# Dorothy Audrey Brakspear v Nedgroup Trust (Jersey) Ltd

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| **Jurisdiction:** | Jersey |
| **Judge:** | Martin JA |
| **Judgment Date:** | 02 August 2019 |
| **Neutral Citation:** | [2019] JCA 150 |
| **Date:** | 02 August 2019 |
| **Court:** | Court of Appeal |



**Text**

[2019] JCA 150

Court of Appeal

Before:

Sir William Bailhache, **Bailiff of Jersey, President**

John Vandeleur Martin, **Q.C**

Robert Logan Martin, **Q.C**.

Between
(1) Dorothy Audrey Brakspear
Applicants

and

(2) Alison Shane Bowler

and

(3) Ian Donald Brakspear
and
Nedgroup Trust (Jersey) Limited
Respondent

Dorothy Audrey Brakspear **appeared for the Applicants**.

**Advocate** M. H. D. Taylor **appeared for the Respondent**.

**Authorities**

*Brakspear v Nedgroup Trust (Jersey) Limited* [2018] JRC 121.

Bankers' Books Evidence (Jersey) Law 1986

Trusts (Jersey) Law 1984

*Spread Trustee Co-Limited v Hutcheson* [2012] 2 AC 194

*Sinel v Hennessy & others* [2018] JCA 071

*United Capital Corporation v Bender and Others* [2006] JLR 269

*Hadmor Productions Ltd v Hamilton* [1983] 1 AC 191, 220

Court of Appeal — application for leave to appeal.

Martin JA

This is the judgment of the Court.

1 This is an application for leave to appeal from an order dated 5 July 2018 by which the Royal Court (Clyde-Smith, Commissioner, and Jurats Grime and Thomas) struck out the claims brought by the present applicants against the present respondent, Nedgroup Trust (Jersey) Limited. In summary, the claims were of dishonest breaches of trust, dishonest breaches of fiduciary duties, and conspiracy to injure. At the heart of the claims lay complaints about the respondent's conduct in relation to what turned out to be a disastrous purchase of a farm in South Africa.

2 The grounds on which the Royal Court struck out the proceedings were in essence that the complaints made in them were prescribed or had been conclusively determined against the applicants by the South African courts.

**Background**

3 The background is set out with admirable clarity in paragraphs 3 to 32 of the Royal Court's judgment *Brakspear v Nedgroup Trust (Jersey) Limited* [2018] JRC 121. We would not in ordinary circumstances feel it necessary to do more than identify the key features necessary to the determination of the appeal; but in view of some of the submissions made to us by the applicants, in writing and orally, we think it desirable to go into a little detail.

4 The applicants are all members of the Brakspear family. The first applicant, Dorothy Brakspear ("Dorothy") is the mother of the second applicant Alison Brakspear ("Alison") and of the third applicant Ian Brakspear ("Ian"). At the start of the narrative, in 2003, Dorothy and Alison were living in Zimbabwe. Ian was living in South Africa. All of them were concerned about the political and economic conditions in Zimbabwe, and were anxious that Dorothy and Alison should leave. A scheme was evolved, primarily by Ian with the assistance of professional advisers, for the purchase of a wine farm known as Kleine Normandie ("the farm"), in the Western Cape district of South Africa, which would provide a temporary home for Dorothy, Alison and Ian while the development potential of the farm was explored so that it could be sold at a profit.

5 The scheme involved the creation of a trust structure and the incorporation of a number of companies. The scheme was described in outline as follows by the Royal Court in paragraph 7 of its judgment:

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

6 The applicants were already beneficiaries of a Guernsey trust known as the Julian Adrian Michael Brakspear Overseas Trust. This trust was described in the Royal Court's judgment as ***"the J Trust"***, but to avoid possible confusion we will call it *"the Guernsey trust"*. The trustee of the Guernsey trust was Fairbairn Trust Company Limited, now part of the Nedgroup trust division ("the Guernsey trustee"). The assets of the Guernsey trust exceeded £1 million, and the intention was that some of those assets would be used to make or guarantee loans to facilitate the purchase of the farm.

7 A separate trust, to be administered in Jersey, was established for the purpose of indirectly acquiring the farm. This trust, the Westley Trust, was established by a declaration of trust dated 5 May 2004 made by Gerrard Trust (Jersey) Limited (now known as Fairbairn Trust

Limited, also part of the Nedgroup trust division: “the Jersey trustee”). Dorothy and Alison were named as beneficiaries, but Ian was not. That was because he could not be associated with the new structure if the tax and financing arrangements were to work as intended in South Africa. The initial trust fund consisted of £10, which was initially meant to be provided by Ian. The requirement that he not be associated with the structure prevented this, however, and the £10 was in the event provided out of the assets of the Guernsey trust and accounted for by the Guernsey trustee as a distribution to Alison. In their appeal submissions, the applicants complained about this. They said that there were no written records or evidence of Alison being settlor of the Westley Trust, and that her property had been taken without her consent. There are three answers to this. First, Alison was not the settlor: the Jersey trustee was the only party to the declaration of trust, and as such was the settlor, although Alison was the economic settlor to the extent of the £10. Secondly, Alison was not deprived of property that belonged to her. The £10 came from the Guernsey trust, which was a discretionary trust. Although Alison was named as a beneficiary, she was no more than an object of the trustee's discretion, and had no interest in the trust assets until a discretion was exercised in her favour. That was what happened when the £10 was paid to constitute the Westley Trust: the Guernsey trustee resolved to exercise its discretion to make a distribution for her benefit. Thirdly, it is clear from paragraphs 25 to 32 of the first affidavit of Christopher John Roscouet, sworn on behalf of the respondent, and in particular from the communications referred to in those paragraphs, that Ian knew and understood all these arrangements and himself suggested that Alison should be the economic settlor.

8 In anticipation of the establishment of the Westley Trust, the Jersey trustee caused Westley Holdings to be incorporated in the British Virgin Islands on 15 April 2004. Only one share was issued: it was issued to Gerrard Nominees (Jersey) Limited, which on 5 May 2004 executed a declaration of trust acknowledging that it held the share as nominee for the Jersey trustee as trustee of the Westley Trust. This declaration of trust was produced in the course of the hearing before us, the applicants having complained that there was no evidence that the Jersey trustee had any interest in Westley Holdings. We are satisfied that there is nothing sinister in this, and accept that the Jersey trustee in its capacity as trustee of the Westley Trust was at all material times the beneficial owner of the entirety of the issued shares in Westley Holdings. Again, it was known to and understood by Ian that Westley Holdings should be incorporated as a wholly owned subsidiary of the Westley Trust, and he cannot sensibly have been in any doubt that that had happened.

9 The purchase price of the farm in South African Rands was ZAR 20,900,000, broadly equivalent to £1,776,600. The majority of the purchase price – ZAR 17,500,000 (about £1,487,500) – was to be borrowed by West Dunes from FirstRand Bank Limited (“FirstRand”), the loan being secured primarily by a charge over the farm and a personal guarantee from Ian. Interest on this loan was to be rolled up for two years.

10 The residue of the purchase price, and additional security for the FirstRand loan, were provided in the following way.

11 Associated with the Guernsey trustee and the Jersey trustee was a Jersey bank then called

Fairbairn Private Bank Limited (“the Jersey bank”). As part of the arrangements for the acquisition of the farm, the Jersey bank agreed (a) to lend to the Jersey trustee as trustee of the Westley Trust the sterling equivalent of ZAR 4 million (about £340,000), the loan agreement being dated 26 May 2004, and (b) guarantee repayment by West Dunes to FirstRand of £550,000, the guarantee being given by letter dated 7 June 2004. The Jersey trustee as trustee of the Westley Trust gave the Jersey bank an indemnity (itself a guarantee of the liability of West Dunes to repay FirstRand) in respect of its potential liability under the FirstRand guarantee. The loan and the indemnity were treated as facilities granted by the Jersey bank to the Jersey trustee.

12 As security for the loan made by the Jersey bank and its potential liability under the guarantee given to FirstRand, the Guernsey trustee as trustee of the Guernsey trust gave (in its then name of NIB International Trust Company Limited) a guarantee dated 26 May 2004 to the Jersey bank. The guarantee was expressed to be a guarantee of the facilities granted by the Jersey bank to the Jersey trustee. That guarantee in its turn was secured by charging a deposit of £900,000 placed by the Guernsey trustee with the Jersey bank's wholly-owned subsidiary in the Isle of Man, Fairbairn Private Bank (IoM) Limited (“the IoM bank”).

13 The upshot of these arrangements was that the majority of the assets of the Guernsey trust were in effect pledged to the Jersey bank and were liable to be lost if FirstRand called on the Jersey bank to satisfy its guarantee or if the Jersey trustee as trustee of the Westley Trust failed to repay the Jersey bank loan. These events would only occur if West Dunes failed to repay the loan it had obtained from FirstRand and failed to provide (through the chain of companies) the money for the Jersey trustee to repay the Jersey bank. However, the liability to the Jersey bank was at all times a liability of the Jersey trustee.

14 The purchase of the farm was effected as follows. (1) The Jersey bank made the loan of ZAR4 million to the Jersey trustee. Interest on this loan also was to be rolled up for two years. (2) The Jersey trustee as trustee of the Westley trust made an unsecured, interest-free loan of ZAR3,914,218.37 (ZAR4 million after administration fees) to Westley Holdings on 28 May 2004. The applicants say there was no power to do this; but it was done in exercise of the express power in paragraph 3 of the first schedule to the Westley Trust declaration of trust, which allowed the trustee to form a company and make secured or unsecured loans to it at or free of interest. (3) Westley Holdings used the money borrowed from the Jersey trustee to buy 100 shares (the total issued share capital) in Money Box Investments 0012 (Pty) Ltd (“Money Box”). A copy of the share certificate for these shares was exhibited to an affidavit dated 19 December 2008 of Nico Botha made on behalf of the Jersey trustee in support of the winding up of West Dunes. Money Box already owned 60% of the shares in West Dunes, the remaining 40% being then held by a South African company owned by Ian's business partner. (4) The price for the 100 shares in Money Box was paid directly by the Jersey bank to the seller of the farm in July 2004 on Ian's instructions as director of Money Box. This payment was the only money (apart from the FirstRand loan) to pass under the combined transactions: it simultaneously constituted the loan to the Jersey trustee and the payment for the Money Box shares, as well as the

payment to the seller of the farm. (5) The remainder of the purchase price was provided by FirstRand pursuant to the loan described above.

15 The upshot of these arrangements was that the Jersey trustee as trustee of the Westley Trust owned (through a nominee) 100% of Westley Holdings, which in turn owned 100% of Money Box; and Money Box owned 60% of West Dunes, which owned the farm. So far as the financing was concerned, West Dunes owed ZAR17.5 million to FirstRand plus interest (although the interest was not payable for two years); Westley Holdings owed approximately ZAR 3.9 million to the Jersey trustee; the Jersey trustee owed ZAR4 million plus interest (rolled up for two years) to the Jersey bank, and was liable to indemnify the Jersey bank if the Jersey bank became liable under its guarantee to FirstRand; and the Guernsey trustee was liable to the Jersey bank under its guarantee of the loan to the Jersey trustee and in respect of any liability the Jersey bank incurred under the FirstRand guarantee.

16 Two things are worth noting at this stage: first, no payment had been made by the Guernsey trust apart from the £10 used to constitute the Westley Trust. The £900,000 deposit remained in the IoM bank. Secondly, Westley Holdings had not made a loan to anybody. The ZAR3.9 million it had borrowed from the Jersey trustee had been used to subscribe for the shares in Money Box, so that the money became Money Box's to use as it wished. That was not altered by the fact that the money was paid directly to the seller of the farm at Money Box's direction. The arrangement would on the face of it have constituted West Dunes (as the purchaser of the farm) a debtor of Money Box, but it would not have made it a debtor of Westley Holdings.

17 Not long after the farm had been acquired, it became apparent that Ian's business partner had been defrauding West Dunes, notably but not exclusively by purchasing the farm and then selling it on to West Dunes at an inflated price. Matters were resolved, so far as relevant to this application, by the transfer of the outstanding 40% shareholding in West Dunes to Money Box, which thereafter held the whole of the issued share capital in West Dunes. As the Royal Court remarked, Ian “was the sole director of the two South African companies, Money Box and West Dunes, and in control, therefore, of all of the Westley Trust assets in South Africa and in particular the operation of the farm”.

18 The FirstRand loan fell due for repayment two years after the acquisition of the farm. The farm had not been sold by then. Ian negotiated an extension until September 2007; but the interest was now to be paid monthly. An extension to the loan from the Jersey bank to the Jersey trustee was also negotiated and the security arrangements altered. A new guarantee was given by the Jersey bank to FirstRand on 9 October 2006 in the reduced sum of £500,000; the loan from the Jersey bank to Westley Holdings was increased to £415,000; and the guarantees given by the Guernsey trustee to the Jersey bank in respect of those liabilities were increased to £915,000.

19 By March 2007 West Dunes had fallen behind in the interest payments due to FirstRand.

On 3 July 2007 First Rand demanded payment under the guarantee given by the Jersey bank; and on 5 July 2007 the IoM bank remitted to FirstRand £500,000 of the £915,000 it held as security for the guarantee. This payment is evidenced by a Swift advice exhibited to an affidavit made by Justine Helen Hoppe made on 13 March 2009 in the liquidation of West Dunes. The same affidavit stated that " *Although the sum of £500,000 was paid directly by Fairbairn Private Bank to [FirstRand] this payment was pursuant to an agreement between the Westley Trust and Fairbairn Private Bank in terms whereof Fairbairn Private Bank advanced the sum of £500,000 to the Westley Trust*". This statement fails to recognise that the IoM bank and the Jersey bank were separate legal entities within the description Fairbairn Private Bank, and that the £500,000 did not relate to the loan (of ZAR 4 million) made by the Jersey bank to the Jersey trust. However, that does not matter. As we have said, the primary liability for the loan and the liability under the FirstRand guarantee lay with the Jersey trustee. In that sense, it is not inaccurate to say that £500,000 had been advanced by the Jersey bank to the Jersey trustee. The proper analysis is that the IoM bank was utilising money it held as part of the £915,000 deposited with it by the Guernsey trust as security for the Jersey trustee's liability in respect of the guarantee given by the Jersey bank to FirstRand. By doing so, it discharged the Jersey bank's liability to FirstRand; but that discharge had a number of consequences in law. First, West Dunes was released from part of the debt it owed to FirstRand; but, since it had not repaid it itself, it remained liable to the extent of the repayment. Secondly, since the Jersey bank had discharged West Dunes' liability under the guarantee given to FirstRand, the Jersey bank was entitled to be subrogated to FirstRand's rights against West Dunes to the extent of the repayment. That meant that West Dunes now owed £500,000 to the Jersey bank. Thirdly, however, the Jersey bank had a right to enforce against the Jersey trustee its obligation to indemnify the Jersey bank in respect of the amount paid to FirstRand. Since that indemnity was itself a guarantee of West Dunes' liability, the Jersey trustee was in its turn entitled to be subrogated to the Jersey bank's rights against West Dunes. As a consequence, the £500,000 was owed by West Dunes not to First Rand or to the Jersey bank but to the Jersey trustee. Fourthly, the Jersey trustee was liable to reimburse the Guernsey trust in respect of the amount paid out under its guarantee of the Jersey trustee's liability. This chain of liabilities, all of which arose from the failure of West Dunes to pay FirstRand, meant that the Jersey trustee was entitled to be treated as a creditor of West Dunes for £500,000, even though it had been paid from assets belonging to the Guernsey trustee; but the Guernsey trust had a claim against the Jersey trust for £500,000. The Guernsey trustee initially accounted for the payment as a distribution to Ian; not surprisingly, since he was a beneficiary of the Guernsey trust and had promoted the scheme for the purchase of the farm which had led to the payment out of the funds of the Guernsey trust. Although the accounting treatment was later changed, the applicants have used this fact to claim that in some way it was Ian who was entitled to the £500,000; but that ignores the fact that the money was spent in discharging a liability of West Dunes that it could not itself discharge, with the consequence that the only persons entitled to claim repayment were the Jersey trustee against West Dunes and the Guernsey trustee against the Jersey trustee.

20 In the meantime West Dunes was trying to sell the farm. On 3 July 2007 it entered into heads of terms for a sale to a BVI company called Obsidian South Africa Limited at a price of ZAR 35 million. That sale fell through, and in August 2007 a sale was instead arranged

to Zamien Investments 99 (Pty) Limited ("Zamien") for ZAR 37.75 million. By November 2007, however, Zamien was seeking to get out of the transaction, asserting that it had been misled. This was known to the Jersey trustee.

21 In anticipation of these sales, the Jersey trustee negotiated an extension of its loan from the Jersey bank to the end of February 2008. On 30 November 2007 the Jersey trustee sent an email to Ian informing him of this fact. The email also said the following:

> *"As you are aware, the Trust does not have sufficient liquid assets to repay the loan unless it receives the proceeds from the sale of the farm.* It is important, therefore that the sale is progressed as soon as is reasonably possible as the Bank will not provide a further extension on the loan and will be seeking full repayment on 28 February 2008. If the Trust is not put in funds by this date, the terms of the loan are such that the Bank is able to call upon the cash collateral being held as security for the loan, in order to offset the debt".

By mistake, this email was sent also to the lawyer acting for Zamien. It was accepted by the Jersey trustee for the purposes of the strike-out hearing that the mistake amounted to gross negligence, so that it could not rely on the exoneration clause in the Westley Trust declaration of trust. Ian immediately complained that the mistake had weakened his negotiating position. According to an email dated 7 January 2008 from Ian to the Jersey trustee, Zamien withdrew from the purchase on 4 December 2007.

22 On 13 June 2008 the farm was sold at auction to Zambrotti Investments 35 (Pty) Ltd ("Zambrotti") for ZAR 18 million. As appears below, this sale was never completed.

23 On 29 July 2008 the Jersey bank formally demanded repayment of the loan made to the Jersey trustee, and on 30 July 2008 it enforced the security it held for that loan over the remainder of the deposit made by the Guernsey trust with the IoM bank. This meant that the Guernsey trust had lost the whole of the deposit, although it had a right of action against the Jersey trustee so as to be reimbursed from the assets of the Westley Trust.

24 On 19 December 2008 the Jersey trustee applied in the South African courts for the winding up of West Dunes. The basis of the claim was set out in paragraphs 15 and 16 of the supporting affidavit of Nico Botha, which in material part stated as follows:

> *"In and during June 2008 the Westley Trust lent and advanced the sum of £500,000 to [West Dunes] at the latter's special instance and request.* This amount is due and payable, but [West Dunes] is unable to repay same. The claim of the Westley Trust is unsecured. … The sum of £500,000 was paid to [FirstRand] as [West Dunes'] debt to [FirstRand] was not being serviced by [West Dunes]".

This passage is described by the applicants as a lie; but in its essential elements it is true. As we have explained, the Jersey trustee was a creditor of West Dunes in the sum of

£500,000. That debt had not arisen as a result of the failure of West Dunes to repay a loan made to it by the Jersey trustee; it had arisen (albeit in July 2007, not June 2008) as a consequence of the failure of West Dunes to make payment to FirstRand. That failure caused the Jersey bank to pay £500,000 pursuant to its guarantee and in turn gave rise to a liability of the Jersey trustee to the Jersey bank under the indemnity, which allowed the Jersey trustee to stand in the shoes of FirstRand as creditor of the West Dunes to the extent of £500,000.

25 The initial reaction of West Dunes, acting through Ian as its sole director, was to resist the winding up petition on the ground that the debt was owed to the Guernsey trustee, not the Jersey trustee. As a consequence, the Guernsey trustee applied to be joined to support the application to wind up. West Dunes then withdrew its opposition, although on terms that it did not accept that the debt was owed to the Jersey trustee. The withdrawal of its opposition was because it became apparent that liquidators appointed by the court would be able to set aside the ZAR 18 million sale to Zambrotti and sell for a higher price of ZAR 25 million to Applemint Properties 99 (Pty) Ltd ("Applemint"). A final winding up order was made on 5 February 2009; and on 9 February 2009 the liquidators applied for leave to terminate the sale to Zambrotti and to sell the farm instead to Applemint. The application was opposed by Zambrotti. Ian intervened in the application to support the liquidators, saying in his affidavit that he applied to intervene with the support of Dorothy and Alison, who both supported the liquidators' application. On 13 February 2009 the South African court granted the relief sought by the liquidators, and the farm was subsequently sold to Applemint for ZAR 25.2 million.

26 As recorded in paragraph 22 of the Royal Court's judgment, Ian failed to cooperate with the liquidators or with a commission of enquiry ordered by the South African court on 14 May 2009 into the affairs of West Dunes. In some respects, these failures amounted to criminal offences.

27 On 8 June 2009 Dorothy sent an email to the Jersey trustee requiring it and the Guernsey trustee to resign with immediate effect. Her email said that she had a power of attorney from Alison. Neither trustee agreed to resign.

28 On 17 November 2009, Ian sent a letter to the Master of the South African court objecting to the Jersey trustee's claim and to a claim made by Westley Holdings, both of which had been admitted by the liquidators, claiming that they were fraudulent. His letter said that he was fully supported by the beneficiaries of the Westley Trust, namely Dorothy and Alison, from both of whom he had powers of attorney. On 9 May 2011, the Master rejected Ian's objections.

29 On 12 October 2011, Dorothy and Alison issued a representation before the Royal Court in their capacities as beneficiaries of the Westley Trust. By that representation, they sought the removal of the Jersey trustee as trustee of the Westley Trust. As the Royal Court remarked in its judgment below, this representation is important in the context of

prescription, because it sets out a number of complaints about the conduct of the Jersey trustee. This representation was discontinued by consent on 13 November 2012.

30 On 13 September 2012 the Guernsey trustee issued proceedings in the Royal Court against the Jersey trustee claiming £946,649.29 plus interest. This sum represented the amounts paid out by the IoM bank from the deposit made by the Guernsey trustee to support its guarantee given to the Jersey bank in respect of part of the FirstRand loan and the loan made to the Jersey trustee. The legal basis of the claim was the right that the Guernsey trustee had acquired by subrogation to enforce the right of indemnity given by the Jersey trustee to the Jersey bank. The Jersey trustee had already, on 21 June 2011, notified Dorothy and Alison of this claim, saying that it had been advised that there was no merit in defending and that it proposed to settle the claim, subject to any alternative proposals that Dorothy and Alison might make. No proposals were forthcoming. On 18 September 2012, after issue of the proceedings, the Jersey trustee again informed Dorothy and Alison that it had decided on advice not to defend the proceedings but that they could apply to join the proceedings and defend them. They did not take any steps to do so. On 21 September 2012 the Jersey trustee submitted to judgment, paid over to the Guernsey trustee the remaining cash held by it as trustee of the Westley trust, and assigned to the Guernsey trustee any future proceeds from the liquidation of West Dunes.

31 On 13 June 2013, some four and a half years after the making of a provisional winding up order, Ian applied to the South African High Court to have the winding up of West Dunes declared void on the ground that it had been obtained by fraud. He asserted that the Jersey trustee's claimed debt of £500,000 was fictitious and fraudulent; that no winding up order had in fact been made, the court order being a forgery; and that the payment of £500,000 by the IoM bank to FirstRand was in fact a distribution to him from the Guernsey trust. This application was dismissed on 20 October 2014 by Kgomo J after an eight-day hearing. Leave to appeal was refused by the South African High Court on 16 September 2015, and by the South African Supreme Court of Appeal on 18 December 2015.

32 The Royal Court rightly regarded Kgomo J's judgment as important, and quoted extensively from it between paragraphs 33 and 44. We do not need to repeat those passages here; but we note in particular the analysis at paragraph 196 of the way in which the liability of West Dunes to the Jersey trustee had arisen, that analysis according with our own set out at paragraph 19 above; and we note also that Ian was not regarded by the judge as a witness of truth.

33 These proceedings were started by the applicants by representation dated 11 September 2015. The Jersey trustee applied to strike out that representation by summons dated 26 November 2015. After a series of procedural steps outlined in the Royal Court's judgment, a revised representation was produced by an amicus appointed by the Royal Court for the purpose of producing a pleading that put forward the applicants' case, but without regard to the professional requirement imposed on members of the Law Society that there be reasonably credible material establishing an arguable case of fraud before fraud is pleaded. That revised representation took the form of an Order of Justice filed on 20

November 2017. On 29 January 2018 the Jersey trustee applied to strike out the Order of Justice. The Royal Court appointed a different advocate as *amicus* for the purpose of the strike out application, the role of the *amicus* being to analyse the applicants' case and indicate to the Royal Court how in the view of the *amicus* that case might best be put.

34 On 8 March 2018 the Royal Court made an order under the Bankers' Books Evidence (Jersey) Law 1986 for the disclosure by the Jersey bank of the entries in its books relating to the accounts of the Jersey trustee as trustee of the Westley Trust.

35 We observe that the procedural steps taken by the Royal Court amounted to quite exceptional efforts to ensure that the applicants' case was properly identified and properly put, and that the documents that might conceivably be relevant to their case were provided to them.

36 The strike out application was heard on 23 and 24 April, and 2 May, 2018. Dorothy attended the hearing and read submissions to the Court. Those submissions, and Dorothy's affidavits and skeleton argument, were said by Dorothy to have been drafted by Ian. Further submissions were lodged after the hearing, relating to the Bankers' Books evidence.

**The Order of Justice**

37 The Order of Justice made allegations which we summarise as follows:

(1) The Jersey trustee failed to amend the terms of the guarantee given to FirstRand so as to comply with FirstRand's standard terms, causing Dorothy, Alison and Ian to make mortgage payments on West Dunes' behalf (paragraphs 34 to 43);

(2) The Jersey trustee was negligent in sending the email dated 30 November 2007 referred to in paragraph 21 above, which caused Zamien to withdraw from the purchase of the farm at ZAR 37.75 million and gave rise to a loss of ZAR 19.75 million when the farm was subsequently sold at auction for ZAR 18 million (paragraphs 44 to 50);

(3) The Jersey trustee attempted to impose terms on the giving of its consent to the sale to Applemint; and when those terms were rejected by West Dunes the Jersey trustee started proceedings “to place West Dunes into a contrived liquidation for the non-payment of fictitious debts said to be owed to the Jersey trustee”. This was done solely for the purpose of covering up the Jersey trustee's breaches of duty and to prevent West Dunes from suing the Jersey trustee for the loss of ZAR 19.75 million arising from the withdrawal of Zamien's offer to purchase (paragraphs 54 to 61);

(4) The Jersey trustee knowingly misrepresented to the South African court that it was a creditor of West Dunes in the sums of £500,000 and ZAR 4 million or £340,000 and thereby induced the court to order West Dunes to be wound up and the liquidators to

admit the Jersey trustee's claims (paragraphs 62 to 75);

(5) By placing West Dunes into a contrived liquidation, making false representations of fictitious loans, and submitting false trust accounts to the South African court, the Jersey trustee dishonestly broke its duties to act with integrity, to observe the utmost good faith in the administration of the Westley Trust, and act in the best interests of its beneficiaries, to keep accurate accounts and records, to preserve and enhance the value of the trust property, and not to prefer its interests over those of the applicants. The liquidation and legal fees of more than ZAR 6.7 million and the expenses of ZAR 5.7 million incurred by the applicants in an attempt to preserve the farm were lost as a direct result of these breaches and of the Jersey trustee's efforts to cover up its misfeasance and dishonest breaches of trust (paragraphs 79 to 82);

(6) The accounts prepared by the Jersey trustee were fabricated and false in numerous respects and amounted to a deceitful and dishonest breach of the Jersey trustee's duty to act with integrity and to keep accurate accounts and records of its trusteeship (paragraphs 83 to 100);

(7) The proceedings described in paragraph 30 above amounted to a conspiracy between the Jersey trustee and the Guernsey trustee to defraud the applicants. The Jersey trustee knew that the representations made to the Royal Court by the Guernsey trustee were false, and in submitting to judgment the Jersey trustee dishonestly broke its fiduciary duties (paragraphs 101 to 118);

(8) The Westley Trust was a sham, and all or many of the intended steps to establish the trust and corporate structure were not carried out at all, or not carried out timeously or in compliance with the law, or were not properly recorded (paragraphs 119 to 147);

(9) The applicants were entitled to damages, including punitive damages, of at least ZAR 24 million together with compound interest at 15.5% for the Jersey trustee's dishonest breaches of duty and conspiracy to injure (paragraphs 148 to 151).

**The Royal Court's judgment**

38 After setting out the facts and background, the Court set out the relevant legal principles between paragraphs 53 and 84. The topics covered in those paragraphs were the principles applicable to a strike out (paragraphs 53 to 56); prescription (paragraphs 57 and 58); pleading fraud (paragraphs 59 to 63); *res judicata*, cause of action estoppel and issue estoppel (paragraphs 64 to 68); abuse of process (paragraphs 69 to 72); estoppel by conduct (paragraphs 73 and 74); and sham trusts (paragraph 75).

39 In relation to prescription, the Court referred to article 57 of the Trusts (Jersey) Law 1984, which provides that the period within which an action founded in breach of trust may be brought against a trustee by a beneficiary is three years from the date on which the beneficiary first had knowledge of the breach of trust, unless the action is brought against the trustee in respect of any fraud to which the trustee was a party or to which it was privy. Actions in tort, such as those based on allegations of negligence or conspiracy, are to be

brought within three years of accrual of the course of action.

40 Between paragraphs 76 and 84, the Royal Court dealt with re-litigation of issues. Paragraphs 78 to 80 are central to the judgment, and we quote them:

> ***"78. We are concerned with the winding up of a South African company, West Dunes, whose only asset was a farm situated in South Africa, ordered by the High Court of South Africa. The South African liquidators appointed by that court finalised the liquidation of the company in May 2010, when the liquidators' liquidation and distribution account was approved. Some three years later, [Ian] sought to challenge the winding up of West Dunes on the ground that the claim made by the [Jersey trustee] was fictitious, and part of a conspiracy between it and its legal representatives to advance that fictitious claim, knowing that it was false. The following issues were determined finally by the South African Court: –***
>
> > ***(i) West Dunes was insolvent and the order for its winding up was properly made at the instance of the [Jersey trustee] acting in good faith;***
> >
> > ***(ii) No false or fictitious claim was asserted by the [Jersey trustee];***
> >
> > ***(iii) There was no fraudulent conduct on the part of the [Jersey trustee] or its advisors;***
> >
> > ***(iv) The claim of the [Jersey trustee] in the liquidation was good in law, in particular notwithstanding [Ian's] assertion that the sum of £500,000 which formed the claim of the [Jersey trustee] had been distributed to him out of the [Guernsey trust]*** .
>
> ***79. In our view, issue estoppel applies to each of these issues finally determined by the South African Ct and furthermore, it would be an abuse of process for those issues to be re-litigated here*** .
>
> ***80. In addition, in those proceedings [Ian] did not challenge the trust structure of the Westley Trust and the way the purchase of the farm had been financed and in evidence he accepted the authenticity and validity of the security documentation."***

At paragraph 81, the Royal Court held that the estoppel applied not only to Ian but also to Dorothy and Alison as his privies, for the reasons set out in the rest of that paragraph and in paragraphs 82 and 83; and at paragraph 84 the court concluded that the interest of Dorothy and Alison was sufficient to make it just that they be bound by the decision of the South African court.

41 The Royal Court then addressed the allegations made in the Order of Justice.

42 In relation to the claim that the Jersey trustee was negligent in failing to amend the FirstRand guarantee (paragraphs 34 to 43 of the Order of Justice), the Royal Court referred to the South African court's finding that it was the insolvency of West Dunes that was causative of FirstRand demanding repayment of the loan and having recourse to the guarantee in the form in which it was given. At paragraph 91, the Royal Court held that ***"leaving all that aside"*** the claim was prescribed: fraud was not alleged, and it was clear that all of the applicants had the relevant knowledge by at least 19 October 2011, which was more than three years from the date when these proceedings were first issued.

43 In relation to the allegations concerning the email of 30 November 2007 (paragraphs 44 to 50 of the Order of Justice), the Royal Court held that this issue too was prescribed. An allegation of gross negligence was not an allegation of fraud, and it was clear that all three applicants were aware of the breach of trust at least from 12 October 2011, which was more than three years before the issue of the proceedings. In Ian's case the email had been addressed to him and he was aware of it at the time; in the case of Dorothy and Alison, it was specifically covered in section 5.1 of their representation brought on 12 October 2011.

44 The allegations of dishonest breach of fiduciary duty and conspiracy to injure (paragraphs 54 to 61 of the Order of Justice) were struck out by the Royal Court as an abuse of process. The process by which this conclusion was reached was as follows. First, the Royal Court considered that the allegations of a contrived liquidation for the non-payment of fictitious debts could not stand in the light of the judgment of the South African court, which found that the debt claimed by the Jersey trustee was not fictitious and was claimed in good faith, and that West Dunes was properly wound up at the instance of the Jersey trustee. Those issues could not be re-litigated (paragraph 103). Secondly, once the effect of that conclusion was taken into account, the applicants were left with an assertion that the Jersey trustee placed an insolvent company it indirectly wholly-owned, and against which it had a valid claim, into liquidation in order to cover up breaches of trust and to prevent the company suing it (paragraph 104). After stating that the Jersey trustee had made it clear in correspondence why it would be taking action against West Dunes (namely to secure its claim for £500,000 for the benefit of the trust and to ensure that there was no dissipation of the proceeds of sale of the farm), pointing out that Ian had been a knowing and willing participant in the liquidation process which had allowed the cancellation of the sale to Zambrotti and the sale to Applemint at a higher price, and commenting that the demands made by the Jersey trustee, while commercially hard, were not on their face dishonest, the Royal Court concluded that there was nothing to tilt the balance and justify an inference of dishonesty (paragraph 106). Thirdly, the Royal Court stated that, although in his application to set aside the winding up Ian was not making a claim for breach of trust, he was very much attacking the good faith of the Jersey trustee in applying for the winding up order and alleging that it had a fraudulent agenda. The question of the Jersey trustee's motive was therefore very much in issue in the South African proceedings, and the allegation that it had applied for a winding up order so as to cover up breaches of trust and to prevent West Dunes suing it should have been included in the South African proceedings (paragraph 107). At paragraph 109, the Royal Court said this:

> ***"Drawing all this together, we conclude: –***

> ***(i) Applying the test in the*** *Three Rivers* ***case, the facts, matters and circumstances relied on by the plaintiffs do not tilt the balance and justify an inference of dishonesty on the part of the [Jersey trustee] in applying to wind up West Dunes.*** It had a valid claim against its indirectly wholly-owned but insolvent company controlled by [Ian] and a legitimate concern, therefore, in ensuring that the sale proceeds of the farm were not dissipated. In addition to securing an equitable distribution of the assets amongst the creditors, the liquidation also enabled the farm to be sold to Applemint at a much higher price, a strategy fully supported at the time by [Ian] .
>
> ***(ii) The [Jersey trustee's] motive for making the winding up application was very much in issue in the South African proceedings and applying the Henderson principle, this allegation could and should have been made in those proceedings.*** As it is the South African Court has found that the [Jersey trustee] was acting in good faith in making the application. That finding is binding on [Ian] and on [Dorothy] and [Alison] as his privies .
>
> ***(iii) The breaches of duty complained of were owed to the beneficiaries, not to West Dunes.*** Winding up West Dunes could not cover up those breaches, which by the time of the South African proceedings were known to all three plaintiffs, and could not have prevented the [Jersey trustee] from being sued for breach of trust by its beneficiaries. The allegations in this respect are obviously and uncontestably bad."

45 In relation to the claims made in paragraphs 62 to 75 of the Order of Justice, which related to West Dunes's contrived liquidation and dishonest breaches of trust and of fiduciary duty, the Royal Court held that the issue had been exhaustively litigated in South Africa and could not be re-litigated in Jersey (paragraph 111). In relation to the claim made by Westley Holdings in the liquidation for £340,000, which the applicants said was fictitious, the Royal Court held that that claim could and should have been raised in the South African proceedings (paragraph 112). All the applicants were barred from pursuing the claims in the Royal Court, and it would be an abuse to allow re-litigation of issues arising out of the winding up and liquidation of West Dunes, which had been exhaustively and definitively dealt with by the South African court (paragraph 114).

46 The same applied to the allegations made between paragraphs 79 and 82 of the Order of Justice, which were merely a reformulation of the same claim.

47 As to the allegation that the Jersey trustee had produced and relied on fraudulent accounts (paragraphs 83 to 100 of the Order of Justice), the Royal Court took the view that these paragraphs were simply a pleading of further evidence in relation to the allegation of a contrived liquidation, and could and should have been litigated in the South African

proceedings (paragraph 120). The revision of its accounts by the Jersey trustee did not justify an inference of dishonesty (paragraph 121), and the allegations would be struck out as an abuse of process (paragraph 122). We think it worth quoting what the Royal Court said in paragraph 121 of the judgment, which highlights the fundamental issue in the proceedings:

> ***"[T]he allegation of deceit and dishonesty cannot stand, in particular in the light of the findings of the South African court that the claim of £500,000 which lies at the heart of all these complaints, was not fictitious and that there was no fraudulent conduct on the part of the [Jersey trustee] and its advisors"*** .

48 In relation to the allegations of dishonest breach of fiduciary duty and conspiracy to injure (paragraphs 101 to 118 of the Order of Justice), which relate to the proceedings brought by the Guernsey trustee against the Jersey trustee, the Royal Court pointed out that although it was accepted by Dorothy that all the applicants were aware of the proceedings none of them took up the invitation to intervene and make the allegation of a dishonest conspiracy in the proceedings (paragraph 126). Both the Guernsey trustee and the Jersey trustee were separately represented, and no inference of dishonesty was justified (paragraph 127). Again, we think it worth quoting from the judgment:

> ***"128. The plaintiffs do not dispute the fundamental point that the [Guernsey trustee] did provide security of some £900,000 (later increased) so that the Westley Trust could acquire the farm, and it has lost the entirety of that sum, which represented, as we understand it, the bulk of the trust fund. A disastrous outcome. The plaintiffs query the mechanics by which the security was called in, but at any level, the [Guernsey trustee] was entitled to recover what it could from the Westley Trust for the benefit of its beneficiaries, the plaintiffs*** .
>
> ***129. How the plaintiffs, who are beneficiaries of both trusts (although [Ian] was not a beneficiary of the Westley Trust), claim to have been defrauded personally when these were transactions between the trustees of two trusts is once again entirely obscure."***

This part of the Order of Justice was struck out as prescribed and as an abuse of process (paragraph 130).

49 Finally, in relation to the allegations that the Westley Trust was a sham (paragraphs 119 to 147 of the Order of Justice), the Royal Court pointed out that there was no relief claimed in respect of this contention, and that on that ground alone the allegations stood to be struck out (paragraph 133); and then, at paragraph 140, it identified a fundamental inconsistency within the pleading, which it expressed in this way:

> ***"If the Court grants the plaintiffs any of the relief they seek on the grounds that the [Jersey trustee] was in breach of its duties as trustee of the Westley Trust, then the Westley Trust cannot be a sham.*** Equally, if the

> Westley Trust is a sham, then the Court cannot grant the plaintiffs any of the relief they seek on the grounds that the [Jersey trustee] is in breach of its duties as trustee of the Westley Trust. There would have to be an entirely different claim by [Ian] that the [Jersey trustee] was in breach of its duties to him as his bare trustee which would pit [Ian] against his mother and sister" .

The Royal Court then concluded (at paragraph 142) that the allegation of sham could not be pleaded in a manner which was consistent with the Order of Justice: it would be an entirely different claim by Ian against the Jersey trustee and his mother and sister.

50 The Royal Court then gave consideration to the Bankers' Book evidence. At paragraph 144, it remarked that fundamentally the applicants still did not appear to appreciate that where a creditor makes a claim by way of subrogation there will not necessarily be a contractual document between creditor and the debtor, since the claim arises by process of law. The point had been examined exhaustively by Kgomo J in the South African proceedings. It was irrefutable, and had been accepted by Ian in those proceedings, that the Westley Trust structure was as set out in paragraph 7 of the Royal Court's judgment; that the purchase of the farm was funded and security provided as set out in paragraph 9 of that judgment; that the Guernsey trustee provided security of £915,000 for the two facilities granted by the Jersey bank to the Westley Trust, namely the guarantee of £500,000 in favour of FirstRand and the loan to the Westley Trust of £415,000; that West Dunes became insolvent and FirstRand enforce the guarantee given by the Jersey bank; that the Jersey bank had recourse to the security provided by the Guernsey trustee both for the guarantee paid out to FirstRand and for the loan made to the Westley Trust; and that whatever assets were recoverable from the liquidation of West Dunes had been assigned by the Jersey trustee to the Guernsey trust, as was only appropriate bearing in mind it had financed a large proportion of the cost of the farm. While some aspects of the conduct of the group companies could be criticised, the Royal Court had seen no evidence of fraud or anything which justified an inference of dishonesty.

51 The Royal Court's conclusions were expressed in paragraphs 146, 147 and 149, which we quote:

> ***"146. The conclusion we have reached is that for the reasons set out above, the whole of the Order of Justice stands to be struck out. We have given careful consideration as to whether any opportunity should be given to the plaintiffs to further reformulate that part of their claim that is not prescribed or uncontestably bad. The difficulty is that underlying the whole of these remaining claims is the complaint that the [Jersey trustee] brought about a contrived winding-up and liquidation of West Dunes in South Africa, which it did dishonestly and using a fictitious claim. Those allegations have been the subject of exhaustive litigation in South Africa (the appropriate forum) and comprehensively dismissed. The liquidation was not contrived, the claim was not fictitious and the [Jersey trustee] had not acted dishonestly. On the contrary, [Ian] was found by the South African Court to be a dishonest witness motivated by malice towards the***

***[Jersey trustee]. These issues cannot now be re-litigated in this jurisdiction and no further re-formulation of the Order of Justice can permit that to happen*** .

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

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

52 For the sake of completeness, we should note that at paragraph 60 of its judgment the Royal Court noted that the applicants sought to rely on the maxim *culpa lata dolo equiparatur* so as to equate the Jersey trustee's conceded gross negligence to fraud. As the Court rightly said, the maxim does not form part of the law of Jersey: see *Spread Trustee Co-Limited v Hutcheson* [2012] 2 AC 194, where the point was decided in relation to the law of Guernsey. In their written appeal submissions, the applicants complain about this: they say (at paragraph 101) that nowhere in the Order of Justice do they rely on the maxim, and that "this finding by the Court is just one of many where slight changes of fact can change the outcome in a Court". It is right that the maxim is not referred to in the Order of Justice. So far as we can see, it was referred to below only in the skeleton argument provided by the Jersey trustee for the strike out application, presumably on the not unreasonable assumption that, given the tenor of the allegations, the applicants regarded the gross negligence as part of the Jersey trustee's overall fraudulent conduct. In any event, had the maxim applied it would have been beneficial to the applicants, since it would have meant that no prescription period applied; so we think it was right for the Royal Court to consider it.

**The grounds of appeal and the applicants' submissions**

53 There is no document which can properly be described as grounds of appeal. The applicants' case on the application is primarily to be discerned from documents called "The Parties and Background" and "Plaintiff Appeal Argument".

54 The applicants' case was presented to us by Dorothy. She did this much more courteously and moderately than the tone of the applicants' documents suggested might be the case, and we found her remarks helpful in identifying where the applicants' concerns truly lay. She relied on two sets of written submissions: the Plaintiff Appeal Argument, and a further speaking note which she handed to us. She made brief oral submissions by way of introduction of the applicants' case. She contended that the Jersey trustee had not rebutted the allegations of breach of trust made against it; that it had not addressed the incorrect facts in its evidence and in the Royal Court's judgment; that it had favoured the interests of other companies in the Nedgroup group over the interests of the applicants as beneficiaries; and that it had given false evidence.

55 These themes were expressed in greater detail in the Plaintiff Appeal Argument, which identified eight grounds or reasons for appeal. They are in summary as follows:

> (1) The Royal Court's judgment treated the allegations set out in the Order of Justice as untrue. In doing so, the Royal Court had insufficient regard to what was shown by the respondent's own documents, dismissed unambiguous contemporaneous evidence, and committed minor and material errors of fact that all favoured the respondent. The law could not be properly applied with errors of fact and with such bias in favour of the respondent.
>
> (2) The Royal Court had re-characterised the applicants' evidence by replacing or omitting material words in the extracts it chose to include in the judgment, thereby favouring the respondent. By doing this, the court exhibited unfair bias in favour of the respondent.
>
> (3) The Royal Court had conducted an inappropriate mini fraud trial without hearing any witnesses and had made findings on heavily conflicting evidential accounts of fact. That was not appropriate on a strike out application. This showed *"a complete and utter bias"* against the applicants. By that bias, the Royal Court had misdirected itself with regard to the principles on which its discretion should be exercised, and had broken its duty to act fairly.
>
> (4) The Royal Court had blatantly ignored new evidence in the form of the Bankers' Book evidence and the Panama Papers in a bias that favoured the respondent absolutely.
>
> (5) Findings of fact had been made in favour of the respondent on the basis of the conflicting records of the Jersey trustee, the Jersey bank and the Guernsey trustee. One or more of these entities had been caught making material false representations, and all had engaged in a subsequent cover-up.
>
> (6) Res judicata, issue estoppel and the Henderson principle did not apply when fraud was involved. The primary fact found by the Royal Court, that the Jersey bank had made a loan and payment of £500,000, was false, but had induced courts in two jurisdictions to give judgment against the applicants. Fraud is a thing apart and unravels all. In any event, the £340,000 claim was demonstrably false.

(7) The Royal Court had ignored violations of Jersey statutory and regulatory codes and orders. These violations by the Jersey trustee coexisted with its dishonest breaches of fiduciary duty, deceit, fraud and/or *dol*.

(8) These matters amounted to serious errors of law by the Royal Court and had infringed the applicants' right to a fair trial under Article 6 of the ECHR. The improper application of various Jersey laws and codes, and the ignoring of the obligations of a fiduciary by the Court, had rewarded the respondent's dishonesty and deceit. The Royal Court's judgment in its entirety ran wholly contrary to the public interest, Jersey codes and orders, and international anti-money laundering laws; was repugnant to the trust concept; and showed an absolute bias against foreign-based beneficiaries and investors.

56 At paragraph 113, the Plaintiff Appeal Argument identified “5 main areas involving dishonesty and or deceit and or dol” from the Order of Justice and the way in which the Royal Court had dealt with them that the applicants wished to cover. They were as follows:

*(i) Sham Trust, Westley Holdings and Panama Papers;*

*(ii) £500,000 distribution by the Guernsey Trustee;*

*(iii) £500,000 loan and payment by the Jersey Bank and contrived liquidation and £340,000 loan to West Dunes by Westley Holdings;*

*(iv) Dishonesty in Royal Court of Jersey in September 2012; and*

*(v) Jersey trustee's financial statement fraud*.

57 The main focus of the suggestion that the Westley Trust was a sham was on the identity of the settlor. Paragraph 117 suggested that the Jersey trustee had variously stated in writing that the settlor was Ian, the Guernsey trust, or Alison, or that it had no settlor. This was said to mean that the Jersey trustee “ *has been caught in a lie, committed perjury and dishonestly breached its fiduciary duty”*. More relevantly to the claim that the Westley Trust was a sham, it was said that since Alison (who in the Royal Court's view was the settlor) had no intention to create a trust, did not settle any of her property on trust, and did not give any instruction as to the terms and beneficiaries of the trust, there could be no trust. In addition, it was said that the Royal Court's statement as to the consequences of a finding of a sham trust made no sense in logic, in the context of a sham, or in law or equity. It was, however, stated in paragraph 114 that “if there is a sham or no trust then it follows that everything that followed is null and void and would lead to a separate damages claim that would require expert advice way beyond our capabilities involving many areas and would require an actuary to assess fully”.

58 The complaint in relation to Westley Holdings related to the ownership of the share. It was said that Gerrard Nominees (Jersey) Limited, if it held shares in Westley Holdings at all, did

so as absolute owner. The consequence of this was said in paragraph 192 to be that there was “time sweat and money we the Plaintiffs would not have spent if we had known the truth of the beneficial ownership of Westley Holdings by [Gerrard] Nominees (Jersey) Limited and that we actually had no proprietary rights in law but for the deception by the Defendant that we did”.

59 In relation to the £500,000 distribution by the Guernsey trust, it was said that title to the £500,000 passed both in law and in equity to Ian as soon as the Guernsey trustee had relinquished all dominion and control, thus the transfer was complete and irrevocable and there was no law or authority to the contrary.

60 So far as concerns the allegation of a contrived liquidation of West Dunes, it was said that the Royal Court blatantly ignored new and previously unavailable Bankers' Book evidence and the incontrovertible evidence that there were no loans or payment of £500,000 by the Jersey bank on behalf of the Jersey trustee to any company in South Africa, so that the judgments obtained in South Africa were obtained by perjury and fraud.

61 In relation to the £340,000 loan by Westley Holdings to West Dunes, it was said that there was irrefutable proof that the Jersey trustee made a false representation to the South African court in 2010, because there was no loan made by Westley Holdings to West Dunes. This was said to be demonstrated by the Jersey trustee's own documents, so that the Jersey trustee “has been caught in dishonest and deceitful actions by its own documents and the Court totally ignored the Defendant's own contradicting evidence, to the absolute advantage of the Defendant”.

62 As to the false statements made to the Royal Court in 2012, it was said that it was demonstrable from the Bankers' Book evidence that there was no guarantee and indemnity agreement between the Guernsey trustee and the Jersey bank, so that the Guernsey trustee was not entitled to be subrogated to any right of the Jersey bank against the Jersey trustee. No reasonable opportunity was given to the applicants to intervene in the proceedings.

63 Finally, in relation to financial statement fraud, it was said that the accounts of the Westley Trust do not contain any identifiable payment in or out of £500,000, any receipt from any recipient bank for a payment of £500,000, any recognition of foreign exchange gains or losses, or any material relating to a creditor of £134,010 in 2010.

64 There was then a section dealing with factual matters which the applicants assert were mistakenly determined by the Royal Court.

65 We recognise that the above summary is no more than a relatively short statement of what we regard as the central points contained in the 320 paragraphs of the Plaintiff Appeal Argument. We have, however, taken careful account of everything that is said in that

document. The same applies to the contents of the second document relied upon by Dorothy, which was produced in response to the Jersey trustee's skeleton argument. That document does not appear to us to contain any new allegation, and we do not consider it necessary to set out or summarise its contents here.

66 After Advocate Taylor for the Jersey trustee had made his submissions to us, Dorothy again addressed us orally. She said that she did not understand how Alison could be declared settlor of a trust and know nothing about it. Ian had thought that he was the settlor, but it was now said that it was Alison. There was no written confirmation that Ian had withdrawn his opposition to the liquidation of West Dunes, which was said by Advocate Taylor to have been given by telephone. In relation to the applicants' failure to intervene in the claim by the Guernsey trustee, they had been given only three days' notice at a time when they were in South Africa and their Jersey lawyer in the United States. The judgment of Kgomo J was based on false evidence and false documents, as had been proved by the Panama papers. The Bankers' Book documents could not be brushed aside as irrelevant. £600,000 had been incurred in fees because neither the Jersey trustee nor the Guernsey trustee had complied with the applicants' instructions to stop their actions: the applicants would have been £600,000 better off if the proceedings had stopped. The applicants had thought that there was a distribution of £500,000 to Ian, since it said so in the accounts of the Guernsey trustee; it had never been mentioned that it was a loan. They relied on the written documents, or – since not all documents had been provided – the lack of them.

**Discussion**

67 It is important to note that an appeal to this court does not involve a complete rerun of the proceedings below. The hearing in the Royal Court was the occasion for consideration of the applicants' arguments; and this court will only grant leave to appeal if the appeal has a real prospect of success: see the first ground set out in *Sinel v Hennessy & others* [2018] JCA 071, the other two grounds being immaterial in the circumstances of the present case.

68 In determining whether or not the appeal has a real prospect of success, it is necessary to bear in mind that in striking out the proceedings the Royal Court was exercising a discretion. It is well established that this court will only interfere in the exercise by a court of a discretion if the court has misdirected itself with regard to the principles governing the exercise of the discretion, or has taken into account matters which it ought not to have done or disregarded matters it should have taken into account, or has reached a conclusion that is plainly wrong, or where there has been a change of circumstances justifying a different outcome: see *United Capital Corporation v Bender* [2006] JLR 269. In such circumstances, as Lord Diplock stated in *Hadmor Productions Ltd v Hamilton* [1983] 1 AC 191, 220, “the function of an appellate court… is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only”.

69 Applying this test, we consider first whether the Royal Court proceeded on the basis of the correct principles. We note that the only challenge by the applicants to those principles concerns the effect on them of allegations of fraud; but, since the applicants act in person, we have taken care to satisfy ourselves that the principles stated by the Royal Court were correct and complete. We are so satisfied.

70 As to the contention that the principles are affected by the applicants' allegations of fraud, the problem is that those allegations are untenable. They stem from the applicants' misunderstanding or amnesia about the nature and legal effect of the transactions that provided the funding for the purchase of the farm. The applicants are quite right that the Jersey trustee did not make a payment of £500,000 by way of funding for that purchase, and they are quite right that Westley Holdings did not make a loan to West Dunes in connection with the purchase. What the Jersey trustee did do, however, was to undertake a liability to the Jersey bank in respect both of the £500,000 and of the loan which it obtained from the Jersey bank. If the focus is on the liability, it becomes easier to understand how the Jersey trustee was in a position to apply for the winding up of West Dunes. The process, which was explained by Kgomo J in paragraph 196 of his judgment, by the Royal Court in paragraph 144 of its judgment, and by us in paragraph 19 above, started with the failure of West Dunes to repay the money it had borrowed from FirstRand. That this was the cause of all that followed appears to have been forgotten or ignored by the applicants. The failure gave rise to a liability on the Jersey bank to pay FirstRand, and to an obligation on the Jersey trustee to indemnify the Jersey bank against that liability. That meant that the Jersey trustee was entitled to stand in the shoes of FirstRand and enforce the liability of West Dunes to repay the £500,000 originally owed to FirstRand. The fact that the liability of the Jersey bank to FirstRand, and the liability of the Jersey trustee to the Jersey bank, were discharged by payment from the deposit made by the Guernsey trustee with the IoM bank does not change this; it merely means that the Guernsey trustee had a right to reimbursement from the Jersey trustee. We find incomprehensible the apparent suggestion that the fact that the Guernsey trustee initially accounted as a distribution to Ian for the payment of £500,000 that it was obliged to make, in some way had the effect of causing the liability of West Dunes to disappear or of depriving the Jersey trustee of its rights to claim payment from West Dunes. As to the loan of ZAR 4 million, made by the Jersey bank to the Jersey trustee and on-lent to Westley Holdings, it was again the failure of West Dunes to fund repayment of that loan by channelling money up the chain of companies that led to the Jersey trustee defaulting on its obligation to repay the Jersey bank. That in turn led to a call by the Jersey bank on the guarantee given by the Guernsey trustee. Although the correct entity to reclaim this sum from West Dunes was Money Box, that company was indirectly wholly owned by the Jersey trustee; and it is impossible to categorise a failure to respect the company structure as fraud. Moreover, since the Guernsey trustee had discharged West Dunes' liability to repay the loan made to it, it was arguably entitled to be subrogated to the rights of the original creditor; and, as we have said, it applied to be joined in the South African proceedings for the purpose of supporting the application to wind up West Dunes. There is nothing in any of this to justify any inference of fraud.

71 Once that is out of the way, it is clear that the Royal Court proceeded on the right

principles. Despite the applicants' assertions to the contrary, it does not appear to us that the Royal Court took into account irrelevant considerations or failed to take into account relevant ones. We are at a loss to understand why the applicants are so fixated on the identity of the settlor of the Westley Trust: the amount initially placed in trust was only £10, Alison incurred no liability as economic settlor, and had there been any profits derived from the sale of the farm they would on the face of it have accrued to her and to Dorothy as beneficiaries. There is no doubt that the trust was properly constituted by the declaration of trust executed by the Jersey trustee, and the suggestion that it was a sham, or not a trust at all, is hopeless. The applicants have not demonstrated any relevant mistake of fact. As Advocate Taylor conceded, and as the Royal Court recognised, some aspects of the conduct of the Jersey trustee are open to criticism; but the reliance placed by the applicants on these is wildly exaggerated, and falls far short of establishing fraud. The reliance on the Panama papers is likewise misplaced: there is no doubt that the beneficial interest in Westley Holdings was held by the Jersey trustee, although the legal interest was held on a bare trust for it. The Bankers Books evidence does show that the Jersey trustee did not make a payment of £500,000; but the Royal Court's judgment did not proceed on the basis that such a payment had been made by the Jersey trustee, but rather on the basis of the chain of liabilities that we have identified.

72 We turn finally to consider whether the Royal Court's decision can be categorised as plainly wrong. In our judgment, it was in fact plainly right. The court's conclusions did not involve a mini trial, merely the application of settled principles. The repeated allegations of bias are wholly unjustified. Not only did the Royal Court come to a conclusion eminently justified by the material available to it, it went out of its way to ensure that the applicants' case was presented in the way most favourable to them and that the court had the benefit of impartial advice as to the merits of the applicants' claim in circumstances where they had no advocate of their own. The applicants may not like the outcome, but they cannot legitimately claim that it represents bias by the Royal Court in favour of Jersey institutions.

73 Looked at overall, it is clear to us that the applicants have no legitimate complaints in relation to the way in which the transaction was funded or the reliance on the liabilities that arose from the structure then adopted. Where they might have had a legitimate complaint was in relation to the allegation of gross negligence (although it is far from clear that that negligence was causative of loss, since there were already complaints of fraud made by the prospective purchaser before the Jersey trustee's email was wrongly copied to it). There is absolutely no doubt, however, that that claim is prescribed. Not even the applicants suggest that the email was sent fraudulently; the claim is one in tort, and had to be brought within three years of the cause of action arising. That was when the email was sent. Ian knew of it at the time, and complaint was made of it in the representation brought by Dorothy and Alison in 2011 but discontinued in 2012. A defence of prescription would inevitably succeed, and there is no point in allowing the claim to go to trial.

74 That last statement applies to the matter generally. The applicants have had ample opportunity to air their grievances before the courts in South Africa and in Jersey. The courts in both those jurisdictions have given careful consideration to the complaints made,

and have dismissed them. It is now too late for many of the complaints to be litigated, and the others represent either an attempt to re-litigate matters that have already been decided against the applicants or to litigate matters that could and should have been determined in the earlier proceedings. The Royal Court's conclusions on these matters appear to us unimpeachable, and there is no realistic prospect that they would be set aside on appeal.

**Disposition**

75 For these reasons, we dismiss the application for leave to appeal.

76 Our provisional view is that the respondent's costs of the application should be paid on the standard basis by the applicants, such costs being taxed if not agreed. We will, however, allow the parties until 4pm on Wednesday 21 August 2019 to propose in writing a different order if they wish to do so.

77 For the sake of completeness, we mention that immediately before the hearing of the application a Mr Justin Lewis, who acted as a McKenzie friend to Dorothy in the Royal Court proceedings, sent two emails to the Judicial Greffier for our attention. We have read those emails, but do not find it necessary to comment on them.