He agreed that he had no reason whatsoever to doubt their authenticity and the veracity of their contents. He admitted that his founding affidavit was full of unsubstantiated allegations that have ultimately proven to be untrue and/or unfounded. He blamed himself for trusting the words of policemen without being shown any substantiation. He said when he asked the police to peruse their docket(s) they told him it was not allowed. He admitted further that Botha, the banks, legal representatives and all other people and/or institutions he accused in his papers are facing serious ***reputational damage as a result.*** He also admitted that the articles concerning the actors in this case written and appearing in Noseweek were based on incorrect, untruthful and contumacious stories that are not only baseless but also very damaging. Although he admitted having furnished the facts upon which the stories or articles were based, [Mr Brakspear] distanced himself from them."

39 "Noseweek" is a South African publication that had published an article in its 13 th February, 2014, edition, which according to Kgomo J contained all the adjectives, language, accusations and allegations of fraud fictitiousness and non-existent court orders that were crafted in the same style as the applicant's founding affidavit and heads of argument. The judgment contains a lengthy extract from that article.

40 Turning to Kgomo J's decisions in relation to Mr Brakspear's contention that there was a conspiracy between the Jersey Trust Company and the legal representatives to advance a fictitious claim by the Westley Trust, well knowing this claim to be false, he said this at

paragraphs 195 and 196:-

> ***"[195] In his evidence in this Court, [Mr Brakspear] did not dispute the Westley Trust structure by which West Dunes Properties had been funded.*** He equally did not challenge any of the documents or agreements comprising the structure .
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> ***[196] He was taken through all of them in great detail in the course of his cross-examination: As part of the funding structure, [the Jersey Bank] had put up the guarantee in favour of [FirstRand] on behalf of the Westley Trust.*** Under cross-examination [Mr Brakspear] accepted the authenticity and validity of the agreements setting up the structure, which culminated in the guarantee of £500,000 being given on behalf of the Westley Trust. When this guarantee was called up by [FirstRand], [the Jersey Bank], which was in possession of the money, paid out to [FirstRand] on 5 July 2007. This process triggered the following chain-reaction or 'domino-effect':
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> ***196.1 West Dunes Properties was released from its indebtedness to [FirstRand] in respect of the mortgage loan to the extent of £500,000 – approximately R7 million in South African currency*** .
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> ***196.1 At the instance of the Westley Trust, [the Jersey Bank] had issued the guarantee to [FirstRand] for the obligations of West Dunes Properties.*** The indemnity was given on 26 May 2004. A counter-indemnity was given by the Westley Trust to [the Jersey Bank] in respect of this facility. The Westley Trust thus became liable to the bank in the amount of £500,000. Of course, the bank held security for this indebtedness in the form of a charge over a cash deposit of £500,000 by [the J Trust]. These moneys were appropriated by [the Jersey bank] when payment was made by it in terms of the guarantee. This, correspondingly, gave [the J Trust] a right of recourse against the Westley Trust to the extent of [£]500,000 .
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> ***196.3 The Westley Trust, at whose instance [the Jersey Bank] had issued the guarantee, then had a right of recourse against West Dunes Properties as it was for the West Dunes Properties' indebtedness to [FirstRand] that the £500,000 guarantee had been given*** .
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> ***196.4 Consequently, on 5 July 2007 the Westley Trust stepped into the shoes of [FirstRand] as a loan creditor to the extent of £500,000 or R7 million in South African currency.*** In doing so, the Westley Trust was simply in law exercising its right of recourse against West Dunes Properties .
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> ***196.5 All the above-mentioned come down to is that the Westley Trust was substituted for [FirstRand] as the loan creditor of West Dunes Properties in the amount of £500,000 and this amount became due and payable by West Dunes Properties to the Westley Trust on 5 July 2007*** .
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> ***[197] It was this claim of £500,000 which the Westley Trust, represented by***

[the Jersey Trust Company], asserted as the petitioning creditor in the West Dunes Properties' winding-up application. I could not come across any evidence to suggest that this claim was promoted by [the Jersey Trust Company] or its legal representatives otherwise than in good faith. Katz stated in his evidence, which was not challenged, that he had relied on the advice of an experienced senior counsel and insolvency specialist, Adv Manca SC when he formulated the claim(s) which forms the basis and substance of Botha's founding affidavit .

[198] There are no compelling reasons why this Court should not accept the above as representing how things started and panned out. That thus, in my considered view, sounds a death-knell to [Mr Brakspear's] claims or allegations that fraud played a part. His claim further that everything is based on fictitious grounds also stands to be dismissed."

41 Kgomo J went on to say that Mr Brakspear's assertion that he had never at any stage adopted the standpoint that the J Trust was the creditor of West Dunes was contradicted by the documents before the court. He found that Mr Brakspear's testimony during the hearing in this respect was ***"dishonest"***. He went on to find that West Dunes was ***"obviously commercially insolvent"*** which ought not to be gainsaid. The liquidators in their report to the creditors had stated that one of the causes of the failure of West Dunes was that it had never produced sufficient income to meet its expenses, and that its liquidation was accordingly justified. Quoting from paragraphs [207] and [208]:-

"[207] From the totality of the evidence adduced in this Court as supported by the papers filed of record, it is not evident what [Mr Brakspear's] complaint is. Even if the Westley Trust was not the creditor of West Dunes Properties (which in my view cannot be the case as there is overwhelming evidence to show that it is indeed the creditor when the guarantee is anything to go by) it was commercially insolvent and thus liable to be wound-up. West Dunes Properties was still susceptible to be wound-up at the instance of [the J Trust] if it had transpired, as [Mr Brakspear] alleged, that it was in fact the creditor in connection with the guarantee. Nevertheless, there is nothing to suggest that [the Jersey Trust Company] and the legal representatives involved herein knowingly asserted a false claim against West Dunes Properties. It is my considered view also that in any event, the facts, circumstances and probabilities herein points to it being highly improbable that it would have done so: there is no benefit to be derived from such a course. Furthermore, the trustee of [the J Trust] was a company in the Nedgroup Group of companies which could in any event have wound up West Dunes Properties if [Mr Brakspear's] version of events was correct. As indicated above, he was decidedly not correct. As was put to [Mr Brakspear] on several occasions during the course of his cross-examination, there is simply no evidence of fraud in relation to the Westley Trust's claim and [Mr Brakspear] could produce none .

[208] It is my considered view and finding that West Dunes Properties was prima facie, properly wound-up at the instance of the Westley Trust

represented by Nedgroup Trust. I cannot find that the claim was not asserted in good faith. I could further find no evidence of [the Jersey Trust Company] advancing any fictitious claim. Neither can I make a finding that its conduct was irregular or fraudulent."

42 Kgomo J dismissed the allegation that the court order of 23 rd December, 2008, was fabricated and in terms of Mr Brakspear's credibility, he referred to his extreme bias and hostility and said this at paragraph [220]:-

"[220] After evaluating all relevant aspects relevant to this hearing, as a general observation, [Mr Brakspear] was –

220.1 evasive and argumentative;

220.2 blatantly biased (for which he should not be penalised unless it was extreme);

220.3 often even obtuse; and

220.4 generally made a poor impression in this Court as a witness."

43 In his conclusion, Kgomo J said that the evidence overwhelmingly established that the winding up order was properly issued and that he was " ***persuaded and convinced that [Mr Brakspear] was unable to point to any documentation which supported his allegations of fraud on the part of …… the Nedgroup Group of companies."*** As to the issue of an alleged distribution of £500,000 from the J Trust to Mr Brakspear, Kgomo J said this at paragraph 241:-

"[241] What this 'distribution' document and the statement of account mentioned above were nothing more than a confirmation that his interest as a beneficiary of [the J Trust] had been debited with the amount of £500,000, being the amount which [the J Trust] had in effect been obliged to forfeit as a result of the disastrous investment he was responsible for at West Dunes Properties, which resulted in the foreclosure by [FirstRand] of the bond. [Mr Brakspear] would have none of it, irrespective of the fact that the 'distribution' document was not a bank statement or actual or physical distribution of assets at [the J Trust]. Despite him being taken laboriously through the documentary evidence indicating the chain process that culminated in the Westley Trust acquiring a right of recourse against West Dunes as a result of having to perform in terms of a guarantee which it furnished to [FirstRand], [Mr Brakspear's] final answer was that this was a genuine distribution made in his favour and that for that reason the Westley Trust had no claim against West Dunes Properties .

[242] The improbability of his answer came about from the fact that when each and every step or procedure was explained to him, he agreed with it every time. He would come up with this answer of his only at the end when it

was put to him that his agreement with all the procedural steps pointed to him denying the undeniable just for the sake of denying .

[243] It is my view and finding that indeed [Mr Brakspear] agreed with the scenarios he was taken through by counsel, thus making his final denial or answer to stick out like a sore thumb, it (answer) thus pointing to him as an untruthful and unreliable litigant who is not prepared to admit to the obvious."

44 In Kgomo J's view and finding, Mr Brakspear was "a mendacious witness whose evidence was resplendent or shot through with contradictions and inherent improbabilities" (paragraph 251) and that he was "to some degree actuated by extreme malice towards …. [the Jersey Trust Company]" (paragraph 252).

45 Mr Brakspear's application to the High Court for leave to appeal this judgment was dismissed on the 16 th September, 2015. He subsequently applied to the South African Court of Appeal on 16 th October, 2015, for leave to appeal. That application was dismissed on the 8 th December, 2015, "on the grounds that there is no reasonable prospect of success in an appeal and there is no other compelling reason why an appeal should be heard".

Procedural History

46 These proceedings were commenced by representation dated 11 th September, 2015, and a summons to strike out the representation was issued by the Jersey Trust Company on 26 th November, 2015. On 11 th January, 2016, the Master recused himself from presiding over that strike out application and the matter was referred to the Royal Court. On 8 th March, 2016, the Royal Court adjourned the matter so that the representors could seek legal advice and reformulate their claim which had not been properly pleaded. The Court directed that the Judicial Greffier liaise with the Bâtonnier in order to appoint an advocate to represent the representors, and in accordance with that order, Viberts were appointed by the Bâtonnier.

47 On 3 rd April 2017, the Court was informed that the representors were no longer represented by a lawyer, and a reformulated claim had not been prepared or filed for the Court. The representors did not wish to be represented by a lawyer under the Legal Aid scheme. The Court ordered that an *amicus curiae* be appointed for the sole purpose of drafting an amended representation setting out the representors' claim in proper pleaded format. Advocate James Sheedy was appointed *amicus curiae* and on 5 th July, 2017, the Court directed that the *amicus* produce an amended pleading (Order of Justice) that excluded any matters which should not be in a pleading, but one that is pleaded without any regard to Rule 4 of the Law Society Code of Conduct, ignores any deficiencies in the evidence and any flaws that may exist as a matter of law or prescription. The representors

were also ordered to produce an affidavit structured in such a way that it could be read in conjunction with the Order of Justice.

48 Rule 4 of the Law Society Code of Conduct provides that members should not do anything which could reasonably be seen by the public to undermine honesty, integrity and independence. Rule 4.2 provides that members should not draft any statement of case containing any allegation of fraud unless the member has clear instructions to allege fraud " ***and has reasonable credible material which establishes an arguable case of fraud"***.

49 The representation was accordingly reformulated as an Order of Justice and filed on 20 th November, 2017. On 5 th January, 2018, the Court appointed Advocate Dickinson as *amicus curiae* to assist the Court in connection with the hearing of the Jersey Trust Company's application to strike out the whole of the Order of Justice, the role of the *amicus* being limited to analysing the (now) plaintiffs' case and providing the views of the *amicus* as to how the plaintiffs might best put their case (but without cooperative assistance being provided on an ongoing basis).

50 On 8 th March, 2018, the Court, on the application of the plaintiffs, made an order under Article 6 of the Bankers' Books Evidence (Jersey) Law 1986 that the Jersey Bank (now a branch) should disclose entries in its Bankers' Book relating to the accounts of the Jersey Trust Company, as trustee of the Westley Trust, such documents to be used for the sole purpose of these proceedings, with leave of the Court being required for the documents to be used for any other purpose.

51 The strike out application was heard on 23 rd, 24 th April and 2 nd May 2018.

52 The Court had affidavits from Mrs Brakspear, Christopher John Roscouet, a director of the Jersey Trust Company, and Leonard Katz, the South African attorney who acted for the Jersey Trust Company in the winding-up proceedings of West Dunes in South Africa. Mrs Brakspear, who is now 83, attended the hearing. She and Mrs Bowler now reside in England and Mr Brakspear continues to reside in South Africa. She informed us that Mr Brakspear had drafted her affidavits, her skeleton argument and the written submissions she read to us at the hearing. Following the hearing the Court requested further written submissions on the issue of the Bankers' Book evidence.

Relevant legal principles

Strike out

53 Pursuant to Royal Court Rules 2004 6/13 the Court may at any time strike out a claim (or part thereof) if (so far as relevant):

(i) it discloses no reasonable cause of action (Rule 6/13(1)(a)) — no evidence is admissible under this head. (Rule 6/13(2)).

(ii) it is scandalous, frivolous or vexatious (Rule 6/13(1)(b)); and

(iii) it is otherwise an abuse of process (Rule 6/13(1)(d)).

54 The jurisdiction is broad; however, an action should only be struck out in ***"plain and obvious cases"*** (*Lapidus v Le Blancq* [2013] 2 JLR 308). For an action to be struck out as an abuse of process it must be ***"obviously and incontestably bad"*** (*Holmes v Linguard* [2015] JRC 226).

55 Although the circumstances justifying strike out are not circumscribed, specific instances include the expiry of a limitation period. The Court should strike out the claim where the limitation period in respect of it has clearly expired. In *Re Wooley* [1991] JLR Note 11 C the Court explained that the remedy should be barred even though the Plaintiff's cause of action has not been extinguished. It would be a waste of time to permit the matter to proceed. In such cases the defendant should apply to strike out the claim on the ground that it is frivolous and vexatious and an abuse of the Court. This approach was followed in *Classic Herd Limited v Jersey Milk Marketing Board* (2014) 2 JLR Note 4.

56 Even if an action is not struck out in its entirety, certain claims or sections of a pleading may be struck out. However, the defendant must identify the sections of the pleading to strike out (*Lapidus v Le Blancq*).

Prescription

57 Article 57 of the Trusts (Jersey) Law 1984 provides as follows:-

"a. no period of limitation or prescription shall apply to an action brought against a trustee in respect of any fraud to which the trustee was a party or to which it was privy; and

b. where the foregoing does not apply then the period within which an action founded in breach of trust may be brought against a trustee by a beneficiary is three years from:

i. the date of delivery of the final accounts; or

ii. the date on which the beneficiary first had knowledge of the breach of trust

whichever is earlier."

58 Article 2(1) of the Law Reform (Miscellaneous Provisions) (Jersey) Law 1960 provides that

the period within which actions founded on tort may be brought is extended to 3 years from the date on which the cause of action accrued.

Pleading fraud

59 Any pleading alleging fraud has to set out the facts, matters and circumstances relied upon to show that the party charged had or was actuated by a fraudulent intention (*Makarenko v CIS Emerging Growth Limited* [2001] JLR 348). The acts alleged to be fraudulent have to be stated fully and precisely with full particulars.

60 The plaintiffs seek to rely on the maxim *culpa lata dolo aequiparatur* as part of a contention that gross negligence equates to fraud. That maxim is not recognised in Jersey law or English law – (*Armitage v Nurse* [1998] Ch 241, at p. 254; *Spread Trustee Co Ltd v Hutcheson* [2012] 2 AC 194, at p. 200.) Negligence, however gross, does not amount to fraud.

61 In the case of *In the matter of Il* [2018] JRC 031, the Royal Court upheld the decision of the Master (*In the matter of Il* [2016] JRC 116) striking out particulars alleging fraud applying the principles as to pleading of fraud contained in the opinion of Lord Millett in *Three Rivers DC v Bank of England (No 3)* [2003] 2 AC 1 at paragraphs 184–190, which, as they are directly relevant to the case before us, we set out in full:-

> ***"184 It is well established that fraud or dishonesty (and the same must go for the present tort) must be distinctly alleged and as distinctly proved; that it must be sufficiently particularised; and that it is not sufficiently particularised if the facts pleaded are consistent with innocence: see Kerr on Fraud and Mistake 7th ed (1952), p 644;*** *Davy v Garrett* (1878) 7 Ch D 473, 489; *Bullivant v Attorney General for Victoria* [1901] AC 196; *Armitage v Nurse* [1988] Ch 241, 256. ***This means that a plaintiff who alleges dishonesty must plead the facts, matters and circumstances relied on to show that the defendant was dishonest and not merely negligent, and that facts, matters and circumstances which are consistent with negligence do not do so***.
>
> ***185. It is important to appreciate that there are two principles in play. The first is a matter of pleading. The function of pleadings is to give the party opposite sufficient notice of the case which is being made against him. If the pleader means 'dishonestly' or 'fraudulently', it may not be enough to say 'wilfully' or 'recklessly'. Such language is equivocal. A similar requirement applies, in my opinion, in a case like the present, but the requirement is satisfied by the present pleadings. It is perfectly clear that the depositors are alleging an intentional tort*** .
>
> ***186. The second principle, which is quite distinct, is that an allegation of fraud or dishonesty must be sufficiently particularised, and that particulars of facts which are consistent with honesty are not sufficient. This is only***

partly a matter of pleading. It is also a matter of substance. As I have said, the defendant is entitled to know the case he has to meet. But since dishonesty is usually a matter of inference from primary facts, this involves knowing not only that he is alleged to have acted dishonestly, but also the primary facts which will be relied upon at trial to justify the inference. At trial the court will not normally allow proof of primary facts which have not been pleaded, and will not do so in a case of fraud. It is not open to the court to infer dishonesty from facts which have not been pleaded, or from facts which have been pleaded but are consistent with honesty. There must be some fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved .

187. In *Davy v Garrett* 7 Ch D 473, 4789 ***Thesiger LJ in a well known and frequently cited passage stated:***

'In the present case facts are alleged from which fraud might be inferred, but they are consistent with innocence. They were innocent acts in themselves, and it is not to be presumed that they were done with fraudulent intent.'

188 In *Armitage v Nurse* [1998] Ch 241 ***the plaintiff needed to prove that trustees had been guilty of fraudulent breach of trust.*** She pleaded that they had acted 'in reckless and wilful breach of trust'. This was equivocal. It did not make it clear that what was alleged was a dishonest breach of trust. But this was not fatal. If the particulars had not been consistent with honesty, it would not have mattered. Indeed, leave to amend would almost certainly ***have been given as a matter of course, for such an amendment would have been a technical one; it would merely have clarified the pleading without allowing new material to be introduced.*** But the Court of Appeal struck out the allegation because the facts pleaded in support were consistent with honest incompetence: if proved, they would have supported a finding of negligence, even of gross negligence, but not of fraud. Amending the pleadings by substituting an unequivocal allegation of dishonesty without giving further particulars would not have cured the defect. The defendants would still not have known why they were charged with dishonesty rather than with honest incompetence .

189 It is not, therefore, correct to say that if there is no specific allegation of dishonesty it is not open to the court to make a finding of dishonesty if the facts pleaded are consistent with honesty. If the particulars of dishonesty are insufficient, the defect cannot be cured by an unequivocal allegation of dishonesty. Such an allegation is effectively an unparticularized allegation of fraud. If the observations of Buxton LJ in *Taylor v Midland Bank Trust Co Ltd* (unreported) 21 July 1999 ***are to the contrary, I am unable to accept them*** .

190. In the present case the depositors (save in one respect with which I shall deal later) make the allegations necessary to establish the tort, but the particulars pleaded in support are consistent with mere negligence. In

my opinion, even if the depositors succeeded at the trial in establishing all the facts pleaded, it would not be open to court to draw the inferences necessary to find that the essential elements of the tort had been proved."

62 It appears that the Courts in the case of *In the matter of Il* were not made aware of the more recent authority of *JSC Bank of Moscow v Kekhman* [2015] EWHC 3073 (Comm), a High Court decision which articulates the test in *Three Rivers* in somewhat clearer terms. Quoting from paragraph 20 of the judgment of Flaux J:-

> ***"I agree with Mr Gourgey QC that this overstates what is required for a valid plea of fraud.*** The claimant does not have to plead primary facts which are only consistent with dishonesty. The correct test is whether or not, on the basis of the primary facts pleaded, an inference of dishonesty is more likely than one of innocence or negligence. As Lord Millett put it, there must be some fact "which tilts the balance and justifies an inference of dishonesty". At the interlocutory stage, when the court is considering whether the plea of fraud is a proper one or whether to strike it out, the court is not concerned with whether the evidence at trial will or will not establish fraud but only with ***whether facts are pleaded which would justify the plea of fraud.*** If the plea is justified, then the case must go forward to trial and assessment of whether the evidence justifies the inference is a matter for the trial judge."

63 That test had been adopted in two earlier first instance judgements in *Abbar v Saudi Econimic & Development Company Real Estate* [2010] EWHC 2132 (Ch) and *Foley v Lord Ashcroft* [2012] EWHC 1710 QB and it is the test we will apply.

***Res Judicata*, cause of action estoppel, issue estoppel and abuse of process**

64 The law in Jersey on these related principles is set out in the Master's judgment in *Dubai Islamic Bank v Ridley* [2016] JRC 102 at paragraphs 108–109, which was approved on appeal. At first instance and on appeal the Court applied the principles set out in the judgment of Lord Sumption giving the judgment of the Supreme Court in *Virgin Atlantic Airlines Limited v Zodiac Seats (UK Limited)* [2014] AC 160, in particular at paragraphs 17 – 25. Quoting from paragraph 17 of the judgment:-

> ***"17 Res judicata is a portmanteau term which is used to describe a number of different legal principles with different juridical origins.*** As with other such expressions, the label tends to distract attention from the contents of the bottle. The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is 'cause of action estoppel'. It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings. Secondly, there is the principle, which is not easily described as a species of estoppel, that where the claimant succeeded in the first action and does not challenge the outcome, he may not

bring a second action on the same cause of action, for example to recover further damages: see *Conquer v Boot* [1928] 2 KB 336. ***Third, there is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given on it, and the claimant's sole right as being a right on the judgment.*** Although this produces the same effect as the second principle, it is in reality a substantive rule about the legal effect of an English judgment, which is regarded as 'of a higher nature' and therefore as superseding the underlying cause of action: see *King v Hoare* (1844) 13 M & W 494, 504 ***(Parke B).*** At common law, it did not apply to foreign judgments, although every other principle of res judicata does. However, a corresponding rule has applied by statute to foreign judgments since 1982: see section 34 of the Civil Jurisdiction and Judgments Aft 1982. Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, ***some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties:*** *Duchess of Kingston's* ***Case*** (1776) 20 State Tr 355. ***'Issue estoppel' was the expression devised to describe this principle by Higgins J in*** *Hoysted v Federal Commissioner of Taxation* (1921) 29 CLR 537, 561 ***and adopted by Diplock LJ in*** *Thoday v Thoday* [1964] P 181, 197–198. ***Fifth, there is the principle first formulated by Wigram V-C in*** *Henderson v Henderson* (1843) 3 Hare 100, 115, ***which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones.*** Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger."

65 We would summarise the position as follows:-

(i) *Res judicata* comprises a number of related principles, in particular those of cause of action and issue estoppel. These principles are underlain by the more general procedural rule against abusive proceedings. However, *res judicata* and abuse of process are distinct concepts. *Res judicata* is a rule of substantive law. Abuse of process is a concept which informs the court's procedural powers.

(ii) Cause of action estoppel: This is the principle that once a cause of action has been held to exist (or not) that outcome may not be challenged by either party in subsequent proceedings.

(iii) Issue estoppel: This is the principle that even where the cause of action is not the same in the later action as in the earlier one, an issue which is common to both was decided in the earlier case and is binding on the parties. A party is precluded from contending the contrary of any precise point which having been distinctly put in issue has been solemnly and with certainty determined against him in a judicial decision that is final. Issue estoppel may apply to the determination of preliminary issues or interlocutory matters decided in the same action between the parties and an interlocutory decision may determine some question so as to make it *res judicata*,

whether that be through admission or a determinative finding.

(iv) The *Henderson* principle: this precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones.

(v) Abuse of process: There is also the more general procedural rule against abusive proceedings. Unlike cause of action estoppel and issue estoppel, abuse of process does not require the parties to be the same in the original proceedings and the current proceedings.

66 It is clear that a decision of a foreign court is capable of constituting an estoppel by res judicata (*A v B (Family)* [2015] JRC 262).

67 Cause of action estoppel and issue estoppel only operate on the parties to the original proceedings or their "privies". Privies may be privies in blood (e.g. heirs), privies in law (e.g. bankrupt and trustee in bankruptcy) or privies in estate or interest – (*Carl Zeiss Stiftung v Rayner & Keeler Ltd and Others No 2* [1967] 1 AC 853). As stated in *Halsbury's Laws of England*, Volume 12A at paragraph 1634:-

> ***"The question seems to be determined by an examination of the factual identity of interests of the parties and the fairness of binding them by a decision in which they were not represented."***

68 In *House of Spring Gardens Limited v Waite* [1991] QB 241 one of the defendants was held by the English Court of Appeal to have been estopped from alleging that the foreign judgment had been obtained by fraud even though he did not join in the foreign proceedings to set aside the original foreign judgment; he was well aware of the proceedings and was privy to them. The Court of Appeal also held that even if the judgment did not create an estoppel, it was an abuse of process and contrary to justice and public policy for the issue of fraud to be litigated in the English court after the issue had been tried and decided by the foreign court.

Abuse of process

69 The court has an inherent jurisdiction to prevent abuse of its process. It is put this way in *Halsbury's Laws of England*, Volume 12A at paragraph 1651:-

> ***"The law discourages re-litigation of the same issues except by means of appeal.*** It is not in the interests of justice that there should be a re-trial of a case which has already been decided by another court, leading to the possibility of conflicting judicial decisions, or that there should be collateral challenges to judicial decisions; there is a danger, not only of unfairness to the ***parties concerned, but also of bringing the administration of justice into disrepute."***

70 Even if a decision does not amount to an issue estoppel, it may be an abuse of process for a party to seek to rely on an argument or issue which has already been resolved against it or other parties by the Court. The question in every case is whether, applying a broad merits-based approach, a party's conduct is in all the circumstances an abuse of process, judged in the light of the particular facts of the case and without rigidity. An action or defence by a party which was unsuccessful at an earlier hearing (where the party was given a proper opportunity of being heard) may constitute an abuse of process where it amounts to a collateral attack on the earlier decision, (*Stephenson v Garnett* [1898] 1 QB 677 CA), especially if there are aggravating features such as ulterior purpose, prejudicial delay or the absence of fresh evidence.

71 There is no hard and fast rule; the Court should adopt a broad merits-based approach which takes account of the public and private interests involved and takes account of all the facts of the case (*Johnson v Gore Wood* [2002] 2 AC 1, at 31D-E). The crucial question is whether a party is abusing the process of the Court.

72 The question for the Court is whether rearguing the issue would be manifestly unfair to the other party or bring the administration of justice into disrepute – (*Kotonou v Nat West* [2015] EWCA 1106, at paragraphs 42 and 45).

Estoppel by conduct

73 Finally, a party's conduct in legal proceedings may estop him from adopting an inconsistent position in later proceedings – (Spencer Bower and Handley on Res Judicata, Fourth edition, at paragraph 9.46)

74 In *Re Lart* [1896] 2 Ch 788 the beneficiary's husband was aware of proceedings to determine the construction of a will, to which he should have been party, and he benefited from a distribution of a share following the decision; it was held that he was estopped from contending for a different construction of the same language in relation to a different share.

Sham Trusts

75 In order to establish that a deed of trust is in fact a sham transaction a party must establish that:

(i) Both the settlor and the trustee had the common intention that the true position should be otherwise than set out in the trust deed; and

(ii) Both parties must have an intention to mislead third parties – (*Re Esteem* [2003] JLR 188, at paragraphs 53, 54 and 57–59; approved in *MacKinnon v Regent*

Trust Company Limited [2005] JLR 198 at paragraphs 14 and 18.)

Re-litigation of issues

76 A key consideration for the Court is the extent to which issues determined finally in the South African proceedings are being re-litigated in these proceedings.

77 This is not a case in which it is sought by any party to enforce the South African judgment here, as was the case in the *House of Spring Gardens* case, where it was common ground that in proceedings in England to enforce a foreign judgment as a debt at common law, the defendant can set up a defence that the judgment was obtained by fraud.

78 We are concerned with the winding up of a South African company, West Dunes, whose only asset was a farm situated in South Africa, ordered by the High Court of South Africa. The South African liquidators appointed by that court finalised the liquidation of the company in May 2010, when the liquidators' liquidation and distribution account was approved. Some three years later, Mr Brakspear sought to challenge the winding up of West Dunes on the ground that the claim made by the Jersey Trust Company was fictitious, and part of a conspiracy between it and its legal representatives to advance that fictitious claim, knowing that it was false. The following issues were determined finally by the South African Court:-

(i) West Dunes was insolvent and the order for its winding up was properly made at the instance of the Jersey Trust Company acting in good faith;

(ii) No false or fictitious claim was asserted by the Jersey Trust Company;

(iii) There was no fraudulent conduct on the part of the Jersey Trust Company or its advisors;

(iv) The claim of the Jersey Trust Company in the liquidation was good in law, in particular notwithstanding Mr Brakspear's assertion that the sum of £500,000, which formed the claim of the Jersey Trust Company, had been distributed to him out of the J Trust.

79 In our view, issue estoppel applies to each of these issues finally determined by the South African court and furthermore, it would be an abuse of process for those issues to be re-litigated here.

80 In addition, in those proceedings Mr Brakspear did not challenge the trust structure of the Westley Trust and the way the purchase of the farm had been financed and in evidence he accepted the authenticity and validity of the security documentation.

81 That estoppel applies not only to Mr Brakspear, who initiated and was a party to the South African proceedings, but to Mrs Brakspear and Mrs Bowler, as his “privies”. They had a privity of interest in the winding-up of West Dunes:-

> (i) as the two named beneficiaries of the Westley Trust, which indirectly owned West Dunes, and which was established for the purpose of enabling them to migrate to South Africa.
>
> (ii) As beneficiaries of the J Trust, which provided security for the purchase of the farm.

82 They were closely involved in the liquidation process, as evidenced by their support of Mr Brakspear's intervention on the 9 th February, 2009, to support the termination of the sale to Zambrotti and by Mr Brakspear's letter to the Master of the South African court of 17 th November, 2009, in which he confirmed their involvement and the existence of powers of attorney from them in his favour. Furthermore, all three plaintiffs confirm in paragraph 4 of the Order of Justice that Mr Brakspear had informed Mrs Brakspear and Mrs Bowler of the purpose of the structure in 2004 and that he “kept them fully informed of all matters over the next five years”.

83 We do not know whether, as beneficiaries, they could have intervened in the South African proceedings to formally support Mr Brakspear, but they certainly had the ability to invoke this Court's supervisory jurisdiction over the Jersey Trust Company, if they thought that it was acting in South Africa in a fraudulent manner.

84 In our judgment, their interest is sufficient to make it just that they are bound by the decision of the South African Court.

Strike out

85 We now turn to the Order of Justice, which after a number of introductory paragraphs sets out the claims of the plaintiffs under headings which we take in turn.

“The Trustee's negligence in failing to amend the 2006 guarantee”

(Paragraphs 34 to 43)

86 The plaintiffs allege that the Jersey Trust Company failed to amend the wording of the 2006 guarantee issued by the Jersey Bank to FirstRand to meet with FirstRand's international requirements. The allegation stems from the letter of demand of 16 th March, 2007, sent by FirstRand to Mr Brakspear, which cites, as one would expect, the failure to meet the monthly instalments on the loan, but which also adds this:-

> *"6 A guarantee dated 9 October 2006 was furnished to us, however, it did not comply with Firstrand International's prescribed format.* [The Jersey Bank] was requested to have the guarantee altered as per Firstrand International's requirements. The principal debtor [West Dunes] has omitted to furnish us with the requested guarantee."

87 In the representation of 11 th September, 2015, Mrs Brakspear confirms that she and Mr Brakspear were paying the monthly mortgage instalments on behalf of West Dunes up until December, 2007 and in an e-mail of 12 th February, 2008, Mr Brakspear confirmed to the Jersey Bank that he had now completely run out of money and had stopped paying the monthly mortgage payments agreed with FirstRand the previous year.

88 We have seen no written evidence that the Jersey Trust Company was made aware of any need to amend the guarantee issued by the Jersey Bank and indeed, the evidence showed that Mr Brakspear expressly excluded the Jersey Trust Company from the negotiations over the guarantee. Furthermore, he specifically requested that the wording of the guarantee be the same as the original guarantee issued in 2004.

89 As a consequence of this alleged negligence, the plaintiffs claim the amount of the mortgage payments paid by "the Brakspear family" in the sum of £73,857, together with out-of-pocket expenses for improvements and operating costs for the farm in the amount of £214,285.

90 The South African court found that West Dunes was insolvent and unable to meet its bond repayments and it was its insolvency that was causative of FirstRand demanding repayment of the loan and having recourse to the guarantee (see in particular paragraph 84 of the judgment cited above), notwithstanding its apparent lack of conformity to FirstRand's international standards, whatever that meant.

91 Leaving all that aside, we agree with the contention of Advocate Taylor, on behalf of the Jersey Trust Company and the advice of the *amicus* that this claim is prescribed. Mr Brakspear was clearly aware of the issue when it arose, as was Mrs Brakspear, who was paying the loan interest with him. Furthermore, she and Mrs Bowler refer to FirstRand calling in the loan in section 5.2 of their representation of 19 th October, 2011. In addition, Mrs Brakspear, in her e-mail of 8 th June, 2009, states that she held a power of attorney from Mrs Bowler to act on her behalf in relation to the Westley Trust and Mr Brakspear confirmed in his letter of 17 th November 2009 to the Master of the South African court that he held powers of attorney on behalf of both his mother and his sister. Fraud is not alleged and it is clear that all of the plaintiffs had the relevant knowledge, by at least 19 th October, 2011, which is more than three years from the date when these proceedings were first issued.

92 Because this claim is prescribed, it would be an abuse of process to allow it to proceed. It will, therefore, be struck out.

"The Jersey Trustee's gross negligence – breach of confidence"

(Paragraphs 44–50)

93 The allegation here is that on 30 th November, 2007, when Mr Brakspear was negotiating the sale of the farm to a prospective purchaser for the sum of ZAR37.75 million, the managing director of the Jersey Trust Company sent an e-mail which was inadvertently copied to the purchaser's South African lawyer, disclosing the financial position of the Westley Trust. The managing director apologised, but it is alleged that as a result of this, the purchaser withdrew, causing West Dunes to suffer a loss of the difference between that sum and the sum the farm was eventually sold for.

94 An e-mail we have seen of 30 th November, 2007, apparently sent by the chairman of the group of companies of which the prospective purchaser formed part, casts serious doubt as to whether the Jersey Trust Company's e-mail was causative of the purchaser withdrawing. That e-mail alleges that the transaction, under which a deposit had been paid, was fraudulent, because the purchaser had not been informed that the property was occupied by vagrants. The e-mail talks in terms of the purchaser acquiring a conviction against both the agent and the seller and seeking to have the client (which we presume is Mr Brakspear) and his agent arrested in due course.

95 Advocate Taylor acknowledged that for the purpose of this application it should be assumed that the sending of this e-mail by the managing director of the Jersey Trust Company was grossly negligent, and that the Jersey Trust Company was not therefore protected by the release from liability contained within clause 19 of the trust deed of the Westley Trust. Gross negligence does not equate to fraud (see paragraph 60 above) and he again contended, and the *amicus* agreed, that this claim is prescribed. The e-mail was addressed to Mr Brakspear and therefore he was aware of it at the time. Furthermore it is specifically covered in section 5.1 of the representation brought by Mrs Brakspear and Mrs Bowler of 12 th October, 2011, and therefore it is clear that all three plaintiffs were aware of this breach of trust, at least from that date, which is more than three years before these proceedings were issued.

96 We agree, therefore, that this claim is prescribed and it would be an abuse of process to allow it to proceed. It will, therefore, be struck out.

"Dishonest breach of fiduciary duty and conspiracy to injure"

(Paragraphs 54–61)

97 The plaintiffs allege that by letter dated 8 th December, 2008, addressed to the South African counsel to West Dunes, the South African lawyers acting for the Jersey Trust Company, the Guernsey Trust Company, Westley Holdings, the Westley Trust and the J Trust set out terms upon which they would agree to a sale if an offer was put forward for the purchase of the shares in West Dunes namely, *inter alia*, that they should receive ZAR1 million and that Mrs Brakspear and Mr Brakspear would "unequivocally waive and abandon any claims which they allege they are entitled to against any of my clients. This waiver and abandonment must also extend to the shareholders of [the Guernsey Trust Company] and [the Jersey Trust Company]. In addition, both …. must confirm that they will not receive any further financial benefits from the two trusts referred to above."

98 The farm at that stage had already been sold in public auction to Zambrotti, but the sale had not been completed because of problems with squatters. The letter does not identify who might make this offer for the shares in West Dunes or the amount to be offered, although the plaintiffs plead that the prospective purchaser was Applemint which was offering ZAR25 million, the sum it eventually paid to the liquidators for the farm. The letter makes it clear that the Jersey Trust Company would only countenance a sale of the shares if Zambrotti walked away from the purchase without any claims.

99 Mrs Brakspear and Mr Brakspear say they refused to accept what the Order of Justice describes as "unlawful and extortionate demands indicating that West Dunes would sue for the loss caused" and the Order of Justice alleges that immediately thereafter, the Jersey Trust Company commenced legal proceedings "to place West Dunes into a contrived liquidation for the non-payment of fictitious debts said to be owed to the Jersey Trustee". The Order of Justice goes on to aver that "the contrived liquidation was done solely for the purpose of covering up the breaches of duty by the Jersey Trustee and to prevent West Dunes from suing the Jersey Trustee for losses and damages."

100 Under paragraph 61 of the Order of Justice the loss and damages claimed relate to the loss suffered by West Dunes as a result of the purchaser for ZAR37.75 million withdrawing following the breach of confidence described in the preceding section.

101 In the view of the *amicus*, it was at least arguable that a trustee deliberately taking proceedings to prevent any claim against itself in order to protect its own interests would amount to dishonesty sufficient to categorize the alleged breach as a fraudulent breach of trust, such that no prescription period would govern the claim pursuant to Article 57(1)(a) of the Trusts Law. But for the allegation of fraud this claim would now be prescribed, because once again it was specifically referred to in sections 5.3 and 5.4 of the representation of 12 th October 2011.

102 He submitted that *Res judicata* could not apply, as no claim for breach of trust was brought before the South African court and if the Jersey Trust Company brought the winding-up proceedings because the conditions it demanded had not been met, it is at least arguable, although he put it no higher than that, that this points to a deliberate

intention by the Jersey Trust Company to protect its own interests, which would arguably amount to a fraudulent breach of trust. The *amicus* considered that the point may be a marginal one, and would need careful consideration.

103 In the view of the Court, the allegations that this was a ***"contrived"***, meaning false, liquidation for the non-payment of ***"fictitious"*** debts cannot stand in the light of the judgment of the South African court, which found that the debt claimed by the Jersey Trust Company was not fictitious, the claim by the Jersey Trust Company was made in good faith and West Dunes was properly wound up at its instance. These issues cannot be re-litigated for the reasons set out above. That entails the Court striking out the offending words in Paragraphs 60 and 61 of the Order of Justice, so that the last two lines of paragraph 60 will now read as follows:-

> *"….to place West Dunes into liquidation for the payment of debts owed to the Jersey Trustee."*

Paragraph 61 will now read:-

> *"It is averred that the liquidation was done solely for the purpose of covering up the breaches of duty by the Jersey Trustee …."*

104 What the plaintiffs are then left with is an assertion that the Jersey Trust Company placed an insolvent company it indirectly wholly owned, and against whom it had a valid claim, into liquidation in order to cover up breaches of trust and to prevent the company suing it.

105 We have given this careful consideration, particularly in the light of the advice of the *amicus* that this claim might be arguable, albeit marginally. We make a number of points on the facts alleged:-

> (i) We have not been shown any communication to the Jersey Trust Company in which it is informed that West Dunes intended to sue it for the loss of the ZAR37.75 million sale. Consistent with this we note that in paragraph 59 of the Order of Justice, the plaintiffs claim only that they instructed West Dunes's attorney to inform the Jersey Trust Company of this claim, not that the Jersey Trust Company was informed.
>
> (ii) The letter of the 8 th December, 2008, makes it clear why the Jersey Trust Company would be taking action against West Dunes, namely to secure its claim for £500,000 for the benefit of the trust and to ensure that there was no dissipation of the proceeds of sale of the farm, a process still at that stage controlled by Mr Brakspear. It is worth setting out the last paragraph in full:-
>
> *"Finally, I did indicate to you when we spoke on Friday afternoon, that I was with instructions to issue a letter of demand to West Dunes Properties on behalf of [the Jersey Trust Company] to claim repayment of the full residue on the proceeds of the current sale in order to reimburse [the Jersey Trust Company] a portion of the monies*

drawn down on the guarantee which was issued in favour of [FirstRand] for the liabilities of West Dunes in the sum of GBP500,000, and which was drawn down in July 2007. At the same time, I hold instructions to call for an undertaking by West Dunes Properties not to dissipate any of the surplus pending the resolution of the claim of [the Jersey Trust Company] and, in the event of such an undertaking not being forthcoming, to apply to Court for appropriate relief to prevent the dissipation of those proceeds. As requested, rather than send such demands to the company's registered office, which we understand is no longer in use, we enquired whether we could send such demands care of yourself. Your urgent response in this regard, upon receipt of your instructions, is awaited"

There is no evidence we have seen that there was a response to this. The application to wind up West Dunes was made shortly thereafter on the 23 rd December, 2008.

(iii) The reason given by Mr Botha for the application to wind up West Dunes in his founding affidavit (to which the Order of Justice also later refers) was that:-

"30.4 Accordingly, a liquidator should be appointed as a matter of urgency to take charge of [West Dunes's] assets and to ensure an equitable and legitimate distribution of the proceeds of realisation. In this regard, a liquidator will be in a position to elect whether or not to continue with the transfer or to cancel the existing sale in order to sell to [Applemint] for a higher purchase price"

We know from Kgomo J's judgment at paragraph 87 (cited above) that Mr Brakspear was a knowing and willing participant in the liquidation process which allowed the cancellation of the sale to Zambrotti and the sale to Applemint at a much higher price.

(iv) The condition that Mr Brakspear and Mrs Brakspear should indemnify the Jersey Trust Company and agree that they could no longer benefit from the trusts was in response to a proposal put forward by them for the sale of a trust asset which they, or Mr Brakspear, controlled and which had been financially disastrous for both trusts. Whilst commercially hard, such demands in that context are not on their face dishonest. In any event they were demands which were not accepted and for a sale of the shares in West Dunes which never took place. The farm was sold by the liquidators.

106 The facts, matters and circumstances pleaded therefore show the Jersey Trust Company facing a very difficult issue. It had a valid claim to recover £500,000 from an indirectly wholly owned but insolvent South African company, West Dunes, which had become insolvent under the management and direction of Mr Brakspear. It responded to a proposal from Mr Brakspear that it should agree to the sale of the shares in West Dunes by setting out its terms and shortly thereafter it applied to wind up the company because of a concern to ensure that the sale proceeds were not dissipated and to enable the sale to Applemint to proceed at a much more favourable price. Applying the test in the *Three Rivers* case, we see nothing in this which tilts the balance and justifies an inference of dishonesty.

107 Whilst it is correct that in bringing the set aside proceedings before the South African

Court in 2013, Mr Brakspear was not making a claim for breaches of trust against the Jersey Trust Company, he was very much attacking its good faith in applying for the winding up order; indeed he alleged that it had a fraudulent agenda (see paragraph 101.6 of the judgement of Kgomo J cited above). The motive of the Jersey Trust Company in applying to wind up West Dunes was therefore very much in issue in the South African proceedings and this allegation that it applied for a winding up order in order to cover up breaches of trust and to prevent West Dunes suing it, could and should have been brought in the South African proceedings along with all the other allegations of dishonesty he levelled against the Jersey Trust Company. In our view, therefore, the *Henderson* principle does apply to this issue—its motive or reasons for bringing the application. As it was the South African Court found that it brought the application in good faith.

108 It is clear from the letter of the 8 th December, 2008, that the South African lawyers were seeking to impose terms upon Mr Brakspear and Mrs Brakspear as beneficiaries of the J Trust and the Westley Trust; not upon West Dunes which was the subject matter of the correspondence. Paragraph 61 of the Order of Justice refers to breaches of duty by the Jersey Trust Company and Paragraphs 76–78 of the Order of Justice claim that those duties were owed as trustee of the Westley Trust. Those duties were therefore owed by the Jersey Trust Company to the beneficiaries of the Westley Trust, and West Dunes was not a beneficiary; it was an indirectly wholly owned asset of the Westley Trust. It is the beneficiaries of the Westley Trust (and of the J Trust), not West Dunes, who can hold the Jersey Trust Company (and the Guernsey Trust Company) to account for breaches of its duty as trustee. Furthermore, the winding up West Dunes could not have covered up alleged breaches of which at least Mr Brakspear and Mrs Brakspear were aware.

109 Drawing all this together, we conclude:-

(i) Applying the test in the *Three Rivers* case, the facts, matters and circumstances relied on by the plaintiffs do not tilt the balance and justify an inference of dishonesty on the part of the Jersey Trust Company in applying to wind up West Dunes. It had a valid claim against its indirectly wholly owned but insolvent company controlled by Mr Brakspear and a legitimate concern, therefore, in ensuring that the sale proceeds of the farm were not dissipated. In addition to securing an equitable distribution of the assets amongst the creditors, the liquidation also enabled the farm to be sold to Applemint at a much higher price, a strategy fully supported at the time by Mr Brakspear.

(ii) The Jersey Trust Company's motive for making the winding up application was very much in issue in the South African proceedings and applying the *Henderson* principle, this allegation could and should have been made in those proceedings. As it is the South African Court has found that the Jersey Trust Company was acting in good faith in making the application. That finding is binding on Mr Brakspear and on Mrs Brakspear and Mrs Bowler as his privies.

(iii) The breaches of duty complained of were owed to the beneficiaries, not to West

Dunes. Winding up West Dunes could not cover up those breaches, which by the time of the South African proceedings were known to all three plaintiffs, and could not have prevented the Jersey Trust Company from being sued for breach of trust by its beneficiaries. The allegations in this respect are obviously and uncontestably bad.

110 For all of the reasons set out above it would be an abuse for this claim to be allowed to proceed and it will, therefore, be struck out.

"West Dunes's contrived liquidation – dishonest breach of trust and dishonest breach of fiduciary duty"

(Paragraphs 62–75)

111 As the heading suggests, this seeks to re-litigate issues in the South African proceedings. The plaintiffs allege once again that the Jersey Trust Company claim for £500,000 was fictitious. That issue has been exhaustively litigated in South Africa, and cannot be re-litigated here.

112 The plaintiffs also allege that the claim of Westley Holdings in the liquidation for £340,000 was fictitious. That claim was accepted by the liquidators and Mr Brakspear's claim that it was fictitious was raised before and rejected by the master of the South African Court, although it was not an issue dealt with by the South African court. However the *Henderson* principle comes into play here, in that if Mr Brakspear alleges that this claim was also fictitious, it could and should have been raised before the South African court, and he is now barred from litigating that claim in this Court.

113 The only loss claimed in the Order of Justice as a consequence of these allegedly fictitious claims was that they caused the legal and liquidators' fees to exceed ZAR6.7 million (approximately £487,000). We are puzzled by this figure, as the accounts of the liquidation, which we have seen (an admittedly poor copy), would indicate that the liquidators' fees came to a more modest ZAR44,139.39. Quite how increased costs in the liquidation of West Dunes can give rise to a claim for damages by the plaintiffs is entirely obscure.

114 In any event Mr Brakspear is barred from pursing these claims in this court and this extends to Mrs Breakspear and Mrs Bowler as his privies. Quite separately it would be an abuse to allow the plaintiffs to re-litigate issues arising out of the winding up and liquidation of West Dunes, exhaustively and definitively dealt with by the South African Court. The *Amicus* concurs with our views.

"Dishonest and deceitful breaches of duty as trustees arising from the defendant's false representations to the South African court in a contrived liquidation"

(Paragraphs 79–82)

115 This is a reformulation of the same claim, namely that the Jersey Trust Company placed West Dunes into a contrived liquidation by making false representations of fictitious loans and submitting false trust accounts to the South African court to prove itself to be a creditor. It falls to be struck out for the same reasons.

“The Jersey Trustee's financial statement fraud in Westley Trust accounts.”

(Paragraphs 83–100)

116 The plaintiffs allege that the Jersey Trust Company submitted accounts for the period 1 st May, 2008 – 28 th February, 2009, which were false, in particular, showing West Dunes as a debtor of the Westley Trust. These “fabricated” accounts induced the South African court, they allege, into winding up West Dunes and appointing liquidators, causing the plaintiffs to cause financial loss and damage. They go on to allege that in later accounts, sent to them as beneficiaries, the accounting changed in a variety of ways, which were false and misleading.

117 As a consequence, they allege the Jersey Trust Company has deceitfully and dishonestly breached its duty to act with integrity and to keep accurate accounts. This claim, as Advocate Taylor points out, is flawed on its face, in that it alleges in paragraph 83, he says correctly, that the Jersey Trust Company submitted these accounts to the South African court in March 2009, after the provisional order for the winding-up made on 23 rd December, 2008, and the final order made on 5 th February, 2009, and so cannot have influenced the South African court in any way. They were, of course, available to Mr Brakspear for the set aside proceedings he brought in 2013, where he challenged the validity of the claim for £500,000 – as Advocate Taylor says, there is nothing new in them.

118 Advocate Taylor acknowledges that the accounts were revised and distributed to the beneficiaries, but re-stating accounts cannot itself give rise to a cause of action.

119 In the view of the *amicus*, these claims are not really a separate cause of action, but simply a pleading of further evidence in relation to the allegation of a contrived liquidation, and the same analysis therefore applies.

120 We agree that this is simply a pleading of further evidence in relation to the allegation of a contrived liquidation, and if Mr Brakspear did not specifically rely on the accounts in his arguments in the South African proceedings in 2013, then the *Henderson* principle applies – he is estopped from doing so now. That estoppel extends to Mrs Brakspear and Mrs Bowler, as his privies.

121 Furthermore, applying the *Three Rivers* test, the facts relied upon by the plaintiffs, the revision by the Jersey Trust Company of accounts, do not tilt the balance and justify an inference of dishonesty. Accordingly the allegation of deceit and dishonesty cannot stand, in particular in the light of the findings of the South African court that the claim of £500,000 which lies at the heart of all of these complaints, was not fictitious and that there was no fraudulent conduct on the part of the Jersey Trust Company and its advisors.

122 For all these reasons it would be an abuse of process to allow this claim to proceed. It will, therefore, be struck out.

"Dishonest breach of fiduciary duty and conspiracy to injure"

(Paragraphs 101–118)

123 The plaintiffs allege that the proceedings between the Guernsey Trust Company (not convened to these proceedings) and the Jersey Trust Company in 2012 were an unlawful and deceitful conspiracy between them to defraud the plaintiffs. They allege that the representations of the Guernsey Trust Company in its Order of Justice, in which it claimed £946,649 were false and that the Jersey Trust Company knew that they were false, dishonestly submitting to judgment.

124 The plaintiffs claim at paragraph 108 that the true position was that the J Trust had paid FirstRand £500,000 directly and recorded it as a distribution to Mr Brakspear *"as the beneficial owner of the farm"* and not as a contingent liability or a loan to a third party.

125 Advocate Taylor submits that the plaintiffs make self-serving mischaracterisations of the transactions. In the view of the *amicus* the Guernsey Trust Company had a good claim and the Jersey Trust Company had no choice but to submit to judgment, as it was advised to do. In his view there is simply no point in this claim going to trial.

126 Mrs Brakspear in her affidavit admits that the plaintiffs were aware of these proceedings which were issued on 13 th September, 2012, but were the subject of correspondence for some time before. Indeed, she and Mrs Bowler were represented by Sinels, and had a replacement trustee ready to take over the trusteeship of the Westley Trust. There is a letter dated 1 st July, 2011, from Bedell Cristin to Sinels, enclosing correspondence received from Carey Olsen, acting for the Guernsey Trust Company, and giving notice that the Jersey Trust Company would make arrangements to settle the claim unless the plaintiffs made alternative proposals acceptable to the Jersey Trust Company and which satisfied its liability under that claim. The letter pointed out that the amount of the claim exceeded the value of the assets of the Westley Trust. If the plaintiffs allege that there was a dishonest conspiracy afoot, then they should have taken up the invitation of intervening and making that accusation in the proceedings brought by the Guernsey Trust Company in Jersey, rather than standing back and letting judgment be taken. Judgment was eventually taken

on 21 st September, 2012, just over three years before these proceedings were issued.

127 The principles set out in the *Three Rivers* case come into play here. The facts pleaded by the plaintiffs are of proceedings between the Guernsey Trust Company and the Jersey Trust Company both separately represented. The Jersey Trust Company, on advice, submitted to the claim as the *amicus* says it was bound to do. These facts do not tilt the balance and justify an inference of dishonesty.

128 The plaintiffs do not dispute the fundamental point that the Guernsey Trust Company did provide security of some £900,000 (later increased) so that the Westley Trust could acquire the farm, and it has lost the entirety of that sum, which represented, as we understand it, the bulk of the trust fund. A disastrous outcome. The plaintiffs query the mechanics by which the security was called in, but at any level, the Guernsey Trust Company was entitled to recover what it could from the Westley Trust for the benefit of its beneficiaries, the plaintiffs.

129 How the plaintiffs, who are beneficiaries of both trusts (although Mr Brakspear was not a beneficiary of the Westley Trust), claim to have been defrauded personally when these were transactions between the trustees of two trusts is once again entirely obscure.

130 Shorn of the allegation of dishonesty, the plaintiffs were on their own admission well aware of this claim at least three years before these proceedings were issued, and the claims are prescribed. In any event, we agree with Advocate Taylor and the *amicus* that to allow these allegations of dishonest conspiracy to continue would be an abuse of process.

"Sham Trust"

(Paragraphs 119 – 147)

131 The plaintiffs allege that the Westley Trust is a sham. They say the Jersey Trust Company represented that Mr Brakspear would be the beneficial owner of the farm, contrary to the provisions of the trust, which name his mother and sister as beneficiaries. The plaintiffs appear to base their case essentially on the true identity of the settlor of the initial declared sum of £10, who they say was Mr Brakspear and not his sister (through a distribution from the J Trust) and secondly, on the assertion that the Jersey Trust Company was never the legal owner of the one issued share in Westley Holdings. This is in stark contrast to Paragraph 13(b) of the representation of Mrs Brakspear and Mrs Bowler of 12 th October, 2011, where they state that the Westley Trust owned 100% of the issued share capital of Westley Holdings.

132 We would observe that from the documentary evidence we have seen, the Jersey Trust Company went to some length to ensure that Mrs Bowler, not Mr Brakspear, was the settlor of the initial £10. The tax advice from South Africa was that he could neither be a beneficiary nor settlor and it was he who suggested his sister, to whom the Guernsey Trust

Company made a distribution of £10 out of the J Trust for that purpose. Although Mr Brakspear paid the costs of setting up the Westley structure, no assets were settled by him or anyone else, but the purchase of the farm was funded in large part by the J Trust and in our view it would properly be considered to be the true settlor of the assets in the trust beyond the £10 had the investment in the farm investment not been so disastrous.

133 The plaintiffs have devoted some 29 paragraphs of the Order of Justice to this allegation of sham, but seek no remedy for it. There is no prayer for the trust to be declared a sham and the allegations stand to be struck out on that ground alone.

134 Mrs Brakspear has queried why Advocate Sheedy, as the first *amicus*, who reformulated the plaintiffs' claim, did this. We think there is an answer to that. All of the allegations contained in the Order of Justice, bar the allegation of sham, are allegations of breach of trust by the Jersey Trust Company as trustee of the Westley Trust in the exercise of express powers given to it as trustee of that trust. This is made abundantly clear not just from the allegations themselves, but also from paragraphs 76–78 of the Order of Justice. Paragraph 76 starts " *The Jersey Trustee owed the following duties to the plaintiffs in the execution of the Westley Trust …*".

135 If the Westley Trust is declared a sham, then the Jersey Trust Company owed none of those duties and had none of those express powers. On the plaintiffs' case, it would instead have been a bare trustee for Mr Brakspear alone.

136 As Advocate Taylor says, the pleading is problematic, in that it does not allege the necessary constituent elements of a sham trust. A finding of sham would, as the case of *Re Esteem* cited above makes clear, require the Court to find a common intention between the Jersey Trust Company and Mr Brakspear (assuming he is found to be the settlor) to mislead third parties so that at every stage, and in all of its actions, Mr Brakspear knew that the Jersey Trust Company was not trustee of Westley Trust at all, but bare trustee for him. The Order of Justice is unclear as to whether Mrs Brakspear and Mrs Bowler were also party to this sham, and they knew that they were not in fact beneficiaries of the Westley Trust with no locus to bring proceedings as such.

137 The conduct of Mrs Brakspear and Mrs Bowler is inconsistent with any belief on their part that the Westley Trust is a sham in that:-

(i) On 4 th or 5 th June 2009, they wrote to the Jersey Trust Company asking it resign as trustee of the Westley Trust in favour of another trust company.

(ii) They brought a representation before the Court on 12 th October, 2011, seeking the removal of the Jersey Trust Company as trustee of the Westley Trust and the appointment of another trust company in its place. That representation went into some detail over the creation and purpose of the Westley Trust and the alleged breaches of

trust by the Jersey Trust Company as trustee. There is no reference to the trust being a sham and Advocate Taylor submitted that they should be estopped by this conduct from now alleging sham.

138 We interpret the pleading as an allegation that the Jersey Trust Company represented to Mr Brakspear that he would at all times be the beneficial owner of the farm, not explaining that in fact he was not the beneficial owner (paragraphs 122 and 123). His complaint, therefore, is that, contrary to representations he said were made by the Jersey Trust Company, he was not the beneficial owner of the farm; it was instead an asset of the Westley Trust. This is not an allegation that the Westley Trust is a sham; quite the opposite. His complaint is that, contrary to the representations made to him and to his expectations, the Westley Trust was a genuine trust. This is consistent with the plaintiffs' allegations of mis-selling of financial products to contained in Paragraph 146 of the Order of Justice. In reality, this is not an allegation of sham, but an allegation by the plaintiffs of misrepresentation.

139 Looking at the history of the actions taken by the Jersey Trust Company in South Africa, most of which were vigorously opposed by Mr Brakspear, it would seem barely credible that he considered the Jersey Trust Company to be his bare trustee and vice versa.

140 Irrespective of these difficulties, there is a fundamental inconsistency within the pleading. If the Court grants the plaintiffs any of the relief they seek on the grounds that the Jersey Trust Company was in breach of its duties as trustee of the Westley Trust, then the Westley Trust cannot be a sham. Equally, if the Westley Trust is a sham, then the Court cannot grant the plaintiffs any of the relief they seek on the grounds that the Jersey Trust Company is in breach of its duties as trustee of the Westley Trust. There would have to be an entirely different claim by Mr Brakspear that the Jersey Trust Company was in breach of its duties to him as his bare trustee which would pit Mr Brakspear against his mother and sister.

141 As the *amicus* submitted, there is no documentary evidence to suggest a sham and no pleading that the Jersey Trust Company intended Mr Brakspear to be the real owner of the assets, nor any evidence on which to base a pleading; on the contrary, his complaint is that it did not intend him to be the real owner of the assets. In the view of the *amicus*, the claim does not go anywhere, in the sense of any relief being pleaded, and he could not see any way in which this position might be improved by an amendment of the Order of Justice.

142 We agree with the *amicus*. We cannot see how this allegation of sham can be pleaded in a manner which is consistent with the Order of justice. It would be an entirely different claim by Mr Brakspear against the Jersey Trust Company and his mother and sister. It is to be struck out.

Bankers' Book Evidence

143 The plaintiffs place much reliance on the evidence supplied by the Jersey Bank (now a branch) pursuant to the Court's order of the 8 th March, 2018. In her second affidavit Mrs Brakspear asserts that this evidence shows that Mr Brakspear was not an untruthful and unreliable witness in the South African proceedings and that it was the Jersey Trust Company and its agents and lawyers who were deceitful. They rely on this evidence to justify them being able to re-litigate the issues in the South African proceedings.

144 We have received very lengthy further submissions on this evidence which we are not going to rehearse as it would be disproportionate to do so. On looking at the evidence supplied it is in fact a lack of evidence that the plaintiffs rely on (rather than anything new) and fundamentally they still do not appear to appreciate that where a creditor makes a claim by way of subrogation, there will not necessarily be a contractual document between that creditor and the debtor. The claim arises by process of law. The point was examined exhaustively by Kgomo J in his judgment—see paragraph 196 cited above. It is the case that Mr Botha made mistakes in his founding affidavit referred to at paragraph 126 of the judgment of Kgomo J (acknowledged by Advocate Taylor), which were put straight in evidence and there has been some conflation between the Jersey Bank and the Isle of Man Bank, but it is irrefutable and was accepted by Mr Brakspear in the South African proceedings that:-

(i) The Westley Trust structure was as set out in paragraph 7 above.

(ii) The purchase of the farm was funded and security provided as set out in paragraph 9 above.

(iii) There were two sources of funding only, FirstRand and the J Trust. The J Trust provided security of £900,000, increased to £915,000, for the two facilities granted by the Jersey Bank to the Westley Trust, namely the guarantee in favour of FirstRand in the sum of £550,000, later reduced to £500,000, and the loan to the Westley Trust in the sum of £415,000.

(iv) West Dunes became insolvent. FirstRand called in its facility, enforcing both the guarantee given by the Jersey Bank and its first charge over the farm, which was sold.

(v) The Jersey Bank had recourse to the security provided by the J Trust both for the guarantee it had paid out to FirstRand and the loan it had made to the Westley Trust, so that the J Trust lost the whole amount it had put up by way of security.

(vi) The Westley Trust terminated in 2012 and whatever assets were recoverable from the liquidation of West Dunes have been assigned to the J Trust, which is only appropriate bearing in mind it financed a large proportion of the cost of the farm.

Whilst some aspects of the conduct of the group companies can be criticized, we have seen no evidence of fraud or indeed anything which justifies an inference of dishonesty.

145 The *amicus* has gone through the claims of Mrs Brakspear in relation to the Bankers' Book evidence and confirms both that it has been carefully reviewed by him and that it makes no difference to his advice to the Court. We have seen nothing in the Bankers' Book evidence to justify this Court allowing the plaintiffs to re-litigate in this jurisdiction the issues definitively and finally determined by the South African Court.

Conclusion

146 The conclusion we have reached is that for the reasons set out above, the whole of the Order of Justice stands to be struck out. We have given careful consideration as to whether any opportunity should be given to the plaintiffs to further reformulate that part of their claim that is not prescribed or uncontestably bad. The difficulty is that underlying the whole of these remaining claims is their complaint that the Jersey Trust Company brought about a contrived winding-up and liquidation of West Dunes in South Africa, which it did dishonestly and using a fictitious claim. Those allegations have been the subject of exhaustive litigation in South Africa (the appropriate forum) and comprehensively dismissed. The liquidation was not contrived, the claim was not fictitious and the Jersey Trust Company had not acted dishonestly. On the contrary, Mr Brakspear was found by the South African Court to be a dishonest witness motivated by malice towards the Jersey Trust Company. These issues cannot now be re-litigated in this jurisdiction and no further re-formulation of the Order of Justice can permit that to happen.

147 That all of the plaintiffs' claims relate in reality to the winding-up and liquidation of West Dunes is clear from the relief sought in Paragraphs 148 and 149 of the Order of Justice, which claims losses arising out of the farm and the mortgage on it, both assets and liabilities of West Dunes, as if West Dunes was an asset of the plaintiffs, and not of the Westley Trust. Paragraph 50 of the Order of Justice, which set out the relief sought in relation to the alleged conspiracy to injure, claims losses over the security provided for the acquisition of the farm. There is also an unexplained alternative claim for punitive damages of £2 million each for the “complete disregard of the plaintiffs' rights for thirteen years”.

148 To the extent that claims are not prescribed because, on their face, they allege fraud, we doubt, in the light of the findings of the South African Court, that any Jersey lawyer could have concluded there was credible material which established an arguable case of fraud. Advocate Sheedy was, of course, relieved of his obligation in this respect under rule 4.2 of the Law Society Code of Conduct.

149 In essence, Mr Brakspear has challenged the winding-up and liquidation of West Dunes in the South African Court and that challenge has failed, following an eight day hearing and for the reasons set in a very lengthy and comprehensive judgment. All applications for leave to appeal have been refused. It would be an abuse for this Court to allow those same issues, dressed up as claims in breach of trust, to be re-litigated here.

150 The Court had the benefit of the advice of an *amicus* and he can see no basis upon which further opportunities to re-formulate the plaintiffs' pleadings should be allowed and we agree.

Alleged breach of court order

151 In his affidavit of 30 th April, 2018, Mr Roscouet provided the Court a copy of a Noseweek article dated 1 st, May 2018, Noseweek being the publication referred to in the judgment of Kgomo J. This article makes specific references to the Bankers' Book evidence disclosed by the Jersey Bank pursuant to the order of the court dated 8 th March 2018, which stipulated under Paragraph 3 that the plaintiffs should use the documents disclosed for the purpose of the Jersey proceedings brought by them against the Jersey Trust Company and they must seek the leave of the court to use the documents for any other purpose. Mr Roscouet states that Mrs Brakspear was well aware of the limitations of the order, as she had requested how she may use the material in an e-mail to the Judicial Greffier on 3 rd April 2018, and he responded in an email of 5 th April 2018, both of which are exhibited to his affidavit. No application has been made for the use of this material in the publication in Noseweek.

152 We have received a fourth affidavit from Mrs Brakspear which addresses the issue of this alleged breach and in which she says that Noseweek and numerous other publications have quoted extensively from her affidavit, by which we assume she means her second affidavit in which she discusses the Bankers' Book evidence between paragraphs 5 and 20 and exhibits the documentation itself. Her fourth affidavit goes into greater detail. She appears to assert that this does not breach the order because the information does not come directly from the affidavit sworn on behalf of the Jersey Bank disclosing the evidence.

153 As the plaintiffs are not legally represented, we have been accommodating in allowing Mr Brakspear to make the running through his mother, but she was very open in disclosing to us that he has drafted all of the affidavits and written submissions. Bearing in mind Mr Brakspear's association with Noseweek referred to in the judgment of Kgomo J, his residence in South Africa and his leading role in this matter on behalf of his mother and sister, it seems reasonable to suppose that he is orchestrating the dissemination of information.

154 We therefore require Mr Brakspear to file with the Court within two weeks of this judgment being handed down an affidavit setting out what information he, or to his knowledge the other plaintiffs, have provided to Noseweek and any other third party that includes or makes reference to the Bankers' Book evidence. We will then hold a preliminary hearing to ascertain whether the allegation of a breach of the Court's order needs to be taken further and if so there will be a further hearing which we may require Mr Brakspear to attend.

155 No further steps in these proceedings can be taken by the plaintiffs (other than to apply for

leave to appeal) until this issue has been satisfactorily resolved by the Court. If they are given leave to appeal, then it seems to us that it will be for the Court of Appeal to decide whether they can continue that appeal whilst this issue is unresolved.