Michaela Walker; Ross Walker; B (a minor by his guardian ad litem, Michaela Walker); Delarose Trustee Ltd v Paul Egerton-Vernon; Walker Representatives Ltd; Mark Chown; Hawksford Trust Company

Jurisdiction:	Jersey
Judge:	David Roderic Notley Hunt
Judgment Date:	24 January 2014
Neutral Citation:	[2014] JRC 25
Reported In:	[2014] JRC 25
Court:	Royal Court
Date:	24 January 2014

Text

[2014] JRC 25

ROYAL COURT

(Samedi)

Before:

David Roderic Notley Hunt, **QC., Commissioner, sitting alone**.

Between
(1) Michaela Walker
(2) Ross Walker
(3) B (a minor by his guardian ad litem, Michaela Walker)
(4) Delarose Trustee Limited

Plaintiffs
and
(1) Paul Egerton-Vernon
(2) Walker Representatives Limited
(3) Mark Chown
(4) Hawksford Trust Company
Defendants

Advocate E. C. P. Mackereth **for the Plaintiffs**.

Advocate P. D. James **for the First Defendant**.

Advocate B. J. Lincoln **for the Second Defendant**.

Advocate P. G. Nicholls **for the Third Defendant**.

Advocate M. L. A. Pallot **for the Fourth Defendant**.

Authorities

Trusts (Jersey) Law 1984.

Public Services Committee v Maynard [1996] JLR 343 .

Boyd v Pickersgill [1999] JLR 284 .

Minories Finance Limited v Arya Holdings Limited [1994] JLR 149 .

Channel Islands and International Law Trust Company Limited v Pike [1990] JLR 27 .

Jersey Financial Services Commission v A.P. Black Limited [2005] JRC 119A .

Cunningham v Cunningham [2009] JLR 227 .

Trant v AG [2007] JLR 231 .

Alhamrani v Alhamrani [2007] JLR 44 .

Settlement — application by the 4th plaintiff for leave to re-amend the order of justice and application by the 4th defendant to strike out some or all of the claims made against it in the re-amended order of justice.

THE COMMISSIONER:

1 This is my ruling on two procedural applications argued yesterday, namely:–

It was of obvious importance to all parties that they should know the outcome of these applications as soon as possible, not least because of the potential implications in terms of the trial date; the trial is presently fixed to start on 6 th October, 2014, with a time estimate of 20 weeks. I therefore prepared this ruling overnight. As a result, this ruling is briefer and less detailed than would otherwise have been the case. I do, however, emphasise that I have had regard to all the submissions made to me, even if I do not refer specifically to them in this ruling.

(i) an application by the fourth plaintiff, Delarose Trustees Limited ("Delarose"), for leave to re-re-amend the Order of Justice so as to allow Delarose to make against the first defendant, Paul Egerton- Vernon ("PEV"), the second defendant, Walker Representatives Limited ("WRL") and the third defendant, Mark Chown ("MC"), the claims already made against those defendants by the first, second and third plaintiffs; and

(ii) an application by the fourth defendant, Hawksford Trust Company Jersey Limited ("Hawksford") to strike out some or all of the claims made against it in the re-amended Order of Justice.

The background

2 The first three plaintiffs are the beneficiaries of the Jack Walker 1987 Settlement ("the Settlement"). PEV was a trustee of the Settlement from its creation on 9 th July, 1987, until his retirement on 21 st July, 2009. WRL was incorporated by Hawksford in May 1997 and was a trustee of the Settlement until it retired on 5 th December, 2012. MC was a trustee of the Settlement from 1 st February, 2001, until his retirement on 6 th February, 2007. By 22 nd July, 2009, therefore, WRL was the sole trustee of the Settlement. Both PEV and MC were directors of WRL; PEV was also an employee of Hawksford. Delarose was incorporated on 4 th December, 2012, and appointed a trustee of the Settlement the following day.

3 This action was commenced on 16 th March, 2012. In summary, the plaintiffs allege that the first to third defendants were grossly negligent in their handling of the affairs of the Settlement, in particular in pouring very substantial amounts of the Settlement's funds into highly speculative and disastrous investments. At the hearing yesterday various figures were bandied about for the amount of the losses sustained by the Settlement but Advocate Mackereth for the plaintiffs informed the Court that the claims were presently valued in total at about £127 million.

4 At a hearing on 2 nd October, 2013, the plaintiffs indicated an intention to seek leave to add Delarose as a plaintiff in place of the existing plaintiffs and to join Hawksford as the fourth defendant. They did not, however, pursue that application. Instead, by a consent order dated 25 th November, 2013, Delarose was added as the fourth plaintiff and Hawksford was joined as the fourth defendant, in each case pursuant to Rule 6/36 of the Royal Court Rules and the plaintiffs were given leave to re-amend the Order of Justice accordingly.

(1) Delarose's application

5 By the plaintiffs' summons dated 13 th December, 2013, Delarose applied for leave to file and serve on all defendants a re-re-amended Order of Justice, one effect of which would be to allow Delarose to make against PEV, WRL and MC the claims already made against those defendants by the first, second and third plaintiffs. The application was opposed by PEV and MC, on the basis that each of them had a defence of prescription to the proposed new claims. In short, each of them contended that, by virtue of Article 57(3B) of the Trusts (Jersey) Law 1984, Delarose's claims were subject to a prescription period of three years from the date of their retirement as trustees, so that the time for making a claim against MC had expired on 6 th February, 2010, and against PEV had expired on 21 st July, 2012. WRL, on the other hand, accepted that it did not have this same prescription defence as PEV and MC, so it adopted a neutral stance to the application and indicated that it would *"rest on the wisdom of the Court in this regard".*

6 At the outset it was apparent from the respective Skeleton Arguments (and I express the Court's appreciation to all parties for their helpful Skeletons) that the parties disagreed as to the nature of Delarose's application. Advocate Mackereth contended that his application was for leave to amend pursuant to Rule 6/12 of the Royal Court Rules. Advocate James for PEV, however, contended that in substance the application was for the joinder of Delarose pursuant to Rule 6/36; he was supported in this regard by Advocate Nicholls for MC. (Indeed Advocate James and Advocate Nicholls effectively made common cause on the application.) Since it was clearly essential to establish which jurisdiction was being invoked, I heard argument on this issue by way, in effect, of a preliminary point.

7 Advocate Mackereth's case was simple. Delarose had been joined as fourth plaintiff by virtue of the consent order of 25 th November, 2013. Since Delarose was already a party, his application could only be for leave to amend. Although this submission had an immediate logic, Advocate James and Advocate Nicholls contended that it was misconceived in the light of the circumstances in which Delarose had come to be joined in November. Following the abortive hearing on 2 nd October, 2013, there was a discussion between the then parties as to the way forward. PEV and MC had indicated that they would oppose any joinder of Delarose insofar as that would involve any additional claims against them. On the other hand Ogier for the plaintiffs were anxious to get proceedings against Hawksford under way.

8 Accordingly on 7 th November, 2013, Advocate Mackereth emailed Advocate James (copied to Advocate Lincoln for WRL and to Advocate Nicholls) as follows:–

> *"Dear Advocate James*
>
> *We note what you and Advocate Nicolls say and in the light of your comments*

we intend to issue a summons in relation to the claims intended to be brought by Delarose Trustee Limited against the existing defendants. However, that issue will inevitably take some time to be determined, and in the interim please could each of the three existing defendants' advocates confirm by return their consent in principle to the addition of the proposed Hawksford defendant and the addition of Delarose in relation to the claim against Hawksford (and only in relation to Hawksford). By bifurcating the process we can then get the Hawksford timetable up and running as soon as possible whilst the argument is had in relation to Delarose's claims against the first and third defendants."

Mr James replied later the same day in these terms:–

"Dear Advocate Mackereth

I understand the logic behind your suggested approach to the convening of Hawksford and agree that it would be sensible to try to agree a mechanism which gets the timetable up and running as soon is possible. I confess that I am not entirely sure how such a process will operate in practice, but I am sure that the draft order will clarify matters. As a matter of principle, I am not sure that my client has any right to object to your clients (whether beneficiaries or trustee) bringing a claim against Hawksford and the only issue, at least from my client's perspective, is the procedural ramifications of Hawksford being introduced. But to the extent that you need it for the purpose of what you propose, please take this e mail as providing the appropriate consent.

I look forward to sight of the draft order."

In response Ogier emailed, again the same day, saying:–

"Dear Advocates James, Lincoln and Nicholls

Further to the below, please find ***attached*** *a draft order and draft re-amended order of justice which together provide for the addition of the proposed Hawksford defendant and the addition of Delarose in relation to the claim against Hawksford (and only in relation to Hawksford, as made clear in the draft re-amended order of justice by paragraphs 12, 17 and the prayer for relief).* Please could you confirm whether these documents are agreed.

We will write separately as regards issuing a summons in relation to the claims intended to be brought by Delarose Trustee Limited against the existing defendants."

Finally, as foreshadowed in Ogier's email, para.17 of the Re-Amended Order of Justice read:–

"Pending a proposed application for permission to amend to introduce the Fourth Plaintiff as a Plaintiff to the claims made herein against the Trustee Defendants, the Fourth Plaintiff only makes the claims made in this Re-Amended Order of Justice against Hawksford, and does not (yet) make the

claims made in this Re-Amended Order of Justice against the Trustee Defendants."

9 It was clear to me from that exchange that all parties were agreed that the joinder of Delarose was only in relation to the claims against Hawksford. There was no suggestion that PEV or MC were agreeing to the joinder of Delarose so far as any claims against them were concerned. Accordingly Advocate James and Advocate Nicholls were, in my judgment, correct in submitting to me that, in effect, PEV and MC were reserving all their rights in relation to the joinder of Delarose as against them. I agreed, therefore, with PEV and MC that in substance the application of Delarose was to be joined in the proceedings against the first 3 defendants and I so ruled. It follows that the relevant Royal Court Rule is Rule 6/36, which reads:–

"6/36 Misjoinder and nonjoinder of parties

At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application –

(a) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party;

(b) order any of the following persons to be added as a party, namely –

(i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or

(ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between that person and that party as well as between the parties to the cause or matter,

but no person may be added as a plaintiff without that person's consent signified in writing or in such other manner as the Court may direct."

10 Having delivered that ruling, I rose for a short while to enable the parties to take stock of where they stood. Delarose, PEV and MC agreed that in those circumstances the "relation back" principle did not apply and Delarose would not be deemed to be a party at any earlier date than the date of joinder. That still left the issue of PEV's and MC's prescription defence. Delarose accepted that the relevant prescription period was three years; its response was that it could rely on the doctrine of *empêchement d'agir* to defeat any such prescription defence. Happily Delarose, PEV and MC were also agreed that the test for

whether Delarose's application should be granted was whether it had an arguable case, in the sense of a case which would survive a strike out application, that it could defeat PEV's and MC's prescription defence. If it did have such an arguable case, the application should be granted. If it did not, the application should be refused.

11 All parties accepted that the relevant test for *empêchement* was to be found in the decisions of the Jersey Court of Appeal in *Public Services Committee v Maynard* [1996] JLR 343 and *Boyd v Pickersgill* [1999] JLR 284. The test is one of practical impossibility, which:–

> ***"is to be applied objectively to a reasonable person in the particular circumstances in which the plaintiff was placed.*** It is not a subjective test"

(per Southwell J.A. in *Boyd* (at p.294). And as the headnote in *Minories Finance Limited v Arya Holdings Limited* [1994] JLR 149 makes clear, what is required is that the party claiming *empêchement* should have been ***"incapable of acting at all"*** (at p.151). Finally, both PEV and MC accepted for the purposes of the application that it was at least arguable that the doctrine of *empêchement* could apply to trust claims such as those which Delarose wished to make.

12 PEV and MC submitted that there were two reasons why Delarose's empêchement argument was inevitably doomed to fail, either of which was sufficient for their purposes.

I take each of those points in turn.

> (i) Since Delarose was not incorporated, and therefore did not come into existence, until 4 th December, 2012, it was incapable of being *empêché* prior to that date, by which time the three year prescription period had expired in respect of both PEV and MC.
>
> (ii) Even if *empêchement* could in principle arise, on the admitted facts Delarose could not satisfy the test of practical impossibility.

(a) The incorporation of Delarose

13 This argument had the obvious attraction of simplicity. It was, said PEV and MC, only the plaintiff who could rely on *empêchement*; if the plaintiff did not exist he could not be *empêché*. Faced with the obvious force of this point, Advocate Mackereth submitted that it was *"the office of trustee"* which was subject to *empêchement*. Doing my best accurately to record his submission, he contended that the doctrine should apply where (as in the present case) there is a group of trustees who have been party to the same impugned behaviour, where one or more of those trustees retire but part of the group are left holding the remaining trustee positions. In those circumstances there is no practical possibility that the remaining trustee will take proceedings against the retiring trustee(s) although it is the duty of the person who holds the office of trustee to take action in such circumstances. As

and when a new trustee is appointed who is prepared to take proceedings, the *empêchement* to which the office of trustee has been subject accrues to the new trustee. So here, when MC retired in February 2007, WRL and PEV remained as trustees, and when PEV retired in July 2009, WRL remained as trustee. In practice WRL would never institute proceedings against its own directors, since that would involve pointing the finger of blame at itself and would have invited claims for contribution from both individuals. So Delarose, when it came into existence by virtue of its incorporation, could take the benefit of the *empêchement* which had accrued to the office of trustee of the Settlement.

14 Not surprisingly, in my view, Advocate Mackereth was unable to cite any authority in support of his proposition that *empêchement* can apply to the *"office of trustee"*. Indeed in my judgment Advocate James' description in his address of this office of trustee as a nebulous entity was something of an understatement. Suffice it to say that I am wholly unpersuaded by Advocate Mackereth's submission and I have no hesitation in dismissing it as wholly unarguable. Delarose cannot rely on the doctrine of *empêchement* in respect of any period prior to its incorporation.

15 I record for the sake of completeness that Advocate Mackereth had what he described as a subsidiary argument arising out of the period from December 2011, when WRL was asked to retire, to December 2012 when it actually retired (to be replaced by Delarose). During this period WRL, so Advocate Mackereth contended, was unreasonably refusing to retire. Advocate Mackereth accepted that this subsidiary argument could not assist him in relation to MC because the three year prescription period in respect of MC had expired long before December 2011; Advocate Mackereth relied on this period in respect only of PEV. But leaving aside the question of whether WRL acted unreasonably or not (and WRL did not accept that it had acted unreasonably), this subsidiary argument inevitably fails for the same reason as set out in the preceding paragraph.

16 That conclusion is, of course, sufficient in itself to dismiss Delarose's application as against PEV and MC. But for the sake of completeness I proceed to consider PEV's and MC's second reason.

(b) Practical impossibility

17 It was Advocate Mackereth's submission that it was enough for the purposes of the practical impossibility test that Delarose was unable to bring its claim until it had been incorporated and could benefit from the *empêchement* which had accrued to the office of trustee. It did not matter that other remedies might have been available. On the basis of the authorities I have already cited, I reject this argument also. It is clear, for instance, that the plaintiff beneficiaries, or some other trust company engaged by them, could have applied to this Court at any time under Article 51 of the 1984 Law to dismiss WRL as a trustee and appoint a new trustee in its place, with a view to bringing proceedings against PEV and/or MC within the relevant prescription period. They chose not to do so. Indeed in the context of the period between December 2011 and December 2012, Advocate Edwards of Ogier, in

her affidavit sworn on 20th December, 2013, said at para.10 as follows:–

> *"In the light of WRL's demands, the Beneficiaries faced the horns of a dilemma:*
>
> > *(a) They were desperate for WRL to cease being trustee because of the way in which they thought (and think) the Trust had been mismanaged by WRL for so long, and the amount of money lost to the Trust during WRL's trusteeship; but*
> >
> > *(b) They were faced with what they regarded as excessive demands by WRL as the price for them going.*
>
> *The beneficiaries had to recognise that WRL would not retire until they had the indemnity and security they wanted or were removed by the Court as a result of hostile court proceedings the Beneficiaries would have to take.* The beneficiaries thus faced the unattractive alternatives of accepting WRL's demands or incurring the expense and delay of going to court. They decided that agreeing to WRL's demands was the lesser of those two evils, and negotiations with WRL proceeded."

That is clearly not the language of practical impossibility; it is the language of choice.

18 Accordingly on both the grounds I have set out, I find that Delarose does not have even an arguable case that it can rely on the doctrine of *empêchement*. It follows that while I allow the joinder of Delarose as against WRL and allow the proposed re-re-amendment of the Order of Justice in that respect, I disallow the joinder of Delarose as against PEV and MC and I disallow the re-re-amendment with regard to them.

(2) Hawksford's application

19 Hawksford's principal application was for orders that (and I quote from its Summons):–

> *"1 Pursuant to Rule 6/13 of the Royal Court Rules 2004 (the "RCR") and/or the inherent jurisdiction of the Court, the Plaintiffs' claims against the Fourth Defendant contained in their re-amended order of justice served on the Defendants on 26 November 2013 (the* ***"Re-Amended OJ"****) be struck out in their entirety on the basis that:*
>
> > *(a) In part, they disclose no reasonable cause of action;*
> >
> > *(b) In whole, they may prejudice, embarrass or delay the fair trial of the action; and*
> >
> > *(c) In whole, they are otherwise an abuse of the process of the Court,*
>
> *and that the Plaintiffs' claims against the Fourth Defendant as a whole should not proceed."*

20 In summary, there were two parts to Advocate Pallot's application.

(i) He sought to have all the claims dismissed under Rule 6/13 of the Royal Court Rules and/or the inherent jurisdiction of the Court.

Alternatively

(ii) He sought to strike out the claims at paras. 86 to 91 of the re-amended Order of Justice alleging contractual or tortious liability on the part of Hawksford as disclosing no reasonable cause of action.

Again I take each in turn.

(a) Dismissal of all the claims

21 For the purposes of this application Hawksford relied on Rule 6/13(1)(c) and (d) of the Royal Court Rules, which reads:–

> ***"(1) The Court may at any stage of the proceedings order to be struck out or amended any claim or pleading, or anything in any claim or pleading, on the ground that –***
>
> > ***(c) it may prejudice, embarrass or delay the fair trial of the action; or***
> >
> > ***(d) it is otherwise an abuse of the process of the Court***
> >
> > ***…,***
>
> ***and may make such consequential order as the justice of the case may require."***

Hawksford also relied by analogy on the principles governing the dismissal of claims for want of prosecution. Advocate Pallot accepted that he could not rely on these latter principles in their strict sense, for the simple reason that the delays in proceeding against Hawksford of which he was complaining predated the commencement of proceedings.

22 I reject this part of the application by Hawksford for the following reasons.

I see no reason not to accept that explanation. As the Deputy Bailiff (as he then was) observed in *Cunningham v Cunningham* [2009] JLR 227, at para.46:–

> ***"It seems to me reasonable that if, although he has potential claims against additional parties, a plaintiff chooses to concentrate on just one defendant, on the basis that, if successful, he will recover from that defendant all of his losses, he may wish to change his tactics if he***

> ***discovers that, contrary to his belief, the defendant he has chosen may not be able to meet any judgment in full.*** Such circumstances would, it seems to me, provide proper grounds for an application to bring in defendants against whom he has an arguable claim but whom he decided not to join when it did not seem necessary."

That said, Advocate Pallot was at pains to point out that even if Hawksford were to be found liable, that would not necessarily increase the size of the insurance pool which might be available to satisfy the plaintiffs' claims.

(i) The attempt to rely on the principles relating to dismissal for want of prosecution by way of analogy is misconceived. Hawksford has no right to complain of delay prior to the commencement of proceedings.

(ii) As Advocate Pallot accepted, there is a body of Jersey authority to the effect that Rule 6/13(1)(c) cannot apply to striking out the whole of an Order of Justice (see *Channel Islands and International Law Trust Company Limited v Pike* [1990] JLR 27, at p.38) and can only apply to a party who will remain a party to the action after the strike out (see *Jersey Financial Services Commission v A.P. Black Limited* [2005] JRC 119A, at para.26). Nevertheless Advocate Pallot invited me to have regard to the wording of Rule 6/13(1)(c) itself and not to follow the Jersey authorities. I am not persuaded that it would be proper for me to take that course. On the basis of the Jersey authorities I conclude that Rule 6/13(1)(c) does not avail Hawksford.

(iii) I see no basis on which the claims against Hawksford could be categorised as an abuse of the process of the court.

(iv) I agree with the submission of the plaintiffs that the practical difficulties relied on by Hawksford are not relevant to a strike out of the claims; rather they go the question of whether the trial should be adjourned.

(v) The reason given by the plaintiffs for not commencing proceedings against Hawksford at the outset is set out in the 2nd affidavit of Advocate Johnson of Ogier, sworn on 9 th January, 2014, where she says:–

> *"7. The claim is a breach of trust claim: the central complaint made is that the trustees breached their duty in making disastrous investment decisions. The obvious defendants to that claim were therefore the trustees who were in office at the time the disastrous decisions were made. Proceedings were therefore launched against those trustee defendants, as the most proportionate and effective way to proceed.*
>
> *8. However, in May 2013, the plaintiffs began to have serious concerns as to their ability to recover against the trustee defendants if and when their claims succeeded against them, because it started to become apparent that the trustee defendants had serious and complex insurance coverage difficulties which the Plaintiffs had not anticipated when they commenced the proceedings, and did not know about until May 2013."*

(b) The contractual and tortious claims

23 The re-amended Order of Justice makes two distinct claims against Hawksford. As summarised in paras13 to 16 of the re-amended Order of Justice, those claims are as follows:–

> *"13 WRL was a private trust company the purpose of which, and the only purpose of which, was to act as trustee of the JW 1987 Settlement.*
>
> *14 Hawksford provided the JW 1987 Settlement with trust services from 1997 onwards, including the provision of the administration, operation and management of WRL and the JW 1987 Settlement.*
>
> *15 Hawksford is liable for the foregoing losses which were caused by its negligent provision of trust services to the JW 1987 Settlement and/or WRL, in particular in failing to supervise or monitor the operational performance of the JW 1987 Settlement and/or failing to prevent the former trustees from procuring the disastrous investments to be made.*
>
> *16 Further or alternatively Hawksford is vicariously liable for the foregoing losses on the basis that Paul Egerton- Vernon is liable for them as a trustee of the JW 1987 Settlement and Paul Egerton- Vernon's services as trustee of the JW 1987 Settlement since prior to 2000 until his retirement as trustee on 21 st July 2009 were provided by him as employee or agent of Hawksford such that Hawksford is vicariously liable for the liabilities of Paul Egerton- Vernon as trustee of the JW 1987 Settlement."*

I say at once that Hawksford does not apply to strike out the vicarious liability claim. Their challenge is limited to the contractual/tortious head of claim. The claims against Hawksford are set out in detail at paras.78 and following of the re-amended Order of Justice. The contractual/tortious claims are pleaded at paras.86 to 91, which read as follows:–

> *"86 Hawksford owed*
>
> *86.1 The trustees of the JW 19897 Settlement from time to time a duty of care in tort to administer, operate and manage the affairs of the JW 1987 Settlement with the skill, care and diligence to be expected of a professional and regulated trust service provider charging substantial fees for its services; and/or*
>
> *86.2 WRL as trustee of the JW 1987 Settlement a duty of care in contract and/or in tort, or in either, to provide the services set out above with the skill, care and diligence to be expected of a professional and regulated trust service provider charging substantial fees for its services.*
>
> *87 These duties, and clause 4 of the 2002 Agreement, required Hawksford to monitor and/or supervise the investment activity of the JW 1987 Settlement and if necessary to intervene, by issuing directions to the First Defendant and/or the*

Hawksford employees on the board of WRL, reconstituting the board of WRL and/or procuring proper professional investment advice for the JW 1987 Settlement.

88 In breach of those duties, and in breach of clause 4 of the 2002 Agreement, Hawksford failed to

88.1 Monitor and supervise the financial performance of the JW 1987 Settlement, with the result that the disastrous investments were not prevented;

88.2 Intervene promptly with the result that the disastrous investments continued to be made and/or

88.3 Use every effort to safeguard the property, rights and interests of the JW 1987 Settlement and/or of WRL as trustee of the JW 1987 Settlement with the result that the disastrous investments were made, not prevented, and continued to be made and not prevented.

89 In further breach of duty, Hawksford also failed to

89.1 Administer, manage or operate the affairs of the JW 1987 Settlement or

89.2 provide its trust services to the JW 1987 settlement and/or WRL as trustee of the JW 1987 Settlement

with the skill, care and diligence to be expected of a professional and regulated trust service provider charging substantial fees for its services in that it

> *(a) Permitted the disastrous investments to be made; and/or*
>
> *(b) Failed to prevent the disastrous investments being made.*
>
> *(c) Failed to advise and require the former trustees of the JW 1987 Settlement and/or WRL to take all appropriate advice before committing the JW 1987 Settlement's funds to the disastrous investment*
>
> *(d) Failed to replace the directors of WRL with directors who could ensure that WRL acted competently as a trustee in connection with the use and investment of the JW 1987 Settlement's funds and/or*
>
> *(e) Failed to procure the former trustees to appoint alternative, competent, trustees before, themselves, resigning.*

90 As a result of Hawksford's said breaches of duty and/or contract, the JW 1987 Settlement has suffered the loss and damage caused by the disastrous investments, as set out above.

91 For the avoidance of any doubt, this claim against Hawksford does not depend upon the Plaintiffs establishing that Hawksford was grossly negligent in its provision of services to the JW 1987 Settlement. It is the Plaintiffs' case that

> Hawksford will be liable to pay it damages if it establishes that Hawksford acted in breach of duty and/or contract (without the need to establish gross negligence) which caused loss to the JW 1987 Settlement."

24 The test applicable in this jurisdiction to applications to strike out is conveniently set out by Beloff J.A. in *Trant v AG* [2007] JLR 231, where he said (at para.22):–

> ***"22 The test on an application to strike out is well established.*** It is only where it is plain and obvious that the claim cannot succeed that recourse should be had to the court's summary jurisdiction to strike out. Particular caution is required in a developing field of law. Provided that a pleading discloses some cause of action or raises some question fit to be decided only by a judge, jurats or jury, the mere fact that a case is weak is not a ground for striking it out. These propositions are vouched for by a wealth of Jersey authority embracing principles deployed by the courts of the United Kingdom, see e.g. In re Esteem Settlement (2000 JLR at 127) ***(we note en passant that a new regime, arguably more favourable to an application to strike out, has been introduced in England and Wales by the Civil Procedure Rules)."***

25 Not surprisingly in the light of the passages from the re-amended Order of Justice which I have just read out, Advocate Pallot submitted that both the contractual and tortious claims as pleaded were bound to fail. As for the contractual claims, there was no allegation that the plaintiffs were parties to the contracts with Hawksford, or that the plaintiffs were in any way privy to those contracts. As for the tortious claims, which were for pure economic loss, there was no allegation of proximity such as to found a duty of care in negligence. He also complained that the reference in the re-amended Order of Justice to Hawksford providing *"trust services"* was misleading; all that Hawksford contracted to provide was administrative services. More particularly, Hawksford could not, and did not, control the exercise by the individual trustees of their discretion in managing the affairs of the Settlement.

26 It was not until Advocate Mackereth addressed the Court that it became clear, at any rate to me, how the plaintiffs put this part of their case against Hawksford. He explained that it was not the plaintiffs' case that the contractual and tortious duties as pleaded were owed to the plaintiffs; he accepted that they were owed to WRL. Rather the plaintiffs' case (albeit unpleaded) was that WRL's claims against Hawksford for breach of the contractual and tortious duties which Hawksford owed to WRL constituted assets of the Settlement, which the plaintiffs were entitled to enforce against Hawksford, in accordance with the principles explained by Mr Commissioner Page in *Alhamrani v Alhamrani* [2007] JLR 44. In the light of that explanation, I am persuaded that the application to strike out this aspect of the claims against Hawksford must fail. It is clearly arguable that the plaintiffs can recover against Hawksford on the basis explained by Advocate Mackereth. I do, however, direct that the draft re-re-amended Order of Justice be changed before service so as to include a plea along the lines indicated by Advocate Mackereth. In that way all parties will know precisely how the plaintiffs put this part of their case against Hawksford.

27 Whilst I see the force of Advocate Pallot's further submission based on the extent of the control (or lack of control) exercised by Hawksford over the individual trustees, it seems to me that this point is likewise clearly arguable and cannot therefore be stuck out.

28 It follows that I dismiss Hawksford's application in its entirety and that Hawksford will remain a party to these proceedings. Although there was some discussion at the hearing yesterday about the potential consequences in the event that I dismissed Hawksford's application, I made clear that all parties were at liberty to return to this issue once I had delivered my ruling today. I will, therefore, hear such further submissions as the parties wish to make in this regard, in addition to the submissions on the other matters before the Court at this hearing.

29 I invite all parties to prepare an agreed order reflecting this ruling and any subsequent directions that I make today.