Freeman v Ansbacher

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Judge:	The Deputy Bailiff
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Text

[2009] JRC 3

ROYAL COURT

(Samedi Division)

Before:

M. C. St. J. Birt, **Esq**., Deputy Bailiff **(sitting alone)**.

(1) Sarah Daile Freeman
(2) Robert Keith Freeman
(3) Rosanna Freeman
Plaintiffs
and
Ansbacher Trustees (Jersey) Limited
Defendant

Advocate A. Hoy **for the Plaintiffs**.

Advocate N. F. Journeaux **for the Defendant**.

Authorities

Royal Court Rules.

Re Esteem Settlement [2000] JLR 165.

Trusts (Jersey) Law 1984.

Lewin on Trusts.

Re Manisty's Settlement Trusts [1974] Ch 17.

Lemos v Coutts (Cayman) Limited (2005–06) 8 ITELR 153.

Schmidt -v- Rosewood Trust Ltd (2003) All ER 76.

Alhamrani v Alhamrani [2007] JLR 444.

Paragon Finance Plc v D.B. Thakerar & Co [1999] 1 All ER 400.

Midland Bank Trust Company (Jersey) Limited v Federated Pension Services [1995] JLR 352.

Hoechst UK Limited v Inland Revenue Commissioners (2004) STC 1486.

Edgington v Fitzmaurice (1885) 29 Ch D 459 at 483.

Berezovsky v Abramovich (2008) EWHC 1138 (Comm).

Prudential Assurance Co Limited v Newman Industries Limited (No. 2) (1982) Ch 204.

Ellis v Property Leeds (UK) Limited (2002) EWCA Civ 32.

Foss v Harbottle (1843) 2 Hare 461.

Khan v Leisure Enterprises Limited [1997] JLR 313.

Johnson v Gore-Wood & Co (2002)2 AC 1.

Shaker v Al-Bedrawi (2003) Ch 350.

Re Lucking's Will Trust (1968) I WLR 866.

Walker v Stones (2001) QB 902.

Ellis v Property Leeds (UK) Limited (2002) EWCA Civ 32.

Gardner v Parker (2005) BCC 46.

Christensen v Scott (1996) 1 NZLR 273.

Walker v Stones (2001) QB 902.

Bartlett v Barclays Bank Trust Co Ltd (No 1) (1980) 1 All ER 139.

The Deputy Bailiff

1 This is an application by the defendant to strike out the order of justice under RCR 6/13(1)(a), (b) and (c) and under the inherent jurisdiction of the Court. It raises a number of questions, including the *locus standi* of the object of a mere power to sue for breach of trust and the application of the rule against reflective loss where the company in question is owned by trust. There is an associated application by the plaintiffs to amend the order of justice.

Background

(i) The Trust

2 The JB Sims No. 1 Jersey Settlement ("the Trust") is governed by Jersey law and was established by deed dated 4th May, 1978. The named settlor was Mr Jack Sims, a resident of the US, who contributed funds of US$2,000. He does not appear to have contributed any other funds. He explained in correspondence at the time that he was setting up the Trust for the benefit of the children of his business associate, a Mr Kenneth George Freeman ("Mr Freeman").

3 The Trust was set up on the advice of a London based accountant named George Boxall ("Mr Boxall") who is said to have been the financial adviser to Mr Freeman. The defendant ("Ansbacher") was the original trustee under its then name of Codex (Jersey) Trust Company Limited. It appears that Ansbacher dealt mainly with Mr Boxall in connection with the affairs of the Trust until his death in 1991, following which it dealt with Mr Freeman. Mr Freeman settled substantial additional assets into the Trust over the years.

4 The Trust was a conventional discretionary trust. Clause 5(a) of the deed provided as follows:-

> *" The Trustees shall hold the capital and income of the Trust Fund UPON TRUST for all or such one or more exclusively of the others or other of the members of the Specified Class if more than in such shares and portions and at such time or times and subject to such conditions provisos and limitations and subject to such restrictions in all respects as the Trustees ……* may from time to time revocably or irrevocably in writing ……. appoint …… AND PROVIDED FURTHER …….. that any appointment may (if the Trustees think fit) be made in respect of income alone without any appointment of capital ……."

5 By virtue of Clause 2(b), the 'Specified Class' was defined as Sarah Daile Freeman, Robert Keith Freeman and any person added to the Specified Class by the Trustees in exercise of the power conferred upon them by Clause 9(b). Sarah Daile Freeman and Robert Keith Freeman are both children of Mr Freeman.

6 By instrument executed under its common seal on 18th September, 1989, Ansbacher exercised the power conferred upon it by Clause 9(b) to add the third plaintiff, Rosanna Freeman as a member of the Specified Class. Rosanna is a further child of Mr Freeman having been born on 18th December, 1986.

7 Clause 6 of the Trust provides as follows:-

> *"In default of subject to and until any such appointment as aforesaid the Trustees shall until the Vesting Date accumulate the entire income of the Trust Fund arising between the date hereof and the said date by investing the same and the resulting income thereof in any investments hereinafter authorised and the accumulations so made shall be held as an accretion to the capital of the Trust Fund PROVIDED ALWAYS that the Trustees shall have power to pay or apply such part or parts of the annual income of the Trust Fund as it arises to or for the maintenance and support or otherwise for the benefit of all or such one or more exclusively of the others or other of the persons who shall for the time being be members of the Specified Class in such manner and if more than one in such shares as the Trustees shall in their absolute discretion and without being liable to account for the exercise of such discretion think fit and so that the Trustees may at any time or times apply at their discretion the whole or any part or parts of the said accumulations as if the same were income arising in the then current year or for any of the purposes for which monies arising under this Settlement are authorised to be applied."*

8 Clause 8 then provides as follows:-

> *" SUBJECT to the trusts hereinbefore contained the Trustees shall stand possessed of the Trust Fund on the Vesting Date UPON TRUST for such persons, corporations or charities as shall be then living or existing members of the Specified Class in such shares as the Trustees shall on or before the Vesting Date determine and in default of and subject to such determination UPON TRUST for such of the members of the Specified Class as shall then be living in equal shares per capita absolutely."*

9 From this it can be seen that the structure of the Trust is relatively conventional in providing for accumulation trusts of income, subject to powers of appointment of capital or income in favour of a specified class of beneficiaries until the Vesting Date and then ultimate default trusts in favour of those beneficiaries.

10 Ansbacher was the sole trustee from 1978 to 1998 but by deed of appointment dated 14th August, 1998, the settlor exercised his power under Clause 22(c) of the Trust to appoint additional trustees. The deed appointed Mr Freeman, his wife Pauline Ann Freeman and his personal assistant Sarah Jane Beazley ("the New Trustees") as additional trustees to act jointly with Ansbacher.

11 Ansbacher retired as trustee of the Trust with effect from 1st March, 2000 and accordingly the New Trustees have been the only trustees of the Trust since that date. The New Trustees purported to execute another appointment of Rosanna as a member of the Specified Class by deed dated 7th December, 2007. Mr Journeaux suggested in argument that the deed dated 18th September, 1989, whereby Ansbacher purported to add Rosanna as an additional member of the Specified Class, was not a valid exercise of the power conferred by Clause 9(b). He submitted that the fact that the deed was executed under the common seal of Ansbacher meant that it was not executed *'in writing under their hands'* as required by clause 9(b). I have to say that I find the suggestion that a document executed by means of the signature of a director and secretary of a corporate trustee is not a document under hand merely because a corporate seal has also been affixed to be somewhat far fetched. However, I do not need to rule finally upon the point as, for the purposes of a strike-out application, I am certainly content to proceed on the basis that it is, to say the least, very strongly arguable that the deed complies with the requirements of clause 9(b) and that Rosanna has accordingly been a member of the Specified Class since 18th September, 1989 rather than only from 7th December, 2007.

12 Part of the initial trust fund of US$2,000 was used to subscribe for the entire issued share capital of a Jersey company called S.D. & R. Trading Limited ("SDR"). At all material times the shares in SDR were the sole significant asset of the Trust and all the underlying assets were owned by SDR or its subsidiaries.

13 According to an affidavit filed on behalf of Ansbacher, the day to day administration of the Trust was carried out largely by an employee of Ansbacher named Mr Alfred Sidney Holley ("Mr Holley"). Mr Holley was also a director of SDR from 28th May, 1981 until his retirement as a director on 19th December, 2000.

14 The corporate records of SDR apparently show that the first directors of SDR were two residents of Sark, Mr and Mrs Maisney and a resident of Jersey, a Mr Norden. Mr Norden retired as a director on 28th May, 1981 at which point he was replaced by Mr Holley.

15 Mr and Mrs Maisney remained as directors until 30th April, 1986 at which time they were replaced by two persons resident in Bermuda, who were not employed by Ansbacher. They resigned on 1st February, 1989 at which point another employee of the Ansbacher group in Jersey, Mr Wilton, took office as Mr Holley's co-director until 31st May, 1991 at which point he was replaced by Mrs Pamela Simon and Mrs Patricia Jeanne, both employees of Ansbacher in Jersey. Mrs Simon retired as a director in March 1993 and was replaced by Mr Frith who resigned in turn in October 1998. Mrs Jeanne and Mr Holley continued as

directors until their resignation on 19th December, 2000, which was after Ansbacher had retired as trustee of the Trust on 1st March, 2000.

(ii) The claims

16 The plaintiffs issued and served their order of justice on 14th December, 2007. The claims fall under three main headings which can conveniently be referred to as the tax claim, the Spanish land claim and the software claim. It is not necessary to rehearse the allegations in any detail because, although it denies any breach of trust, Ansbacher accepts that, save in one respect concerning the tax claim, the Court should, on a strike out application, proceed on the basis that the pleaded allegations are arguably true.

(a) The tax claim

17 At paragraphs 7, 8 and 22(1) of the order of justice, the plaintiffs allege that, because Ansbacher failed to ensure that the directors of both SDR and its subsidiary Velvet International Ltd ("Velvet") were all resident outside the United Kingdom, by allowing Mr Boxall, a UK resident, to be a director of Velvet until his death in 1991, SDR incurred a UK corporation tax liability of £28,283 and a liability for the fees of tax investigation consultants in the sum of £11,458. It is not clear from the pleadings what year(s) this relates to, but it was clearly before Mr Boxall's death in 1991.

(b) The Spanish land claim

18 This is dealt with in paragraphs 9–17 and 22(2) and (3) of the order of justice. It appears to be quite a complex story. In briefest summary it is alleged that in 1988 SDR funded litigation in the United Kingdom and Spanish courts by a Mrs Rowe concerning land in Spain; in 1989 SDR made an investment in the Spanish land through companies owning the land; in 1991 SDR entered an agreement with the Smyth Settlement whereby that settlement acquired an interest in the companies owning the land; in 1997 the Smyth Settlement brought litigation against SDR alleging misrepresentation on the part of SDR in connection with the 1991 agreement (the misrepresentation action"); SDR failed to compromise that action at an early stage on advantageous terms; and finally that in May 1997 SDR became involved as a co-plaintiff in a libel action against Mr Smyth in the English High Court. It is said that the misrepresentation action was eventually settled on terms less advantageous to SDR than those offered and rejected at an earlier stage and the libel action was discontinued in December 2003 on terms which required payment of Mr Smyth's costs.

19 It is alleged that, if the affairs of SDR had been managed with proper care and skill and if Ansbacher had ensured that SDR's affairs were conducted in such manner as was necessary to safeguard the investments of the Trust and/or to protect the interests of the beneficiaries of the Trust, SDR would not have invested in the Spanish land and/or the litigation commenced by Mrs Rowe; would not have entered into the agreement with Mrs Rowe concerning her litigation; would not (without the issues of title to the Spanish land

being resolved) have obtained or relied upon funding from the Smyth Settlement to finance the obtaining of planning permission for the Spanish land; would have ensured that Mr Smyth and the trustees of the Smyth Settlement were in no doubt as to the disputed nature of the title to the Spanish land (thereby avoiding the misrepresentation action); would have agreed an earlier settlement of the misrepresentation action; and would not have been party to the libel action. The losses arising out of these matters are not quantified in the order of justice but it is said that the value of the trust fund has been diminished as a result.

(c) The software claim

20 This part of the claim is set out in paragraphs 18–21 and 22(4) of the order of justice. It is alleged that in September 1991 SDR purchased for £200,000 the worldwide selling rights to three named software products. It is further alleged that, by the date of the SDR accounts in April 1992, the purchase price had been written down to £100. It is alleged that if the affairs of SDR had been managed with proper skill and care and if Ansbacher had ensured that SDR's affairs were conducted in such manner as was necessary to safeguard the investments of the trust fund and/or to protect the interests of the beneficiaries of the Trust, the software would not have been purchased. In particular, it is said that no due diligence was conducted in relation to the existence or commercial value of the software; the price paid exceeded SDR's entire assets at the time of purchase; SDR was rendered insolvent by the making of the investment which was written off as worthless within about six months; and no prudent businessman would have agreed to purchase the selling rights to the software either on the terms agreed by SDR or at all. It is alleged that the value of the trust fund has been diminished by £200,000 as a result of SDR's acquisition of the software rights.

(iii) Delay in bringing the claim

21 Ansbacher contends that there has been substantial delay in bringing these claims. It would seem from the order of justice that the events concerning the Spanish land occurred between 1988 and 1997 and the software transaction took place in 1991 and 1992. The order of justice contains no date as to when the tax claim arose but it was clearly before the death of Mr Boxall in 1991.

22 Ansbacher has filed affidavits from Mrs Elizabeth Dulake, managing director of Ansbacher and from Mr James Sharkey, an English solicitor who at the material time was employed by a firm called DLA Piper, which firm represented Ansbacher. In view of the response of the plaintiffs to the information contained in the affidavits (to which I shall refer shortly) I do not need to rehearse in any detail the information contained in these affidavits. It is clear that all of Ansbacher's files were released to the New Trustees on 30th June, 2000. Before then there had been correspondence between DLA Piper and a Mr Grace, who was a solicitor employed by the English firm of Blaser Mills Winter Taylors (“Blaser Mills”) until about 2002, following which he carried on practice on his own account. He stated on 8th January, 2003 that he had been acting for the New Trustees and, at their request, for SDR since August 1998, when the New Trustees were appointed. He said that he had also been

retained to advise the beneficiaries of the Trust and, in particular the minor Rosanna, with regard to their position generally. According to Mr Sharkey, it was clear that by 1998 relations between Mr Freeman and Ansbacher had broken down and some time was spent seeking to agree the terms upon which Ansbacher would retire. This was not achieved until 2000. There had been discussion and correspondence in 1998 and 1999 concerning some of the matters contained in the order of justice but on 14th September, 2000 (after receipt of Ansbacher's files) Blaser Mills wrote summarising the potential claims for breach of trust against Ansbacher.

23 Mr Sharkey asserts in his affidavit that the matters raised in that letter correspond with the claims now brought in the order of justice. The letter stated that a barrister, a Mr Aiden Christie, had been instructed to advise on formulating the breach of trust allegations. There was a further letter from Blaser Mills on 20th October, 2000 which amplified the alleged breaches of trust. There was some further correspondence with Blaser Mills and then Mr Grace on his own account but, according to Mr Sharkey, this ended in September 2003, although there was reference in that letter to the possibility of the beneficiaries bringing a claim through Rosanna.

24 According to the affidavits filed by Ansbacher, nothing further was heard until service of the order of justice on 14th September, 2007. Ansbacher asserts that the delay in commencing the proceedings is unfair. All the matters now complained of were known to the New Trustees, to the beneficiaries and to their lawyers by 2000 at the latest. Nothing new has arisen since then. If proceedings were to be taken against Ansbacher, they should have been taken then. Furthermore, the New Trustees and the plaintiffs and their lawyers have always known that Mr Holley and Mrs Jeanne were the most important witnesses for Ansbacher. Mr Holley retired in 2004 and Mrs Jeanne in 2005. They are now aged 68 and 64 respectively. Ansbacher asserts that the plaintiffs and the New Trustees would have appreciated that Mr Holley's and Mrs Jeanne's recollection of the events complained of (which go back many years) will have been impaired over the period of more than seven years since the plaintiffs and New Trustees started alleging the breaches of trust which are now complained of in the order of justice.

The strike-out application

25 RCR 6/13 provides as follows:-

> ***"(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:-***
>
> > ***(a) it discloses no reasonable cause of action or defence, as the case may be;***
> >
> > ***(b) it is scandalous, frivolous or vexatious;***
> >
> > ***(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…..

(ii) No evidence shall be admissible on an application under paragraph (1)(a).”

As already stated, this application is brought under paragraphs (a), (b) and (d) as well as under the inherent jurisdiction of the Court. No evidence can be considered under (a) but the evidence in the various affidavits can be considered under the remaining heads.

26 The principles upon which the Courts acts on such applications are well established. It is only where it is plain and obvious that the case cannot succeed that the claim should be struck out. As long as the order of justice discloses some cause of action or raises some question to be decided, the mere fact that the case is weak and unlikely to succeed is no ground for striking it out. This is particularly so in an uncertain and developing field of law. (See for example *Re Esteem Settlement* [2000] JLR 119 at 127–128).

27 Ansbacher applies to strike out the order of justice on the following grounds:-

I shall consider each of these in turn.

(i) Prescription

(i) Prescription; it is said that the claims of the first and second plaintiffs are brought outside the limitation period.

(ii) *Locus standi*; it is said that none of the plaintiffs has the necessary standing to bring the claims, being simply the objects of a mere power.

(iii) The exculpation provisions; it is said the provisions in the trust deed provide a complete defence and that leave to amend the order of justice to circumvent this aspect should not be granted.

(iv) Reflective loss; it is said that the losses claimed by the plaintiffs are merely reflective of losses sustained by SDR and that the claims are therefore barred by the rule against reflective loss.

(v) In relation to the tax claim, it is said that the plaintiffs have not pleaded the facts of any tax assessment raised, nor that it was paid by SDR.

28 The relevant parts of Article 57 of the Trusts (Jersey) Law 1984 (“the 1984 Law”) are as follows:-

whichever period shall first begin to run.

“(2) Save as provided in paragraph (1), the period within which an action

founded on breach of trust may be brought against a trustee by a beneficiary …… is:-

(a) 3 years from the delivery of the final accounts of the trust to the beneficiary ….. or

(b) 3 years from the date on which the beneficiary …….. first has knowledge of the occurrence of a breach of trust ,

(3) Where a beneficiary is a minor the period referred to in paragraph (2) shall not begin to run before the day on which the beneficiary ceases to be a minor.

3(A) Save as provided in paragraph (1), the period within which an action founded on breach of trust may be brought against a former trustee by a current trustee is 3 years from the date on which the former trustee ceased to be a trustee of the trust."

29 Ansbacher asserts that the first and second plaintiffs, who were adults at all material times, have had knowledge of the occurrence of the alleged breaches of trust for more than three years before the order of justice was served. Having considered the evidence, the first and second plaintiffs now concede that this is so and that accordingly their claims are statute barred pursuant to Article 57(2)(b). In the circumstances I order that they be removed as plaintiffs in the action.

30 The order of justice pleads that Rosanna was born on 18th December 1986. She therefore ceased to be a minor on 18th December, 2004. Pursuant to Article 57(3) the 3-year period for her to bring proceedings expired on 18th December, 2007. The order of justice was issued and served on 14th December, 2007 and is therefore within the relevant limitation period by a matter of a few days. It follows that Rosanna's claim is not prescribed.

(ii) *Locus standi*

31 On this aspect Mr Journeaux relies on paras (b) and (d) of Rule 6/13(1) as well as the inherent jurisdiction of the Court.

32 Although it is often used, the term 'discretionary trust' is somewhat imprecise. The conventional discretionary trust will normally in fact contain a mixture of trusts and powers.

33 As it is well known, trusts may be categorised as *bare* trusts (e.g. where the trustee holds the property for a single beneficiary absolutely) and *special* trusts (where the trustee typically has other duties and powers). Special trusts may in turn be divided into *fixed* trusts and *discretionary* trusts.

34 An instrument may confer the legal authority on a person to dispose of property which is

not his own:—a *power*. There are various ways in which these types of powers may be distinguished. For present purposes, the most relevant distinction is between *fiduciary* powers and *personal* powers. The distinguishing feature of a fiduciary power is that the donee of a power owes a duty to the objects of the power to consider from time to time whether and how to exercise it. As a general rule, every power given to trustees of the property to which the power relates in virtue of their office is a fiduciary power.

35 Fiduciary powers may in turn be sub-divided into *trust* powers and *mere* powers. Trust powers are powers which the trustee is compelled to exercise, whereas mere powers are powers which the trustee is merely compelled to consider whether or not to exercise from time to time.

36 The Trust in this case is comprised of (i) mere powers of appointment conferred on the trustee to appoint capital and income to the members of the Specified Class during the trust period; (ii) a trust to accumulate the income; and (iii) a default trust at the expiry of the trust period for the members of the Specified Class as shall then be living in equal shares absolutely. Indeed the Trust is similar to the description of a typical discretionary trust given by Lewin on Trusts (18th Edition) at 29–23:-

> ***"A typical example of a discretionary trust in the wider sense (particularly in the context of offshore trusts) is one under which the trustees have various mere powers of appointment, and of distribution or application of capital and income, among a class of beneficiaries during the trust period, subject to which income is to be accumulated during the trust period, and at the end of the trust period the trust fund and its income, so far as not disposed of, is held on fixed trusts for the descendants of the settlor.*** In this example, the trust is described as a discretionary trust though none of the discretions are imperative and none of the default trusts themselves involves the exercise of any discretion."

The difference in this case is that the ultimate default trust is for members of the Specified Class rather than for the descendants of the settlor.

37 It follows that Rosanna has an interest under the Trust in two ways, both as a result of her membership of the Specified Class. First, as an object of the mere power to appoint capital and income contained in Clause 5(a) of the Trust and the mere power to distribute income in Clause 6; and secondly, as a beneficiary of the ultimate default trust established under Clause 8.

38 So far there is no dispute between the parties. The difference arises over whether the object of a mere power has the necessary standing to sue for breach of trust and, where appropriate, seek the reconstitution of the trust fund. Both counsel are agreed that there is no Jersey authority on the point and that guidance is to be obtained from English authority.

39 I was referred in this context to para 39–69 of *Lewin* which is to be found in the section dealing with who has *locus standi* to sue trustees for breach of trust. The paragraph is worth quoting in full:-

> ***"An object of a discretionary trust or fiduciary power has no right to the present or future entitlement to trust income or capital, whether contingent or defeasible, unless and until the discretion is exercised in his favour.*** Such an object does, however, have a right to require the exercise of discretion in the case of a discretionary trust and a right to require the consideration of an exercise of discretion in the case of a fiduciary power, and though that right gives the beneficiary no more than an expectation of benefit, it is an expectation which is protected by the right conferred on the beneficiary and to that extent is more than a mere hope. The traditional approach of the court was to draw a line between discretionary trusts and fiduciary powers. Objects of discretionary trusts had locus standi to bring an action to secure the trust fund and their right in it, while objects of fiduciary powers had locus standi to seek a removal of trustees who failed to give due consideration to an exercise of their fiduciary powers, but none to seek any other kind of relief, with the possible exception of a claim to enforce an exercise of the power in special circumstances. In our view, following the decision of the Privy Council in *Schmidt v Rosewood Trust Ltd*, ***locus standi does not depend on the distinction between discretionary trusts and fiduciary powers.*** And objects of both discretionary trusts and fiduciary powers have locus standi to seek relief for the protection of their rights, though the court has a discretion to determine what relief, if any, should be granted. As was said in that case:
>
> ***"The right to seek the court's intervention does not depend on entitlement to a fixed and transmissible beneficial interest.*** The object of a discretion (including a mere power) may also be entitled to protection from a court of equity, although the circumstances in which he may seek protection, and the nature of the protection he may expect to obtain, will depend on the court's discretion."
>
> ***The protection which the court may award includes the disclosure of information, documents and accounts.*** But we consider that there is no tenable basis for the view either that the protection cannot extend to the reconstitution of a trust fund which has been dissipated or depleted by a breach of trust or that the protection must extend to the reconstitution of the trust fund without the court having any discretion in the matter. In our view, a discretionary beneficiary, whether as an object of a discretionary trust or of a fiduciary power, can invoke the court's jurisdiction to seek the proper administration of the trust and the relief claimed can be the reconstitution of the trust, and whether that relief is granted is a matter for the discretion of the court."

40 Mr Journeaux's primary submission as developed in his skeleton argument is that I should declare Jersey law to be to the like effect as the traditional approach of English law as described by Lewin in the passage quoted above, namely that the object of a mere power

has no locus *standi* to seek the reconstitution of the trust fund on account of a breach of trust. He referred me in particular to *Re Manisty's Settlement Trusts* [1974] Ch 17, which is the authority cited for the traditional approach in *Lewin*. That case was concerned with an intermediate power on the part of the trustees of the settlement to add to the class of beneficiaries. When discussing the remedies open to an object of a mere power, Templeman J said at page 25:-

> ***"If a person within the ambit of the power is aware of its existence he can require the trustees to consider exercising the power and in particular to consider a request on his part for the power to be exercised in his favour.*** The trustees must consider this request, and if they decline to do so or can be proved to have omitted to do so, then the aggrieved person may apply to the court which may remove the trustees and appoint others in their place. This, as I understand it, is the only right and only remedy of any object of the power……"

Later at page 27 he said:-

> ***"Nor does an intermediate power break the principles laid down by Lord Eldon L.C. in the passage which I have read because, in relation to a power exercisable by the trustees at their absolute discretion, the only 'control' exercisable by the court is the removal of the trustees, and the only 'due administration' which can be 'directed' is an order requiring the trustees to consider the exercise of the power, and in particular a request from a person within the ambit of the power."***

41 Mr Journeaux submits that *Manisty* was not expressly overruled by *Schmidt* and therefore still represents the law of England. I should likewise decide that it reflects the law of Jersey. Mr Hoy, on the other hand, submits that *Re Manisty* cannot stand with *Schmidt* and that the correct position is as described in the passage from Lewin cited above. He also referred me to the Cayman Islands case of *Lemos v Coutts (Cayman) Limited* (2005–06) 8 ITELR 153. He accepted that the point at issue in that case was very different but pointed out that counsel for the defendant trustees (Michael Briggs QC, now Briggs J of the English Chancery Division) conceded that the object of a mere power may sue for reconstitution of the trust fund. Thus at para 47 of the judgment it is recorded that:-

> ***"[Mr Briggs] concedes that a discretionary beneficiary, the object of a mere power, has the right to invoke the court's inherent jurisdiction to seek the proper administration of the trust fund and the relief claimed can be the reconstitution of the trust fund."***

42 It seems to me that this is a pure point of law upon which I have heard full argument and where it may be helpful for me to reach a concluded view rather than simply to find that the point is arguable and therefore suitable for trial. I am in no doubt that I should declare Jersey law to be as set out in *Lewin*, namely that the object of a fiduciary power (whether a trust power or a mere power) has *locus standi* to apply to the Court for relief and that such relief can include the reconstitution of the trust fund where loss has been caused by a trustee's breach of trust. It will be a matter of discretion for the Court as to what relief, if any,

should be granted in any particular case.

43 I reach this conclusion for the following reasons:-

(i) *Re Manisty* was concerned with whether the object of a mere power had a remedy for failure by the donee to consider the exercise of that power. The case was not concerned with whether, in a situation where the trustees have committed a breach of trust and mis-managed the assets so as to cause loss to the trust fund, the object of the power would have any standing to seek a remedy. Templeman J held that, in the event of a failure to consider the exercise of the power, the Court could appoint new trustees to consider exercising the power. However, if the former trustees have caused loss to the trust fund, this would hardly be a satisfactory remedy as the loss would remain and the new trustees could only make appointments out of whatever assets remained. Whilst it is clearly arguable that *Re Manisty* is authority for the proposition that the object of a mere power has no standing to sue the trustee for reconstitution of the trust fund, I do not think that it is undoubtedly so.

(ii) Even if *Re Manisty* is authority for the proposition, I consider that, for the reasons summarised by Lewin, it cannot stand with the subsequent decision of the Privy Council in *Schmidt*. Although the actual decision in *Schmidt* was concerned with the provision of information, Lord Walker's language concerning the court's jurisdiction to supervise and if appropriate, intervene in the administration of trusts is in general terms. In particular he offers the view that there is no reason to draw any bright dividing line between transmissible and non-transmissable (that is discretionary) interests or between the rights of an object of a discretionary trust and those of an object of a mere power (of fiduciary character), when considering the question of *locus standi* to approach the Court for relief. Furthermore I note that at paragraph 42 Lord Walker appears implicitly to express some reservations on the observation of Templeman J at page 27 of his judgment in *Manisty*, to which I have referred at paragraph 40 above.

(iii) I would endorse the observation of *Lewin* referred to earlier that a typical discretionary trust will often confer mere powers of appointment on the trustees. This may well be so even where the clear intention of the settlor is that the objects of the mere power (such as his children or grandchildren) are the persons who are realistically expected to benefit from the trust fund. It would be in my judgment be a highly unsatisfactory situation if such beneficiaries were held not to have standing to sue the trustees for breach of trust where, for example, the trustees had made speculative investments which had resulted in devastating loss to the trust fund.

(iv) As was made clear in *Schmidt* (see para 66) the differences in this context between trusts and powers are a good deal less significant than the similarities. For example, to a beneficiary of a discretionary trust, there will be no real difference in what he expects from his trustees in connection with the income of the trust whether the trust deed constitutes a trust to pay income amongst the beneficiaries subject to a power to accumulate or a trust to accumulate with power to pay income amongst the

beneficiaries. The effect for him will be exactly the same, namely that he will only receive income if the trustees decide in their discretion that it should be paid to him. It seems to me a wholly unsatisfactory outcome if he were held to have *locus* to sue the trustees for breach of trust and reconstitution of the trust if there was a trust to pay out income with power to accumulate but not if there were a trust to accumulate with a mere power to pay out income. The effect on him of a loss to the capital of the trust fund and a consequent diminution of income would be the same and there seems no logical reason why he should not be able to seek a remedy from the trustees in either case.

(v) The object of a mere power clearly falls within the definition of 'beneficiary' in Article 1(1) of the 1984 Law. Although that Law says nothing about whether all beneficiaries have the standing to bring an action for breach of trust, there is nothing in the Law which is inconsistent with my conclusion.

44 As stated at para 37 above, Rosanna also has a contingent interest as a default beneficiary under Clause 8 of the trust deed. Again, there is no Jersey authority on the standing of such a beneficiary to sue for breach of trust. The position in England seems to be well established, namely that such a beneficiary has traditionally been regarded as having standing to sue for breach of trust. The position is conveniently set out in *Lewin* at paras 39–68 which again is worthy of quotation in full:-

> ***"In the past the existence of an equitable vested or contingent interest, however minute or remote, has been treated as sufficient to give a claimant locus standi to take proceedings to have the trust fund secured, or to take proceedings for breach of trust.*** ……. This traditional approach does not fit easily with the decision of the Privy Council in *Schmidt v Rosewood Trust Ltd*, ***in relation to applications for disclosure of information, documents or accounts, that the court has a discretion to grant no relief at all at the instance of beneficiaries with remote or wholly defeasible interests.*** Further, it is not easy to distinguish the Schmidt case on the basis that an application for disclosure of information, documents or accounts should be governed by quite different principles from those governing an action to have the trust fund secured, or to take proceedings for breach of trust. A beneficiary who seeks disclosure invokes the jurisdiction of the court to supervise, and where necessary intervene in, the administration of the trust to protect the interest or rights of that beneficiary. Another aspect of that protection is having the trust fund secured in accordance with the trusts, and having the trust fund reconstituted if dissipated or depleted by a breach of trust. It would be odd for the court to have a discretion to deny a beneficiary with a defeasible interest the former kind of protection, having regard to the remoteness of his interest, but none to deny such a beneficiary the latter kind of protection, however remote his interest. Even so, we consider that a court would be cautious in exercising its discretion to deny a beneficiary with a remote or defeasible interest a right to have the trust fund secured or a breach of trust remedied, on account of the remoteness of his interest, and perhaps it is only where the interest is so remote that the court would be prepared to authorise a

distribution notwithstanding a remote interest, that no relief would be given."

45 Mr Hoy did not seek to argue that, following *Schmidt*, the Court did not have a discretion as to whether to grant relief in a particular case. In my judgment, that represents the correct approach. Accordingly, I hold that a person with a contingent interest does have *locus standi* to bring an action for breach of trust, including seeking reconstitution of the trust fund, but that the Court has a discretion as to whether to grant relief in any particular case.

46 It follows that, whether she is considered as an object of a mere power or as a beneficiary with a contingent interest, Rosanna has the *locus standi* to bring the present proceedings.

47 Mr Journeaux's second argument is that, even if Rosanna has *locus standi*, the case against the Court exercising its discretion in her favour (assuming breach of trust is proved) is so overwhelming that her case is doomed to failure and should be struck out at this stage.

48 I would summarise his grounds for arguing that no court would exercise its discretion in her favour as follows:-

(i) Ansbacher never exercised any power of appointment in her favour.

(ii) The transactions which are the subject of criticism were all undertaken at the instigation of Mr Freeman who was completely familiar with them.

(iii) The New Trustees were the correct persons to bring an action against Ansbacher as former trustee for any breach of trust or to procure that SDR should bring an action against its directors for breach of their duties to SDR. The New Trustees have been the sole trustees since March 2000 and yet, despite having full knowledge of all the relevant matters (having received Ansbacher's files in June 2000), they chose to take no action against Ansbacher or to procure that SDR take action against its former directors. The time for the New Trustees to bring any action against Ansbacher has now expired.

(iv) The Freeman family consists of a small number of members, namely Mr and Mrs Freeman (both of whom are New Trustees) and their three children. Mr and Mrs Freeman and the first and second plaintiffs accept that they have known all about the alleged breaches of trust since, at the latest, the supply of the files in 2000. They have at all material times been represented by English solicitors, by Voisins (who now act for Rosanna) and apparently by English counsel. They considered instituting proceedings but chose not to. It is grossly unfair, says Mr Journeaux, to allow Rosanna at this late stage to seek relief on behalf of all the beneficiaries (as reconstitution of the trust fund would benefit them all equally) in circumstances where the other beneficiaries and the New Trustees could have sought the same relief at a much earlier stage but have chosen not to and are now prescribed.

(v) Although Rosanna was a minor until 2004, the fact remains that the English solicitor who was advising the other beneficiaries asserted that he was also looking after the interests of Rosanna. (See para 22 above)..

(vi) The delay in bringing proceedings has caused real prejudice to Ansbacher who, from 2003 to 2007, were entitled to think that the matter had gone away. The key personnel who administered the affairs of SDR and the Trust have now retired. They will have to recall incidents which go back as much as 20 years. They would have been in a much better position to respond to the allegations of breach of trust had proceedings been brought promptly after the retirement of Ansbacher in 2000, as they should have been.

49 One can understand the dismay felt by Ansbacher at facing a claim for breach of trust at this late stage in the circumstances described by Mr Journeaux. But a discretion can only be exercised after consideration of all the relevant facts. The plaintiffs have filed affidavits sworn by Rosanna and by Mr Peter Coyle, her present English solicitor, explaining the circumstances in which the proceedings came to be brought at this late stage. Mr Hoy accepted in argument that, if, as he put it, the Court found in due course that Rosanna was simply acting as 'stool pigeon' for Mr Freeman in respect of a claim that he, as one of the New Trustees, refused to bring, the Court could exercise its discretion to refuse relief even if a breach of trust were established; but it was premature to do so now. In my judgment he is correct. It will be for the Court at trial to consider all the evidence and decide at that stage, in the light of the facts which it finds proved, whether to exercise any discretion in Rosanna's favour so as to grant her relief in the event of a breach of trust by Ansbacher being proved. I cannot possibly say at this stage that her chances of persuading the Court to exercise its discretion in favour are so hopeless that the case should be struck out.

(iii) The exculpation provisions and whether leave to amend should be granted

50 Clause 25 of the trust deed provides as follows:-

> ***"In the execution of the trusts and powers hereof no Trustee shall be liable for any loss to the Trust Fund arising in consequence of the failure, depreciation or loss of any investments made in good faith or by reason of any mistake or omission made in good faith or of any other matter or thing except wilful and individual fraud or wrongdoing*** **on the part of the trustee** ***who is sought to be made liable or (in the case of a corporation) of any of its officers."*** [Emphasis added]

51 Article 30(10) of the 1984 Law is in the following terms:-

> ***"Nothing in the terms of a trust shall relieve, release or exonerate a trustee from liability for breach of trust arising from his own fraud, wilful misconduct or gross negligence."***

52 Mr Hoy accepts that the exculpation provision in Clause 25 of the trust deed will be effective to exclude any liability on the part of Ansbacher except to the extent that the relevant breach of trust arises from fraud, wilful misconduct or gross negligence on the part of Ansbacher. The allegation in the order of justice is to the effect that the affairs of SDR were not managed with proper skill and care. Mr Hoy accepts that this is an allegation of ordinary negligence and does not specifically allege gross negligence on the part of Ansbacher.

53 Accordingly Mr Hoy applies on behalf of Rosanna for permission to amend the order of justice to allege gross negligence. The sole change to the original order of justice would be to introduce a new paragraph 21A in the following terms:-

> ***"It is averred that these breaches of duty constituted gross negligence on the part of the Defendant within the meaning of Clause 25 of the Settlement and Article 30(10) of the Trusts (Jersey) Law 1984 revised edition.*** In this regard, the Plaintiffs will refer, inter alia, to:
>
> > ***(1) the failure to ensure that the directors of SD&R and Velvet were resident outside the United Kingdom:***
> >
> > ***(2) the decision to invest in the Spanish litigation and the litigation commenced by Mrs Rowe and the decision to enter into the agreements pleaded in paragraph 10 above:***
> >
> > ***(3) the failure to accept the offer to settle the Misrepresentation Claim;***
> >
> > ***(4) the decision to commence the Libel Action;***
> >
> > ***(5) the decision to invest in the Software."***

54 The limitation period for Rosanna to bring a claim for breach of trust has now expired. Counsel are agreed that, in such circumstances, (see *Alhamrani v Alhamrani* [2007] JLR 444) the Court must consider the following two questions:-

(a) Is there a new cause of action?

(i) Will the effect of the amendment be to add a new cause of action? If it will not, the second question no longer arises and the Court can move on to consider whether or not to allow the amendment as a matter of general discretion applying the normal criteria.

(ii) If the effect of the amendment is to add a new cause of action, the Court must then ask itself whether the new cause of action arises out of the same facts or substantially the same facts as a cause of action already pleaded. If it does not, the Court cannot allow the amendment. If it does, the Court may, as matter of discretion, allow the amendment.

55 Mr Journeaux submits that paragraph 21A adds a new cause of action in that a breach of trust based on gross negligence is a different cause of action from a breach of trust based on ordinary negligence. He refers in support to the English case of *Paragon Finance Plc v D.B. Thakerar & Co* [1999] 1 All ER 400 and to the decision of the Court of Appeal in *Midland Bank Trust Company (Jersey) Limited v Federated Pension Services* [1995] JLR 352.

56 Mr Hoy, on the other hand, submits that the effect of the proposed amendment is simply to insert an averral that the breaches of trust already pleaded constitute gross negligence. The cause of action, namely Ansbacher's breaches of trust, remains exactly the same. No new facts are alleged. It is simply a question of the appropriate label for the breaches of trust already pleaded.

57 In *Midland Bank Trust* the Court of Appeal considered whether gross negligence, for the purposes of what is now Article 30(10) of the 1984 Law, involves any specific mental element. At page 393 Le Quesne JA said this:-

> ***"In each of [these cases] the approach was to treat 'gross negligence' as meaning 'very great negligence', or flagrant or extreme negligence, or negligence consisting of 'a very marked departure from the standards' of responsible and competent people.*** In none of them was it suggested that 'gross negligence' involved either 'a certain mens rea' or 'an intentional disregard of danger' or 'recklessness'.
>
> ***In our judgment, the direction to the Jurats in the present case as to the meaning of 'gross negligence' was erroneous.*** All that this phrase means is a serious or flagrant degree of negligence. It does not import any question of intentional or reckless fault. ….."

58 How does one determine what constitutes a cause of action? I was referred to two cases which assist in this respect. In *Paragon* Millett LJ said this at 406:-

> ***"The classic definition of a cause of action was given by Brett J in*** *Cooke v Gill* (1873) LR 8 CP 107 ***at 116;"'cause of action' has been held from the earliest time to mean every fact which is material to be proved to entitle the plaintiff to succeed, —every fact which the defendant would have a right to traverse."*** (My emphasis) In the Thakerar case Chadwick J cited the more recent definition offered by *Diplock LJ in Letang v Cooper* [1964] 2 All ER 929 at 934, [1965] 1 QB 232 at 242–243, ***and approved in Steamship Mutual Underwriting*** *Association Limited v Trollope & Colls Limited* (1986) 6 Con LR 11 at 30; ***'A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.'*** I do not think that Diplock LJ was intending a different definition from that of Brett J. However it is formulated, only those facts which are material to be proved are to be taken into account. The pleading of

> unnecessary allegations or addition of further instances or better particulars do not amount to a distinct cause of action. The selection of the material facts to define the cause of action must be made at the highest level of abstraction."

59 The observations of Brett J and Diplock LJ were also referred to by Park J in *Hoechst UK Limited v Inland Revenue Commissioners* [2004] STC 1486. He expressed the matter this way at paragraph 24 of the judgment:-

> ***"Two critical concepts which feature in the foregoing formulations of the legal position are those of cause of action and of the limitation period.*** A cause of action in this context is not so much the label attaching to a claimant's claim (for example 'breach of statutory duty' or 'money paid under a mistake of law'). Rather, it is the set of facts which entitles the claimant to relief….."

60 Mr Hoy submitted that the expression 'gross negligence' in this context is essentially a label to be applied to a set of facts to denote the degree of culpability involved rather than a cause of action in its own right. In support of this he referred to Matthews and Sowden, the Jersey Law of Trusts (3rd Edition) at para 14.10:-

> ***"Lastly, there is 'gross negligence'.*** This is perhaps like the elephant: instantly recognisable but difficult to describe. In Scots law, as in Jersey law, trustees' liability for trustees' gross negligence ('culpa lata') cannot be excluded, and in one Scottish (House of Lords) case, Lord Herschell said:
>
> ***"It is impossible to draw any hard-and-fast line between the want of that care which a man of ordinary prudence would display in the management of his own affairs and that high degree of negligence which is termed culpa lata"*** (*Rae v Meek* (1889) 14 App Cas 558 at 573)."

61 In *Paragon* the plaintiffs commenced proceedings against the defendants alleging breach of contract, negligence and breach of fiduciary duty. Subsequently, after any applicable limitation period had expired, the plaintiffs sought to amend their pleadings in order to allege fraud, conspiracy to defraud, fraudulent breach of trust and intentional breach of fiduciary duty. The Court of Appeal held that an amendment which sought to make a new allegation of intentional wrongdoing, where previously no intentional wrongdoing had been alleged, constituted the introduction of a new cause of action, since intentional and unintentional wrongdoing gave rise to distinct causes of action.

62 In my judgment, paragraph 21A does not add a new cause of action. The present case is quite different from *Paragon*. In that case, what was sought to be added was an allegation of intentional wrongdoing. The plaintiffs had therefore to prove as a fact that the defendants had the necessary intention. They were therefore alleging and would have to prove an additional fact to those contained in the original pleaded causes of action, namely that any wrongdoing had been intentional. As Pill LJ observed, quoting the well known remark of Bowen LJ in *Edgington v Fitzmaurice* (1885) 29 Ch D 459 at 483:-

"The state of a man's mind is as much a fact as the state of his digestion…."

63 Conversely, in this case no new facts are alleged. As is clear from *Midland Bank Trust*, there is no additional element of *mens rea* in gross negligence as compared with ordinary negligence. What is alleged by Rosanna is that Ansbacher committed a breach of trust by acting in breach of the duties pleaded at paragraph 5 of the order of justice, namely to exercise the care and skill of a professional trustee in managing the affairs of the Trust and the investment of the trust fund, to ensure that it had such information as to SDR's affairs as the directors of the company could be expected to have, and to take such action as a reasonable professional trustee would take to ensure that SDR's affairs were conducted in such manner as was necessary to safeguard the investments of the trust fund and/or to protect the interests of the beneficiaries of the Trust. The amended order of justice does not allege any additional respects in which Ansbacher is said to have breached these duties. It relies upon exactly the same allegations as in the original order of justice. It merely asserts that these breaches can be categorised as gross negligence. That is ultimately a value judgment to be applied by the Court to the facts which it finds and is essentially a label to denote the degree of culpability involved.

64 I have not forgotten Mr Journeaux's point that, because of the terms of the exculpation clause in the trust deed and of Article 30(10) of the 1984 Law, Rosanna's claim will fail unless she can prove gross negligence and it must therefore be a new material fact. But I do not accept that this assists him. I do not think that asking the Court to make a value judgment (after it has found all the necessary facts) by categorising any want of diligence on Ansbacher's part as ordinary negligence or gross negligence is asserting a new fact so as to amount to a new cause of action. For example, suppose that a plaintiff beneficiary alleges a breach of trust through want of exercising due diligence as would a prudent person (see Article 21(1) of the 1984 Law) and suppose that the defendant trustee then pleads an exculpation clause exempting liability for anything less than gross negligence. In my opinion it would be open to the plaintiff to deal with this matter in his reply by pleading that the facts and matters pleaded in the order of justice were sufficient to amount to gross negligence.

65 For these reasons I conclude that paragraph 21A does not seek to introduce a new or additional cause of action.

(b) Does the amendment arise out of the same facts?

66 In case I am wrong in finding that there is no new or additional cause of action, I go on to consider whether, assuming that paragraph 21A does amount to a new cause of action, it arises out of the same facts or substantially the same facts as the cause of action already pleaded.

67 In this connection Mr Journeaux refers me again to *Paragon* where the court held that an

allegation of intentional wrongdoing did not arise out of the same facts or substantially the same facts as the claims in respect of unintentional wrongdoing such as negligence. He also referred me to the observations of Judge Mackie QC sitting in the English High Court in the case of *Berezovsky v Abramovich* [2008] EWHC 1138 (Comm) where he said the following at paragraph 15:-

> ***"Miss Dohmann submits that even if the relevant primary limitation period has expired the claims for breach of trust and breach of fiduciary duty can still be added because they arise out of the 'same facts or substantially the same facts as a claim in respect of which [the Claimant] has already claimed a remedy in the proceedings'.*** She draws attention to several cases containing helpful observations from the Court of Appeal but I say at once that these seem to me to be 'trumped' by the recent guidance set out in *Society of Lloyds v Henderson* [2007] EWCA Civ 930 ***and*** *Giles v Rhind* [2008] EWCA Civ 118. ***These cases take the matter on from early authorities*** *notably Goode v Martin* [2002] 1 WLR 1828 ***and their effect was helpfully summarised in two paragraphs of Mr Popplewell's skeleton argument as follows***:
>
> > ***(a) A new claim does not arise 'out of the same facts' as those on which the old claim was based 'if, in order to prove it, new facts have to be added.'*** The basic test therefore is 'whether the plea introduces new facts.' It is not sufficient merely to demonstrate that some or a substantial part of the facts relied on to promote the new claim were relied on to promote the old claim. Moreover it is not sufficient that certain facts are indirectly relevant, for example by way of background, to the old claim. Rather they have to be facts 'in respect of which' a remedy was originally claimed.
> >
> > ***(b) The additional possibility that the new facts are substantially the same of those already relied on is limited to '….*** something going no further than minor differences likely to be the subject of enquiry but not involving any major investigation and/or differences merely collateral to the main substance of the new claim, proof of which would not necessarily be essential to its success.' (taken from Colman J in *P&O Nedlloyd v Arab Metals* [2005] 1 WLR 3733 at 3745)"

68 In that case the plaintiff's original claim had been in respect of tortious liability, in particular for intimidation arising from the sale of his beneficial interest in a company. The plaintiff applied to amend his claim to add claims for breach of trust, breach of fiduciary duty and an account of profits arising from the sale of the company. Judge Mackie QC said that, had it been a domestic case, he would have been attracted by Miss Dohmann's argument that the new claims simply put a different label on essentially the same case. But he went on to say that the claims of breach of trust might well give rise to dispute as to the proper law involving factual investigation of the circumstances of the alleged trust as part of a dispute as to whether a trust existed and, if it did, what the trustee's duties were. The additional claim would involve exploration of potentially wide-ranging matters which did not arise on

the claim for intimidation. He held therefore that the new claims did not arise from substantially the same facts.

69 *Paragon* and *Berezovsky* seem to me to be very different cases from the present one. In *Paragon* the need to prove an intention on the part of the defendant which was not necessary in relation to the original claim clearly meant that the new cause of action did not arise out of the same facts or substantially out of the same facts. Similarly, I can readily understand the reasons for Judge Mackie's decisions described above.

70 But in the present case I have already indicated when dealing with whether the amendment amounts to a new cause of action, that I do not consider that there are any new facts to be proved. The allegations concerning the tax claim, the Spanish land claim and the software claim are completely unaltered by the proposed amendments to the order of justice. The only amendment to the entire text is that contained in paragraph 21A, which simply asserts that the facts and matters already pleaded in the original order of justice amount to gross negligence (as opposed to ordinary negligence). The amendment will involve no new matters to be investigated and no new lines of enquiry. Ansbacher will not be faced with any matters which it was not already facing. No further evidence will need to be called as a result of the amendment. The Court will have to decide exactly the same issues of fact as for the original order of justice. The only additional matter which the Court will have to undertake is to make a value judgment as to whether any breach of trust which it finds to have been committed by Ansbacher is so serious that it can be categorised under the label of gross negligence rather than ordinary negligence. This will be a matter of inference and assessment based upon the facts as found by the Court.

71 For these reasons I hold that, even if, contrary to my view, the amendment amounts to a new or additional cause of action, it arises out of the same or substantially the same facts as the original cause of action and there is accordingly jurisdiction to grant leave to amend.

72 Finally, I must consider whether, as a matter of discretion, I should grant leave to amend. Mr Journeaux argues strongly that I should not. He relies upon the same matters as in relation to the *locus standi* point and I have summarised those matters at paragraph 48 above. However, as mentioned above, I do not consider that the amendment will prejudice Ansbacher any more than the existing delay has already prejudiced it. Thus, Mr Holley and Mrs Jeanne will not need to be asked about any additional matters arising out of the amendment, nor will Ansbacher have to pursue any additional lines of enquiry. The factual issues in dispute between the parties remain exactly as previously and Ansbacher has no doubt already been able to make such enquiries as it wishes to make. Given my view that, as a matter of strict technicality, the matter of gross negligence could probably have been dealt with in a reply, I consider that the interests of justice point towards leave being granted so that the matters in issue between the parties can be adjudicated upon on their merits. I therefore grant leave to Rosanna to amend the order of justice by including a new paragraph 21A in the form referred to above.

(iv) Reflective loss

73 Mr Journeaux submitted that the losses claimed in the order of justice were merely reflective of the losses suffered by SDR and were not therefore recoverable at the instance of the beneficiaries. The claim was doomed to failure for this reason and the order of justice should accordingly be struck out in its entirety.

74 The reflective loss principle was articulated in its modern form in the case of *Prudential Assurance Co Limited v Newman Industries Limited (No. 2)* [1982] Ch 204 and I shall for convenience refer to it as the 'Prudential principle'. However, as was stated by Mantell LJ in *Ellis v Property Leeds (UK) Limited* [2002] EWCA Civ 32 at para 13, the Prudential principle is essentially a reaffirmation and explanation of the rule in *Foss v Harbottle* (1843) 2 Hare 461 to the effect that the proper plaintiff in respect of loss suffered by a company as a result of a wrong done to it is the company itself and not its shareholder(s). The rule in *Foss v Harbottle* undoubtedly forms part of Jersey law (see for example *Khan v Leisure Enterprises Limited* [1997] JLR 313) and accordingly, in the absence of Jersey authority upon the Prudential principle, it is appropriate to look to the English authorities on the topic.

75 The most recent authoritative statement of the principle is to be found in the decision of the House of Lords in *Johnson v Gore-Wood & Co* [2002] 2 AC 1. Because the principle has not fallen for consideration in Jersey previously I think it would be helpful to quote certain extracts from the speeches of Lord Bingham and Lord Millett. Lord Bingham summarised the position as follows at page 35 (omitting the case references):-

> ***"These authorities support the following propositions.*** (1) Where a company suffers loss caused by a breach of duty owed to it, only the company may sue in respect of that loss. No action lies at the suit of a shareholder suing in that capacity and no other to make good a diminution in the shareholder's shareholding where that merely reflects the loss suffered by the company. A claim will not lie by a shareholder to make good a loss which would be made good if the company's assets were replenished through action against the party responsible for the loss, even if the company, acting through its constitutional organs, has declined or failed to make good that loss. ….. (2) Where a company suffers loss but has no cause of action to sue to recover that loss, the shareholder in the company may sue in respect of it (if the shareholder has a cause of action to do so), even though the loss is a diminution in the value of the shareholding. …… (3) Where a company suffers loss caused by a breach of duty to it, and a shareholder suffers a loss separate and distinct from that suffered by the company caused by breach of duty independently owed to the shareholder, each may sue to recover the loss caused to it by breach of the duty owed to it but neither may recover loss caused to the other by breach of the duty owed to that other…….
>
> ***These principles do not resolve the crucial decision which a court must make on a strike-out application, whether on the facts pleaded a shareholder's claim is sustainable in principle, nor the decision which the***

trial court must make, whether on the facts proved the shareholder's claim should be upheld. On the one hand the court must respect the principle of company autonomy, ensure the company's creditors are not prejudiced by the action of individual shareholders and ensure that a party does not recover compensation for a loss which another party has suffered. On the other, the court must be astute to ensure that the party who has in fact suffered loss is not arbitrarily denied fair compensation. The problem can be resolved only by close scrutiny of the pleadings at the strike-out stage and all the proven facts at the trial stage: the object is to ascertain whether the loss claimed appears to be or is one which would be made good if the company had enforced its full rights against the party responsible, and whether ……. the loss claimed is 'merely a reflection of the loss suffered by the company'. In some cases the answer will be clear, as where the shareholder claims the loss of dividend or a diminution in the value of a shareholding attributable solely to depletion of the company's assets, or a loss unrelated to the business of a company. In other cases, inevitably, a finer judgment will be called for. At the strike-out stage any reasonable doubt must be resolved in favour of the claimant."

76 Lord Millett explained the position with great clarity at page 61 in the following terms:-

"A company is a legal entity separate and distinct from its shareholders. It has its own assets and liabilities and its own creditors. The company's property belongs to the company and not to its shareholders. If the company has a cause of action, this is a legal chose in action which represents part of its assets. Accordingly, where a company suffers loss as a result of an actionable wrong done to it, the cause of action is vested in the company and the company alone can sue. No action lies at the suit of a shareholder suing as such, though exceptionally he may be permitted to bring a derivative action in right of the company and recover damages on its behalf……. Correspondingly, of course, the company's shares are the property of the shareholder and not of the company, and if he suffers loss as a result of an actionable wrong done to him, then prima facie he alone can sue and the company cannot. On the other hand, although a share is an identifiable piece of property which belongs to the shareholder and has an ascertainable value, it also represents a proportionate part of the company's net assets, and if these are depleted the diminution in its assets will be reflected in the diminution in the value of the shares. The correspondence may not be exact, especially in the case of a company whose shares are publicly traded, since their value depends on market sentiment. But in the case of a small private company like this company, the correspondence is exact.

This causes no difficulty where the company has a cause of action and the shareholder has none; or where the shareholder has a cause of action and the company has none…. Where the company suffers loss as a result of a wrong to the shareholder but has no cause of action in respect of its loss, the shareholder can sue and recover damages for his own loss, whether of a capital or an income nature, measured by the diminution in the value of his

shareholding. He must, of course, show that he has an independent cause of action of his own and that he has suffered personal loss, caused by the defendant's actionable wrong. Since the company itself has no cause of action in respect of its loss, its assets are not depleted by the recovery of damages by the shareholder.

The position is, however, different where the company suffers loss caused by the breach of a duty owed both to the company and the shareholder. In such a case the shareholder's loss, insofar as this is measured by the diminution in value of his shareholding or the loss of dividends, merely reflects the loss suffered by the company in respect of which the company has its own cause of action. If the shareholder is allowed to recover in respect of such loss, then either there will be double recovery at the expense of the defendant or the shareholder will recover at the expense of the company and its creditors and other shareholders. Neither course can be permitted. This is a matter of principle; there is no discretion involved. Justice to the defendant requires the exclusion of one claim or the other; protection of the interests of the company's creditors requires that it is the company which is allowed to recover to the exclusion of the shareholder. These principles have been established in a number of cases, though they have not always been faithfully observed."

77 Mr Journeaux submitted that, on the basis of the pleading contained in the order of justice, all of the losses in respect of which the claim is brought were suffered by SDR. Thus the tax claim arises out of a UK corporation tax liability incurred by SDR; the Spanish land claim arises out of loans and investments made by SDR and the involvement of SDR as a party in certain litigation; and the software claim arises out of the acquisition by SDR of the software selling rights for £200,000 and the subsequent loss of that sum. He argues that, assuming the allegations in the order of justice are correct, the losses claimed would be made good if SDR had enforced its full rights against the parties responsible, namely its directors who, on that assumption, would have been in breach of their duty towards the company.

78 Mr Hoy raised only one argument against the proposition that the losses claimed in the order of justice are reflective of losses suffered by SDR. As the passages from the speeches of Lord Bingham and Lord Millett quoted above make clear, the Prudential principle has no application where the company never had a cause of action in respect of the loss for which the shareholder is making a claim.

79 Mr Hoy points out, correctly, that, if the shareholders of a company authorise the company to enter into a transaction which prejudices the company, then the company has no claim against the directors even if, apart from such authority, there would have been such a claim. This is a matter of trite company law. He argued that, as SDR was wholly owned by Ansbacher in its capacity as trustee of the Trust, SDR entered into the relevant transactions with the authority of Ansbacher as it shareholder and therefore never had a claim against the directors.

80 The difficulty with this is that it is quite contrary to the plaintiffs' pleaded case. The order of justice is based upon Ansbacher's failure to supervise the directors, to ensure that it had adequate information as to SDR's affairs and to take action to ensure that SDR's affairs were conducted in a proper manner. There is no suggestion that Ansbacher,in its capacity as shareholder, specifically authorised the relevant transactions. Accordingly I do not think this point is open to Mr Hoy on the pleadings.

81 I therefore proceed on the basis that the losses claimed in the order of justice are reflective of losses suffered by SDR which would have been made good if SDR had taken the necessary action against its directors.

82 The Prudential principle is a matter of company law where the law of Jersey is based on similar principles to that of England and Wales. In my judgment the Prudential principle does form part of the law of Jersey. On the face of it, therefore, the principle would appear to be of application to the claims in this case so as to prevent Ansbacher from being liable to the plaintiffs for losses suffered by SDR.

83 However, despite the arguments which Mr Journeaux has put forward most persuasively, I have come to the clear conclusion that it would be wrong to strike out the claim. My main reason for doing so is that I consider there to be considerable uncertainty as to the extent to which the Prudential principle should be applied to a claim such as the present relating to a trust. The authorities are clear that a court should be particularly careful in striking out a claim in a developing field of law on the basis of assumed facts. It is best to consider how the law should develop with the benefit of knowing the actual facts.

84 I have been referred to a number of cases relating to the Prudential principle and I have read them all carefully. The majority involve a conventional position where the shareholder is seeking to sue the wrongdoer who has not only caused loss to the company by reason of his breach of duty but has also caused loss to the shareholder by reason of a diminution in the value of the shareholders shares in the company. That is not the position here. Rosanna and the other plaintiffs are beneficiaries of a discretionary trust. They are not shareholders in SDR. The trustees of the Trust are the sole shareholders in SDR. Thus the case is not on all fours with previous cases.

85 Mr Journeaux argues that this is a distinction without a difference and that the Prudential principle is equally applicable where the plaintiff is a beneficiary under a trust as where he is a registered shareholder. He has referred to three cases in support of this proposition.

86 The first is *Shaker v Al-Bedrawi* [2003] Ch 350. The facts pleaded in that case were that the plaintiff was entitled to a proportion of the company's shares which were held on bare trust for him by the defendant, who was the sole director of the company. The plaintiff brought proceedings against the defendant in respect of US$6 million which, it was

claimed, had been misappropriated by the defendant or had been unlawfully distributed by him. The plaintiff's claim against the defendant was that, as trustee, he should account to the plaintiff as beneficiary for a due proportion of the US$6 million as a profit deriving from the use of the trust property. The plaintiff argued that a claim by a beneficiary against his trustee, holding shares in a company on trust, to account for a profit, being a claim different in nature from any claim which the company could properly bring against the trustee as a director, was not caught by the Prudential principle. He relied on the cases of *Re Lucking's Will Trust* [1968] I WLR 866 and *Walker v Stones* [2001] QB 902 in support of that argument. However, the court pointed out that these cases both pre-dated *Johnson* in the House of Lords and were not entirely consistent with it. The court held that the Prudential principle could be applied in the circumstances of that case, although they remitted the matter to the judge in order to ascertain whether the company had a claim against the trustee in respect of the whole of the US$6 million. However, it is important to note that the nature of the trust in that case was very different from that in the present case, in that the defendant held the shares in the company on bare trust for the plaintiff.

87 The second case to which Mr Journeaux referred is *Ellis v Property Leeds (UK) Limited* [2002] EWCA Civ 32. The claim in that case was brought by Mr Ellis and Mr Clayton against a firm of estate agents alleging that an employee of the agents had made fraudulent and/or negligent misrepresentations to them as to the value of a property which had been purchased on the strength of that valuation by a company called Cross Lane Construction Limited ("Construction") in which Mr Ellis and Mr Clayton were interested. The valuation was alleged to have been grossly overstated with the consequence that not only Construction but also other associated companies controlled by Mr Ellis and Mr Clayton became insolvent and the shareholdings in them became worthless.

88 The estate agents sought summary judgment on the basis that the claims were bound to fail because the losses suffered by Mr Ellis and Mr Clayton were simply reflective of the losses suffered by the various companies. The issue before the Court of Appeal was whether the valuation prepared by the estate agents had been addressed to the various companies in the group so that the companies (as well as Mr Ellis and Mr Clayton) had a claim against the estate agents. The Court of Appeal upheld the judge in finding that the companies did have such claim and accordingly held that the Prudential principle applied to prevent Mr Ellis and Mr Clayton from bringing any claim based upon the diminution in the value of the shares in the companies.

89 I have to say that the position of Mr Ellis and Mr Clayton in relation to the companies is not entirely clear from the report. Mantell LJ referred at para 9 to Mr Ellis' and Mr Clayton's shareholdings in the companies having become valueless, thereby suggesting that they were shareholders. Peter Gibson LJ, on the other hand, referred at para 21 to:-

> ***"…….. the companies, of which [Mr Ellis and Mr Clayton] were directors and the shares in which were held by one or other or both of them or by trustees of a settlement of which one or the other was the principal beneficiary….."***

90 Mr Journeaux places particular reliance on a passage from the judgment of Peter Gibson LJ at para 22 when, having referred to the decision of House of Lords in *Johnson*, he said:-

> ***"It is clear that if a shareholder or director of a company or a beneficiary under a settlement the trustees of which are shareholders in the company suffers a loss which merely reflects the loss suffered by the company, for which it can sue, that shareholder, director or beneficiary cannot as a matter of policy be allowed to bring proceedings to recover his loss, but it must be left to the company to take proceedings to recover its loss."***

He submits that this passage is authority for the proposition that the Prudential principle is fully applicable where the company is owned by a trust.

91 I have to say that I am not sure that *Ellis* takes the position much further. It is clear that the sole issue which was before the Court of Appeal was whether the companies had any claim against the estate agents. The discussion in the judgments was focused entirely on that aspect. It was conceded by the plaintiffs that, if the companies did have such a claim, the Prudential principle applied to prevent the plaintiffs from succeeding. Thus, although Peter Gibson LJ referred to the Prudential principle applying where a company is owned by a trust, the remark was clearly obiter and the matter does not appear to have been the subject of any argument because the point was conceded by counsel.

92 Finally, Mr Journeaux referred to *Gardner v Parker* [2005] BCC 46. The facts in that case were that a company BDC was owned by the defendant as to 85% and by a trust for the benefit of the plaintiff G and his family as to 15%. BDC's two main assets were 9% of the shares in a company called Scoutvale and a loan to that company. The remaining 91% of the shares in Scoutvale were owned by the defendant who was also in substance the sole director of both BDC and Scoutvale. It was alleged that the defendant had procured the transfer of assets at a gross undervalue out of Scoutvale to a company in which he was interested. The consequence was that Scoutvale became insolvent, BDC's shareholding in and loan to Scoutvale became worthless and BDC was placed in liquidation. The liquidator of BDC assigned to the plaintiff all BDC's rights of action in respect of these matters. However, it is important to appreciate that the plaintiff was in substance BDC and it was suing as a shareholder of Scoutvale to recover its losses arising from the diminution of the value of its shares in Scoutvale and the loss of its loan to Scoutvale. The fact that G had an interest under a trust which held shares in BDC was irrelevant for the purposes of the case.

93 The trial judge held that the defendant owed duties as a director to Scoutvale and to BDC and that he was in breach of both of these duties. He held further that the Prudential principle then applied to prevent BDC from claiming any losses caused by the diminution of the value of its shares in Scoutvale and the irrecoverability of its loan to that company; but the plaintiff appealed contending that the rule against reflective loss had no application in a case where the shareholder was seeking to recover from the defendant by virtue of breach of a fiduciary duty towards the shareholder independent of the defendant's duty to the company concerned.

94 The decision of the Court of Appeal as contained in the judgment of Neuberger LJ is conveniently summarised in two paragraphs of the head note as follows:-

> ***"(1) In light of the first, and unchallenged, finding of Blackburne J, the threshold requirement for the engagement of the rule against reflective loss was satisfied, namely that the defendant, P, owed separate duties to the company, Scoutvale, and to the shareholder, BDC. In each case, the defendant's liability arose from the fact that he was a director, but the source of each liability was different, in that his liability to the shareholder was attributable to the fact that he was a director of the shareholder, whereas his liability to the company was attributable to the fact that he was a director of the company. The present case appeared to contain the two essential ingredients which resulted in the rule against reflective loss being engaged, namely (i) the losses claimed to have been suffered by BDC were losses suffered in its capacity as shareholder in or creditor of, Scoutvale; and (ii) the damages claimed in these proceedings against P, being based on the losses suffered by BDC as a result of the transfer of the Old Hall shares at a substantial undervalue, were damages which would have been made good if Scoutvale had enforced its rights against P. The fact that BDC only had a proportion of the issued shares in Scoutvale, and the fact that one might not be able to "trace" Scoutvale's loss to the shareholders, without effecting some sort of adjustment, could not make any difference. If it were otherwise, then the reflective loss principle would in practice rarely apply.***
>
> ***(2) The contention that the rule against the reflective loss did not apply to a breach of fiduciary duty owed by a defendant to the shareholder, independent of any duty owed to the company, should be rejected.*** *In Shaker v Al-Bedrawi* [2003] BCC 465 ***the Court of Appeal had recently considered the arguments and authorities relating to that contention and rejected it.*** Particularly as this was a difficult and developing topic, it would require a very cogent case to be made out before the Court of Appeal should refuse to follow its own recent clear, unanimous and fully-reasoned conclusion on an important aspect of the rule against reflective loss. It was clear that the rule against reflective loss was not concerned with barring causes of action as such, but with barring recovery of certain types of loss. On that basis, there was obviously a powerful argument for concluding, as the Court of Appeal had done in *Shaker v Al-Bedrawi* ***(supra), that whether the cause of action lay in common law or equity, and whether the remedy lay in damages or restitution, should make no difference as to the applicability of the rule against reflective loss.*** Furthermore, given that the foundation of the rule was the need to avoid double recovery, there was a powerful case for saying that the rule should be applied in a case where, in its absence, both the beneficiary and the company would be able to recover effectively the same damages from the defaulting trustee/director."

95 It is true that, in his judgment, Neuberger LJ followed the decision in *Shaker*. However it is important to note that no question as to the applicability of the Prudential principle to a trust

in fact arose in the case. The only fiduciary relationship which arose in that case was the relationship between a director and the company of which he is a director. Accordingly, the court did not have in mind the situation which arises in this case.

96 I accept that, if the Prudential principle applies to the present case, the order of justice should be struck out. However, I am by no means convinced that the principle should necessarily be applied to a situation such as the present involving a discretionary trust. I think it is not entirely clear that the principle would necessarily be applied in England; but, even if it were, I consider that there are strong grounds for believing that Jersey law should follow a different path. In this respect I note that the Prudential principle as applied in England and Wales has not always found full favour in other jurisdictions; see for example *Christensen v Scott* [1996] 1 NZLR 273.

97 I would summarise my reasons for concluding that it is strongly arguable that the Prudential principle does not apply in the present case as follows:-

> ***"It is clear, from the analysis and discussion in the cases to which I have referred, that the rule against reflective loss is not concerned with barring causes of action as such, but with barring recovery of certain types of loss.*** On that basis, there is obviously a powerful argument for concluding, as this court did in Shaker, that, whether the cause of action lies in common low or equity, and whether the remedy lies in damages or restitution, should make no difference as to the applicability of the rule against reflective loss. Furthermore, given that the foundation of the rule is the need to avoid double recovery, there is a powerful case for saying that the rule should be applied in a case where, in its absence, both the beneficiary and the company would be able to recover effectively the same damages from the defaulting trustee/director." (Emphasis added)

(i) The principle is an exclusionary rule. Thus it applies where a shareholder has suffered loss (e.g. the diminution in the value of his shares) by reason of an actionable wrong done to him by the wrongdoer. In normal circumstances, he would be able to recover for such loss under ordinary legal principles. However, because the wrongdoer has also committed an actionable wrong against the company and because the shareholder's loss merely reflects the loss suffered by the company, the principle operates to prevent the shareholder from recovering what he has lost. However, it is an exclusionary rule which operates to prevent a shareholder recovering what he would normally be able to recover and it should therefore be confined to those circumstances where it is clearly applicable.

(ii) The two policy reasons for the existence of the rule are clear, and are conveniently summarised in the passage from Lord Millett's speech in *Johnson* referred to at para 76 above. In the first place, there is a risk of double recovery from the defendant. If the company can sue for the wrong done to it by the defendant and the shareholder can sue for the wrong done to him, the defendant may end up paying twice for what is ultimately the same loss. Secondly, if the shareholder is allowed to recover from the

defendant, this may prejudice creditors of the company as the recovered monies will pass directly to the shareholder rather then returning to the company's coffers from which the creditors could be paid. The significance of the risk of double recovery was emphasised by Neuberger LJ at para 49 of his judgment in *Gardner* when explaining why the court should follow *Shaker* in holding that the Prudential principle applied to trusts. He said this:-

(iii) In Shaker, the trust in question was a bare trust so that, if he recovered from the defendant trustee, the plaintiff would be absolutely entitled to the funds. They would therefore never find their way to the company, which would remain out of pocket. Accordingly, both reasons for the Prudential principle were applicable on the facts of that case.

(iv) None of the English cases has had to consider the position where there is a discretionary trust. It seems to me strongly arguable that the two reasons for the principle may have no application in a case such as the present. Rosanna has no entitlement to the trust fund. She will not be entitled to receive any monies paid out by Ansbacher. She is merely seeking reconstitution of the trust fund. It seems to me strongly arguable that the remedy, were breaches of trust on Ansbacher's part proved, is at the discretion of the Court and, being an equitable remedy, may be moulded to suit the circumstances of the case. Thus, in the event of the breaches of trust being proved, the Court could arguably order Ansbacher to reconstitute the trust fund exactly by reimbursing that particular part of the trust fund which had been primarily affected by the breach of trust. Thus the Court could order Ansbacher to reimburse SDR from whence the funds had been lost in the first place. Alternatively, if it was felt that the Court could only order Ansbacher to reimburse the trust fund itself by putting the appropriate monies into the trust fund, it seems to me arguable that the Court could nevertheless direct as a term of such relief that the funds be used to acquire new shares in SDR, so that the funds eventually find their way into SDR. This would have the effect of exactly reconstituting the trust fund because it would take the value of the shares in SDR back to what they had been previously and the financial position of SDR back to what it had been. Such remedies may not be available in all cases but it seems to me strongly arguable that they are available where the company in question is wholly owned by a discretionary trust.

(v) If either of these courses is followed, neither of the reasons for the Prudential principle would be applicable. SDR will have been reimbursed and will therefore no longer have suffered any loss. Accordingly it may no longer bring any claim against its directors. There will therefore be no risk of double recovery. Secondly, because the monies will have been replaced in SDR, there can be no prejudice to any creditors as they will be in the same position as they were prior to the wrongful investments which gave rise to the breaches of trust. Given the exclusionary nature of the principle and given the policy considerations referred to below, I would consider it strongly arguable that the Prudential principle should not be applied in circumstances where neither of the two underlying reasons for it are applicable.

(vi) Mr Journeaux accepted in argument that, in all the cases so far, the same person was the defendant both to the action brought by the shareholder and to the potential

action by the company. Certainly, the various expressions of principle in the cases and the references to the risk of double recovery seem to envisage that the defendant will be the same in each case. Mr Hoy argued that this is a requirement for the Prudential principle to apply and that it is not the case here. The defendant to the claim by Rosanna is Ansbacher as trustee of the Trust whereas the defendants to any claim by SDR would be the directors at the time the various transactions were undertaken. He referred in support to the fact that, on page 933 of the decision of the Court of Appeal in *Walker v Stones* [2001] QB 902 to the effect that the Prudential principle did not prevent the claim in that case, Sir Christopher Slade mentioned, as one of the grounds for so holding, the fact that the principal defendants in any claim by the companies would not include the trustees, who were the persons sought to be made liable by the beneficiaries. In response, Mr Journeaux referred me to the observation of Neuberger LJ at para 52 of his judgment in *Gardner* where he envisaged that the lack of identity of the defendants should not prevent the rule from applying where the same loss was concerned. He also referred me to para 39–39 of Lewin which reads:-

> ***"The beneficiaries' claim will be against the trustees while the company's claim will usually be against one or more of its directors.*** It is only where the trustees are also the directors against whom the company has a claim that the defendants to both claims will be the same. It is not, however, clear that the reflective loss principle can apply only in a case where the defendants to both claims are the same. The purpose of the reflective loss principle is to ensure, first, that double recovery is not achieved and, secondly, that the company's assets are preserved in the interests of its creditors so that its claim takes precedence over the claims of persons interested in its shares. It is arguable that this purpose is engaged in the trust context irrespective of whether or not the trustees are the same as those against whom the company has a claim."

I acknowledge the force of Mr Journeaux's submission but nevertheless, as Lewin says, it is not clear whether the defendant has to be the same and I would be reluctant to strike out Rosanna's claim without allowing her the opportunity of exploring the matter fully in the light of the facts as found at trial. Where the defendant is the same, it is comparatively easy to conclude, on a strike-out application, that, if the shareholder is successful against the alleged wrongdoer, the company's claim against that wrongdoer would also be successful and therefore the company's assets would have been replenished by action against the wrongdoer. This is because the actions of the defendant relied upon are likely to be the same in each case. However, where the shareholder's claim is against A for his actions but the company's action is against B for his actions, it is harder to be sure, on a strike-out application, that if the shareholder succeeds in his action against A, the company must necessarily succeed in its action against B. If there is any question mark over whether the company would be able to replenish its assets by action against B, it would be wrong to strike out the shareholder's claim on the basis that his loss was bound to

be reflective of the company's loss.

(vii) At page 934 of his judgment in *Walker v Stones* (with which the other two judges agree) Sir Christopher Slade said this:-

> ***"More generally, I do not think that any of the policy considerations which influenced this court in reaching its conclusions in the Prudential Assurance case ….*** and *Stein v Blake* ***…… apply in the present case.*** On the contrary, the policy considerations in my judgment point strongly the other way. As counsel for the plaintiffs pointed out, in many, perhaps most, cases where a trustee is found guilty of a breach of his duty to supervise the trust investments in accordance with the *Bartlett* ***principle, the company concerned will also have a claim against a director or manager who has mismanaged its corporate affairs (a fortiori if there has been dishonesty on the part of the trustee).*** If Rattee J's ruling on this point in the present case were correct, it would appear that the Prudential Assurance principle would always afford a defence to the trustee in this situation. I cannot think that would right."

(viii) Like Sir Christopher Slade, I consider that there are strong policy reasons for thinking very carefully before applying the Prudential principle in all its rigour to claims by beneficiaries of a discretionary trust in respect of alleged mismanagement of a company which is wholly owned by the trust and where the remedy sought is reconstitution of the trust fund. The case of *Bartlett v Barclays Bank Trust Co Ltd (No 1)* [1980] 1 All ER 139 (which confirmed the duty of trustees to supervise the affairs of a company of which they were the controlling shareholder) is a case engraved on the hearts of all trust lawyers. Like Sir Christopher, it seems to me that, if the Prudential principle is to be applied fully to cases such as the present, that case must have been wrongly decided and it is difficult to envisage when such an action could ever be brought in future because the loss suffered by the trust will almost invariably be reflective of the loss suffered by the company.

(ix) Jersey has a very substantial trust industry. In some cases the investments of the trust are held directly by the trustee (which will in the vast majority of cases be a corporate trustee licensed to carry on business as a trustee by the Jersey Financial Services Commission); but in many, if not most cases, the investments will be held through a company which is wholly owned by the trust and the shares of which comprise the sole directly held asset of the trust. Whereas in the days when Jersey had corporation tax, the directors of the company might well have been persons who were not employees of the trustee and resided outside Jersey, the strong likelihood nowadays is that the directors of the wholly owned company will be the very same employees of the corporate trustee in Jersey who are responsible for administering the affairs of the trust. There will therefore, as a practical matter so far as the beneficiaries are concerned, be no difference between the situation where the trustee holds the trust investments directly and where it chooses to do so through a company which is wholly owned by the trust. In each case the decisions on investments will be taken by the employees of the corporate trustee acting in the course of their employment. The only technical difference is that in one case they will be doing it on

behalf of the trustee whereas in the other they will be acting as directors of the wholly owned company.

(x) Yet, if these employees mismanage the investments, the consequences will be very different for the beneficiaries if the Prudential principle applies. Where the investments are held directly by the trustee, the remedy of the beneficiaries is simple. They may sue the trustee for breach of trust in making imprudent investments and seek the reconstitution of the trust fund. If, on the other hand, the investments have been made through a wholly owned company and the Prudential principle applies, such an action cannot be brought. So how are the beneficiaries to obtain redress for mismanagement of the investments in those circumstances? They cannot sue the directors as the directors owe no duty to the beneficiaries. Nor can the trustee sue the directors. The only entity which can sue the directors is the company. However, unless or until there is a change of trustee, it seems unlikely in the extreme that the trustee would cause the company to sue its directors, who are the persons employed by the trustee to administer the affairs of the trust as well as act as directors of the company.

(xi) During the course of the hearing, I pressed Mr Journeaux on how, as a practical matter, he would expect the beneficiaries to be able to vindicate their rights in such circumstances. His response was that there were at least two alternative courses which could be followed:-

> (a) If the trustee refused to cause the company to take the necessary action against its directors, the trustee would thereby be committing a new breach of trust which would give rise a loss in respect of which the company would have no claim. In those circumstances the Prudential principle would have no application and the beneficiaries could therefore sue the trustee for breach of trust in failing to cause the wholly owned company to take the necessary action against the directors. The measure of loss caused by such a breach would be the same as that caused by the mismanagement of the directors and therefore there would be no prejudice to the beneficiaries.
>
> (b) Alternatively, the beneficiaries could take proceedings to secure the removal of the trustee (if it did not resign voluntarily) on the grounds of an obvious conflict of interest. The new trustee could then cause the company to take action against the directors and thereby recover the loss. If, for any reason, the company's claim against the directors had become prescribed, the new trustee could then sue the former trustee for breach of trust in failing to ensure that the company exercised its rights against the directors within the relevant period.

(xii) I accept that these options are available to the beneficiaries. But they are complex and far removed from the real complaint, which is that the trustee failed to ensure that its employees (in the form of directors of the company) managed the investments prudently. One can, for example, envisage the possibility of difficulty in finding a new trustee willing to embark on litigation against the old trustee or against the directors of the company. Alternatively, the new trustee might differ from the beneficiary on the strength of the case. A *Beddoes* application (with its additional

costs) would certainly be necessary. In relation to the first alternative, one can envisage questions about when such a breach of trust would become actionable. Would the beneficiaries have to wait until the limitation period for the company to claim against the directors had expired? All of the options would involve the beneficiary in becoming involved in satellite litigation rather than addressing the real complaint.

(xiii) In my judgment, it would not reflect well on the law or on Jersey as a centre for the administration of trusts if beneficiaries had to go through these considerable hoops unless it was absolutely unavoidable. It is of the first importance that beneficiaries of a trust whose assets have been mismanaged should have a simple and effective remedy available to them whether such assets are held directly by the trustee or through a wholly-owned company. I consider that it is strongly arguable that the law of Jersey provides this simple and effective remedy in a case such as the present by enabling the Court to order the defaulting trustee to reconstitute the trust fund by reimbursing the company for its losses, thereby removing both reasons for the application of the Prudential principle.

(xiv) At para 46 of his judgment in *Gardner*, Neuberger LJ described the question of the applicability of the Prudential principle to breach of fiduciary duty as " ***a difficult and developing topic"***. *Lewin* at paras 39–37 to 39–43 contains, if I may say so, a most helpful summary of the current position, but it also refers at 39–43 to the " ***uncertain state of the authorities concerning the application of the reflective loss principle in relation to trusts ….***". In these circumstances it is clear that a court must be particularly careful before striking out a claim on assumed facts. I do not consider that, assuming that she is ultimately successful in proving a breach of trust by Ansbacher, Rosanna's claim is doomed to failure by reason of the Prudential principle. On the contrary, for the reasons given, I consider that there are perfectly arguable grounds for concluding that the principle has no application in cases such as the present where a discretionary beneficiary is asking for reconstitution of the trust fund because of a failure by the trustee to supervise the investments of a wholly owned company. Furthermore, I think that it would indeed be preferable for the facts to be established at trial and for all parties to then have the opportunity of making detailed and considered submissions as to the application of the law to those facts.

98 For these reasons I decline to strike out Rosanna's claim on the basis of the Prudential principle.

(v) The tax claim

99 Paragraphs 7 and 8 of the order of justice plead that, by reason of the fact that Mr Boxall was a UK resident director of Velvet, SDR incurred a liability to UK corporation tax and to payment of the fees of the tax consultants who advised on negotiations with the Inland Revenue concerning SDR's tax liability.

100 Mr Journeaux pointed out that the order of justice does not state specifically that SDR has

paid these two sums and there is reason for Ansbacher to believe, for the reasons stated in Mrs Dulake's affidavit, that the sums were in fact paid by Mr Freeman. He submits therefore that the tax claim should be struck out under paragraphs (a), (b) and (d) of RCR 6/13 as well as under the inherent jurisdiction.

101 Mr Hoy responded that this is a matter for further and better particulars. The pleading states that SDR incurred the liability for these two sums and that is sufficient for present purposes.

102 I agree with Mr Hoy. In my judgment, the claim is adequate pleaded by asserting that SDR incurred liability for these two sums. Ansbacher may seek further and better particulars with a view to flushing out whether SDR has in fact paid these sums.

Conclusion

103 For the reasons given, I do not strike out any part of the order of justice save to remove references to the first and second plaintiff. I give leave to file an amended order of justice in the form which was submitted to me, save that the amended order of justice should refer only to one plaintiff, namely Rosanna, and there should be consequential amendments so as to refer to ‘plaintiff’ rather than ‘plaintiffs’.

104 Finally, I would like to thank Mr Journeaux and Mr Hoy for the high quality of the written and oral submissions in this case, which were of great assistance to me in preparing this judgment.