Neutral Citation Number: [2024] CA (Bda) 14 Civ

Civil Appeal No. 37 of 2022

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CIVIL JURISDICTION
BEFORE THE HON. CHIEF JUSTICE
CASE NUMBER 2015: No. 290

Sessions House
Hamilton, Bermuda HM 12

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL HON ELIZABETH GLOSTER
and
JUSTICE OF APPEAL HON ANTHONY SMELLIE

- -

Between:

GLOBAL DISTRESSED ALPHA CAPITAL I LIMITED

Appellant

- and -

(1) CHRISTIAN MICHELSEN HERMAN
(2) WALTON LAW EDDLESTONE

Respondent

Gregory Banner KC and Lilla Zuill of Zuill & Co for the Appellant
Graham Chapman KC, Katie Tornari of Marshall Diel & Myers Limited and Jai Pachai of Wakefield Quin Limited for the Respondents

Hearing date(s): 26th January 2024
Formal hand down date[1]: 12th November 2024

[1] See paragraph 52 below.

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APPROVED JUDGMENT

GLOSTER JA:

1. On 23 June 2023 this Court handed down judgment ("the CA Judgment") on the Appellant's appeal against the order of the Honourable Chief Justice Hargun ("the Chief Justice") made on 13 October 2021. The Chief Justice's order had, pursuant to RSC Ord. 18, r. 19., struck out the Appellant's Amended Specially Endorsed Writ of Summons dated 5 January 2016 ("the Amended Statement of Claim") against Christian Michelson Herman and Walton Law Eddlestone, who are respectively the Third and Fourth Defendants to the action and the Respondents to the appeal (together "the Defendants"). Bell JA had granted leave to appeal the Chief Justice's order at the conclusion of a hearing of this Court on 14 December 2022. (In this judgment we refer to the Appellant variously as "GDACI", "the Plaintiff" or "the Appellant".)

2. In summary the Chief Justice's reasons, as stated in his judgment ("the CJ Judgment"), for striking out the Amended Statement of Claim were that the Defendants could rely on GDACI's Bye-Laws ("the Bye-Laws") to defeat the claim, and that, in any event, no claim was pleaded in the Amended Statement of Claim which fell within that part of the Bye-Laws relied on by GDACI.

3. We allowed the appeal against the strikeout of GDACI's claim in part and gave GDACI 21 days to provide a draft re-amended statement of claim to the Defendants for their agreement or otherwise. We further directed that, if the Defendants did not agree to the proposed re-amendment, GDACI would have to make a formal application for leave to re-amend to this Court, which would then consider whether or not any new draft re-amended statement of claim contained the necessary averments to bring the claim within the proviso to Bye-Law 42.5.

4. A draft re-amended statement of claim was provided to the Defendants on 12 July 2023 ("the draft RASC"). Following a short exchange of correspondence, and the issuance by GDACI of an application for leave to make the proposed re-amendments, on 16 August 2023 the Defendants indicated formally that they did not agree to the proposed re-amendments and that they would contest GDACI's application for leave to re-amend.

5. For the full procedural history of, and factual background to, GDACI's claim, I refer to paragraphs 4 - 20 of the CJ Judgment. Save as provided below, it is not necessary for me to repeat those paragraphs in this judgment.

6. In the context of the present application, however, it is necessary to remind oneself that (as referred to in the CA Judgment), whilst the original statement of claim as specially endorsed on the original writ of summons pleaded allegations of dishonesty and wrongful benefit as against the Defendants, so as to circumvent the provisions of Bye-Law 42.5, those averments had been specifically deleted in the Amended Statement of Claim so that there was no allegation against the Defendants of dishonesty or wrongful benefit.

7. As will be seen from the CJ Judgment, the critical issue for present purposes is whether the latest version of the draft Re-Amended Statement of Claim – viz. the draft RASC as defined above – surmounts the hurdle of the wording of Bye-Law 42. Although previously set out in paragraph 19 of the CA Judgment, it is worth repeating the provisions of the Bye-Law in order to make this judgment self-contained. It is in the following terms:

> *"42 Indemnity*
>
> *42.1 Subject to the proviso below, every Indemnified Person shall be indemnified and held harmless out of the assets of the Company against all liabilities, loss, damage or expense (including but not limited to liabilities under contract, tort, and statute or any applicable foreign law or regulation and all reasonable legal and other costs and expenses properly payable) incurred or suffered by him or by reason of any act done, conceived in or omitted in the conduct of the Company's business or in the discharge of his duties and the indemnity contained in this Bye-Law shall extend to any Indemnified Person acting in any office or trust in the reasonable belief that he has been appointed or elected to such office or trust notwithstanding any defect in such appointment or election PROVIDED ALWAYS that the indemnity contained in this Bye-Law shall not extend to any matter which would render it void pursuant to the Companies Acts.*
>
> *42.2 No Indemnified Person shall be liable to the Company for the acts, defaults or omissions of any other Indemnified Person.*
>
> *42.3 Every Indemnified Person shall be indemnified out of the assets of the Company against all liabilities incurred by him by or by reason of any act done, conceived in or omitted in the conduct of the Company's business or in the discharge of his duties in defending any proceedings, whether civil or criminal, in which judgment is given in his favour, or in which he is acquitted, or in connection with any application under the Companies Acts in which the relief from liability is granted to him by the court.*
>
> *42.4 To the extent that any Indemnified Person is entitled to claim an indemnity pursuant to these Bye-Laws in respect of amounts paid or*

> *discharged by him, the relevant indemnity shall take effect as an obligation of the Company to reimburse the person making such payment or effecting such discharge.*
>
> *42.5 Each Shareholder and the Company agree to waive any claim or right of action he or it may at any time have, whether individually or by or in the right of the Company, against any Indemnified Person on account of any action taken by such Indemnified Person or the failure of such Indemnified Person to take any action in the performance of his duties with or for the Company PROVIDED HOWEVER that such waiver shall not apply to any claims or rights of action arising out of the fraud of such Indemnified Person or to recover any gain, personal profit or advantage to which such Indemnified Person is not legally entitled.*
>
> *42.6 Expenses incurred in defending any civil or criminal action or proceeding for which indemnification is required pursuant to these Bye-Laws shall be paid by the Company in advance of the final disposition of such action or proceeding upon receipt of an undertaking by or on behalf of the Indemnified Person to repay such amount if any allegation of fraud or dishonesty is proved against the Indemnified Person."*

8. It was common ground that for the purposes of the appeal and this application[2]:

   8.1. The Third Defendant, Christian Michelson Herman, is an individual who was a director of the Appellant between 28 November 2007 and 7 October 2013.

   8.2. The Fourth Defendant, Walton Law Eddlestone, is an individual who, it is alleged by GDACI, was: (i) a *de facto* director of the Plaintiff between 16 October 2011 and 24 December 2012; and (ii) a *de jure* director of the Plaintiff between 24 December 2012 and 7 October 2013. The Fourth Defendant disputes that he was a director at all between 16 October 2011 and 24 December 2012 and contends that he only acted as an alternate director to the Third Defendant (pursuant to the Plaintiff's Bye-Laws) between 24 December 2012 and 7 October 2013. However, the present strike out application proceeds on the basis that the Plaintiff's pleaded case is correct and that he was a director in the relevant period.

9. I would emphasise that this court did not regard the draft re-amended statement of claim before it in June 2023 as sufficiently meeting the justified criticisms of the Amended Statement of Claim referred to in the CA Judgment. Thus, at paragraph 47 of the CA Judgment I said:

[2] See paragraphs 7 and 8 of the CA Judgment.

> *"I agree with the Chief Justice, and with the submissions of the Respondents, that the Amended Statement of Claim does not contain any adequate allegation, or positive plea, that the Third and Fourth Defendants had personally profited, or benefited, as a result of the breach of any fiduciary obligation owed by them to the Appellant."*

And I elaborated the point at paragraph 49 ibid as follows:

> *"But nowhere in the lengthy Amended Statement of Claim can one find a clear allegation in relation to the numerous allegedly improper loans or payments that the Respondents are said to have authorised, that they (i.e. the Third or Fourth Defendants) have personally profited or benefited as a result of a breach of any fiduciary obligation owed by them to the Appellant; nor is there any allegation that the Respondents have made "any gain, personal profit or advantage to which such ……(p)erson is not legally entitled." In a pleading of a breach of fiduciary duty of this sort, together with an allegation of consequent personal benefit, there is a duty on the pleader to make the allegations clearly and directly. It is wholly inappropriate to contend that such consequences can be inferred from the unparticularised allegations of breach of fiduciary duty or from the claim for relief in paragraph (4) of the prayer for "an account of profits" where there is no pleaded basis in the body of the Amended Statement of Claim to support such relief. As Mr Chapman submitted, any such allegation had to be pleaded in terms; in particular in circumstances where, as here, the allegations are required to engage the proviso to bye-law 42.5 in order to have a non-demonstrable claim."*

10. Another matter to note is that, on 14 July 2023 the Defendants made an application to this Court for leave to appeal the CA Judgment to the Privy Council, the disposal of which application is dependent on this Court resolving whether or not GDACI should have leave to make the proposed re-amendments as set out in the draft RASC. The principal grounds of the proposed appeal are that:

> *"The Court of Appeal erred in law in construing [GDACI's] byelaws as it did and, in particular, in holding that the indemnity and waiver provided by bye-law 42.1 was confined to claims brought by third parties and did not apply to claims brought by [GDACI] itself against its directors such that the only bye-law applying to claims brought by [GDACI] was bye-law 42.5. The Court of Appeal should have held (as the Chief Justice had) that the protections afforded by the bye-laws was cumulative in nature such that bye-law 42.1 applied to [GDACI's] claims and afforded the [Defendants] a complete defence to those claims.*
>
> *The Court of Appeal erred in affording [GDACI] a yet further opportunity to seek leave to re-amend its Amended Statement of Claim*

> *in particular given (a) the delay on the part of [GDACI] in advancing the proceedings; (b) the accrual of relevant limitation defences and (c) [GDACI's] express disavowal of any intention to seek leave to re-amend both before the Court of Appeal and the Chief Justice."*

11. The application for permission to re-amend was heard before this Court remotely by video link on 26 January 2024. The hearing was unavoidably adjourned on an earlier date because of illness on the part of one of the legal representatives.

12. At the hearing Gregory Banner KC of Maitland Chambers, London and Lilla Zuill of Zuill & Co appeared on behalf of GDACI; Graham Chapman KC of 4 New Square, London, Katie Tornari of Marshall Diel & Myers Limited and Jai Pachai of Wakefield Quin Limited, appeared on behalf of the Defendants. We are grateful to counsel for their helpful written and oral submissions.

Summary of GDACI's position

13. GDACI's stated position at the hearing was in summary as follows:
    13.1. The proposed re-amendments as set out in the draft RASC ("the Re-Amendments") do not plead a new cause of action – they add a head of relief arising from a currently pleaded cause of action – and the Court should exercise its discretion to permit them under RSC 20/5(1).
    13.2. Alternatively, if the Re-Amendments plead a new cause of action, it is not statute barred, and the Court should exercise its discretion to permit them to be made under RSC 20/5(1).
    13.3. Alternatively, if (as the Defendants must argue) the Re-Amendments plead a new, but statute barred, claim, then it is one arising from the same or substantially the same facts as already pleaded, and the Court should exercise its discretion to permit them under RSC 20/5(5).

Summary of the Defendants' position

14. The Defendants' stated position was in summary as follows:
    14.1. The Re-Amendments seek to introduce new causes of action after the primary limitation period has expired in circumstances in which the Re-Amendments do not arise out of the same or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the Appellant.
    14.2. The Defendants have (at the very least) a reasonably arguable case that the proposed new cause of action is statue-barred.
    14.3. The new cause of action does not arise out of the same or substantially the same facts.

14.4. In any event, the Court should not exercise its discretion to permit the amendments because the Re-Amendments do not remedy the defective pleading and are brought too late.

Do the proposed Re-Amendments constitute a new cause of action?

15. GDACI submitted that the Court needed to go no further than this point to determine the application to re-amend in GDACI's favour. In support of its contention that there was no new cause of action, it submitted as follows:

15.1. A cause of action was "*simply a factual situation the existence of which entitles one party to obtain from the court a remedy against another person*": *Letang v Cooper* [1965] 1 QB 232, 242 per Diplock LJ.

15.2. A claim was the remedy sought, and was different from the cause of action: *Revenue & Customs* Commissioners *v Begum* [2010] EWHC 1799 (Ch), para 29-30 per David Richards J. In the context of RSC 20/5, "*[a] change in the remedy may change the claim, but not the cause of action. A change in the essential features of the factual basis … will introduce a new cause of action*" (ibid).

15.3. The "factual basis" was to be given a broad interpretation: it is "*the whole range of facts which are likely to be adduced at the trial even though many of them may not be essential to the establishment of the claimant's cause of action*": *Grayken v Grayken* [2011] CA (Bda) 3 Civ, para 13, citing the judgment of Blackburne J in *Finlan v Eyton Morris Winfield* [2007] EWHC 914 (Ch).

15.4. GDACI's previous Amended Writ pleaded breaches of fiduciary duty by reason of wrongful payments of company money away to third parties. That was a complete cause of action which may give rise to a range of remedies (i.e. *"claims*"), but the remedies are not the cause of action. The Court's focus was on the cause of action: the "*factual situation the existence of which entitles one party"* to a remedy. A change in the remedy sought does not change the cause of action: *Begum*, cited in paragraph 15.2 above.

15.5. GDACI's proposed re-amendments are encapsulated in paragraphs 114.4 to 114.6 and 120 of the Re-Amendments. Those paragraphs are generic, summarising versions of the re-amendments proposed in relation to each recipient of GDACI's money (paragraphs 24-113) and the legal duties alleged in paragraph 23. Clarifying the Defendants' legal obligations cannot generate a new cause of action, as a cause of action is a set of facts. Alleging a purpose for the payments is a matter of characterisation and not fact. Alleging personal gain by the Defendants goes to the remedy, or the claim, and not the cause of action.

15.6. Accordingly, no new cause of action is alleged by the Re-Amendments, and the contrary is not reasonably arguable on a proper understanding of the terms "*claim*" and "*cause of action*" in the context of RSC 20/5. The attempt to characterise them as a "*wholesale abandonment of [GDACI's] existing case and an attempt to start over"*[3] is over- ambitious to the point of misconception, and one only has to look at the volume of retained material in the pleading to see so.

15.7. Contrary to what was said by the Defendants in their submissions dated 15 September 2023, the Amended Writ did indeed claim a breach of fiduciary duty on the part of the Defendants, as stated in paragraph 48.1.8 of the CA Judgment.

16. On the other hand, the Defendants submitted that:

16.1. The Re-Amendments seek to add new causes of action which do not arise out of the same or substantially the same facts as a cause of action in respect of which relief has already been claimed.

16.2. The following propositions of law show what constitutes a new cause of action:

16.2.1. A "cause of action" is "*a factual situation the existence of which entitles one person to obtain from the court a remedy against another person*" : *Mulalley & Co Ltd* v *Martlet Homes* [2022] EWCA Civ. 32 at [40], citing *Letang v Cooper* – see 15.1. above. In considering whether an amendment raises a new cause of action it is the essential facts giving rise to the original and the new cause of action which need to be identified and compared. *(Grayken v Grayken (above) at [12]***;** *PJSC Tatneft v. Bogolyubov* [2017] EWCA Civ 1581 at [34], [36].

16.2.2. The exercise of comparing the essential facts involves considering the facts *"at a high level of abstraction" (PJSC Tatneft* at [35]**.** In *The Bank of Bermuda v Dilton Robinson* [2002] Bda LR 55 the Bermuda Court of Appeal described the approach as *"substantially a matter of impression"*. This indicates that a broad approach should be taken; but there are limits that are set down or illustrated by authority. For example, the mere fact that an existing claim is pleaded in negligence, does not of itself mean that a different set of facts that would entitle a claimant to obtain a remedy in negligence is not a new cause of action. *(Jalla v Royal Dutch Shell Plc* [2020] EWHC 459 (TCC) at [161].

16.2.3. Where an amendment pleads a duty which differs from that pleaded in the original action, it will usually assert a new cause of action. (*Co-operative Group v Birse Developments Limited* [2013] EWCA Civ 474 at [22]. Where different

[3] MDM's letter of 16 August 2023 to Zuill & Co, paragraph 9.

facts are alleged to constitute a breach of an already pleaded duty, it is a matter of degree whether a new cause of action is sought to be relied on. (*Co-operative Group* at [22]).

16.3. It is clear that the Re-Amendments give rise to a new cause of action. By the proposed re-amendments the Appellant has effectively abandoned its existing pleaded case and seeks to introduce new duties, new allegations of breach and an entirely new pleading in relation to causation/effect which taken together comprise new causes of action.

16.3.1. The Existing Statement of Claim sets out a number of alleged duties at paragraph 23 which the Appellant imprecisely and inaccurately described as *"express or implied statutory, contractual, fiduciary and/or common law duties, as a matter of Bermuda law".*

16.3.2. On proper examination it is evident that those duties are in reality statutory, contractual or common law duties – heavy reliance is, for example, placed on the Bermuda Companies Act 1981. The Appellant had made the mistake of conflating a duty owed by a fiduciary with a fiduciary duty. It is well established that not every duty owed by a fiduciary is a fiduciary duty *(Bristol and West Building Society v Mothew* [1998] Ch. 1).

16.3.3. By the Re-Amendments the Appellant has (i) deleted reference to "*statutory, contractual and common law duties*" and (ii) not only sought to re-cast what remains as fiduciary duties (for example, by introducing the phrase *"with undivided loyalty"* into paragraph 23.1) but introduced three entirely new and hitherto unpleaded fiduciary duties (paragraphs 23.3 - 23.5). See per *Co-operative Group* where it is stated that an amendment which pleads a duty which differs from that pleaded in the original action is indicative of a new cause of action.

16.3.4. Moreover, the Appellant has not only pleaded new fiduciary duties for the first time but it has re-pleaded its case on breach (paragraph 114 and the sub-paragraphs therein) and causation (paragraphs 34, 43, 52, 60, 70, 78, 86, 113 and 120). The effect of those proposed re-amendments is that the Appellant seeks to rely on an entirely new set of essential facts to establish a remedy against the Defendants.

16.3.5. The Appellant now seeks to rely not only on the facts necessary to constitute breaches of the new duties (i.e. facts about the conduct of the Respondents *qua* fiduciaries which differ from the facts previously relied on to establish breach - see the new allegations at paragraphs 34.4A, 34.4B, 39, 43.4A, 43.4B, 52.4A, 52.4B, 60.4A, 60.4B, 70.4A, 70.4B, 78.4A, 78.4B, 86.4A, 86.4B, 113.5A,

113.5B and 120) but also alleged facts about how the Respondents are said to have benefitted from the alleged wrongful payments. In this respect the Appellant has pleaded a generic and speculative paragraph which is repeated *mutatis mutandis* at paragraphs 34.6, 43.6, 52.6, 60.6, 70.6, 78.6, 86.6 and 113.6 of the proposed amendments, *viz.*

> *"Benefitted the Second and Fourth Defendants in at least the following ways: they were able to continue to draw remuneration, benefit from management fees charged by [Company Name], benefit from fees charged by their companies to [Company Name], benefit from investments in the Fund, not have to seek cash calls from investors in the Fund and generally preserve and enhance their reputations as fund managers and protect their interest in their corporate fund managers. "*

16.3.6. That paragraph is in any event defective but it plainly is intended to introduce a new set of facts because, as the Court of Appeal identified in its judgment, the Existing Statement of Claim did not contain any pleaded case that the Respondents had received a personal benefit as a result of a breach of fiduciary duty:

> *"...nowhere in the lengthy Amended Statement of Claim can one find a clear allegation in relation to the numerous allegedly improper loans or payments that [the Respondents] have personally profited or benefited." (para. 49).*

16.3.7. Even if the Appellant could be said to have adequately pleaded a fiduciary duty in the Existing Statement of Claim, the Re-Amendments would still constitute a new cause of action because the Appellant now seeks a remedy for the fiduciary duties now pleaded which involves a different set of facts and therefore amount to a new cause of action (by analogy with *Jalla* at [161]).

Discussion and determination of the new cause of action issue

17. RSC Ord. 20. R.5 provides as follows in relation to amendments and amendments after the expiry of a limitation period:

> *"(1) Subject to Order 15, rules 6, 7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct*
>
> *(2) Where an application to the Court for leave to make the amendment mentioned in paragraph (3), (4) or (5) is made after any relevant period*

> *of limitation current at the date of issue of the writ has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so.*
> ……
>
> *(5) An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment.*

18. Accordingly, as was common ground between the parties, the first question which arises is whether the draft RASC raises a *new cause of action* as compared with the Amended Statement of Claim struck out by the Chief Justice. I have reached the conclusion that, contrary to GDACI's submissions, the Re-Amendments do indeed plead a new cause of action.

19. Applying the authorities which were cited to us in this regard, the Court needs to consider and compare "*at a high level of abstraction"* the essential facts which gave rise, on the one hand, to the original cause of action as pleaded in the Amended Statement of Claim and, on the other hand, the facts which give rise to the cause of action as pleaded in the Re-Amendments; see in particular *PJSC Tatneft supra* at [35]. Having performed that exercise, I have come to the conclusion that the essential facts as pleaded in the Re-Amendments to support a cause of action rely on a different "*factual situation the existence of which entitles one person to obtain from the court a remedy against another person." (Mulalley & Co Ltd v Martlet Homes supra* at [40]) from the situation as pleaded in the Amended Statement of Claim.

20. In summary my reasons are as follows:

    20.1. Whilst I agree with Mr Banner's submission that GDACI did indeed plead in the Amended Statement of Claim (and indeed in the original unamended version of the specially endorsed Writ) that the Defendants had fiduciary duties (see for example the original wording as set out in paragraph 23 of the July RASC), the nature of the fiduciary duties as now pleaded in re-amended paragraphs 23.1, 23.3, 23.4 and 23.5 is very different from the duties previously pleaded. The fiduciary duties as alleged in the Amended Statement of Claim did not, for example, include duties of undivided loyalty, or duties not to place themselves in a position where their personal interests and GDACI's obligations and duties to the Fund might conflict; on the contrary the duties as previously alleged were based on unparticularised "*statutory, contractual and common law duties*" and, in the original pleading, a duty to act honestly and in good faith. The reference

to these latter duties has now been deleted in the draft RASC. Whilst each case turns on its own particular facts, as was pointed out in *Co-operative Group v Birse Developments Limited supra* at [22], where an amendment pleads a duty which differs from that pleaded in the original action, that will usually signify a pleading which should be characterised as asserting a new cause of action.

20.2. The second, and more significant, difference between the pleading in the Amended Statement of Claim and the Re-Amendments is that the draft RASC now pleads (without any allegation of dishonesty) that in making, authorising, and/or allowing "the Payments" (viz the Payments referred to at paragraphs 24 to 113 of the draft RASC) to be made from GDACI's Bank Accounts to the various recipients (as set out in Schedule A to the draft RASC) the Defendants received, in breach of their fiduciary duties as now pleaded, a personal "benefit"; see by way of example the generic pleading at paragraph 34.6 of the draft RASC (in similar terms at paragraphs 43.6, 52.6, 60.6, 70.6, 78.6, 86.6, 103.6 and 113.6):

> *"34.6 Benefitted the Second to Fourth Defendants in at least the following ways: they were able to continue to draw remuneration, benefit from management fees charged by CIMS, benefit from fees charged by their companies to CIMS, benefit from investments in funds, benefit from profit shares from maturing funds, not have to seek cash calls from investors in other funds and generally preserve and enhance their reputations as fund managers and protect their interest in their corporate fund managers."*

These payments are described in paragraph 114.6 as follows:

> *"114.6. The Payments caused gains profits or advantages to accrue to the Second to Fourth Defendants, as set out above and as summarised in paragraph 120 below, without the informed consent of the Plaintiff."*

In other words, the draft RASC now, for the first time and in the absence of any allegation of dishonesty, pleads a cause of action for breach of fiduciary duty based on a claim which can be properly characterised as a claim or right of action "*to recover any gain, personal profit or advantage to which such* [defendant] *is not legally entitled",* within the wording of Bye-Law 42.5, notwithstanding that the words *"personal"* and *"to which such* [defendant] *is not legally entitled"* are not expressly included in the pleading.

20.3. In my judgment Mr Chapman, on behalf of the Defendants, is correct in his submission that the claim formulated in that way is indeed a new cause of action. It is a claim, which for the first time is said to arise out of a breach, but not a

dishonest breach, of fiduciary duty alleged to have resulted in the receipt of personal gain, profit or advantage. The new pleading puts forward a wholly different basis for supporting the alleged entitlement to claim a remedy from the Defendants from anything that was pleaded previously.

Are the new claims barred under the relevant limitation provisions?

21. It was common ground[4] between the parties that, if there is an issue as to whether the proposed amendment is statute barred or not, it is up to GDACI to show that the Defendants' limitation defence is not reasonably arguable: see *Ballinger v Mercer Ltd* [2014] EWCA Civ 996.

22. The relevant statutory provision, which disapplies the ordinary six year period prescribed by section 23(3) of the Limitation At 1984 ("the 1984 Act") in certain specified circumstances, is section 23 (1) (b) of the 1984 Act. It provides as follows:

> *"Time limit; trust property*
>
> *23(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action—*
> *…*
> *(b) to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his use."*

Summary of GDACI's position in relation to limitation

23. In summary GDACI contended as follows:

    23.1. The claim pleaded by the Re-Amendments, even if (contrary to GDACI's arguments) what it is seeking is to introduce a new claim, is not in fact statute barred on limitation grounds.

    23.2. The limitation period for an action for an account is the same as that for the claim which is the basis for the duty to account (see section 25 of the 1984 Act).

    23.3. Under English law, directors are treated as trustees and their company is treated as a beneficiary for the purposes of s 21 of the English Limitation Act 1980 – the corresponding provision to s 23 of the Act: see *Burnden Holdings (UK) Ltd*

[4] See paragraph 7.6 of GDACI's submissions dated 15 September 2023; and paragraph 7 of the Defendants' reply submissions dated 22 September 2023.

v Fielding [2018] AC 857 at paragraph 11. GDACI submits that the same analysis should be applied in relation to s 23 of the 1984 Act.

23.4. The intent of s 23(1) (b), which disapplies the six year limitation period prescribed by s 23(3) of the 1984 Act, is to remove the protection that the director would have where, if he were to plead the Act, he would come away with something he ought not to have, such as the company's property received by him and converted to his own use: see *Burnden,* paragraph 17, applied by analogy to s 23 of the 1984 Act.

23.5. The misappropriation by a director of company property is a conversion of it to his own use: *Burnden*, paragraph 19. As fiduciaries in relation to the company, a director is taken to have previously received the property, and accordingly s 23(1)(b) of the 1984 Act applies, thereby disapplying the six year limitation period in s 23(3) of the 1984 Act; ibid, and allowing for the application of the principles in *Burnden* to the Act.

23.6. *Burnden* further showed that the Court has to take a robust approach where the company's property is diverted to another corporate vehicle under the control of the directors: that is still a conversion because of the director's "*economic interest"* in the recipient company; see paragraph 22.

Summary of the Defendants' position in relation to limitation

24. The Defendants submitted that all they had to show was that they had a reasonably arguable case that s.23 (1)(b) of the 1984 Act does not apply. It was clearly arguable that the claims as articulated in the draft RASC are time-barred because more than six years has passed since the alleged wrongful payments.

25. That, the Defendants submitted, they could easily do for the following reasons:

25.1. First, the exception identified in s.23 (1) (b) of the 1984 Act applies in relation to claims for **equitable compensation** not to a claim for an account of profits. The (English) Court of Appeal in *Burnden*[5] stated obiter that it was inclined to agree that a claim for an account of profits did not fall within the scope of s.21 (1)(b) of the English Limitation Act but that a claim in equitable compensation (which was one of the remedies sought in that case) **did fall** within the scope of provision. That point was not challenged on appeal to the Supreme Court[6]. Unlike the claimant in *Burnden*, GDACI does not, in the present case, seek

[5] See *Burnden Holdings (UK) Ltd v Fielding and another* [2017] 1 WLR 39 at paragraph 38.
[6] See paragraph 13 of the decision of the Supreme Court.

equitable compensation. Not only do the proposed amendments expressly delete the Appellant's previously pleaded claim for equitable compensation but the only remedy sought is an account of profits which does not fall within the scope of s.23 (1)(b) as per the Court of Appeal in *Burnden*[7].

25.2. Secondly, and as set out in the Defendants' Submissions, the proposed Re-Amendments do not articulate a coherent case that the alleged wrongful payments personally benefited the Defendants. One element of the inadequacy of the proposed Re-Amendments is that it is entirely unclear what benefit is said to have been acquired by whom. A close analysis of what GDACI seeks to allege shows that what is sought is an account of the Defendants' benefit from the transaction itself (rather than the misappropriation of property). The generic paragraph relied on by GDACI in relation to the alleged personal benefit is as follows:

> *"Benefitted the Second and Fourth Defendants in at least the following ways: they were able to continue to draw remuneration, benefit from management fees charged by [Company Name], benefit from fees charged by their companies to [Company Name], benefit from investments in the Fund, not have to seek cash calls from investors in the Fund and generally preserve and enhance their reputations as fund managers and protect their interest in their corporate fund managers."*

25.3. That draft pleading (or at least some of it) was more consistent with seeking an account of profits earned in breach of fiduciary duty rather than profit earned by misappropriating trust property; as per *Gwembe Valley Development Co Ltd v Koshy* (No 3) [2003] EWCA Civ 1048, such claims become time-barred 6 years after the alleged breach. Moreover, the pleading does not articulate a clear case that the Defendants misappropriated the company's property and converted it to their own use so as to fall within s.23 (1)(b) of the 1984 Act.

25.4. Thirdly, and another example of the inadequacy of the proposed Re-Amendments, is that it is not pleaded that the monies said to have been wrongfully paid out in breach of fiduciary duty were the property of GDACI (as opposed to the property of the Fund) such that the Appellant can rely on s.23 of the 1984 Act. GDACI acted as General Partner of the Fund and it appears to be GDACI's case that the monies belonged beneficially to the Fund (see paragraphs 23 and 24 of the draft Re-Amended Statement of Claim).

25.5. Accordingly, as a result of the fact that the Defendants have at least a reasonably arguable case that the new claim is time-barred, it is necessary for the Court to

[7] At paragraph 38 ibid in the Court of Appeal decision.

consider whether the new claim arises out of the same or substantially the same facts (per RSC Ord. 20. R.5.

Discussion and determination of the limitation of action issue

26. I conclude that it is indeed reasonably arguable by the Defendants that the new claim as made in the proposed Re-Amendments in the draft RASC is time-barred.

27. My reason for reaching this conclusion is that, in essence, what is being claimed in the proposed Re-Amendments is a claim for an account of profits, consequent upon the alleged breaches of the Defendants' fiduciary duties not to self-deal or to apply GDACI's funds in making payments where there was, or may have been, a conflict of interest between their separate commercial interests and those of GDACI. Looked at simplistically, it is difficult, if not impossible, to characterise that pleaded claim as an action "*to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his use."* The nature of the claim actually made is very different. It is not for recovery of specific assets (or their proceeds) paid directly or indirectly (through the medium of a company) to the Defendants. There is no allegation, for example, of constructive trust or of an entitlement to a proprietary tracing claim in respect of the allegedly improper payments. There is no claim for equitable compensation – that claim having been deleted in the latest iteration of the draft RASC. On the contrary, the claim is specifically one for "*an account of such gains, profits or advantages made by the Defendants, or deemed to be made by the Defendants as the Court may assess."* Moreover, there is no indication or particularisation of the quantum of personal benefit or commercial advantage which the Defendants are alleged to have obtained, or deemed to have obtained, as a result of the Payments.

28. Thus, in my judgment, the claim as pleaded in the present case for an account of profits does not fit easily – indeed, in my view, does not fit at all – into the definition contained in section 23 (1)(b) of the 1984 Act; see *Gwembe Valley Development Co Ltd v Koshy (No 3) supra*. And I reach that conclusion irrespective of whether David Richards LJ in *Burnden* was correct in the provisional view which he expressed obiter in that case that a claim for an account of profits does not fall within the ambit of the English equivalent to section 23 (1)(b) of the 1984 Act. I do not think that one needs to reach a definite conclusion on that issue. In some circumstances, depending on the pleaded facts, a claim for an account might properly be characterised as ancillary to a claim to recover from a trustee trust property or the proceeds of trust property in the possession of the trustee. But that is not this case.

29. Accordingly, I conclude that GDACI is indeed pleading a new cause of action after – it is reasonably arguable – the expiry of the limitation period current at the date of issue of the Writ applicable to such cause of action.

Does the new cause of action arise out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed?

30. It therefore becomes necessary to determining for the purposes of RSC Ord. 20. R.5 (5) whether the court has power to allow the amendment:

> *"notwithstanding that the effect of the amendment will be to add or substitute a new cause of action"*

on the grounds that:

> *"**the new cause of action arises out of the same facts or substantially the same facts** as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment." (My emphasis.)*

Summary of GDACI's position in relation to *"the same facts or substantially the same facts"* issue

31. GDACI contends, as its "tertiary position" that if the Re-Amendments constitute a new, time-barred, cause of action, nonetheless such cause of action arises from the same or substantially the same facts as the cause of action in respect of which relief has already been claimed. In support of this contention, it submits as follows:

    31.1. The facts in this context have the broad meaning as previously explained above. If a cause of action is added by the Re-Amendments, it is one that arises out of "*the same facts or substantially the same facts."*

    31.2. The cause of action, on this premise, is breach of fiduciary duty. The facts giving rise to that cause of action are the wrongful payments to third parties made or authorised by the Defendants. The facts that are now relied upon are materially no different to those originally pleaded. The remedy is distinct from the cause of action; and this Court's holding in paragraph 49 of the CA Judgment, that there is no pleaded basis for an account of profits, does not impact on the presence of a properly constituted plea of a cause of action in breach of fiduciary duty. The position may be likened to a plea of breach of contract, which claims as relief damages only. The addition of relief seeking an account of profits, based on *AG v Blake* [2001] 1 AC 268 does not change the cause of action or

add a new cause of action – it adds to the claims that are said to arise from the cause of action.

31.3. The Defendants have contended in correspondence that allegations of personal benefit open up a "*new, and extensive, line of factual enquiry*", and, relying on *Ballinger v Mercer* [2014] 1 WLR 3597 (especially paragraphs 33-38) argue that this gets them home. However, it is artificial, and opportunistic for the Defendants to rely on this point when the facts in question are simply questions of what benefits they have accrued: those matters are ones of their personal knowledge rather than investigation. But more importantly the Defendants' objection misses the point and is thus unarguable: there are no lines of factual enquiry to be made in relation to the cause of action, which is whether the payments were made, to whom, and whether they were wrongful.

Summary of the Defendants' position in relation to "*the same facts or substantially the same facts"* issue

32. The Defendants contend that the proposed Re-Amendments do not arise out of the same or substantially the same facts as the claims previously pleaded. In support of this contention, they submit in summary:

32.1. Whether a new claim arises out of the same or substantially the same facts as an existing claim is not a matter of discretion or case management but is a substantive question of law which depends on analysis and evaluation to obtain the correct answer: see *Mastercard v Deutsche Bahn AG* [2017] EWCA Civ 272 at [36].

32.2. A claim will not arise out of the same or substantially the same facts where the amendment moves the claim into completely new territory: see *The Bank of Bermuda v Dilton Robinson* [2002] Bda LR 55.

32.3. A new claim does not arise out of the same or substantially the same facts as the original claim if it puts the defendant in the position of being obliged to investigate facts and obtain evidence well beyond the ambit of the facts that the defendant could reasonably be assumed to have investigated for the purpose of defending the original claim; see *Ballinger v Mercer* [2014] 1 WLR 3597 at [34].

32.4. "*The same or substantially the same*" is not synonymous with "*similar*." The word "*similar*" is often used in this context, but it should not be regarded as anything more than a convenient shorthand; see *Ballinger* at [37].

32.5. The proposed re-amendments do not arise out of the same or substantially the same facts but, instead, move the claim into new territory.

32.6. The proposed re-amendments introduce a new set of facts not only about the conduct of the Respondents but also, significantly and for the first time, about the alleged personal benefit to the Respondents.

32.7. Those facts will require an entirely new factual enquiry by the Respondents into matters they were not required to investigate to meet the existing claim and are well beyond the ambit of the existing claim.

32.8. The proposed re-amendments therefore do not satisfy the requirements of RSC Ord. 20. R.5 (5) and should not be permitted.

Discussion and determination in relation to "*the same facts or substantially the same facts*" issue

33. Although, for the reasons which I have already given, I consider that the proposed Re-Amendments do indeed plead a new cause of action, I nonetheless conclude, on analysis, that such new cause of action arises "*out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action".* The reality is that this claim has always been based on allegations that the Defendants were liable for breach of their fiduciary or other duties in their capacity as directors of GDACI in relation to the pleaded Payments. The fact that there is now an allegation that the Defendants personally benefitted from the Payments does not in my judgment "*move the claim into new territory*" as alleged by the Defendants, particularly when there has been a claim for an account of profits made by the Defendants since the original unamended Statement of Claim.

34. Accordingly, I conclude that this Court has power to allow the Re-Amendments under RSC Ord. 20. R.5.

Should the Court exercise its discretion to allow the Re-Amendments?

35. The final question is whether the Court should as a matter of discretion permit GDACI to make the proposed Re-Amendments as contained in the draft RASC.

GDACI's submissions on discretion

36. GDACI submits that the Court's power to permit amendments is exercisable, and should be exercised in this case, to enable the real and substantial dispute between the

parties to be determined. It relies on *Cobbold v London Borough of Greenwich* [1999] EWCA Civ 2074, which states at page 5:

> *"Amendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon provided that any prejudice to the other party or parties caused by the amendment can be compensated for in costs, and the public interest in the efficient administration of justice is not significantly harmed".*

37. It accepts that the nature, sufficiency and timing of the proposed re-amendments are all relevant considerations but submits that it is not responsible for the past delay in the case. In particular it submits that the Defendants themselves were responsible for delay since 2017. In this respect, GDACI contends:

    37.1. The writ was issued in July 2015. On 17 February 2017 the Defendants applied to strike out, and that summons was listed for hearing no earlier than 1 May 2017.

    37.2. That summons was stayed for without prejudice discussions which fizzled out during the second half of 2017.

    37.3. Thereafter, the Defendants *"elected not to pursue their strike out, no doubt hoping that the action would likewise fizzle out and let the proverbial sleeping dog lie."*

    37.4. Since August 2020 when GDACI served notice of intention to proceed, *"this strike out, which could have been brought in 2017, has been the sole focus of the parties."*

38. GDACI rejects the Defendants' arguments of lack of particularity in relation to the proposed Re-Amendments. It contends that there is no need for it to have particularised in the draft RASC every personal gain that the Defendants have made. That was an unattractive objection, as the Defendants alone would know the benefits which they received from the Payments; and that lack of particularity is not something that can be characterised as a fault or failing on GDACI's part. The Re-Amendments make good the criticism, set out in paragraph 49 of the CA Judgment to the effect that there was no clear allegation of personal benefit consequent on a breach of duty. The Defendants are perfectly able to understand, evaluate and respond to the case that is made against them.

The Defendants' submissions on discretion

39. On the other hand, the Defendants contend that it would not be just to permit the Appellant to rely on the proposed Re-Amendments and accordingly leave to amend should be refused. In summary they submitted:

39.1. The Re-Amendments do not cure the essential and fundamental defect in the pleadings.

39.2. A proposed amendment must:

39.2.1. carry a degree of conviction (it is not enough to be merely arguable);

39.2.2. be coherent and properly particularised; and

39.2.3. be supported by evidence which establishes a factual basis which meets the merits test; it is not sufficient simply to plead allegations which if true would establish a claim; there must be evidential material which establishes a sufficiently arguable case that the allegations are correct; see *Kawasaki Kisen Kaisha Ltd v James Kemball Ltd* [2021] EWCA Civ 33 at [18];

39.2.4. not be allowed if the proposed amendment is sought to be made after undue delay or will in any way unfairly prejudice or cause detriment to the other party; see *Mexico Infrastructure Finance LLC v The Corporation of Hamilton* [2020] SC (Bda) 3 Com.

39.3. The generic paragraph relied on by the Appellant as to the alleged benefit or advantage received by the Defendants does not satisfy that test or cure the defect. The allegation of personal benefit is devoid of particularity and essentially puts forward – entirely speculatively – a number of different ways in which the impugned payments may have benefited the Defendants. It is nothing more than a list of ways in which a director might benefit which does not have any degree of conviction, is lacking in particularity and is not supported by any evidence.

39.4. Secondly, it would be unjust to permit the proposed re-amendments in light of the passage of time and the impermissible delay in producing the re-amendments which will cause real prejudice to the Defendants if allowed. The claim concerns events which took place over a decade ago and the Appellant issued its claim nearly eight years ago (in July 2015). The Appellant has therefore plainly had more than enough time to investigate its claim and produce an adequate pleading. It is particularly unsatisfactory that the Appellant has failed to do so in circumstances in which:

39.5. Ahead of the hearing of the Respondents' applications to strike out the claim (which were made in 2017 and heard in 2021) the Appellant produced a drafted Re-Amended Statement of Case (which it has now abandoned). However, the Appellant made no application to be permitted to rely on those re-amendments and simply asked the Honourable Chief Justice to consider the proposed pleading *de bene esse.*

39.6. The Appellant produced no further draft in the 18 months between the order made by the Honourable Chief Justice and the appeal hearing.

39.7. The Appellant has now produced another inadequate pleading which, in relation to personal benefit, is entirely speculative.

40. In the circumstances, it would be unjust to allow the amendments in their current defective form or permit the Appellant yet further time to have another go at particularising and articulating an intelligible case.

Discussion and determination of the discretion issue

41. In my judgment, the Court should not, as a matter of discretion, permit GDACI to re-amend the existing Amended Statement of Claim to raise claims which are statute barred as against these two Defendants. This is not a case where allegations of dishonesty or misappropriation are currently being made against them where the Court's approach might well have been different. There is not even currently a claim against the Defendants for damages or equitable compensation for breach of their fiduciary duties. Although serious, the claims to account for profits allegedly made in breach of the self-dealing rules are claims that should have been investigated and pursued diligently within the limitation period.

42. Most importantly, there is no evidence before the Court to explain why nothing was done ***by GDACI*** in the period from the conclusion of the abortive without prejudice discussions during the second half of 2017 (after the stay of the summons to strike out) and August 2020 (a period of almost three years) when GDACI served notice of intention to proceed. It was incumbent on GDACI to proceed with its claim with appropriate expedition and, if necessary, to take steps to obtain a hearing for the strike out application or an order for the filing of a defence. It cannot excuse its inaction by blaming the Defendants for "*elect[ing] not to pursue their strike out, no doubt hoping that the action would likewise fizzle out and let the proverbial sleeping dog lie."*

43. Furthermore, GDACI is to be criticised for failing to formulate its claim adequately, not only in that period but also in the period leading up to the hearing before the Chief Justice and the two hearings before this Court. Once it had decided to abandon its

allegation of dishonest breach of trust, it was incumbent on it to formulate its claim with sufficient clarity to explain why and how it overcame the provisions of Bye-Law 42(5). Even now, the amended pleadings in relation to the alleged personal benefit or advantages received by the Defendants, said to support the claim for an account of profits, are woefully thin. Although I do not accept Mr Chapman's submission to the effect that the pleading on its face is demurrable (because it does not adequately allege personal benefit), I do accept Mr Chapman's criticisms that the generic paragraph relied on by the Appellant as to the alleged benefit or advantage is devoid of particularity and does no more than assert – entirely speculatively – a number of different ways in which the impugned payments might have benefited the Defendants or indeed any director. Since GDACI has to prove that profits were actually made/received by the Defendants as a result of the Payments, one would have expected the draft RASC to have been supported by financial materials/information from which one might infer that profits had indeed been made in the various recipient companies or other entities in which the Defendants had an economic interest. This was certainly the type of case where one would have expected to see supporting evidential material to establish a sufficiently arguable case that the allegations are correct; see in this respect *Kawasaki Kisen Kaisha Ltd v James Kemball Ltd* [2021] EWCA Civ 33 at [18];

44. Furthermore, the delay and passage of time between the issue of the Writ in July 2015 and the first hearing in this Court in March 2023, coupled with the absence of any adequately formulated pleading, can be assumed to have caused prejudice to the Defendants in the conduct of their defence, if the action were to continue.

45. For all the above reasons I would, in the exercise of my discretion, decline to give permission to amend and would dismiss the application.

SMELLIE JA

46. I agree. It is particularly striking to my mind, that for a claim which first emerged as one based upon allegations of dishonesty, GDACI, having abandoned such allegations, now relies upon a claim for account of profits which, in the circumstances of this case, clearly does not in its own right, overcome the strictures of section 23 (1)(b) of the 1984 Act. GDACI must therefore seek to invoke the exercise of the Court's discretion. For the reasons articulated both by my Lady and my Lord President, it would in my view be an improper exercise of discretion to accede to GDACI's application for permission to amend.

CLARKE P

47. I, also, agree.

48. So far as the exercise of our discretion is concerned, that which, in particular, persuades me that we should not allow the amendment is the unacceptably long delay that has overshadowed this claim. The payments relied on were made between February 26 and

August 21 2013 i.e. well over a decade ago. The writ was not issued until July 2015. For the best part of three years nothing happened after the without prejudice discussions fizzled out in the second half of 2017. The sleeping dog that was left to lie belonged to GDACI, and it is GDACI that should have awakened it. Thereafter, as my Lady has observed, it has taken two sets of amendments to produce a passable pleading, the latter only being produced in July 2023, about ten years after the relevant events.

49. I would readily infer that this delay is prejudicial to the Third and Fourth Defendants. If the case goes ahead there will no doubt be sizeable requests for discovery in order to endeavour to make good the entirely unparticularised assertions of profit making. That exercise may postpone the date of any trial for quite a while. To have the disclosure exercise begin over 10 years from the latest payment is inherently unsatisfactory. There may well have been a loss of documents in the interim, or, now, an inability to locate them. Any trial is likely to be in the second half of the 2020s. The fact that it takes place so long after the relevant events is likely to be prejudicial to the Defendants, whose witnesses may well have difficulties in recollection. Further, the extent to which either of the Defendants may have profited from the payments relied on may well be a complicated exercise, likely to be rendered more difficult by the passage of time.

50. In addition, it seems to me that "*the public interest in the efficient administration of justice* [would be] *significantly harmed*" if we were to allow this amendment. To permit this claim to go ahead in the circumstances to which my Lady has referred would be a paradigm of the inefficient administration of justice. The Court system is not a convenience store to which a party can pop in from time to time, or after a long interval. Avoidable delays and failure to produce tenable pleadings for long periods, are likely to cause the Court to exercise its discretion (when it has one) adversely to the delayer, as I would do in this case.

Disposition

51. Accordingly, the application for leave to Re-Amend the Statement of Claim is dismissed.

52. I add, by way of information, that the draft judgment in this matter was circulated by the Court in the normal way to the parties for their suggested typographical and textual amendments on 18 July 2024. These were received and subsequently, on 6 August 2024, the revised judgment incorporating those amendments which had been approved by the Court was circulated. Due to an administrative failure, the judgment was not formally handed down at an earlier date. Accordingly, the formal date for hand down and for the running of any relevant times for appeal, is confirmed as 12 November 2024.

53. The parties have already filed their submissions in relation to costs. The Court will deal with the issue of costs on the papers. However, the parties should also file, within 21 days of the handing down of this judgment, namely 3 December 2024, their submissions on the form of the order that we should make, which, I hope, can be agreed. We shall also deal with the form of the order on the papers.