Barclays Wealth Trustees (Jersey) Ltd (in its capacity as trustee of the R2R Bulgaria Property Fund, the R2R Croatia Property Fund and the R2R Montenegro Property Fund and their respective sub-funds); Barclays Wealth Fund Managers (Jersey) Ltd (in its capacity as trustee of the R2R Bulgaria Property Fund, the R2R Croatia Property Fund and the R2R Montenegro Property Fund and their respective sub-funds) v Equity Trust (Jersey) Ltd; Equity Trust Services Ltd

Jurisdiction:	Jersey
Judge:	Mark Herbert
Judgment Date:	02 May 2014
Neutral Citation:	[2014] JRC 102D
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Text

[2014] JRC 102D

ROYAL COURT

(Samedi)

Before:

Mark Herbert, **Q.C., Commissioner, sitting alone.**

Between
(1) Barclays Wealth Trustees (Jersey) Limited (in its capacity as trustee of the R2R Bulgaria Property Fund, the R2R Croatia Property Fund and the R2R Montenegro Property Fund and their respective sub-funds)
2) Barclays Wealth Fund Managers (Jersey) Limited (in its capacity as trustee of the R2R Bulgaria Property Fund, the R2R Croatia Property Fund and the R2R Montenegro Property Fund and their respective sub-funds)
Plaintiffs
and
(1) Equity Trust (Jersey) Limited
(2) Equity Trust Services Limited
Defendants

Advocate J. Harvey-Hills **for the Plaintiffs.**

Advocate M. L. A. Pallot **for the Defendants.**

Authorities

Collective Investment Funds (Jersey) Law 1988.

Trusts (Jersey) Law 1984.

Royal Court Rules 2004.

Lapidus v Le Blancq and Voisin & Co [2013] JRC 181A .

Underhill & Hayton Law of Trusts and Trustees (18th edition).

Kam Fan Sin's The Legal Nature of the Unit Trust (Clarendon Press 1997 re-printed 2007).

Thomas & Hudson's The Law of Trusts (2nd edition).

Financial Services and Markets Act 2000.

Bristol & West Building Society v Mothew [1998] Ch 1 .

BA v Verite Trust Company (In re E, L, O and R Trusts) [2008] JRC 150 .

Vestey's Executors v IRC [1941] 1 All ER 1108 .

In re Forest of Dean Coal Mining Company (1878) 10 Ch D 450 .

Young v Murphy [1996] 1 VR 279 .

Lewin on Trusts (18th edition).

Re Brogden (1888) 38 Ch D 546 .

Trust — application by two defendant companies to strike out parts of two plaintiffs companies claims.

THE COMMISSIONER:

1 This judgment deals with an application by the two defendant companies in the action to strike out important parts of the two plaintiff companies' claims. The application raises important questions about the nature of unit trusts, the legal status of managers and trustees of unit trusts, and the juridical basis of claims against them by a successor trustee and successor manager. There is some academic and professional literature exploring these questions, not all of it unanimous in its conclusions, but little judicial authority.

2 In financial terms the claim is substantial, and both sides appeared before me by experienced advocates, namely Advocate Marcus Pallot of Carey Olsen for the defendant companies and Advocate Justin Harvey-Hills of Mourant Ozannes for the plaintiff companies.

3 The claim relates to three unit trusts established in July 2005 by the defendant companies Equity Trust (Jersey) Limited and Equity Trust Services Limited as trustee and manager respectively. In the pleadings these names are abbreviated to ETJL and ETSL, and I shall follow that practice. The purpose of the unit trusts was to make investments, through intermediary companies and other investment vehicles, in property of various kinds in Bulgaria, Croatia and Montenegro.

4 In August 2007 the Jersey Financial Services Commission started regulatory proceedings in relation to these unit trusts under the Collective Investment Funds (Jersey) Law 1988 seeking the removal of ETJL and ETSL and the winding up of the funds. In December 2007 ETJL and ETSL were, by consent, replaced by the plaintiff companies, now renamed Barclays Wealth Trustees (Jersey) Limited and Barclays Wealth Fund Managers (Jersey) Limited as trustee and manager respectively. In the pleadings these are called BWT and BWFM.

5 In December 2010 BWT and BWFM issued the Order of Justice against ETJL and ETSL, claiming that the latter are liable to make compensation to the unit trusts in respect of what are alleged to be breaches of duty committed in the course of their trusteeship and management of the three unit trusts. These are expressed in terms of alleged breaches of trust, breaches of fiduciary duty and breaches of contract. They depend partly on the terms of the trust instruments and partly on statute, principally the Trusts (Jersey) Law 1984 as amended.

6 There are also three additional claims that arise from information contained in one or more reports made in 2007 by the accountants BDO and a later report by Grant Thornton in 2008 pursuant to the investigation by the Jersey Financial Services Commission. The first of these relates to improper time charges made by ETJL or ETSL from the funds of each of the three unit trusts, over and above what was provided for in the governing documents. This claim amounts to a little under €250,000. The second such claim is for improperly apportioned costs, where the claim is for about €6 million. The third is for improper payments made to third parties, amounting to about €9 million. Some repayments appear to have been made in response to these latter claims, but significant sums are still said to be owing. The defendants have not applied to strike out these additional three claims, but that is not an admission that the claims are valid.

The trust instruments

7 Looking first at the trust instruments, there is one for each of the three trusts, namely Bulgaria, Croatia and Montenegro. For present purposes the three trust instruments are in the same terms. Each is described as an instrument made between ETSL as manager and ETJL as trustee. ETSL is essentially the promoter of each trust, though unlike ETJL it is not amongst the ‘co-promoters’ named in the prospectuses for the individual funds, and most of the obligations are made obligations of ETSL. For its part ETJL has a custodianship function.

8 Clause 36 provides that the manager shall manage and administer the trust and its fund and shall exercise all powers, duties and discretions except those conferred on the trustee. Clause 36.2 requires the trustee to perform all acts necessary to enable the manager to exercise its powers of management and other powers. The full text of clause 36 is given below.

9 Clause 37 imposes basic obligations on ETSL, namely to hold the permit for it to be a functionary of the trust, to devote time and attention to its duties, and to comply with the terms of the trust instrument itself, the prospectus to be issued to unitholders, and the fund rules. Clause 38 then spells out, in 20 sub-paragraphs, the management responsibilities of the manager. These include negotiating borrowings, reporting to unitholders, keeping accounts and book-keeping records, dealing with auditors, dealing with requests for redemption of units, the preparation of prospectuses, the determination of questions relating to the allotment of units, and finally maintaining the administrative services reasonably required for the due performance of its duties.

10 Clause 39 deals specifically with investment management, imposing on the manager substantive duties in relation to the acquisition, review, and sale of investments. Clause 39.1.4 provides that, in carrying out its duties as investment manager, the manager must observe and have regard to the primary purpose of the trust's investment policy as described in the prospectus and fund rules for each class of unit, any restrictions for the time being contained in the trust instrument, the prospectus and the fund rules for each

class of unit, the entitlement of unitholders to require redemption of their units and any other matter to which a prudent investment manager to an investment portfolio should reasonably pay regard in the proper discharge of his duties. The one thing which these clauses do not impose on the manager is the actual holding of trust investments.

11 As for the trustee, clause 44 imposes basic obligations similar to those in clause 37 for the manager, namely to hold the permit which it requires in order to act as trustee, to devote time and attention to its duties as is necessary for the efficient conduct of them, and to comply with the terms of the trust instrument, the prospectus and the fund rules. Clause 45 then spells out the trustee's responsibilities to take custody and control of investments, and to deal with them in accordance with what are defined as the 'proper instructions' of the manager, to make payments in accordance with directions given by the manager, to hold title documents of investments, to open and maintain bank accounts and to keep appropriate records.

12 I also need to draw specific attention to three particular clauses defining the duties of the trustee and manager. These could be regarded as exoneration clauses, but in strictness the effect of each of these clauses is to limit the scope of the trustee's duties.

13 First, clause 26 deals with investments. These are to be held by the trustee but dealt with in accordance with the directions of the manager. Clause 26.3 defines the relation between the manager and the trustee at some length:–

> *"26.3 The selection, acquisition in any manner, holding, realisation in any manner and the management of Investments shall in all respects be the sole responsibility of the Manager and not of the Trustee and in relation to such matters the Trustee shall rely exclusively on the Manager and, in particular, the Trustee shall not be concerned as to whether the investment restrictions contained in the relevant Fund Rules and/or the Prospectus are complied with.* Subject as aforesaid, the Trustee shall have and, in discharging its responsibilities hereunder in relation to the management of the Trust Fund, the Manager shall have (in addition to all other powers vested in them hereunder or by law) in respect of the Trust Fund the same full and unrestricted powers in all respects of –
>
> *26.3.1 purchasing or otherwise acquiring or entering into underwriting or other commitments in respect of any Investment;*
>
> *26.3.2 dealing in any way whatsoever with and managing the Trust Fund and all property and Investments comprised therein; and*
>
> *26.3.3 doing all acts or things in connection with the foregoing,*
>
> *as either of them would have had were it absolutely and beneficially entitled thereto.* No person dealing with the Trustee shall be concerned to see or enquire as to whether the transaction is authorised by the Manager or contrary

to any of the provisions of this Instrument."

On the face of it, therefore, the trustee is relieved of all, or most, of the duties relating directly to the investment function.

14 Next, clause 36 deals with the managers' power to manage the trust. I have summarized this already, but the full text states as follows:–

> *"36.1 The Manager shall manage and administer the Trust and the Trust Fund in accordance with this Instrument and shall exercise all powers, duties and discretions exercisable under the Trust (except any power or discretion herein expressly conferred on the Trustee) and the Trustee shall in no way be concerned with or responsible or liable to any person for the same.*
>
> *36.2 Subject to the provisions of Clause 53, the Trustee shall concur in and perform all acts necessary to enable the Manager to exercise its powers of management or any other power or discretion vested in it hereunder."*

15 Here again, so far as concerns the management and administration of the trust, this clause imposes reciprocal duties on the manager and trustee. It is true that the final words of clause 36.1 could be read as an exoneration for what would otherwise be a breach of trust, but it is probably better construed as imposing a limit on the trustee's responsibilities and duties. Clause 36.2 imposes a positive duty on the trustee.

16 Finally ETJL relies on clause 53, which appears under the heading 'Protections for the trustee':–

> *'53.1 When acting pursuant to Proper Instructions, the Trustee shall not be under any duty to make any enquiry as to the genuineness or authenticity of any such instructions, so long as such instructions reasonably appear to be genuine and authentic.*
>
> *'53.2 The Trustee shall not be responsible for:–*
>
> *53.2.1 ascertaining or verifying any valuations of the Investments or the prices at which Units are issued, converted or redeemed; or*
>
> *53.2.2 the selection of Investments or for establishing whether the price to be paid or received for any Investment is fair or reasonable; or*
>
> *53.2.3 preserving or enhancing the value of Investments; or*
>
> *53.2.4 ascertaining or verifying whether any transaction which is instructed by Proper Instructions accords with the applicable Fund Rules or Prospectus (as amended from time to time),*
>
> *PROVIDED THAT, without prejudice to the foregoing, the Trustee may refuse to*

act upon Proper Instructions until the Manager has furnished the Trustee with such information as it may reasonably request for the purpose of satisfying itself in relation to any of the above matters.'

17 The whole of clause 53 depends on receiving what are called *'Proper Instructions'*, and this phrase is given a long definition in clause 1 of each trust instrument. It is unnecessary however to reproduce that definition here, and it is enough to state that it is entirely technical in nature. It defines the modes by which instructions may effectively be given by one party to the other, and on the signature or purported signature of which individual those instructions may effectively be given. The definition has nothing to do with the quality, lawfulness or justification of the instruction.

Pleaded duties of ETJL

18 Turning to the Order of Justice, the status and alleged duties of ETJL are set out in paragraphs 17, 18 and (after an amendment made in 2013) 18A. Paragraph 17 provides that by virtue of its office as trustee of the funds ETJL owed duties as trustee to all unitholders. Under paragraph 17a it is claimed that, under the trust instruments, it was subject to the express duties and responsibilities as trustee set out in clauses 44 and 45. Paragraph 17b claims that under the Trusts (Jersey) Law 1984 it was subject to the duties set out in paragraphs (1), (2) and (4) of Article 21, which are quoted in full. Article 21(1) provides that a trustee shall in the execution of his or her duties and in the exercise of his or her powers and discretions (a) act with due diligence, as would a prudent person, to the best of the trustee's ability and skill and (b) observe the utmost good faith. Article 21(2) provides : ***'Subject to this Law, a trustee shall carry out and administer the trust in accordance with its terms.'*** Article 21(4) contains express prohibitions, subject to certain stated exceptions, against profiting from the trusteeship.

19 I shall comment at this stage that no question of bad faith arises in these proceedings, so I shall sometimes refer to the duties imposed by Article 21(1) simply as the statutory duty of diligence.

20 Paragraph 17c of the Order of Justice acknowledges that on the terms of the trust instruments ETJL's responsibilities as trustee were limited "in order that its functions did not overlap with or conflict with those of the manager ETSL". Accordingly, clauses 26, 36 and 53 are said to provide protection to the trustee in the usual course of the funds' business. Paragraph 17c continues:–

"Nonetheless and notwithstanding those provisions, and in accordance with the opening words of Article 21 of the Trusts (Jersey) Law 1984, ETJL was not authorised to or excused for acting on instructions given by ETSL, where by virtue of the knowledge held by it, or which ought to have been held by it had it complied with its duties under Article 21(1), it was a breach of its duties under Article 21(1) to comply with such instructions.'

No doubt this should be read as if the word 'act' were added after 'not authorised to."

21 Paragraph 18 (as amended in 2013) claims that in addition, by each of the trust instruments a contract was formed between the trustee and the unitholders of the relevant fund such that, by virtue of its office as trustee of the funds, ETJL owed duties in contract to all unitholders of each of the funds, namely duties identical to the three sub-paragraphs of paragraph 17.

22 Paragraph 18A claims, further or alternatively, that by each of the trust instruments a contract was formed between the trustee and the manager, each in their capacity as such office-holder and in each case with the knowledge that the other was contracting for the benefit of unitholders in the relevant fund, such that, inter-alia :–(a) breaches of contractual duty by one office-holder would be held by the other office-holder on trust for unitholders; (b) successor office holders would be entitled to sue on behalf of unitholders for any such breaches of duty by their assumption of the counterparty office; and (c) ETJL therefore also owed the duties pleaded in paragraph 18 to the manager of each fund for and on behalf of unitholders.

23 I interpose here some comments about paragraphs 18 and 18A. Paragraph 18 asserts a contract between ETJL as trustee and the unitholders. No doubt there is a contract with ETSL (not ETJL) when each unitholder applies for units, and no doubt the express or implied terms of that contract would include one to the effect that ETSL will abide by the terms of the trust instrument and the relevant prospectus and fund rules. But I am not persuaded that this process would establish a contractual relationship, as opposed to a trust relationship, between ETJL and the unitholder. Even if I am wrong about that, paragraph 18 does not plead that anyone other than the unitholders are in a position to enforce their contractual rights against ETJL. Even if it did, I do not see how the successor trustee or manager could enforce those contractual rights in the absence of an express assignment by the unitholders (and no such assignment is claimed). Paragraph 18 therefore seems to add nothing of value to the pleading.

24 Paragraph 18A is different, asserting a contractual relationship between ETSL and ETJL, with each of those defendants holding the benefit of the contract in trust for the unitholders. In regard to contractual duties owed by ETJL, the idea seems to be that the benefit of the contract is an asset of the unit trust (though the pleading is not in those exact terms) so that the successor trustee and manager become entitled to enforce the contract for the benefit of the fund. It is, however, not claimed that the contractual obligations are more extensive than the trust obligations owed by ETJL, so again it is hard to see that anything valuable is added by paragraph 18A.

Pleaded duties of ETSL

25 Turning to ETSL, paragraph 19 of the Order of Justice begins by claiming that, by virtue of its office as manager of the funds, ETSL was co-trustee of the funds with ETJL and owed duties as trustee to all unitholders of each fund. The paragraph continues that (a) it was subject to the express duties and responsibilities as manager set out in clauses 37 to 39 of the trust instrument and that (b) under the Trusts (Jersey) Law 1984 it was subject to the statutory duties already set out in relation to ETJL.

26 Alternatively, paragraph 20 pleads that ETSL was a fiduciary office holder and owed fiduciary duties to the unitholders as well as equitable duties of care and skill, which are in the same material terms as those set out in Article 21(1), (3) and (4) of the Trusts (Jersey) Law 1984.

27 By paragraph 21, as amended in 2013, it is pleaded that by each of the trust instruments a contract was formed between the manager and the unitholders such that, by virtue of its office as manager of the funds, ETSL owed duties in contract to all unitholders of each fund. As such, paragraph 21 continues, it was subject to the express duties and responsibilities in contract set out at clauses 37 to 39 of the trust instrument and it was also subject to an implied duty of care and skill in the discharge of its functions as a manager.

28 Paragraph 21A, added in 2013, applies paragraph 18A to ETSL, so that it is pleaded that ETSL owed to ETJL the duties identified at paragraph 21, that is the explicit duties set out in clauses 37 to 39 and the implied duty of care and skill, to the trustee of each fund for and on behalf of unitholders.

29 Commenting on paragraphs 21 and 21A, as with paragraphs 18 and 18A, it may indeed be that there is a contractual relationship between ETSL and the unitholders, but in the absence of an assignment to the new trustee and manager I do not see how they can enforce the contract as such. Paragraph 21A asserts a contract between ETSL and ETJL themselves, and that is said to be enforceable by the successor trustee and manager. However, this claim seems to be no more extensive than the claims for breach of trust or breach of fiduciary duty.

Pleaded breaches of duty

30 The pleaded breaches of duty in regard to the R2R Bulgaria Fund are set out in paragraphs 81 to 84 of the amended Order of Justice. Paragraph 81 concentrates on an allegation of mismanagement by companies comprised in the fund while financing the purchase of property in a sub-fund called the Arkoutino sub-fund, leading to losses alleged in paragraphs 85 and 86. It is said that ETJL acted in breach of trust and in breach of contract by not devoting enough time and attention to its duties as to prevent certain advances from being made in the course of the financing process, failed to comply with the provisions of the relevant prospectus, and failed to satisfy the requirements of due diligence. Further and alternatively, paragraph 82 pleads that, by acting on instructions from

ETSL, ETJL was in breach of its duties as trustee under Article 21(1)(a) of the Trusts (Jersey) Law 1984 and/or in breach of its contractual duty of care and skill in agreeing, or failing to take reasonable steps to prevent, certain unexplained payments identified in paragraph 73 of the Order of Justice.

31 Paragraph 83 makes similar claims against ETSL, claiming that it acted in breach of trust, or in breach of fiduciary duty, or in breach of contract in failing to devote time and attention to its duties by permitting the same advances mentioned above, failing to comply with the relevant prospectus, and failing to act with due diligence. Paragraph 83bb also alleges that ETSL was in breach of its implied duty of care and skill in pursuance of its responsibilities under clause 39 of the trust instruments. Paragraph 84 makes a claim, parallel to that against ETJL in relation to the sums pleaded at paragraph 73, asserting breach of duty as trustee and/or in breach of its contractual duty of care and skill.

32 In regard to the R2R Croatia Fund the allegations centre on a company called R2R Dubrovnik Limited, namely that it made unauthorized payments towards the purchase of land in the name of a Croatian company, or otherwise in connection with that purchase and the acquisition of shares in the Croatian company and (cutting a long story short) that this contributed towards undermining the commercial prospects of R2R Dubrovnik Limited, contrary to the impression said to have been given in the relevant prospectus. Paragraphs 102 to 105 of the Order of Justice plead breaches of duty similar to those pleaded in paragraphs 81 to 84.

33 In regard to the R2i Montenegro Fund the allegations focus on a company called R2i Sveti Stefan Limited and on the purchase of several plots of land which turn out to be forest land, which was allegedly not revealed in the relevant prospectus. The burden of the allegations is that R2i Sveti Stefan Limited and some other funds were under-capitalised, with the result that they finished with smaller proportions of the underlying properties than were envisaged in the relevant prospectus.

34 To summarise these alleged breaches, it can be said that there is no pleaded dishonesty, nor any pleaded breach of the fundamental duties of disloyalty and good faith essential to the trustee relationship. Instead there are allegations of unauthorized or excessive payments, made not by the defendant companies themselves but by entities under their control or influence, or other mismanagement in breach of the duties imposed by the trust instruments, augmented by the statutory duty of diligence or other implied duties of care and skill.

Answer

35 The defendant companies' answer, after an amendment in April 2013, begins and ends with long series of non-admissions and a few admissions. In regard to paragraphs 17 to 21A of the Order of Justice, however, the amended answer is fuller. As to paragraph 17,

sub-paragraph a is admitted but the rest is denied, and it is pleaded that the defendants will rely on Article 21 of the Trusts (Jersey) Law 1984 as amended. Then in regard to paragraphs 18 and 18A:–

> *"13. Paragraph 18 is denied. At no material time did the Trustees and/or the unit-holders have any or sufficient intention to nor did they create any binding contractual relationships, or as pleaded or at all.*
>
> *'13A. Paragraph 18A is denied. At no material time did:–*
>
> > *(i) the Trustee form any intention to create a contractual relationship with the Manager;*
> >
> > *(ii) the Manager form any intention to create a contractual relationship with the Trustee;*
> >
> > *(iii) the Trustee or the Manager, form any intention, or possess any or sufficient capacity, to enter into any form of contractual relationship for the benefit of the relevant unit-holders; nor did*
> >
> > *(iv) the Trustee or the Manager have any knowledge or notice that the other was purportedly contracting for the benefit of the unit-holders in the relevant Funds."*

36 Then follow several further paragraphs attacking paragraph 18A on a number of more specific grounds.

37 In regard to the claims against ETSL, paragraph 14 denies paragraph 19 of the Order of Justice (other than sub-paragraph a), pleading positively that at no material time was ETSL a trustee of the funds. As for the claim based on fiduciary duties paragraph 15 of the amended answer pleads:–

> *"15. Paragraph 20 is denied. The Defendants did not owe any fiduciary duties as pleaded, or at all. To the extent that any fiduciary duties were owed by the Defendants (which is denied), the Plaintiffs do not have any locus standi to pursue the Defendants for the said breaches of fiduciary duties."*

38 Paragraphs 16 and 17 deny the claims based on contract, repeating paragraphs 13 and 13A of the amended answer.

The application to strike out

39 The application to strike out does not apply to every part of the plaintiff companies' pleadings. It does not apply to the three additional claims outlined in paragraph 6 above.

40 Apart from those additional claims, however, the defendant companies attack almost every aspect of the plaintiff companies' pleadings. Coming so long after the service of the Order of Justice, the boldness of the attack seems almost breathtaking. But, as Mr Pallot pointed out, the plaintiffs have had an opportunity to amend their own pleadings, and took advantage of that opportunity in 2013. In any event he argues that rule 6/13 of the Royal Court Rules 2004 expressly authorises the court to strike out a claim or pleading ***"at any stage of the proceedings"***, and I accept that. The application therefore needs to be addressed on the merits and without pre-conceptions. Originally the application was based also on the ground of an alleged abuse of process, but that has now been dropped and the application is based solely on the assertion that the relevant parts of the pleadings disclose no reasonable cause of action.

41 Advocate Harvey-Hills for the plaintiffs points out, and Advocate Pallot does not disagree, that the success of a strike-out application does not simply depend on the plaintiff's case being weak or unlikely to succeed. Instead Advocate Pallot accepts that he must demonstrate that it is clear that the plaintiffs' claim is bound to fail. It was recently reaffirmed in *Lapidus v Le Blancq and Voisin & Co* [2013] JRC 181A at paragraphs 20–21 that the Royal Court has regularly cited with approval the commentary in the 1999 edition of the English Supreme Court Practice (the White Book) on what was Order 18 Rule 19 of the then Rules of the Supreme Court of the United Kingdom, which was in similar terms to rule 6/13 of the Royal Court Rules:–

> ***"Exercise of powers under this rule — It is only in plain and obvious cases that recourse should be had to the summary process under this rule"*** paragraph 18/19/6.
>
> ***"A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered … So long as the statement of claim or the particulars … disclose some cause of action, or raise some question fit to be decided by a Judge or a jury, the mere fact that the case is weak, and not likely to succeed, is no ground for striking out': paragraph 18/19/10."***

That is a steep hurdle to overcome, but Advocate Pallot forcefully submits that he is clearly entitled to succeed even in accordance with that strict standard.

Preliminary analysis

42 Before dealing specifically with counsel's submissions I should repeat what I wrote at the outset, that this action raises profound questions about the exact nature of the legal relationships created by the establishment of a unit trust. There is apparently no judicial authority about such relationships in the Royal Court, or in England and Wales, though there is some in Australia. Advocate Harvey-Hills has therefore drawn my attention to textbook and academic authority, namely passages from Underhill & Hayton Law of Trusts and Trustees (18th edition), Kam Fan Sin's The Legal Nature of the Unit Trust (Clarendon Press 1997 re-printed 2007) and Thomas & Hudson's The Law of Trusts (2nd edition) in

which Chapter 53 contains Professor Hudson's views on the matter. Advocate Pallot suggests that this incursion into textbooks is unnecessary, because the law of Jersey on trusts is already clear, but I disagree. The basic question on which I focus is the degree to which a unit trust is contractual or fiduciary in regard to the obligations imposed on the trustee and manager.

43 The view expressed at paragraph 1.125 of *Underhill & Hayton* is this:–

> ***"The persons who participate in a unit trust by subscribing for units are not beneficiaries with equitable proprietary interests as equitable co-owners of the property held by the trustee until the time comes for determination of the trust pursuant to the terms of the trust deed as set up by the manager of the trust.*** Before such termination they have no *Saunders v Vautier* ***collective rights to divide the assets held by the trustee between themselves, the terms of their contract of subscription as reflected in the trust deed ousting such right.*** They only have individual contractual rights to income and to redemption for a sum of money representing a proportion of the net value calculated and realisable as provided in the trust deed, though, as in the case of a pension trust, the trust property is available as security for their personal claim as is the traceable product of the trust property (such product itself being part of the trust fund), while the existence of the trust automatically imposes fiduciary obligations upon the trustee and the manager, except to the extent of any contrary provision in the trust deed, so far as permitted by the Financial Services and Markets Act 2000."

44 Some of those long sentences need to be unpicked. The unitholder's primary entitlement is to his unit, which is essentially a bundle of contractual rights enforceable against the manager. In normal circumstances that is all that needs to be said. But to write that the unitholders have no ***'equitable proprietary interests'*** seems to me to go too far. The statement at the end of the paragraph that ***'the existence of the trust automatically imposes fiduciary obligations upon the trustee and manager'*** suggests to me that the unit trust is indeed a trust, and that the unitholders are the beneficiaries of fiduciary obligations having effect under that trust (subject indeed to specific derogations effectively provided by the trust instrument). And to me that indicates that the unitholders are beneficiaries of the unit trust, so that they do have beneficial interests (perhaps of a limited kind) in the trust property.

45 Kam Fan Sin is, or was in 1997, a member of the Faculty of Law at the University of New South Wales, and his work is endorsed by a foreword from no less a figure than Sir Anthony Mason, a former Chief Justice of the High Court of Australia. His analysis is to a strong degree historical, portraying the unit trust as an inheritor from other, previous commercial arrangements designed for collective investment. This leads him, in his introductory chapter, to emphasise (at pages 4 and 5) the contractual origin of the relationship:–

> ***"First, it [meaning, the main text of the author's work] will suggest that the***

> ***trust in a unit trust is a contractual creation.*** A trust in a unit trust exists because this is an agreed term. The "three certainties" exist because there is mutual intention that the property will be held on trust and not in any other capacity and because the subject matters and objects have been agreed. This ***contrasts with the position of a private trust inter vivos whereby the certainty rules are concerned with the ascertainment of the donative wishes of a settlor and the implementation of those wishes in default of a trustee."***

46 Mr Sin goes on to suggest that the trust alone cannot explain the relationships, obligations and rights found in a unit trust. At page 5, similarly, he writes:–

> ***"A trust analysis cannot fully describe the relationships at the individual levels between the trustee and the manager, the manager and the unitholders, and the trustee and the unitholders."***

In the same paragraph, however, he recognises that, in some factual circumstances, fiduciary relationships may be created amongst them.

47 Later in his work, at pages 172–173, Mr Sin analyses particularly the position of a unit trust's manager, asking the questions whether the manager is a trustee or a fiduciary. He points out that the manager performs nearly all of the functions of a trustee, and draws a parallel with the position of a private trust having both a managing trustee and a custodian trustee. He argues, however, that the parallel is not exact, apparently for the reason that not all of the conditions required by the relevant statute (in Australia) are satisfied by a unit trust. He then concludes that a manager is not a trustee in the strict sense of the word.

48 At page 172, by contrast, he refers to the trustee-like activities of a unit trust's manager:–

> ***"When the manager manages the investment of the unit trust, it assumes functions analogous to that of a managing trustee under statute.*** Whilst it cannot be characterised as a trustee, its activities as a fund manager are most likely to be accepted by the court as establishing a fact-based fiduciary. The manager has control of properties belonging to others, although it does not hold that title. It is undertaking activities in the interest of other persons, the unitholders. It is a holder of power that can unilaterally affect the interest of the unitholders. In a commercial sense, the unitholders are in a vulnerable position for they have no right to interfere with the management of their own money. In most cases, the speed with which transactions have to be done preclude them from having any knowledge at all. Moreover, it is their confidence in the manager's investment expertise that attracts investors to become unitholders. These common factors alone should satisfy all tests for ***establishing a fiduciary relationship in the management activities of the manager."***

In summary therefore Mr Sin sees the unit trust as essentially contractual, but with a trust relationship created by the contractual nexus, and with the manager having fiduciary

obligations owed to the unitholders. I may say that I broadly agree with that analysis, except perhaps about the manager not being a trustee.

49 While Mr Sin's analysis is relatively theoretical and academic, Professor Hudson's approach is relatively pragmatic. Even so, the latter is more difficult to apply directly to the present case because it depends strongly on the statutory provisions which apply to unit trusts in his own jurisdiction of England and Wales. For example, Professor Hudson writes at paragraph 53.06 of his work:–

> ***"The role of the trustee is to ensure that the scheme manager does not use the trust fund for any purpose outwith the terms of its investment powers as contained in the unit trust's scheme rules.*** The scheme manager and the trustee must be independent of each other, and both must be bodies corporate incorporated in the United Kingdom, or another EC member state, and carry on business there."

Now the authority for the second of those sentences is undoubtedly section 242(2) of the Financial Services and Markets Act 2000, which does not apply in Jersey. And it is unclear what, if anything, is the authority for the first of those two sentences.

50 Even so, the broad thrust of Professor Hudson's analysis is not starkly different from that of Mr Sin. Thus at paragraph 53.04 he describes a unit trust as being, at root, a network of investment contracts between investors, a scheme manager and a trustee. He goes on, however, to state at paragraph 53.05 that the legal structure extends beyond that of a mere contract. After all, as he states, ***"the property is held on trust for the participants".*** Therefore the trust structure constitutes an essential part of a unit trust. At paragraphs 53.12 to 53.15 he discusses the division of what he calls the fiduciary obligations in a unit trust, and by this he seems to mean the obligations of management and custodianship generally owed by a trustee to its beneficiaries. He says first that both scheme manager and trustee are to be considered to be fiduciaries. In regard to the manager he writes:–

> ***"53.13 The scheme manager falls to be considered to be a fiduciary because his investment obligations are owed entirely for the benefit of beneficiaries, to whom the scheme also owes direct contractual obligations.*** Powers of investment in relation to private express trusts have been held to be fiduciary powers in general [citing Lord *Vestey's Executors v IRC* [1949] 1 All ER 1108, 1115 ***per Lord Simonds].*** Such a combination of obligations renders the scheme manager a fiduciary in relation to the participants in the unit trust scheme."

51 That conclusion is much the same as the one reached by Mr Sin at page 172 of his work (quoted at paragraph 48 above). The true difference in Professor Hudson's opinion emerges at paragraph 53.14:–

> ***"53.14 The scheme manager does assume the position of a person bearing all the hallmarks of a trustee by directing the "trustee" how to deal***

> ***with the property.*** The trustee is then required to obey those directions. The acid test would therefore appear to be : what would happen if there were a breach of the investment obligations of the unit trust? Given that the unit trustee is required to obey, the manager must be intermeddling in the affairs of the unit trust either as an express trustee entitled to direct the investment of the trust fund, or as a delegate of the person who is the trustee, or as a trustee de son tort, or as a dishonest assistant in the treatment of the trust property. It would be contrary to principle to consider that someone who was delegated, or appointed in the trust document, to have the specific task of making investment decisions would not be the person who would be subject to the general trusts law obligations of investment. If there was a breach of the investment powers set out in the trust document, it would be remarkable if the person who was responsible for carrying out investment could argue that, while he has breached the investment obligations binding on the trustee, he was somehow responsible for those investment activities solely on the basis of contract. If this were the case, then the scheme manager would not be responsible under the law of trusts for breach of trust to reconstitute the trust fund or pay equitable compensation to the participants as an ordinary trustee would be required to do. It would seem more sensible to suggest that the scheme manager bears the investment obligations of a trustee, and therefore should be liable as a trustee for any breach of those obligations."

52 In the following paragraph 53.15 Professor Hudson eliminates the possible liabilities as dishonest assistant or trustee *de son tort*, and concludes that "it would be more consistent with principle to treat the manager as an express trustee, in carrying out the obligations of a co-trustee."

53 I find the analysis in those two paragraphs to be somewhat confused. It seems unrealistic and unnecessary to analyse the situation in terms of intermeddling, delegation, trustee *de son tort* and dishonest assistance. The manager is given powers and duties explicitly by the trust instrument, or by a combination of the trust instrument and statute, and it is given those powers and duties in its own right. And dishonest assistance arises only in those special cases where the phrase is justified on the particular facts. The important question is therefore in danger of being obscured by including (and then excluding) those concepts in this passage.

54 The acid test, as Professor Hudson himself states, is indeed what happens if there is a breach of investment obligations by the manager. Is that a breach of contract and, if so, how and by whom is it to be enforced? And whatever the answers to those questions may be, is the manager a type of trustee, making it liable to be subjected to the equitable remedies available for breaches of trust? I would go further and ask, even if the manager is not a trustee in the strict sense of the term, or not explicitly described as a trustee in so many words, do its express duties and obligations (to give mandatory directions to the nominal trustee) make the manager in legal reality an express trustee? Alternatively, does it owe duties and obligations of a type (sometimes characterised as fiduciary obligations) which

enable the court to impose any of those same equitable remedies as if the manager were a trustee, or as if it were so close to being a trustee that the court should conclude that those equitable remedies ought to be available against it. This final process may fall into the category of incremental developments of the law which common-law and customary courts can legitimately achieve, or, at least, that this is not something which a court should rule out in a strike-out application.

55 In the light of Justice Hayton's and Mr Sin's and Professor Hudson's texts I shall venture to express some preliminary conclusions. As a matter of pure generality, a unit trust can be expected to establish a triangular relationship between the manager, the trustee and the unitholders. All three writers emphasise the contractual origins of that relationship, but all of them also recognise that the unit trust operates as a trust. I have already examined the trust instruments in issue in the present case, and I do find there the contractual and trust features of the triangular relationship which I have mentioned, spelt out in formal language. I also find that the trustee and the manager owe trustee-like or fiduciary duties and obligations to the unitholders, for the reasons spelt out by Mr Sin and Professor Hudson in the two passages quoted in paragraphs 48 and 50 above. I also find that the original manager and trustee did agree to owe contractual obligations to each other. They were parties to formal instruments containing those obligations, and it can be taken that each company knew and consented to the contents of those instruments and intended to be bound by them.

56 Relevant to the present application, though, there remain three further important questions: (1) What is the extent of the duties and obligations owed by the trustee? (2) What is the nature (contractual or fiduciary or both) of any duties owed by the manager to the unitholders? (3) Can any such duties and obligations be legally enforced by the successor manager and trustee, or by either of them?

57 It may be thought, with justification, given the lack of judicial authority on such questions, and given the difference in emphasis between the only academic or textbook writers whose views I have been asked to consider, that it would be inappropriate for me to reach definitive views on those questions in the course of an application to strike out pleadings. I do indeed regard the application as highly surprising in that regard. But I am prepared to deal with the application on its merits. I shall therefore now consider Advocate Pallot's submissions.

Advocate Pallot's submissions

58 At the risk of some oversimplification his submissions can be summarised in this way:–

(i) The claims based on contract cannot succeed. The trust instruments created trusts, not contracts. A trust is not a contract, and the conditions for the creation of a contract in Jersey law are not satisfied. Nor are they specifically pleaded. Moreover Article 34

of the Trusts (Jersey) Law 1984 as amended protects an outgoing trustee from all liability, except for breaches of trust.

(ii) As for the trust claims, Article 21 of the 1984 Law does not create free-standing duties, and the duties of ETJL as trustee were limited by the trust instrument.

(iii) Turning to ETSL: (1) ETSL was not a trustee. (2) If ETSL otherwise owed fiduciary duties to the unitholders, there is no pleaded mechanism for those duties to be enforced by the successor trustee or manager. In any event fiduciary duties are properly limited to duties of loyalty, and do not extend to the duties of care and skill which are said to have been breached in the present case.

(iv) Additionally BWFM is also not a trustee, and therefore has no *locus standi* to sue the former trustee and manager.

The claims in contract

59 Advocate Pallot attacks this part of the pleading in three ways. He begins by referring to Article 34 of the Trusts (Jersey) Law, which provides:–

> ***"34 Position of outgoing trustee***
>
> ***(1) Subject to paragraph (2), when a trustee resigns, retires or is removed, he or she shall duly surrender trust property in his or her possession or under his or her control.***
>
> ***…***
>
> ***(3) A trustee who resigns, retires or is removed and has complied with paragraph (1) shall be released from liability to any beneficiary, trustee or person interested under the trust for any act or omission in relation to the trust property or the trustee's duty as a trustee, except liability –***
>
> > ***(a) arising from any breach of trust to which such trustee (or in the case of a corporate trustee any of its officers or employees) was a party or to which the trustee was privy;***
> >
> > ***(b) in respect of actions to recover from such trustee (or in the case of a corporate trustee any of its officers or employees) trust property or the proceeds of trust property in the possession of such trustee, officers or employees."***

60 On the strength of Article 34 Advocate Pallot claims that a trustee who has been removed, as ETJL was (by consent) removed, and who has duly surrendered the trust property, as ETJL has done, cannot be sued for breach of contract. He can be sued only for breach of trust.

61 Moreover, Advocate Pallot submits, a trust is not a contract and, although there may have been terms which the defendant companies agreed, they did not enter into contracts containing the rights and obligations pleaded by the plaintiffs. What he means by this, so I understand, is that the companies did not contract to be subjected to the statutory duty of diligence. He points out that under Jersey law a contract has the four requirements of capacity, consent, objet and cause, and he claims that the plaintiffs cannot succeed without pleading the particulars required to claim those elements. He points particularly to the element of consent and submits that the defendant companies did not intend to enter into a legal contract which imposed the duty of diligence.

62 My response to that is that, although much of the trust instruments is couched in the language of a trust, it does to my mind represent a contract between ETSL and ETJL. It is at least arguable that a trust and a contract may coexist. I also agree with Advocate Harvey-Hills on the pleading point, that he does not have to plead specifically all the separate elements which go to make a contract in the legal sense of the word, unless indeed and until the absence of any such element is put in issue by the defence. Advocate Pallot may be correct in his submission that Article 34 rules out any contractual claim, but it is in my judgment at least arguable that Article 34 is restricted to claims against a trustee as trustee and does not extend to claims against a trustee as a contracting party. Besides, Advocate Harvey-Hills has pointed out, not perhaps very convincingly, that the claims for breach of contract are also claims for breach of trust, so that they are not barred by Article 34 anyway.

63 Advocate Pallot also pleads that the defendants had no intention or knowledge that either of them was contracting for the benefit of the unitholders. But this is ruled out by clause 4 of each trust instrument which provides:–

> *"The terms and conditions of this Instrument shall enure for the benefit of and be binding on each Unitholder and all persons claiming through or under him (including all persons on whose behalf such Unitholder holds Units) as if each Unitholder and other such person had been a party to and had executed this Instrument and as if each Unitholder and other such person had covenanted to observe and be bound by all the provisions of this Instrument and had thereby authorised the Trustee and the Manager respectively to do all such acts and things as this Instrument may empower or require the Trustee and the Manager (as the case may be) to do."*

64 That clause is no doubt designed to make sure that each unitholder is bound by provisions of the trust instrument. But it also provides that those provisions *"enure for [their] benefit"*, and this means that, by executing the trust instrument, ETSL and ETJL showed a sufficient consent to their each accepting obligations to the unitholders as beneficiaries of the trust. Following from that, if those obligations made ETSL or ETJL a trustee, then the statutory obligations of Article 21 will apply even if those companies or either of them were unaware of the position. If, for example, the law implies a duty of care and skill for a party owing fiduciary duties, it is no defence that the party did not intend to incur those duties.

65 I would therefore summarise my response to the submissions about the claims in contract in this way:–

(i) I have already criticized the pleading in paragraph 18 of the amended Order of Justice to the extent that it pleads a contract between ETJL and the unitholders. I have also mentioned that, in the absence of assignments in favour of the current manager and trustee, the latter are not in a position to pursue claims based solely on contracts between the unitholders and the defendant companies.

(ii) So far as paragraphs 18A and 21A are concerned, I think that the trust instruments created contractual obligations enforceable between ETSL and ETJL themselves, and clause 4 of each trust instrument shows that these obligations were made for the benefit of the unitholders. This probably means that the plaintiff companies do have *locus* to enforce those obligations against the defendant companies, and I am not prepared to strike out those paragraphs.

(iii) Moreover, to the extent that ETSL or ETJL was a trustee, Article 21(1) imposes the statutory duty of diligence. This is not free-standing, and the plaintiffs have not pleaded it as free-standing, but it is overriding.

(iv) Article 21 applies only to trustees but, even if ETSL is not strictly a trustee, it is at least arguable that a duty undertaken for the benefit of others (having regard to clause 4 of the trust instruments) carries an implied duty of diligence to the same or similar effect.

66 I am therefore not prepared to strike out paragraphs 18A and 21A. In particular it is not necessary, unless requested or ordered to plead particulars to this effect, for the pleader to expound the mechanics by which he asserts the making of a contract. At the same time I express great doubt that any contractual claim under paragraph 18A or paragraph 21A will turn out to be an improvement on claims based on breach of trust or breach of fiduciary duty. Even if they did, I accept Advocate Pallot's submission that a plaintiff beneficiary will not be allowed to obtain an advantage by expressing his claim as a breach of contract. Even more clearly do I doubt that paragraphs 18 and 21 are of any value, on the basis that the purely contractual rights of the unitholders cannot be enforced by the successor trustee and manager. But then paragraphs 18 and 21 do not themselves literally claim that they can.

The trust claim against ETJL

67 I turn now to the claim for breach of trust against ETJL. I have summarized paragraph 17 of the Order of Justice and quoted in full a sentence which forms part of paragraph 17c. There are certainly difficulties with that sentence. However, I am prepared to accept that it is adequate to plead that the trustee has a residual duty, having regard to its knowledge of the facts, to challenge unauthorised instructions of the manager. I do not read clauses 26, 36 and 53 as explicitly negating that duty, and it is arguable that any trustee of a unit trust,

including a custodian, does have that residual duty owed to the unitholders as beneficiaries.

68 In fact paragraph 17c goes further, pleading that this residual duty applies not only where the trustee had actual knowledge of relevant facts but also where it ought to have had that knowledge if it had complied with the statutory duty of diligence. Given that the statutory duty is not free-standing, what paragraph 17c must be taken as pleading is that, if ETJL had diligently carried out its duties under clauses 44 and 45, there are facts which it would have known, and that if it had known those facts (or a *fortiori* if it did actually know them) it ought to have refused to follow ETSL's instruction. I imagine that this will be difficult to demonstrate on the facts, for the reason that carrying out (however diligently) the basic duties described in clauses 44 and 45 (limited as they are also by clauses 26, 36 and 53) may well not have revealed the relevant facts. But I am not prepared to strike this out on that ground. After all, the plaintiffs may be able to prove actual knowledge.

Claims against the manager

69 The Order of Justice sets out three claims against ETSL. First it claims that ETSL is liable as a trustee, second that it owed fiduciary obligations to the unitholders, and third that it owed contractual duties to the unitholders, with all of these claims being enforceable by the new trustee and manager. I have dealt with the contractual claims separately.

70 As for the question whether ETSL was a trustee or owed fiduciary duties to the unitholders (or neither) I am confident that it owed fiduciary obligations to the unitholders in regard to its duties and responsibilities as manager and that breach of those duties and responsibilities would give rise to enforceable claims either to replace assets which had been paid away without authority or to make reparation. On this matter I gratefully adopt the reasoning set out by Kam Fan Sin (op cit) at page 172 (paragraph 48 above) and Hudson (op cit) paragraph (paragraph 50 above). I refer also to what I wrote at the end of paragraph 54 above. It may therefore make little difference whether the manager was a trustee or not. But it is possible that it does make a difference, partly by reason that Article 21 of the 1984 Law applies only to a trustee, and the implied duties owed by a non-trustee fiduciary may be different from those imposed by statute.

71 Advocate Pallot submits strongly that ETSL was never a trustee. In the first place the trust instruments distinguish between ETJL as trustee and ETSL as manager, and this is unambiguous. Second, he points out that Article 2 of the Trusts Law provides:–

> ***"A trust exists where a person (known as a trustee) holds or has vested in the person or is deemed to hold or have vested in the person property …"***

This implies, he says, that a person like the manager, which does not hold the trust property and is not entitled to hold it, cannot be a trustee. Third, he adds that there is a system for licensing financial institutions in Jersey, and that the system provides one form of licence

for a trustee and a different licence for a manager. ETJL was licensed as a trustee and ETSL as a manager. A company is not permitted to act outside the boundaries of its licence. Thus, he continues, ETSL cannot, under Jersey law, act as a trustee and cannot therefore be liable as a trustee. In addition ETSL was insured, not as a trustee but as a manager.

72 By contrast Advocate Harvey-Hills argues that, as matter of substance, the trust instrument confers nearly all of the operative functions of a trustee of the unit trust on the manager, so that the manager is in substance the trustee, with the nominate trustee reduced or elevated to the status of a custodian. Article 2 merely determined whether or not a trust exists, which is not in any doubt in the present case, and it cannot be used to establish definitively the persons liable or not liable as trustees.

73 I agree with Advocate Harvey-Hills that it is at least arguable that the manager of a unit trust is liable as a trustee, and that in the present case ETSL is potentially liable as a trustee. The court will not regard itself as bound by the titles and descriptions which the parties have chosen and agreed to give to themselves and each other. It will analyse the substance of the situation and use that analysis to determine the remedies available. In the present case, the example of investment management is an important one. All the relevant duties and powers are exercisable by the manager, and the nominate trustee must obey the manager's directions. It goes further than that. Virtually all the trustee-like functions are allocated to the manager, virtually none to the trustee. It would be stultifying for the court not to hold the manager responsible for the way in which it executes its duties and exercises its powers.

74 The question of licensing is to my mind a red herring. It is legitimate to assume for the purpose of this application that, at the time when ETSL was applying for its licence as manager, it disclosed to the licensing authority what its duties and obligations would be under the trust instrument. The licence no doubt authorised it to carry out those duties and obligations, and I have no reason to think that ETSL acted outside the general scope of those duties and obligations (except that it may have permitted or promoted unauthorised payments, in the course of its management functions). It is at least arguable that none of that prevents the court from holding the manager liable as a trustee if that was the reality of the situation. I think that a similar analysis applies to the question of insurance.

75 Even if the manager is not a trustee, its duties and obligations are to be carried out for the benefit of the unitholders, not for the personal benefit of the manager or that of the trustee. The plaintiffs may be able to show that there is a sufficient relationship of trust and confidence between the unitholders and the manager. If so, that would give theunitholders the right to enforce the manager's obligations and to claim equitable remedies in respect of their breach.

76 Advocate Pallot's attack on this point is radical. Even if he were to accept, for the sake of argument, that the manager owes fiduciary duties and obligations to the unitholders, he

maintains that it is only the unitholders who are in a position to enforce those obligations or to claim remedies pursuant to them, and they are simply not parties to the present proceedings. He acknowledges, again no doubt for the sake of argument, that it is arguable that a successor trustee (though not a successor manager) may enforce claims against a previous fiduciary for a breach of a fiduciary duty owed to unitholders. But he argues that this is limited to fiduciary duties in the strict sense of duties of loyalty. This appears to be his reason for not attempting to strike out the additional claims mentioned briefly in paragraph 6 above. He says that the ability for a successor trustee to sue former trustees and managers does not extend to a claim for breach of a duty of care, because that duty is distinct from any duty of loyalty. He points out rightly that the allegations of breach of duty are all in terms of negligence or breach of a duty of care, with or without additional duties implied by statute, not breaches of any duty of loyalty.

77 In support of this argument AdvocatePallot cited *Bristol & West Building Society v Mothew* [1998] Ch 1, a decision of the Court of Appeal in England, in which Millett LJ expounded a thorough analysis of the different types of duty owed by a trustee or other person in a fiduciary relationship with a claimant, and the different remedies available in respect of those different obligations. He referred also to *BA v Verite Trust Company (In re E, L, O and R Trusts)* [2008] JRC 150, a case in which the trustee company's position of conflict was in issue in the context of a request for it to retire from the trusteeship.

78 I pointed out during the hearing that the phrase ***"fiduciary duty"*** is used in a variety of meanings, not always in the strict sense insisted on by Millett LJ in the *Mothew* case. Advocate Harvey-Hills also referred to *Vestey's Executors v IRC* [1941] 1 All ER 1108, a decision of the House of Lords in which duties in regard to investment (to be executed, as it happens, by ***"authorised persons"*** who were not the trustees of the relevant settlement) were held to be fiduciary. What he says is that the plaintiffs' claim under this heading is based on a wider meaning of the phrase than the more specific meaning identified in *Mothew*.

79 As always, context is crucial. In a case like *Vestey* the issue was whether the duty or power in question was to be executed or exercised beneficially in the interests of the person exercising it (in which case he would have been personally liable to income tax on the trust income), or whether it was to be executed or exercised for the benefit of others (in which case he would not be so liable). It was held that the duties in regard to investment were to be executed or exercisable only for the benefit of the beneficiaries, not those of the authorized persons personally, and that was the sense in which the duties were labelled as fiduciary. The context of *Mothew* was the more specific one, namely whether the solicitor's duty was to account to the beneficial owner for the property held in trust (which did not depend on any issues of causation or such like) or whether it was a question of making equitable reparation (which did not depend on any duty of loyalty). Similarly in the *E, L, O and R Trusts* case the issue was about conflicts of interest, the rules of which do depend on the duty of loyalty. In the present case loyalty is admittedly not of any relevance.

80 In any event I have come to the conclusion that this distinction between different kinds of

fiduciary and other duties is, in the present case, another red herring. It is true that the phrase fiduciary duty should, in some contexts, be reserved to describe the duties of loyalty which are specific to trustees and others in a similar position. But the phrase is also widely used to describe other duties owed by persons who have the stewardship of property for the benefit of others. This is not a misuse of language. The law reports are full of cases in which such things as the duty of investment are described as fiduciary. It is true that one needs to be aware of the two meanings. The reason is that the remedies for a breach of the duty of loyalty are different from the remedies available for breach of the duty of care. One may also say that a trustee who makes an unauthorised payment does not necessarily act in breach of duty at all: he is liable to reconstitute the fund in full, regardless of the circumstances in which the unauthorised payment was made.

81 But none of this provides a defence in the present case. The substance of the claim is that ETSL acted in breach of certain duties owed to the unitholders, and the successor trustee and manager are suing for that breach. The *locus standi* of a successor trustee to sue a former trustee does not depend on the breach having any particular character as a breach of a fiduciary duty. It applies generally to breaches of trust of all kinds. Thus a successor trustee may sue a former trustee in respect of an unauthorised payment of trust property (which is not necessarily a breach of duty), or in respect of a breach of the duty of loyalty (which is a breach of a fiduciary duty in Advocate Pallot's strict sense of the term), or in respect of a breach of a duty of care owed to beneficiaries as such (such as those largely in issue in the present case).

82 I confess that I have undertaken some additional research of my own on this point while preparing this judgment, seeking the answers to the question, what exactly is the basis on which a successor trustee is empowered to sue a former trustee for breach of a duty owed to the beneficiaries? Such claims are relatively common, but what is the legal justification for them?

83 There is, as far as I can see, surprisingly little English authority on the subject, and I was shown no Jersey case-law on it either. But the textbooks are not silent. Lewin on Trusts (18th edition) states in paragraph 39–76:–

> ***"The other trustees, including any judicial or other new trustees, have locus standi to take proceedings against defaulting trustees.*** They can obtain the replacement of lost assets, even though they were themselves also guilty of the breach. Usually, where trustees take proceedings against former trustees to have a breach of trust redressed, no issues arise as between one beneficiary and another, or as between a beneficiary and the current trustees. The object is to secure the return of the trust property for the benefit of all the beneficiaries, according to their respective interests. Trustees will often, however, be well advised to obtain the directions of the court before proceeding."

The authority of *In re Forest of Dean Coal Mining Company* (1878) 10 Ch D 450 (amongst

others) was given in support of the first line of that citation.

84 The *Forest of Dean* case was not about trustees. It related to the promotion of a company and the purchase by that company of certain collieries. The vendor agreed with the promoter to overstate the price by £10,000 and to let the promoter keep that sum. A few years later the company was wound up. There was no doubt about the company's claim against the promoter, but the liquidator also tried to make a director called Barrett liable for misfeasance in not taking steps to recover the money earlier. Mr Barrett had had the benefit of a mortgage on the collieries, and he did apparently know about the offending payment at the time of the purchase, but he was not then a director of the company and became so only later. Sir George Jessel MR dismissed the claim, but in the course of his (as usual) extempore judgment he is reported at pages 453–454 as giving the example of a new trustee:–

> ***"Analogy or illustration is sometimes useful.*** In the case of new trustees newly appointed, their liability extends to seeing that they get the trust funds into their hands; but did anybody ever imagine that their liability extended beyond that, or that they are bound to enquire into all the dealings with the trust fund from the origin of the trust, and to pursue every past trustee who might by any means whatever have become liable to pay more than the actual trust funds? The case I would put in illustration is this: suppose a trust of £10,000 consols, and one of the trustees with the connivance of the other sells out the stock and engages with it in trade; ten years afterwards he replaces it; five years after that the trustees retire, and new trustees are appointed in their place, who find the fund intact. One of the trustees is then told, "It is all right now, but the money has only been paid in five years before," and is told that one of the former trustees had used it in his trade. It is intolerable to suppose that the new trustees should be made liable for not filing a bill, as it was formally under the old procedure, or bringing an action, as it is now, against the former trustee, or his representative, supposing he is dead, with the value of getting from him either the extra interest over and above the interest of the consols, or the profits he might have made from the use of the money in his business. Is that sort of liability on the part of a former trustee one which the new trustee is bound to enforce, though no doubt it would be one which the cestui que trust has power to enforce?"

85 The Master of the Rolls answered that rhetorical and hypothetical question in the negative, and in one or more previous editions of *Lewin on Trusts* (including the 16th) this passage was cited as authority for the proposition that a successor trustee cannot sue a former trustee for a breach which sounds in damages. It is not easy to see how that conclusion was reached, because the example in the case was not a damages case at all, but a breach of the fiduciary duty of loyalty (not to use trust property for the trustee's own purposes).

86 Be that as it may, the passage in *Lewin* cited at paragraph 83 above referred to the Australian case of *Young v Murphy* [1996] 1 VR 279, a decision of the Supreme Court of

Victoria Court of Appeal. That case is not binding on this court, but it is persuasive and it contains a thorough and convincing analysis of the situation. Towards the beginning of his judgment Brooking J said this:–

> ***"The standing of a trustee to take proceedings to have a breach of trust redressed against a trustee or former trustee or a stranger who has become liable to redress a breach of trust is well recognised.*** Not only may a trustee take such proceedings, but he runs the risk of himself committing a breach of trust if he fails to do so."

87 After citing authority for that proposition, including *Re Brogden* (1888) 38 Ch D 546, which related to the trustees of a settlement failing to collect a legacy due to them, and which held that the only good reason for not doing so would be a well-founded belief that it was futile to bring the claim, the Judge continued:–

> ***"His obligation to take the proceedings (unless they would be futile) is part of his duty to get in the trust estate, which includes rights of action against co-trustees or former trustees and strangers for breach of trust.*** This is clear as a matter of both principle and authority. Moreover, since the trustee will take the proceedings for breach of trust for the benefit of the beneficiaries, he can sue even if he was party to the breach of trust or some other breach of trust. The principle is shortly stated in Snell's Equity 29th edition at pages 286–287, where it is said of a new trustee : "If … he discovers that breaches of trust have been committed, he must obtain satisfaction for them from the old trustee, just in the same way as an original trustee must get in any part of the trust estate which is outstanding : and the only excuse for not doing so is that it would be useless to take proceedings against the old trustees." Snell rightly cites *Re Forest of Dean Coal Mining Co* (1878) 10 Ch D 450 ***for the proposition.*** (This decision is misunderstood in the 16th edition of Lewin on Trusts at page 221, where it is said to stand as authority for the view that a trustee, in contradistinction to a beneficiary, has no cause of action against a former trustee in respect of a breach of trust committed by the latter where the remedy sounds in damages.) The right and duty of a successor trustee to sue his predecessor for breach of trust is in *Re Lane's Will* 97 A 587 (1916) ***correctly founded on his duty to obtain all the property that belongs to the trust and for that purpose to get in from the preceding trustees or their representatives whatever the successor trustee finds to be necessary to reimburse the trust estate for losses sustained through breach of trust."***

88 It is important to my mind that this passage draws no distinction between different categories of breach of trust. More specifically the words in parentheses clearly imply that successor trustees are entitled to sue former trustees for the kind of breach which sounds only in damages, such as breach of a duty of care. The current editors of *Lewin* have duly acknowledged the earlier error. A footnote to the passage cited in paragraph 83 above refers to *Young v Murphy* (above):–

> ***"where the locus standi of new and existing trustees is thoroughly reviewed and it is correctly pointed out that the statement in the previous edition of this work that a new trustee had no cause of action where the remedy sounds in damages was based on a misreading of the Forest of Dean case.*** It is the duty of a new trustee to obtain satisfaction for past breaches of trust …"

89 I would be among the first to acknowledge the danger of a judge relying on authority not cited to him, especially overseas authority. But the basic concepts of trust law in England, Jersey and Victoria seem to me close enough to justify my reference to Australian authority, at least in an application to strike out. The result is that I reject Advocate Pallot's main submission on this part of the application. The allegations made in the case against ETSL are of two kinds, (1) unauthorized payments by companies comprised (indirectly) in the trust funds and (2) breaches of a duty of care owed to the beneficiaries of the trust. These are claims which a successor trustee may legitimately make.

BWFM as plaintiff

90 Finally, I deal briefly with the objection that BWFM, though a successor manager, is not a successor trustee and therefore has no *locus standi* to bring this claim against the former manager and trustee. This turns partly on an issue which I have already dealt with, namely whether the manager of a unit trust is properly described as a trustee. I regard it as at least arguable that BWFM is a trustee. Even if it is not, the nominate trustee BWT is required to act on the directions of BWFM, and to my mind it would be absurd to insist on BWT being the sole plaintiff in circumstances where the actual decisions about the litigation are being taken by BWFM.

Summary

91 The end result is that I am not prepared to strike out any part of the amended Order of Justice. In a draft of this judgment circulated to counsel on 15 th April (or shortly thereafter) I stated that there may be parts of the Amended Order of Justice: I had not checked -which depend exclusively on paragraph 18 such that I would be prepared to strike out those parts. I suggested that Advocate Pallot, having read the draft judgment, might be able to direct me to specific words or phrases or passages in the amended Order of Justice (other than paragraph 18 itself) which satisfy that description. It appears that he has not taken up that invitation. I therefore simply dismiss the defendant companies' application.