COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2021/CLE/gen/00621

BETWEEN

NOMIKI DROSOS TSAKKOS

First Claimant

AND

PETER DROSOS TSAKKOS

Second Claimant

AND

PANTELIS TSAKKOS

(As Executor of the Will of the late Emmanuel Pantelis Tsakkos)

First Defendant

AND

ADITA BOY

Second Defendant

Before: The Honourable Chief Justice Sir Ian R. Winder

Appearances: Michael Scott KC with Marnique Knowles for the Claimants
Sophia Rolle-Kapousouzoglou with Valdere Murphy for the First Defendant
Kelly Ingraham for the Second Defendant

Hearing date(s): 27 May 2024

RULING

WINDER, CJ

These are the applications of the Defendants seeking the striking out of the action or alternatively summary judgment.

Background

[1.] The First Claimant (Nomiki) and the Second Claimant (Peter) (together "the Claimants") are the children of the late Drosos Tsakkos ("DT") and the sole beneficiaries under his Will. DT died in 1997 at the age of 52. At the time of his death, Nomiki was 8 years old and Peter was 12 years old.

[2.] The late Emmanuel Pantelis Tsakkos (EPT) was the brother, executor and trustee of the Last Will and Testament of DT. EPT died on 5 August 2020 at Doctors Hospital. By his Will dated 23 June 2020, the First Defendant (Pantelis) was appointed sole executor. The beneficiaries of EPT's estate are his widow, Adita Boy, Peter and Pantelis.

[3.] By virtue of chain of representation provided for in section 48 of the Probate and Administration of Estates Act, 2011, Pantelis is also the executor of DT's estate.

[4.] On 9 June 2021, the Claimants commenced this action against Pantelis alleging fraud, breach of trust and/or duty and/or devastavit by EPT. On 19 August 2022, the Claimants amended the Statement of Claim to include EPT's widow, Adita Boy (Adita) as the Second Defendant.

[5.] Under DT's Will, EPT was appointed the sole executor and trustee of the Will for the beneficiaries, the Claimants. The Claimants contend that the residue of DT's estate includes shares in Trebert Holdings Limited ("THL"), which they allege, owns certain valuable commercial property situated at West Bay Street.

[6.] A summary of the Claimants' claim is set out in paragraph 4 of the Amended Statement of Claim, which provides:

> EPT and the First and Second Defendants dishonestly put to their own personal and beneficial use, money and property (both real and personal) which formed part of the estate of the late Drosos Tsakkos at the time of his death to the value of between $3,000,000 - $5,000,000. Such property came into the hands of and under the control of EPT as the executor and trustee of the late Drosos Tsakkos' estate. The said assets of the estate of the late Drosos Tsakkos are now within or traceably within the estate of EPT, in respect of which the Defendant is the executor and trustee. In any event, the First Defendant as executor stands in the shoes of EPT and he has himself perpetuated fraud against the estate of the late Drosos Tsakkos.

[7.] It is alleged that, as the executor and trustee of the Will of the late DT, EPT failed to comply with his duty to act honestly, responsibly and reasonably in ensuring that the assets of DT's estate were collected, preserved and distributed to the Claimants. The particulars of fraud which is alleged against EPT are as follows:

(1) Between August 1997 and August 2020, EPT deposited cash and cheques totaling approximately $1,174,835.50 into his personal bank account from tenants of properties in the estate of DT including Playtech Systems Limited and Infincol (Bahamas) Limited, which should have been deposited into THL's account;
(2) Between August 1997 and August 2020, on a regular basis, EPT stole money from THL's bank account with the Royal Bank of Canada;
(3) EPT dishonestly spent or converted the assets of the estate of DT for his own use when he was not so entitled and;
(4) EPT makes (sic) provision in his Will dated 23 June 2020 for assets forming part of the estate of DT to be distributed in the way he saw fit, rather than to give effect to the provisions of the Last Will and Testament of DT which should have been distributed upon the majority of Nomiki on 28 August 2007 to the Claimants.

[8.] The allegations made against Pantelis and Adita Boy are that they have fraudulently misappropriated money and property (real and personal) from the estate of the late DT. The particulars of the fraud alleged against Adita are as follows:

(1) She stole funds from THL after the death of EPT;
(2) She stole a generator and automatic transfer switch from a building belonging to THL; and
(3) She misappropriated rental income from the estate of DT which was deposited into a joint bank account which she shared with EPT.

The particulars of the fraud alleged against Pantelis are as follows:

(1) Pantelis fraudulently misappropriated that the rental income from EPT's Estate was going into an escrow account in the name of EPT when in fact, it was going into his personal account and;
(2) Pantelis dishonestly accepted from Adita Boy and installed into his own property a generator belonging to THL, which Adita Boy had stolen.

[9.] With respect to the allegation of breach of trust, the Claimants asserted that EPT and Pantelis owe the Claimants a fiduciary duty to exercise reasonable care and skill in administering the estate of DT and they breached that duty by failing to administer DT's estate in accordance with his Will; failing to invest the funds of DT's Estate for the benefit of the Claimants; failing to act in accordance with their duty and in the best interests of the Claimants by failing to:

(a) maintain properties forming part of DT's Estate;
(b) pay government and corporate fees for companies in DT's Estate; and

(c) stop leakage of funds from DT's Estate due to tenants leaving THL's properties that were in disrepair.

There are also other allegations including but not limited to EPT and Pantelis spending or converting the assets of DT's Estate for their own use and failing to keep proper record and produce them to the Claimants when requested.

[10.] The prayers for relief in the Amended Statement of Claim are as follows:

(1.) Account of profits;
(2.) Damages for fraud and/or breach of trust and/or duty and/or devastavit by EPT and the Defendants (fraud in the case of the Second Defendant) in their tortious misconduct between August 1997 and present, as trustee and executor of the Last Will and Testament of the late Drosos Tsakkos whereby they dishonesty stole moneys and/or assets belonging to the Claimants under their father's will;
(3.) An injunction restraining the probate and winding up of the estate of the late Emmanuel Pantelis Tsakkos until after the trial of this action or further order;
(4.) Interests on the assets of the estate of the late Drosos Tsakkos, which were used in making a profit;
(5.) Such further or other relief as may in the circumstances be just; and
(6.) Interests and costs.

[11.] In his Defence, Pantelis denied using money or property of DT's Estate for his personal benefit and not complying with his fiduciary duty as executor and trustee of DT's estate. He asserted that the rental income from the THL properties was insufficient to cover their expenses of the estate such as the maintenance, education and benefit of the Claimants. EPT deposited $20,000.00 of his personal money to THL's account for the estate. DT faced serious financial difficulties before his death, including difficulty paying the monthly mortgage payments of a property owned by THL, which remained unsatisfied at the time of DT's death but was satisfied by EPT in or about 2011.

[12.] Throughout the Defence, Pantelis puts the Claimants to strict proof of their assertions.

[13.] A Reply to the Defence was filed on 10 August 2021. The Claimants denied some of the allegations contained in the Defence and put Pantelis to strict proof thereof.

[14.] Pantelis filed a notice of application on 8 April 2024 seeking relief pursuant to Parts 15.2 (a), 26.2(e) and (j) AND 26.3(1)(b) and (c) of the Supreme Court Civil Procedure Rules, 2022 ("CPR") and/or the inherent jurisdiction of the Court. The following orders were sought at paragraph 1 of the Notice of Application:

1.1. That the Writ of Summons and Amended Statement of Claim filed herein on 9th June 2021 and 19th August 2022 respectively on behalf of Nomiki Drosos Tsakkos and Peter Drosos Tsakkos,

the First and Second Claimants herein respectively ("the Claimants") be struck out and dismissed as against the First Defendant on the grounds that the Writ of Summons and Statement of Claim:

1.1.1. do not disclose any reasonable ground for bringing a claim, and/or

1.1.2. are scandalous, frivolous and vexatious; and/or

1.1.3. are otherwise an abuse of the process of the court; and/or

1.1.4. under the inherent jurisdiction of the Court as the claims are statute barred

1.2. Further and/or alternatively that summary judgment be given against the Claimants on the basis that the Claimants have no real prospect of succeeding on the claim.

[15.] The grounds relied upon at paragraph 2 of the Notice of Application were identified as the following:

2.1. The Claimants are barred by their own laches, delay and acquiescence from maintaining any claim as against the First Defendant, specifically:

2.1.1. As regards laches and delay: The acts on the part of EPT which the Claimants allege in [5] and [7] of the Amended Statement of Claim were fraudulent purportedly occurred between August 1997 and August 2020. The Claimants, at the latest, knew of the existence of all matters pleaded in the Amended Statement of Claim since at least 19th October 2003 in relation to Peter Tsakkos when he attained the age of majority, and 28th August 2007 in relation to Nomiki Tsakkos when she attained the age of majority. However, the Claimants did not commence these proceedings for purported breaches of trust and/or duty and/or devastavit until after the death of EPT in August 2020.

2.1.2. As regards acquiescence:

(i) While the residuary estate of Drosos Tsakkos should have been vested equally in the Claimants once Nomiki Tsakkos attained the age of majority on 28th August 2007, the Claimants waited until 9th June 2021 to commence these proceedings.

(ii) The Annual Returns of Trebert Holdings Ltd., ("THL"), the sole asset the Claimants were entitled to under their father Drosos Tsakkos' Will reflects that Myong Tsakkos (the mother of the Claimants), Peter Tsakkos and Nomiki Tsakkos were on the Board of Directors of THL since 7th December 2000, 2nd December 2002 and 8th October 2020 respectively.

(iii) The Claimants advised EPT after they attained the age of majority that they preferred for the status quo to remain relative to Drosos' Estate, and EPT continued to inter alia pay various expenses, including credit card expenses and homeowners' insurance on behalf of the Claimants.

(iv) The Executor has no knowledge of, nor does he have access to the information claimed due to the significant passage of time in order to respond to the claim. The First Defendant would be prejudiced if obliged to defend claims as against EPT which occurred over 24 years ago.

(v) The Claimants have not pleaded any facts which demonstrate that the Claimants made any of the allegations in the Amended Statement of Claim during EPT's lifetime and/or objected to EPT's administration of Drosos' Estate.

(vi) The First Defendant has no knowledge of, nor does he have access to the information claimed in order to properly defend such claims nor have the Claimants pleaded any facts which show that the Claimants made any demands for the return of funds or otherwise from EPT during his lifetime to remedy the alleged breaches of trust and/or duty and/or devastavit.

2.1.3. Given the Claimants' delay in commencing the present proceedings, material evidence in relation to this matter has been lost given the substantial passage of time; and the fact that inter alia EPT is dead. The First Defendant is not in possession of many of the documents, including, receipts, disbursements or otherwise relative to EPT's administration of Drosos' Estate, See the Claimants BDO Forensic Report dated 23rd June 2021 at pages [61]-[62].

2.1.4. The Claimants also admit that they are not in possession of all key documents in support of their claim.

2.2. In the circumstances, the Claimants are barred from maintaining any claim as against the First Defendant as it would be inter alia unconscionable in the circumstances.

2.3. In relation to the claims as against the First Defendant in his personal capacity,

2.3.1. The First Defendant is not liable for fraud or otherwise as alleged by the Claimants for the reasons as particularized in the Third Affidavit of Pantelis Tsakkos to be filed herein, including, but not limited to the following facts:

2.3.1.1. the First Defendant had no involvement with THL at the material time and has no information as to the affairs of THL and/or Drosos' estate as the Claimants have refused to provide same, including, the collection of rental income from tenants of THL.

2.3.1.2. the First Defendant made no fraudulent misrepresentations to the Claimants relative to the deposit of rental income from EPT's estate.

2.3.1.3. the First Defendant did not dishonestly accept and/or install the generator on his own property, and in any event, the generator was purchased by EPT in his own name.

2.3.1.4. the First Defendant did not collect insurance claims or otherwise for damages to THL property.

2.3.2. The First Defendant knows of no reason why the disposal of the claim should await trial.

[16.] Adita filed a notice of application on 3 April 2024 seeking similar relief as claimed by Panteis. She amended her notice to include the grounds for which she seeks the dismissal of the action. The grounds of the application are, *inter alia*:

(i) The Second Defendant is not liable for fraud or otherwise as alleged by the Claimants for the reasons particularized in the Affidavit of Denise V. Williams, including but not limited to the following:

(a) the Second Defendant did not fraudulently misappropriate money and/or property from the Estate of the late Drosos Tsakkos;

(b) the Second Defendant was never an employee, shareholder or director of Trebert Holdings Limited;

(c) the Second Defendant did not dishonestly remove a Generator and automatic transfer switch from a building located on the corner of West Bay Street and Prospect Ridge (the "Building"), in any event, such Generator and automatic transfer switch were the property of the late Emmanuel Pantelis Tsakkos and not the Claimants;

(d) the Second Defendant did not misappropriate funds from the Estate of the late Drosos Tsakkos;

(e) the Second Defendant does not have a joint bank account with the late Emmanuel Pantelis Tsakkos, and as such, the Second Defendant could not and did not, deposit money

and/or cheques into a non-existent joint bank account with the late Emmanuel Pantelis Tsakkos;

(f) the Second Defendant is not liable and/or responsible for any claims for outstanding debts or invoices for utilities and/or rent (if any such rent was owed), where any such outstanding debts or invoices for utilities and/or rent (if any such rent was owed) were in the name of the late Emmanuel Pantelis Tsakkos;

[17.] The issues for determination in these applications may be stated as follows:

(1) Whether the Claimants are barred by virtue of the rule of reflective loss from pursuing the claims vis-à-vis THL.
(2) Whether any of the claims are statue-barred notwithstanding that there are breach of trust claims alleged.
(3) Alternatively, if the claims are not statue-barred, whether the equitable defenses of laches, delay, concurrence and acquiescence are defences available to Pantelis on the facts of this case.
(4) Whether the claim against Adita is frivolous vexatious and an abuse of the process of the Court.
(5) Whether the claim or any part thereof has any reasonable prospects of success such that summary judgment ought not to be granted.

[18.] Rule 15.2 of the Supreme Court Civil Procedure Rules, 2022 provides:

The Court may give summary judgment on the claim or on a particular issue if it considers that the —

(a) claimant has no real prospect of succeeding on the claim or the issue; or
(b) defendant has no real prospect of successfully defending the claim or the issue.

[19.] Rule 26.3 of the Supreme Court (Civil Procedure) Rules 2022 provides:

(1) In addition to any other power under these Rules, the Court may strike out a statement of case or part of a statement of case if it appears to the Court that —

(a) there has been a failure to comply with a rule, practice direction, order or direction given by the Court in the proceedings;
(b) the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim;
(c) the statement of case or the part to be struck out is frivolous, vexatious, scandalous, an abuse of the process of the Court or is likely to obstruct the just disposal of the proceedings; or
(d) the statement of case or the part to be struck out is prolix or does not comply with the requirements of Part 8 or 10.

[20.] In ***Belize Telemedia Limited v Magistrate Usher*** (2008) 75 WIR 138 **Abdulai Conteh CJ** considered the interaction between striking out under the court's case management powers in Part 26 and the power to award summary judgment under Part 15:

> [10] I must point out here however, that there is a considerable overlap between the operation and effect of Pt 15 of the Civil Procedure Rules (relating to summary judgments), r 26.1(2)(j) and r 26.3(1). They all speak to the power of the court to summarily decide a case without the need for a formal trial. This much they all have in common. However Pt 15 is for a summary judgment in circumstances set out in r 15.2, that is, if the court considers that (a) the claimant has no real prospect of succeeding on the claim or on a particular issue, or (b) the defendant has no real prospect of successfully defending the claim or the issue.
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> [11] Rule 15.3 enables the court to give summary judgment in any type of proceedings except those stated which include proceedings by way of a fixed date claim, as the instant claim. Rule 15.4 and 5 set out the procedure and evidence required for a summary judgment.
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> [12] Importantly, in my view, an application for summary judgment presupposes that both parties have filed and exchanged their statements of case from which the court may make the determination specified in r 15.2.
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> [13] Rule 26.1(2)(j) empowers as well the court to dismiss or give judgment on a claim after a decision on a preliminary issue. This power is among the general powers of the court at case management of a case. It is however, in my view, only applicable after a decision on a particular issue.
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> [14] Rule 26.3(1) however, speaks to the armory of sanctions available to the court at case management. In particular, it provides in terms as follows:
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> '26.3.—(1) In addition to any other powers under these Rules, the Court may strike out a statement of case or part of a statement of case if it appears to the Court:
>
> (a) that there has been a failure to comply with a Rule or practice direction or with an order of direction given by the court in the proceedings;
>
> (b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;
>
> (c) that a statement of case or part to be struck out discloses no reasonable grounds for bringing or defending a claim or
>
> (d) that the statement of case or the part to be struck out is prolix or does not comply with the requirements of Parts 8 or 10.
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> [15] An objective of litigation is the resolution of disputes by the courts through trial and admissible evidence. Rules of court control the process. These provide for pre-trial and the trial itself. The rules therefore provide that where a party advances a groundless claim or defence, or no defence, it would be pointless and wasteful to put the particular case through such processes, since the outcome is a foregone conclusion.
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> [16] An appropriate response in such a case is to move to strike out the groundless claim or defence at the outset.
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> [17] Part 26 on the powers of the court at case management contains provisions for just such an eventuality. The case management powers conferred upon the court are meant to ensure the orderly and proper disposal of cases. These in my view, are central to the efficient administration of civil

justice in consonance with the overriding objective of the Supreme Court Rules to deal with cases justly as provided in r 1.1 and Pt 25 on the objective of case management.

[18] The grounds urged by learned counsel in support of the instant application are that the claim discloses no cause of action against either the first or second defendant/applicant, and that the declaration sought in the claim form is academic. Three affidavits were filed in support of the application.

[19] The provision of the rules in r 26.3(1)(c) which enables the court to strike out a claim because it discloses no reasonable grounds for bringing or defending the claim is undoubtedly a salutary weapon in the court's armory, particularly at the case management stage. It is intended to save the time and resources of both the court itself and the parties: why devote the panoply of the court's time and resources on a claim such as to go through case management, pre-trial review and scheduling a trial with all the time and expense that this might entail, only to discover at the end of the line that there was no reasonable ground for bringing or defending a claim that should not have been brought or resisted in the first place? This provision in the rules addresses two situations:

(i) When the content of a statement of case is defective in that even if every factual allegation contained in it were proved, the party whose statement of case it is cannot succeed; or

(ii) Where the statement of case, no matter how complete and apparently correct it may be, will fail as a matter of law.

(See Civil Court Practice (2008) (the Green Book), CPR 3.4[4] at p 76 and Civil Procedure (2005) (the White Book) at paras 3.4.1 and 3.4.2.

Whether the Claimants are barred by virtue of the rule of reflective loss from pursuing the claims vis-à-vis THL

[21.] Pantelis contends that the Claimants are in fact barred by the rule against reflective loss, from pursuing the claims vis-à-vis THL. He says at paragraphs 32-38 of his submissions as follows:

32. The primary claim of the Claimants is one for loss of revenue flowing from THL a company of which they were entitled to become the shareholders upon attaining the age of majority.

33. It is important to note, that the Claimants mother, Myong Tsakkos is presently the President/ Director of THL, and was a Director of THL since 2000 (i.e., three years after Drosos' death). Peter was also an officer of THL since 2003. As at 3rd January 2023, the Annual Statement of THL reflects that the sole shareholders of THL are the Claimants, and Nomiki Tsakkos is presently the Vice President/Director/Treasurer and Secretary of THL.

34. Myong as a Director of THL ought to have been in a position to access information regarding THL as her children stood to benefit from THLs shares upon attaining the age of the majority in 2003 and 2007.

...

36. Further at [6] of the Second Affidavit of Nomiki Tsakkos ("the Second Nomiki Affidavit") it is admitted that the main aspect to the claim relates to THL.

37. At the material time, that is, 1997-2020, Emmanuel was the President and Director of THL. Further, from as early as 1980 he was also the sole signatory on THL's sole Bank account even prior to Drosos death see page 178 to the Exhibits of the Third Pantelis Affidavit.

38. The rule against reflective loss prevents beneficiaries in a breach of trust claim from recovering the diminution in the value of the trust shareholding caused by a breach of duty by the trustees as a director of the company concerned for which the company has a claim against the director. Put another way, the company should bring the claim for the loss suffered not a beneficiary.

...

[22.] The case of **Zonamerica Ltd. v Ferdinand Huts (aka Fernand Huts) and another [2020]** 1 BHS J. No. 47 provides a helpful discussion on the no reflective loss principle. At paragraphs 14-19 the Court stated as follows:

> 14 The rule against reflective loss is simply the embodiment of the basic company law tenet of separate legal personality, i.e. the company is separate and distinct from its directors or members. The tenet, which is of ancient vintage and is as old as company law itself, is reflected in the more important company law decisions going back to Saloman v Saloman and through the line of cases including Foss v Harbottle. The emergence of the rule against reflective loss has been traced to the English Court of Appeal decision in Prudential Assurance Co Ltd v Newman Industries Ltd (No 2) [1982] Ch 204. In Prudential Assurance, the court stated at page 222,
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> > [W]hat [the shareholder] cannot do is to recover damages merely because the company in which he is interested has suffered damage. He cannot recover a sum equal to the diminution in the market value of his shares, or equal to the likely diminution in dividend, because such a 'loss' is merely a reflection of the loss suffered by the company. The shareholder does not suffer any personal loss. His only 'loss' is through the company, in the diminution in the value of the net assets of the company, in which he has (say) a 3% shareholding. The plaintiff's shares are merely a right of participation in the company on the terms of the articles of association. The shares themselves, his right of participation, are not directly affected by the wrongdoing. The plaintiff still holds all the shares as his own absolutely unencumbered property. The deceit practised upon the plaintiff does not affect the shares; it merely enables the defendant to rob the company.
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> 15 Lord Bingham, in Johnson v Gore Wood & Co (A Firm) [2002] 2 A.C. 1, set out the rule against reflective loss in this way:
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> > 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 value of 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.
>
> Lord Bingham, after identifying this as the general rule, went on to summarize the rule in three propositions, which he said derived from earlier authorities. He stated the propositions as follows:
>
> > (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 value of 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 a 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…
>
> 19 The rule bars a person which has suffered loss through a reduction in value of their interest in a company directly against a person which has caused loss to the company, rather than causing the company to make the claim. The rationale behind the rule is that the company has the direct cause of action as opposed to the shareholders who are one level removed. Clearly the rule will prohibit a multiplicity of actions and a win by the company would deal with the issue of the loss to all of the shareholders. ..[t]he rule has elsewhere been termed the rule against double recovery.

[23.] The most recent statement on the no reflective loss principle is to be found in the UK Supreme Court decision in **Sevilleja v Marex Financial Ltd [2020] UKSC 31** where the principle was clarified.

[24.] Marex accused Mr Seviella of stripping two BVI companies of their assets, after judgments were made against them, such that they were unable to pay debts due to it. He, it was alleged, transferred moneys from the bank accounts in the UK into his personal control thereby committing a tort of "knowingly induced and procured the companies to act in wrongful violation of its rights under the judgment" and/or had intentionally caused the Plaintiff loss by unlawful means by dissipating the assets of the companies after the judgment". The companies were placed into voluntary liquidation in the BVI. Leave was sought to serve proceedings out of the jurisdiction against Mr Seviella, who was resident in Dubai. The validity of the service was challenged on the basis that the rule against reflective loss barred Marex from showing a completed cause of action in tort. Notwithstanding this was a non-shareholder/unsecured creditor claim rather than a shareholder's claim, the Eastern Caribbean Court of Appeal agreed with Mr. Serviella that Marex was indeed barred on the basis of the rule against reflective loss.

[25.] The decision of the Court of Appeal was reversed by the Supreme Court. According to Lord Reid, who delivered the leading judgment of the Supreme Court:

> 79. Summarising the discussion to this point, it is necessary to distinguish between (1) cases where claims are brought by a shareholder in respect of loss which he has suffered in that capacity, in the form of a diminution in share value or in distributions, which is the consequence of loss sustained

by the company, in respect of which the company has a cause of action against the same wrongdoer, and (2) cases where claims are brought, whether by a shareholder or by anyone else, in respect of loss which does not fall within that description, but where the company has a right of action in respect of substantially the same loss.

80. In cases of the first kind, the shareholder cannot bring proceedings in respect of the company's loss, since he has no legal or equitable interest in the company's assets: Macaura and Short v Treasury Comrs. It is only the company which has a cause of action in respect of its loss: Foss v Harbottle. However, depending on the circumstances, it is possible that the company's loss may result (or, at least, may be claimed to result) in a fall in the value of its shares. Its shareholders may therefore claim to have suffered a loss as a consequence of the company's loss. Depending on the circumstances, the company's recovery of its loss may have the effect of restoring the value of the shares. In such circumstances, the only remedy which the law requires to provide, in order to achieve its remedial objectives of compensating both the company and its shareholders, is an award of damages to the company.

...

82. As explained at paras 34-37 above, the company's control over its own cause of action would be compromised, and the rule in Foss v Harbottle could be circumvented, if the shareholder could bring a personal action for a fall in share value consequent on the company's loss, where the company had a concurrent right of action in respect of its loss. The same arguments apply to distributions which a shareholder might have received from the company if it had not sustained the loss (such as the pension contributions in Johnson).

83. The critical point is that the shareholder has not suffered a loss which is regarded by the law as being separate and distinct from the company's loss, and therefore has no claim to recover it. As a shareholder (and unlike a creditor or an employee), he does, however, have a variety of other rights which may be relevant in a context of this kind, including the right to bring a derivative claim to enforce the company's rights if the relevant conditions are met, and the right to seek relief in respect of unfairly prejudicial conduct of the company's affairs.

84. The position is different in cases of the second kind. One can take as an example cases where claims are brought in respect of loss suffered in the capacity of a creditor of the company. The arguments which arise in the case of a shareholder have no application. There is no analogous relationship between a creditor and the company. There is no correlation between the value of the company's assets or profits and the "value" of the creditor's debt, analogous to the relationship on which a shareholder bases his claim for a fall in share value. The inverted commas around the word "value", when applied to a debt, reflect the fact that it is a different kind of entity from a share.

85. Where a company suffers a loss, it is possible that its shareholders may also suffer a consequential loss in respect of the value of their shares, but its creditors will not suffer any loss so long as the company remains solvent. Even where a loss causes the company to become insolvent, or occurs while it is insolvent, its shareholders and its creditors are not affected in the same way, either temporally or causally. In an insolvency, the shareholders will recover only a pro rata share of the company's surplus assets, if any. The value of their shares will reflect the value of that interest. The extent to which the company's loss may affect a creditor's recovery of his debt, on the other hand, will depend not only on the company's assets but also on the value of any security possessed by the creditor, on the rules governing the priority of debts, and on the manner in which the liquidation is conducted (for example, whether proceedings are brought by the liquidator against persons from whom funds might be ingathered, and whether such proceedings are successful). Most importantly, even where the company's loss results in the creditor also suffering a loss, he does not suffer the loss in the capacity of a shareholder, and his pursuit of a claim in respect of that loss cannot therefore give rise to any conflict with the rule in Foss v Harbottle.

...

89. I would therefore reaffirm the approach adopted in Prudential and by Lord Bingham in Johnson, and depart from the reasoning in the other speeches in that case, and in later authorities, so far as it

is inconsistent with the foregoing. It follows that Giles v Rhind, Perry v Day and Gardner v Parker were wrongly decided. The rule in Prudential is limited to claims by shareholders that, as a result of actionable loss suffered by their company, the value of their shares, or of the distributions they receive as shareholders, has been diminished. Other claims, whether by shareholders or anyone else, should be dealt with in the ordinary way.

[26.] The learned authors of **Lewin on Trust** provides an assessment of the Supreme Court decision in **Marex** at paragraphs [41-039] and [41-040]:

41-039 The question of how the re-evaluation of the rule against reflective loss will affect claims where trustees are shareholders did not arise for consideration by the Supreme Court in *Marex,* but will inevitably have been affected by it. Following the formulation of the role in *Marex,* a claim by a beneficiary for breach of trust causing loss to a trust-owned company would not appear to fall within the rule as restated, as the claim is not brought by a shareholder (who will be the trustee). The issue arose in the Court of Appeal in *Walker v Stones*, where it was held that the reflective loss principle does not prevent a beneficiary from bringing a claim against the trustees, even though the company has a claim in respect of the subject-matter of the loss, if (a) the claimant can establish that the defendant's conduct has constituted a breach of some legal duty owed to him personally, (b) on its assessment of the facts, the court is satisfied that such breach of duty has caused him personal loss, separate and distinct from any loss that may have been occasioned to any corporate body in which he may be interested. This statement of principle is entirely consistent with the later decision of the House of Lords in *Johnson v. Gore-Wood & Co*, and of the Supreme Court in *Marex*. Reflective loss in itself has nothing to do with point (a) upon which the claimant may rely upon a breach of duty under *Bartlett* principles, if liability is not excluded by a so-called "*anti-Bartlett*" clause. The fact that the beneficiaries' claim may be a claim for breach of fiduciary duty is not a reason why the reflective loss principle should not apply. It is in relation to point (b) that the reflective loss principle causes difficulty. It appears that the loss suffered by the beneficiaries in *Walker v. Stones* was in respect of the diminution in the value of the trust's shareholding caused by the alleged plundering of the assets of a subsidiary of the company in which the trust held shares, though was nevertheless regarded as a separate and distinct loss. It has previously been considered that the reflective loss principle normally does prevent the beneficiaries in a breach of trust claim from recovering the diminution in the value of the trust shareholding in a breach of trust action caused by a breach of duty by the trustee as a director of the company concerned for which the company has a claim against the director. However, we consider that this is no longer the general position, given the restriction in *Marex* of the ambit of the reflective loss rule. It has been held in Guernsey that the rule against reflective loss did not apply to a claim for breach of trust brought on this basis.

41-040 There are two features in trust cases which are not normally present in cases where questions of reflective loss arise in other circumstances. One is that the claimants will not be shareholders in the company concerned (or in its parent company) but will be beneficiaries with a beneficial interest in a trust fund comprising those shares. This has not previously been considered in itself a reason why the reflective loss principle should not apply. But, the Supreme Court has now restricted the principle to claims by shareholders. Furthermore, the policy justifications conventionally put forward for the rule, namely to prevent double recovery, and to preserve the company's assets in the interests of its creditors so that its claim takes precedence over the claims of its shareholders, have now been rejected by the Supreme Court. The other differentiating

> feature in trust cases is that the defendants will not necessarily be the same as those against whom the company has a claim. 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 now appears that reflective loss rule applies only where the shareholder's cause of action is against the same wrongdoer as that of the company. It was previously, not clear whether the reflective loss principle can apply only in a case where the defendants to both claims are the same.

[27.] It appears therefore that the effect of the decision in **Marex** is that the no reflective loss rule is limited to claims by shareholders that, as a result of actionable loss suffered by their company, the value of their shares, or of the distributions they receive as shareholders, has been diminished. The Claimants in this case do not bring their action on the basis of their shareholding per se but in the context of a claim for breach of trust and fraud in their capacity as a beneficiary to a trust.

[28.] It is perhaps safe to say that notwithstanding the large body of case law the no reflective loss rule continues to be a developing area of law. In fact, **Lewin** describes the recent decision in Marex as a re-evaluation of the rule. What also emerges is that the assessment of the rule is a 'fact specific' exercise.

[29.] The authorities all agree that a case should not be struck out where the claim is in an area of developing jurisprudence and the facts need to be investigated before conclusions can be drawn about the law[1]. In the English Court of Appeal in **Farah v British Airways plc and the Home Office** (2000) Times, 26 January, refused to strike out a claim by an acquiring company alleging breach of duty by directors of the company acquired on the basis that this was a developing area of law. The same court in **Equitable Life Assurance Society v Ernst & Young (a Firm)** [2003] EWCA Civ 1114, [2003] 2 BCLC 603, (2003) Times, 10 September, decided that the company's claim against its auditors for loss of a chance of sale of the business should not be struck out: the scope of legal responsibility for the consequences of professional negligence was an area of developing jurisprudence and sensitive to the facts.

[30.] In **Russell v Attorney-General and others** (2018) 95 WIR 1 the Court of Appeal took a similar position in an appeal where the lower court judge had stuck out a claim which was found to have offended the provisions of the Limitation Act. In allowing the appeal, **Barnett P.** stated:

> [12] In our judgment the matter may not be as straightforward as the Judge suggested. Since that judgment in April 2016 the jurisprudence with respect to public authority limitation has been more clearly elucidated by the Privy Council. In December 2017 the Privy Council delivered its judgment in Alves v A-G of the Virgin Islands [2017] UKPC 42, [2018] All ER (D) 136 (Jan). In that case a

[1] Commonwealth Caribbean Civil Practice 3rd ed.

nurse in the employ of a public hospital was injured during the course of her work. She brought an action against the hospital in tort for damages for personal injury. The hospital pleaded as its defence the provision of the Public Authorities Protection Act which provided:

> '2. Where any action, prosecution, or other proceeding is commenced against any person for any act done in pursuance or execution or intended execution of any Act or Ordinance, or of any public duty or authority or of any alleged neglect or default in the execution of any such act, duty, or authority, the following provisions shall have effect—
>
> > (a) the action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof ...'.

...

[14] In our judgment, there should be a factual inquiry as to whether the third through ninth respondents when purporting to arrest the appellant were in fact acting as police officers or whether, for the purposes of s 12, they were acting on a complete frolic of their own carrying out a personal vendetta. It should be noted that in the record of the interview that the police held of the appellant there was no investigation of the initial allegation of 'stabbing the police'. The investigation appears to be limited to the incident at Lowe's on Soldier Road. This may suggest that they were not acting in their capacity as police officers when they brutalized the appellant at his workplace.

...

[17] Whilst there is much force in the analysis of Winder J it is our view that the interest of justice would be better served if there was a full trial and a determination made after a complete ascertainment of the facts. In our view there is scope for the law to develop in a manner which affords a plaintiff relief in circumstances where a person purporting to act as a police officer is in fact acting entirely on his own personal vendetta, thus not having the benefit of the 12 months limitation afforded by s 12. Alves suggests that the limitation of 12 months may not apply to a breach of an individual duty owed by a public authority to an individual person as opposed to the public generally. Ex facie, it is unclear why the duty owed by a police officer not to assault another person should be any different than the duty owed by a non-police officer not to assault another person and thus have the benefit of a shorter limitation period. In our view this is a matter that warrants a full trial and a complete ascertainment of the facts and the law with respect to the facts as ascertained.

[31.] Having regard to the foregoing and in the context of an application for striking out, I am not satisfied that I can properly say that there is no reasonable cause of action against EPT on the basis for the no reflective loss rule. By extension, it cannot be said that there would not exist a reasonable cause of action against the Defendants in whose hands the assets held by EPT are alleged to have flowed.

Whether any of the claims are statue-barred notwithstanding that there are breach of trust claims alleged

[32.] The acts for which the Claimants complain took place over the period dating back to 1997. On this basis, Pantelis contends that much of the claims in this action are statute barred.

[33.] Sections 33-35 of the Limitation Act 1995 provides:

> 33. (1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action —
>
> (a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or
>
> (b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to the trustee's use.
>
> (2) Where a trustee who is also a beneficiary under the trust receives or retains trust property or its proceeds as that trustee's share on a distribution of trust property under the trust, that trustee's liability in any action brought by virtue of subsection (1) (b) to recover that property or its proceeds after the expiry of the period of limitation prescribed by this Act for bringing an action to recover trust property shall be limited to the excess over that trustee's proper share.
>
> (3) Subject to subsection (1), an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiry of six years from the date on which the right of action accrued; and for this purpose the right of action of a beneficiary entitled to a future interest in trust property shall not be deemed to accrue until the interest falls into possession.
>
> (4) No beneficiary as against whom there would be a good defence under this Act shall derive any greater or other benefit from a judgment or order obtained by any other beneficiary than such beneficiary could have obtained in an action brought by such beneficiary in which this Act had been pleaded in defence.
>
> 34. Subject to subsections (1) and (2) of section 33, no action in respect of any claim to the personal estate of a deceased person or to any share or interest in such estate, whether under a will or on intestacy, shall be brought after the expiry of twelve years from the date when the right to receive the same accrued, and no action to recover arrears of interest in respect of any legacy, or damages in respect of such arrears, shall be brought after the expiry of six years from the date on which the interest became due.
>
> 35. An action for an account shall not be brought after the expiry of any time limit under this Act which is applicable to the claim which is the basis of the duty to account.
>
> [Emphasis added]

[34.] Pantelis accepts that the effect of Section 33(1) of the LA is that there is no fixed statutory period for fraudulent breach of trusts. In the absence of fraud, the breach of trust claims by beneficiaries in relation to their interest in DT's estate would be subject to the limitations provided

under Section 33(3) and Section 34 of the LA. Pantelis contends that the relevant periods of limitation had all expired by 2015 in relation to Peter and 2019 in respect of Nomiki.

[35.] Pantelis further contends that the claims for breach of trust which are not of a fraudulent nature and the claim for an account[2] and knowing receipt and dishonest assistance would be statute barred under the provisions of the Limitation Act. The period of limitation under these provisions is six years.

[36.] The Claimants contend that even if statutory limitation periods applied to the claim they do not accept that the claim is statute barred. They say that EPT's fraud created a new cause of action every time he improperly retained money collected from the tenants of commercial property or engaged in any other act which caused loss to the estate. They say that these acts were occurring up to EPT's death in August 2020, which was within the statutory limitation period.

[37.] Accepting that there may be some losses which may not be recoverable, due to limitations, the Claimants assert that the claim could not be struck at this stage and should be held over to the trial where all of the relevant evidence would be before the Court for a proper determination.

[38.] I accepted this submission as there is some merit in the arguments of the Claimants that, if it was proven that EPT engaged in the impugned acts up to his death in 2020, it would not be appropriate to bar their claims at this stage, albeit some losses may be likely not be recovered. In respect of fraudulent breach of trust claims, as actual dishonesty and fraud is required for the operation of Section 33, such a finding could only properly arise following a trial and therefore not appropriately amenable to being resolved on a strike out application. I also bear in mind that we are at the early stages of the trial process where discovery has yet to take place.

Whether the claim ought to be struck out under the equitable remedies of laches, delay, concurrence and acquiescence.

[39.] Pantelis contends that the Claimants ought to be barred from pursuing their claims at this stage on the basis of laches, delay and acquiescence.

[40.] **Section 44** of the **Limitation Act** provides that:

> Nothing in this Act shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence or otherwise.

According to the learned authors of **Lewin on Trusts** 20th ed., claims which fall within Section 21(1) of the English Limitation Act 1980 (the equivalent to Section 33 of the LA) may nonetheless

[2] See Section 35 of the LA

be barred by the equitable remedies of laches delay and acquiescence. At paragraphs 50-016 - 50-017 it states:

> ...[s]uch a claim (i.e., fraudulent breach of trust) may still be barred by laches. Section 21(1) provides not that claims within it are incapable of being barred by the lapse of time at all but only that no period of limitation prescribed by the 1980 Act is to apply. Suggestions that claims within section 21 (1) cannot be barred by laches have been disapproved.
>
> In considering whether a beneficiary has been guilty of laches, one must consider the length of delay and the nature of the acts done during the interval (such as change of position or loss of evidence by the trustee) which might affect either party and cause of balance of justice or injustice in allowing or not allowing the remedy. The modern approach, it has been held , is not to enquire whether the circumstances match those in previous decisions but to ask whether the claimant's actions have been such as to make it unconscionable for him to be permitted to assert his claim. The question for the court in each case is whether, having regard to the delay, its extent, the reasons for it and its consequences[3], it would be inequitable to grant the claimant the relief he seeks. In general, laches required both knowledge of the relevant facts on the part of the claimant and either acquiescence on his part or prejudice or detriment to the defendant. So a defence of laches has succeeded where the claimant had taken 14 or 15 years to issue proceedings, though knowing of the matters complained of, and in the meantime important witnesses had died or become unavailable and documents had been destroyed. Mere delay may perhaps give rise to a defence of laches if it is long enough...

[41.] According to **Snell's Principles of Equity 28th ed** at page 34:

> Delay defeats equity or equity aids the vigilant and not the indolent. In the words of Lord Camden L.C. a court of equity "has always refused its aid to stale demands, where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith, and reasonable diligence; where these are wanting, the Court is passive, and does nothing." Delay which is sufficient to prevent a party from obtaining an equitable remedy is technically called "laches.

[42.] In ***Miller v Fox* [2014] 3 BHS J. No 187,** Barnett CJ (as he then was) set aside a Certificate of Title on the ground that it was obtained by fraud. In his decision, Barnett CJ stated at paragraphs 15 and 22 that:

> [15] In my judgment, a Court must be very careful in impugning the transaction which took place in 1981 in an action brought more than twenty years after the transaction. Neither Mr. Bethel nor John Spurgeon Archer or George Archer who were the parties to the transaction are alive nor were they alive when this action was brought in 2004. There is no evidence that prior to 2010, more than thirty years after her death, did the beneficiaries of the estate of Mrs. Franks take any steps to inquire into the affairs of her estate. No doubt, had this action been brought against Mr. Bethel or his estate for breach of trust, a Court would have been obliged to explore the issue of laches. The Court would consider whether in all the circumstances a claim for fraudulent breach of trust based on a transaction which occurred more than 20 years before the action was brought should be entertained. The modern approach of the Court to this issue is found in the decision in Re Loftus [2007] 1 W.L.R. 591 at para 42;

...

> [22] This matter has had a prolonged history. The beneficiaries of the estate of Mrs. Franks took no steps to inform themselves of the affairs of her estate. It is a bit much for them to come to the Court more than thirty years after her death and twenty years after the 1981 conveyance to complain about the conduct of Mr. Bethel in circumstances where Mr. Bethel is not in a position to defend himself and answer the grave allegations made against him.

[43.] Pantelis contends that Peter and Nomiki have taken 14 years and 18 years respectively, (since attaining the age of majority) to commence these proceedings. He submits that "in the round, it would be prejudicial if [Pantelis] would be required to defend the claims at trial in light of the substantial delay in the commencement of these proceedings which impairs and prejudices [Pantelis] ability to properly defend these proceedings on EPT's behalf not least because he would not have been aware of the alleged breaches as against EPT at the time EPT was alive." He also contends that the expert report of the accounting firm BDO, produced by the Claimants, suggest that the passage of time has caused some gaps in the documentary evidence.

[44.] The Claimants say that Pantelis' reliance on the unavailability of documentation to the authors of the BDO Report is perverse. They contend that it is Pantelis as executor to both DT and EPT who is likely to be in possession or control of the key documentation concerning EPT's fraud, such as EPT's personal bank records. The Claimants contend that the bank records of EPT could fill the gaps which the authors of the BDO Report found. They contend that to the extent that the BDO Report is incomplete such can be rectified through discovery.

[45.] The Claimants contend that "the claim is not in respect of a single act that occurred in 1997". They contend that it appears that acts of fraud were taking place right up until August 2020 just prior to the commencement of these proceedings. The Claimants also say, in relation to the claim that EPT collected rent from the commercial property and fraudulently paid them into his own bank account, latches, delay, concurrence an acquiescence would need to be applied to each such act. This, they say, is not something that the court or the parties can determine at this stage.

[46.] I note that much of the evidence alleged to have been missing emanates from the corporate entity THL, which, if its directors are performing their duties to the statutory standard, THL ought to have the proper records to support EPT's actions. The absence of records is a failing of the Directors of which EPT was a primary. These circumstances ought not to be relied upon by EPT's estate to justify an equitable argument. The maxims "he who seeks equity must do equity" and "he who comes to equity must come with clean hands" are equally relevant.

[47.] I will accept the submissions of the Claimants as I am not satisfied that the balance of the claim by the Claimants ought to be determine at this early stage, on the basis of the equitable remedies of laches and delay.

[48.] In respect of Nomiki, I also accept that her claim ought not to be determined at this stage on the basis of concurrence and acquiescence. I am nonetheless satisfied however that there is some appreciable measure of acquiescence on the part of Peter which lends support to an assessment that the continued prosecution of this action by him, in relation to any loss which flows through THL, is unconscionable and ought not to be allowed to proceed.

[49.] In **Duke of Leeds v Earl of Amherst (1846) ER 886,** the Court held at [888] that,

> "If a party, having a right, stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain. That is the proper sense of the word acquiescence."

[50.] According to the learned editors of **Lewin on Trusts** 20th ed at paragraphs [41-122] –[41-124]:

> [41-122] For an acquiescence, release or confirmation to be valid the following conditions must be satisfied:
>
> (1) As in the case of concurrence, the beneficiary must be of full age and capacity. The Court continues its protection of a minor after he has attained 18 until such time as he has acquired all proper information and a minor on coming of age must, in the case of a formal release being executed by him, having proper legal advice where this is required to counteract any undue influence.
> (2) The beneficiary must have the requisite degree of knowledge, see the next paragraph
> (3) The release must not be wrung from the beneficiary by distress or terror.
>
> The onus of proof of acquiescence lies on the trustee.
>
> [41-123] The Courts have stated a single rule regarding the degree of knowledge required for a beneficiary to concur or acquiesce effectively in breach of trust, and we consider that the same test applies where it is a question of releasing the trustee from liability or confirming a transaction in breach of trust. A release, even where unlimited in its terms, will be construed in accordance with its recitals and the context in which it is made. The test has been stated in relation to concurrence as follows: "The…court has to consider all the circumstances in which the concurrence of the cestui que trust was given with a view to seeing whether it is fair and equitable that, having given his concurrence, he should afterwards turn round and sue the trustee;…subject to this, it is not necessary that he should know that what he is concurring in is a breach of trust, provided that he fully understands what he is concurring in…and it is not necessary that he should himself have directly benefitted by the breach of trust.
>
> [41-124] A beneficiary who has concurred or acquiesced, or who has released the trustee from liability under the principles discussed above, is forever precluded from suing the trustee himself, and such a beneficiary may be exposed to a claim to have his interest impounded to indemnify the trustees who committed the breach or other beneficiaries."

[51.] I accept the contention of Pantelis that it would be manifestly unjust in the circumstances to allow Peter to pursue the claims as against EPT, as it relates to losses which flowed through THL. Pantelis understandably also argues that the alleged fraud and theft which Peter now claims was discoverable by reasonable diligence. Peter was on the Board of Directors of THL since 2 December 2003 and an officer of THL since 2003 and must be taken to have been content with the existing state of affairs and/or there was in fact acquiescence on Peter's part relative to the affairs of THL.

[52.] As a director of THL, Peter had actual and/or constructive knowledge of the affairs of which he now complains, as it relates to losses in THL. These is no documentary evidence of any complaints or demands of EPT during his lifetime as to the alleged breaches of trust and/or duty and/or devastavit. Peter was in a prime position to observe the management of the trust property and there is no real evidence that he objected to the alleged fraudulent breaches during EPT's lifetime.

[53.] In the circumstances I find that there had to have been acquiescence on the part of Peter in respect of the losses which he now claims, flowing from THL and that any part of the claim which asserts such losses must be struck.

[54.] The Claimants are ordered to file an Amended Claim in accordance with my decision to strike out such claims which asserts losses flowing from THL, by Peter.

Whether the claim against Adita is frivolous vexatious and an abuse of the process of the Court.

[55.] Adita asserts that the claim against her is frivolous vexatious and an abuse of process on the basis that she did not do the acts alleged, was not a shareholder or director of THL, did not have a joint account with EPT and is not responsible for the debts of his estate.

[56.] The Claimants allege that assets held by EPT, which belonged to the estate of DT, flowed to Adita, his wife. Whilst I accept that some of the assertions against Adita appear tenuous, much of the claims depend on an assessment of competing factual claims. Resolution of factual disputes would not be appropriate for me to determine summarily in the absence of the hearing of witness testimony.

Whether the claim or any part thereof has any reasonable prospects of success such that summary judgment ought not to be granted.

[57.] Having regard to my findings above, I am satisfied that it could not be said that the Claims (other than those identified against Peter above) have no reasonable prospects of success to warrant the grant of an order for summary judgment.

Conclusion

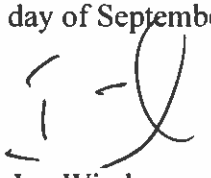
[58.] The application for striking out and for summary judgement as against Nomiki is dismissed.

[59.] The application for striking out and for summary judgment in relation to Peter is granted in the limited context as identified at paragraphs 54 and 55 above as it relates to claims which asserts losses flowing from THL, by Peter.

[60.] The Claimants are ordered to file an Amended Claim in accordance with my decision.

[61.] I will hear the parties by way of written submissions, within 21 days, as to the appropriate order for costs

Dated this 30th day of September, 2024



Sir Ian Winder
Chief Justice