

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION**

CLAIM NO. BVIHCM2017/0118

BETWEEN:

BY WAY OF CLAIM:

**(1) TETIANA IEREMEIEVA
(2) ROMAN YEREMEIEV**

Claimants/Respondents

and

(1) ESTERA CORPORATE SERVICES (BVI) LIMITED

First Defendant/Applicant

**(2) SERGII LAGUR
(3) STEPHAN IVAKHIV
(4) SOFIIA YEREMEIEVA (a minor)**

Defendants

Appearances:

Mr. Robert Weekes, KC, with him Mr. James Walmsley, Ms. Claire Goldstein and Ms. Victoria Lissack for the First Defendant/Applicant

Mr. Michael Gibbon, KC, with him Ms. Jennifer Jenkins, Ms. Sophie Christodoulou and Mr. William Barnes for the Claimants/Respondents

Mr. Christopher McCarthy for the Second and Third Defendants

Mr. Romauld Johnson for the Receiver

2023: October 17, 18;
2024: April 29, June 3.

JUDGMENT

- [1] **Wallbank J (Ag.):** This is the Court's Judgment on an amended application filed by the First Defendant ('Estera') on 22nd March 2019 ('the Amended Application') seeking orders:
- (1) For summary judgment in respect of the whole or part of the claim brought against it, on grounds that the claim has no real prospect of succeeding against Estera; and/or
 - (2) That the Claimants' Claim Form and Amended Statement of Claim against Estera be struck out in whole or part, on grounds that the Claimants' Statements of Claim do not disclose any reasonable grounds for bringing claims against Estera;
 - (3) Requiring the Claimants to pay Estera's costs of and incidental to these proceedings.
- [2] Estera's Amended Application alternatively sought orders for security for costs and to have the proceedings bifurcated. Estera communicated on 20th December 2022 that it was not at that time proceeding with its security for costs application. The Claimants contend that this part of Estera's application should thus be dismissed. The application for bifurcation has already been determined by the Court on a previous occasion.
- [3] The Amended Application was heard over two days, on 17th and 18th October 2023.

1. Introduction

- [4] Estera is a professional trust company doing business in the Territory of the Virgin Islands ('BVI').
- [5] The First Claimant, Mrs. Ieremeieva, is the widow of Mr. Igor Ieremeiev ('Igor'). Igor died on 13th August 2015 following a horse-riding accident.
- [6] The Second Claimant, Mr. Roman Ieremeiev ('Roman'), and the Fourth Defendant ('Sofia'), are their children. Mr. Roman Ieremeiev was born on 8th February 1995, and Sofia was born on 10th August 2007.
- [7] During his lifetime, Igor was a prominent Ukrainian businessman and politician, and was involved in a number of trading businesses collectively known as Continuum. Continuum was not a single corporate group, but under this name there was a range of businesses, dealing in numerous goods and services, from oil and petroleum products to dairy produce. Igor had three business partners: Mr. Sergii Lagur, the Second Defendant; Mr. Stepan Ivakhiv, the Third Defendant; and a Mr. Petr Dyminsky who is not a party to these proceedings.

- [8] It is the Claimants' case that Igor's ultimate interest in Continuum was worth around US\$150-200 million.
- [9] The Claimants say that about six months after Igor died, on 16th February 2016, Mr. Lagur and/or Mr. Ivakhiv informed them for the first time of the existence of a purported Trust over certain of Igor's assets ('the Trust').
- [10] The validity or otherwise of this purported Trust is the key issue in these proceedings. By referring to it as the Trust, this is merely to be taken as shorthand for this purported Trust, without thereby acknowledging its existence.
- [11] The declaration of trust by which the Trust was purportedly established bore 21st August 2014 as its date of execution (i.e., about a year before Igor died), and it named Roman and Sofiia as beneficiaries, but not Mrs. Ieremeieva. The Trust was entitled the 'R & S Trust' – suggesting that it was named for Roman and Sofiia. This declaration of trust can, for convenience, be called the 'Original Trust Instrument'.
- [12] The Original Trust Instrument provided that Igor was to be the first trustee, but that Mr. Lagur was to become the sole trustee of the Trust on Igor's death or incapacity. It moreover provided for the appointment of a 'New Trustee' by Mr. Lagur, or, failing appointment by him within 6 months, by Mr. Ivakhiv. On the appointment of the New Trustee, Mr. Ivakhiv would become Protector of the Trust.
- [13] The Original Trust Instrument was ostensibly executed as a deed by Igor, and by Mr. Lagur, before a Ukrainian lawyer called Ms. Slipachuk, on 21st August 2014.
- [14] The Trust was expressed to be subject to BVI law.
- [15] The Trust assets were expressed to be:
- (1) 10 Pounds Sterling;
 - (2) 1000 shares of nominal value of US\$1 each in a BVI company called 'Yudelle Asset Holdings Limited' ('Yudelle'); and
 - (3) shares in 15 companies, 10 of which are incorporated in the BVI and 5 in Cyprus.
- [16] Clause 9.1 of the Original Trust Instrument provided wide exoneration terms for the trustee ('the Trustee'):

“In the execution of the trusts and powers hereof the Trustee shall not be liable for any loss to the Trust Fund arising in consequence of the failure depreciation or loss of any investments made in good faith by the Trustee or by reason of any mistake or omission made in good faith by the Trustee or of any other matter or thing except wilful and individual fraud and wrongdoing on the part of the Trustee who is sought to be made liable.”

- [17] Following Igor’s death on 13th August 2015, Mr. Lagur ostensibly became the trustee of the Trust.
- [18] As I have already mentioned, it is the Claimants’ case that Mr. Lagur and/or Mr. Ivakhiv did not inform the Claimants of the existence of the Trust for around another 6 months, until February 2016.
- [19] It appears that Mr. Lagur and/or Mr. Ivakhiv approached Estera about Estera accepting appointment as Trustee of the Trust. On 31st May 2016 Estera and Mr. Ivakhiv executed a Deed of Appointment and Replacement (‘the DORA’) whereby Estera took over as Trustee from Mr. Lagur. On the same day, Estera and Mr. Ivakhiv entered into a deed (‘the Amendment Deed’) which sought to amend the Trust and convert it into a trust subject to the Virgin Islands Special Trusts Act (‘VISTA’).¹
- [20] It appears that Estera must have had significant contact with Mr. Lagur and/or Mr. Ivakhiv before agreeing upon the DORA and the Amendment Deed. However, the Claimants contend (and complain) that Estera made no attempt to contact Roman or Sofiia before it accepted the trusteeship and converted the Trust to a VISTA trust.
- [21] The Claimants say (and further complain) that it was some nine (9) months after Estera had assumed the trusteeship and had converted it to a VISTA trust that Estera wrote to the beneficiaries, Roman and Sofiia, for the first time disclosing its appointment as Trustee.

2. The present proceedings

- [22] The Claimants started the present proceedings on 12th July 2017, making claims against Estera, Mr. Lagur and Mr. Ivakhiv. The Claimants filed a Statement of Claim a few days later on 19th July 2017.
- [23] The Claimants’ primary case is that the Trust is a forgery, perpetrated by Mr. Lagur and/or Mr. Ivakhiv, to use the Trust to control Igor’s interest in the Continuum Group for their personal gain. The Claimants advert to several factors which they submit made it unlikely that Igor would have established this Trust, and, conversely, likely that Mr. Lagur and Mr. Ivakhiv were its creators after

¹ No. 10 of 2003.

Igor's death. The Claimants contend that Mr. Lagur and Mr. Ivakhiv conspired to dissipate the assets of the Trust (or engage in so-called 'value-shifting') for their personal benefit. The Claimants contend that the Trust should be set aside as a forgery and other consequential relief should be granted.

[24] The Claimants' secondary case is that if the Trust was not a forgery, that is, if it had indeed been established by Igor, then it was a sham. The Claimants contend that Igor at all times conducted himself, and lived his life, as if no such Trust existed. The Claimants contend that the Trust should be set aside as a sham on this alternative ground. It is well settled as a matter of law that '[i]f held to be a sham there will be no trust at all'.²

[25] For present purposes, we must focus upon the claims made against Estera. It is necessary that I should relate carefully some parts of the case pleaded.

[26] The Claimants alleged that Estera owed fiduciary duties towards **Roman and Sofiia** (my emphasis added), **regardless of whether the Trust was valid or not**, and that Estera had acted in **wilful and dishonest breach of trust** in executing the Amendment Deed, acting in the interests of Mr. Lagur and Mr. Ivakhiv at the expense of Roman and Sofia.

[27] The Claimants' case was that clause 9.1 of the Original Trust Instrument therefore did not exonerate Estera from liability (i.e. because wilful and dishonest wrongdoing was being alleged against Estera).

[28] The Claimants claimed at paragraph 169 of their Statement of Claim:

"Estera is liable as trustee *de son tort*, alternatively constructive trustee (if the Trust is invalid), alternatively for breach of trust and is liable to reconstitute the Trust Fund and make good all losses to the Trust Fund in the period from 31st May 2016."

[29] At paragraph 170 the Claimants pleaded:

"Further or in the alternative Estera is liable (whether as trustee *de son tort* constructive trustee or a validly appointed trustee) to pay damages or equitable compensation."

[30] We see here the advent of the Claimants' case that Estera was a 'trustee *de son tort*'.

[31] At paragraph 171 the Claimants asserted a claim that Estera is 'liable to account for the fees which it has wrongfully charged to the Trust Fund and/or reconstitute the Trust Fund in respect thereof'.

²Snell's Equity (31st edn., Sweet & Maxwell 2005) 40-48, citing *Snook v London and West Riding Investments Limited* [1967] 2 QB 786, 802 (Diplock LJ) and other cases.

- [32] From paragraphs 172 to 176 the Claimants asserted a claim against Estera for having allegedly dishonestly assisted Mr. Lagur and Mr. Ivakhiv in respect, *inter alia*, of alleged breaches of fiduciary duty and/or breach of trust alleged against them.
- [33] Estera filed a Defence, and then an Amended Defence; the latter on 8th October 2018.
- [34] Estera vigorously disputed the claims. Estera admitted that if the Trust were valid, Estera would owe fiduciary duties to Roman and Sofiia. If, however, the Trust was invalid, Estera denied that it would owe fiduciary duties to Roman and Sofiia, but rather towards Igor's personal representative and Igor's estate.
- [35] Estera did not volunteer that it had committed any breaches of such fiduciary duty towards Igor's personal representative or estate. The Claimants had not (yet) advanced such a case.
- [36] Estera did not specifically answer the Claimants' allegation that Estera had assumed the liability of a 'trustee *de son tort*' and/or 'constructive trustee', but Estera responded to this generally with a denial of any breach of trust or any other equitable wrongdoing.
- [37] Estera averred that it was entitled lawfully to charge the Trust Fund for its professional services.
- [38] Estera denied any dishonest assistance.
- [39] About a couple of months later, on 7th December 2018, the Claimants filed an Amended Statement of Claim.
- [40] The Amended Statement of Claim changed the Claimants' case against Estera fundamentally. Out went the allegations of dishonest breach of trust and dishonest assistance on the part of Estera. In came a range of new claims, based either upon the Trust being invalid, or alternatively, valid.
- [41] The Claimants now pleaded that if the Trust had been valid, the DORA and the Amendment Deed would also be valid, and that Estera had breached the provisions of VISTA, and in particular of Estera's obligations under section 8 in failing to provide Roman with certain documents and information, thereby preventing Roman or Mrs. Ieremeieva from seeking information about the Trust from Estera, by way of wilful default.
- [42] The Claimants also changed their case to add that if the Trust were to be invalid, Estera had acted in breach of fiduciary duty and/or breach of trust towards Igor's personal representative and his

estate (no longer just towards Roman and Sofiia), and the alleged breaches were (now) of less gravity than wilful default and dishonesty. Clearly (so it would appear), the Claimants had taken note of:

- (1) Estera's averment of having owed fiduciary duties to Igor's personal representative and estate; and
- (2) The fact that if the Trust was invalid, then logically clause 9.1 of the Original Trust Instrument (the exoneration clause for liability less than wilful default and dishonesty) would not apply either.

[43] The Claimants materially amended their paragraphs 169 and 170 to read as follows:

"169. ... Estera is liable as trustee *de son tort*, alternatively constructive trustee (if the Trust is invalid), ~~alternatively for breach of trust~~ and is liable to reconstitute the Trust Fund and make good all losses to the Trust Fund in the period from 31st May 2016, alternatively from about 1st September 2016."

170. Further or in the alternative Estera is liable (~~whether~~ as trustee *de son tort* or constructive trustee ~~or a validly appointed trustee~~) to pay damages or equitable compensation."

[44] Estera decided to ask the Claimants for some further and better particulars of their amended claims. Estera filed a Request for Further Information ('RFI') on 14th December 2018 pursuant to the Civil Procedure Rules 2000 ('CPR') rule 34.1.

[45] Estera's RFI covered a number of aspects of the Claimants' Amended Statement of Claim. A month later, on 14th January 2019, the Claimants filed their response.

[46] By CPR 2.4,³ a response to a request for further information filed pursuant to CPR 34 is a formal 'statement of case', just as a claim form, statement of claim, defence, counterclaim, ancillary claim form, defence and a reply.

[47] For present purposes, we are particularly concerned with the requests and responses about the Claimant's case that Estera had assumed liability as a 'trustee *de son tort*' 'or' 'constructive trustee'.

³ Under both the 2000 and 2023 editions of the CPR.

[48] At Question 8, Estera asked:

“...whether it is the Claimants’ case that:

- (a) At the time of the execution of the Amendment Deed, there was no trust over the assets formerly owned by Igor, and
- (b) Nevertheless, Estera is liable as a trustee *de son tort*.”

[49] Estera then asked that, if the Claimants’ case was that there was indeed a trust over the assets formerly owned by Igor, the details of such a trust be specified, including its date of imposition, who the trustee(s) was or were, the date they became trustees, and what type of trust the Claimants allege was imposed.

[50] Moreover, Estera asked the Claimants to provide full and proper particulars of each fact and matter upon which the Claimants rely as having constituted Estera a trustee *de son tort*, the date upon which Estera became such a trustee, and the knowledge Estera is alleged to have had at that time.

[51] Estera also asked the Claimants whether their case was that, if they were not to establish that Estera was a trustee *de son tort*, they might nevertheless still establish that Estera is a constructive trustee (and *vice versa*). In other words, Estera was asking the Claimants to clarify whether the only type of constructive trusteeship they were alleging was as trustee *de son tort*, or whether the Claimants were advancing a case that Estera was a trustee *de son tort* and/or some other kind of constructive trustee. This was a fair question, as the Claimants’ Amended Statement of Claim (and Statement of Claim before it) could be read in both ways (i.e., they were ambiguous).

[52] The questions Estera asked on this topic were not long. There were only 11 such questions. But they were very precise, and, with hindsight, clearly prepared by Counsel who had carefully researched the authorities on trustees *de son tort* and constructive trusteeship, and who had carefully read the Claimants’ pleaded case. The Claimants did not object to these questions.

[53] The Claimants’ response to this part of the RFI was as follows.

[54] In respect of Question 8,⁴ they answered:

“It is not. The Claimants’ case is that, as more fully set out below, the assets were held on a constructive trust.”

I understand this response to mean that the Claimants’ case is that at the time Estera took over as trustee of the purported Trust, there was indeed already a trust in existence, in the form of a constructive trust.

[55] As to the next part of Estera’s questions, namely for specificity about any trust the Claimants claimed to be in existence and exactly how, according to the Claimants, Estera satisfied criteria for being a trustee *de son tort*, the Claimants decided not to engage with Estera’s precise questions. Instead, the Claimants proffered a general discursive narrative that alleged that Mr. Lagur had ‘constituted himself as trustee *de son tort* and/or as constructive trustee when he purported to act as trustee of the Trust and to assume the office of trustee in respect of the Trust Fund’, which the Claimants postulated, from details pleaded by Estera, happened ‘as of 13 August 2015’. This explanation suggested that they were, at that point in time, aware that the existence of a trusteeship *de son tort* required the existence of an underlying ‘trust’.

[56] The Claimants then chose to provide the following clarification of their claim:

“11. It is the Claimants’ case that Estera is liable as trustee *de son tort* and that such liability is in the nature of a constructive trust.

12-14. The Claimants’ case is as set out above, that Estera’s liability as constructive trustee arose through it constituting itself as trustee *de son tort*”.

[57] Estera (understandably) took this to mean that the Claimants were advancing a single case, that Estera was a constructive trustee because it was a trustee *de son tort*, and not an alternative case that Estera was either a trustee *de son tort* or some other kind of constructive trustee.

[58] The Claimants have since (for the purposes of the present application) sought to recharacterize their case as being in the alternative by referring to the ambiguous formulation they had used in their Statement of Claim and Amended Statement of Claim – ignoring the clear specification of a single,

⁴ “...whether it is the Claimants’ case that:

(a) At the time of the execution of the Amendment Deed, there was no trust over the assets formerly owned by Igor, and

(b) Nevertheless, Estera is liable as a trustee *de son tort*.”

not alternative, case in their response to the RFI, which stands as a statement of case, that Estera was a constructive trustee because it was a trustee *de son tort*.

[59] As part of their preparation for the present application, the Claimants submitted:

“The concept of a “*trustee de son tort doctrine*” is an elusive one. There are situations where historic cases or textbooks have used that phrase. But on a true analysis, it should be viewed as a phrase that has been used in certain situations where a constructive trusteeship has been found to exist. It is not a test that has to be met in order to be a constructive trustee.”

[60] The Claimants did not refer to, nor quote, what the ‘historic cases or textbooks’ had to say about the concept. Nor did the Claimants offer any analysis in their skeleton argument of what constitutes a trustee *de son tort*. Instead, the Claimants were here characterizing their case as being that Estera should be treated as some kind of constructive trustee in general, not, specifically a trustee *de son tort* as they had pleaded in their RFI response.

[61] At the hearing of the present application, the Claimants contended that a trusteeship *de son tort* does not require an underlying trust. By contrast, according to Estera, there is such a requirement. This issue became the major area of dispute at the hearing of the present application.

3. The setting aside of the Amendment Deed

[62] Of significance to the present application is an order made by this Court (by Adderley J) on 2nd May 2018 in related proceedings brought by Estera as Claimant, against Roman, Mr. Ivakhiv and Sofiia, in claim number BVIHCM2018/0005, by a Claim Form dated 10th January 2018. A hearing was held in those proceedings on 2nd May 2018, at which Counsel for Estera, and for Roman and Sofiia appeared. Mr. Ivakhiv did not appear at that hearing.

[63] That hearing took place almost two years after Estera had taken on trusteeship of the Trust and executed the Amendment Deed on 31st May 2016. So, it had been almost two years in which Estera had been doing, or omitting from doing, things as trustee of the Trust, and rendering professional services for which it charged fees and expenses.

[64] Amongst various other relief, Estera sought (and was granted) the Court’s permission to retire as trustee of the Trust, upon certain terms, which included maintaining a receivership that this Court had imposed over the Trust assets on 20th July 2017. The Order of 2nd May 2018 also (amongst other things) ordered that Estera should take no steps to defend the validity of the Trust (something

which Estera had initially done, somewhat curiously in circumstances where it had, on its own case, no involvement in the creation of the Trust and it was ostensibly independent). For present purposes, it is to be noted that the Court ordered that the Amendment Deed be set aside. This is what the Order said:

“AND IT APPEARING to the Judge that the Deed of Amendment and Restatement (“the Deed of Amendment”) dated 31st May 2016 made by Estera is liable to be set aside on the ground that Estera executed it under the false understanding that the Beneficiaries Roman and Sofiia (acting through her guardian, Mrs. Ieremeieva) knew and approved of the conversion of the Trust into a VISTA trust (but without prejudice to whether the Deed of Amendment might also have been invalid and ineffective upon one or more of the grounds set out in the Statement of Claim in the Main Proceedings)

AND the Judge being satisfied that it is for the benefit of:

- (a) Sofiia and
- (b) The children and remoter issue of Roman and Sofiia

that the Deed of Amendment should be set aside

AND Roman consenting to the Order setting aside the Deed of Amendment

IT IS ORDERED that the Deed of Amendment be set aside”

- [65] So what one has here is a recital in an Order of this Court that the Court was ordering the Deed of Amendment to be set aside, on a single ground that Estera executed it under the false understanding that the Trust’s beneficiaries Roman and Sofiia knew and approved of the conversion of the Trust into a VISTA trust. The Court, there, was making no pronouncement upon whether the Deed of Amendment had been valid or invalid.
- [66] Nor, pertinently for our present purposes, did the Court pronounce upon whether the Deed of Amendment was being set aside as from the date of the Order (2nd May 2018) or from the date Estera had executed it (31st May 2016).
- [67] Estera argues in this application that the Deed of Amendment is to be treated as having been set aside from the date Estera executed it (31st May 2016), ‘*ex tunc*’.⁵ The Claimants argue, however, that the converse position applies, namely that the Deed of Amendment is to be treated as having been set aside from the (later) date of the Order (2nd May 2018) (i.e., ‘*ex nunc*’).

⁵“**Ex tunc** is a legal term derived from Latin, and means "from the outset". It can be contrasted with *ex nunc*, which means "from now on".” - [Ex tunc - Wikipedia](#)

[68] The point about this sub-dispute is that if the Deed of Amendment is to be treated as set aside as of 2nd May **2018**, the Claimants get to keep their claims that Estera acted in breach of VISTA in the two years prior to that Order, because the Trust (if it existed) would then have been governed by VISTA until the Deed of Amendment was set aside. If, however, the Deed of Amendment is to be treated as having been set aside from the date of its execution on 31st May **2016**, then the Trust (if it existed) never became a VISTA trust, VISTA never applied, and so Estera would not be liable for any breach of VISTA, and Estera would retain the benefit of the exoneration provisions at Clause 9.1 of the Original Trust Deed. This part of the dispute was referred to by the parties as ‘the *ex tunc* point’. For convenience, I will do the same.

4. Strike out and summary judgment

[69] In terms of the legal principles in relation to striking out a claim and summary judgment, there was no significant difference between the parties.

4.1 Strike Out

[70] Pursuant to CPR.26.3(1)(b),⁶ the Court may, pursuant to its case management powers, strike out a statement of case or part of a statement of case if it appears to the Court that the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending the claim.

[71] Strike out is ‘appropriate’ where, for example, the facts a statement of claim states, even if true, do not disclose a legally recognisable claim against the defendant: see, e.g., **Citco Global Custody NV v. Y2K Finance Inc.**⁷

“[12] Striking out under the English CPR, r 3.4(2)(a) which is the equivalent of our CPR 26.3(1)(b), is appropriate in the following instances: where the claim sets out no facts indicating what the claim is about or if it is incoherent and makes no sense, or if the facts it states, even if true, do not disclose a legally recognisable claim against the defendant. (See Blackstone’s Civil Practice 2009 at page 431.)”

⁶ The provision is identical in both the 2000 and 2023 editions of the CPR.

⁷ HCVAP 2008/022 (unreported, delivered 19th October 2009) at paragraph [12] (Edwards JA).

[72] The discretion to strike out must also be exercised with a view to furthering the Overriding Objective of the CPR:⁸ see e.g., **Hope-Ross v. Dinning**.⁹ The Court of Appeal further explained that:

“The central principles which undergird the court’s jurisdiction to strike out all or part of a statement claim are now settled...:

In brief, these principles are as follows:

- (i) The court must be persuaded either that a party is unable to prove the allegations made against the other party; or that the statement of claim is incurably bad; or that it discloses no reasonable ground for bringing or defending the case in the sense that it has no real prospect of succeeding at trial. (**CITCO Global Custody NV v Y2K Finance Inc** [2009] ECSCJ No. 165 (delivered 19th October 2009).
- (ii) A statement of claim is not suitable for striking out if it raises a serious live issue of fact which can only be determined by hearing oral evidence. Further, a statement of claim should not be struck out where the dispute between the parties involves a substantial point of law which does not admit of a plain and obvious answer, or the law is in a state of development, or where the strength of the case may not be clear because it has not been fully investigated. (**Ian Peters v Robert George Spencer** [2009] ECSCJ No. 212 (delivered 22nd December 2009), per Pereira CJ; **Tawney Assets Limited v East Pine Management Limited and others** [2012] ECSCJ No. 284 (delivered 17th September 2012) per Gordon JA [Ag].)
- (iii) On hearing an application to strike pursuant to CPR 26.3(1)(b), the pleadings alone are to be examined. The trial judge should assume that the facts alleged in the statement of claim are true unless they are manifestly incapable of proof. (**CITCO Global Custody NV v Y2K Finance Inc** [2009] ECSCJ No. 165 (delivered 19th October 2009) per Edwards JA at para. 13, and **Martin Didier G.C et al v Royal Caribbean Cruises Ltd.** SLUCVAP consolidated appeals 2014/0024 and 2014/0004 (delivered 6th June 2016, unreported) per Pereira CJ at para. 28.)

⁸ CPR 1.1 in both the 2000 and 2023 editions of the CPR.

⁹ AXAHCVAP 2020/0005 & 0006 (unreported, delivered 30th April 2021) at paragraph [21] (Farara JA (Ag)).

- (iv) Striking out is a draconian step or “nuclear option” and ought only to be deployed sparingly, in the clearest of cases. The reason for proceeding cautiously is that the exercise of the jurisdiction to strike out deprives a party of its right to a trial and of its ability to strengthen its case through the process of disclosure, the filing of witness statements or witness summaries and other procedures such as requests for further information. (**Ian Peters v Robert George Spencer** ANUHC VAP2009/0016 (delivered 22nd December 2009) per Creque JA; see also **HRH Prince Abdulaziz Bin Mishal Bin Abdulaziz Al Saud v Apex Global Management Ltd and another** [2014] EWCA Civ 1106.)
- (v) As striking out is a draconian step, the court must consider whether the interests of justice are better served by permitting an amendment, to pleadings or deploying some other sanction, instead of striking out the statement of claim. (Pereira CJ in **The Attorney General of Saint Lucia v Darrel Montrope** [2020] ECSCJ No. 235. (delivered 9th July 2020); See also **Peerless Limited v Gambling Regulatory Authority and others** [2015] UKPC 29 and **Real Time Systems Limited v Renraw Investments Limited and Others** [2014] UKPC 6.)”

[73] The Claimants rely further on two other, English, authorities, which are broadly to the same effect: **Harrington v Charles**¹⁰ and **Begum v Maran (UK) Ltd.**¹¹

4.2 Summary judgment

[74] Pursuant to CPR 15.2(a),¹² the Court may give summary judgment on the claim or on a particular issue if it considers that the claimant has no real prospect of succeeding on the claim or issue.

[75] The leading English authorities on the summary judgment test are summarised by Lewison J in the English High Court in **EasyAir Ltd v. Opal Telecom Ltd**,¹³ which both sides rely on:

¹⁰ [2023] EWHC 2420 (Ch) at paragraph [115] (Miles J).

¹¹ [2021] EWCA Civ 326 at paragraphs [22] - [23] (Coulson LJ).

¹² The provision is identical in both the 2000 and 2023 editions of the CPR.

¹³ [2009] EWHC 339 (Ch) at paragraph [15] (Lewison J).

“i) The court must consider whether the claimant has a “realistic” as opposed to a “fanciful” prospect of success: *Swain v Hillman* [2001] 1 All ER 91;

ii) A “realistic” claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED&F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];

iii) In reaching its conclusion the court must not conduct a “mini-trial”: *Swain v Hillman*;

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725.”

[76] The summary in **Easyair** was approved in this jurisdiction in **Wilton Trustees (IOM) Ltd v. AFS Trustee Ltd**.¹⁴ This Court there summarised the position thus:

“[34] The applicant has the initial evidential burden of showing that there are credible grounds on which the defence to the claim or issue in question may be found to have no real prospect of succeeding. Thereafter the defendant must show that one or more of its defences has a real, as opposed to fanciful, prospect of succeeding. (Unreported; *The Bank of Bermuda Ltd v Pentium (BVI) Ltd & Anor.*, BVI Civil Appeal No 14 of 2003 (delivered 20th September 2004) at [15] (Saunders CJ (Ag.)); *Athena Brands Ltd v Superdrug Stores plc* [2019] EWHC 3503 (Comm) at [6] (HHJ David Cooke)). In particular:

(1) The Court does not have to accept without analysis everything said by a party in its statements before the Court. (*ED&F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [10] (Potter LJ)). A ‘realistic’ defence is one that carries ‘some degree of conviction’; it must be ‘better than merely arguable’. (*ED&F Man Liquid Products v Patel* at [8] (Potter LJ)). The Court’s assessment of the prospects of success of the relevant defence requires ‘an exercise of judgment’; ‘it is the assessment of the whole that is called for. A measure of analysis may be necessary but the ‘bottom line’ is what ultimately matters’. (*Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1, 285 at [158] (Lord Hobhouse of Woodborough). Although Lord Hobhouse was in the minority in that case, this dictum has been cited with approval on a number of occasions since (see e.g. *John Calland v Financial Conduct Authority* [2015] EWCA Civ 192 at [28]-[30] (Lewison LJ))).

(2) Where a defendant has failed to produce anything to persuade the Court that it has a realistic prospect of success – for example, where it has failed to challenge relevant evidence – the Court should not allow the matter to proceed to trial. (*The Bank of Bermuda v Pentium* at [15]-[16] and [18] (Saunders CJ (Ag.)).

(3) Similarly, AFS in its skeleton argument draws attention to the dictum of the Court of Appeal in *Walton v De La Hay* (Unreported; BVIHCVAP 2014/0004 (delivered 14th August 2015) at paragraph [52] (Blenman JA), following *Saint Lucia Motor & General Insurance Co. Ltd v Peterson Modeste*, Unreported; SLUHCVAP2009/0008 (delivered 11th January 2010)(George-Creque JA).) that summary judgment should only be granted (save in instances of abuse of process) in cases where it is clear that a claim or defence ‘obviously cannot be sustained’ and ‘has no real prospects of success’. In the same paragraph (52), the Court also said that ‘[a] defendant with no or no more than a partial defence will not be allowed to cheat a claimant of his just desserts by producing an illusion (The word ‘elusion’ appears in the report. It is assumed that the word ‘illusion’ was intended.) of complexity where none exists’.

[35] The power to dispose summarily of the case or issue at hand is one that must be exercised in accordance with the overriding objective. (See e.g. *The Bank of Bermuda v Pentium* at [25] (Saunders CJ (Ag.)).”

¹⁴ BVIHCM 2018/0154 (Unreported, delivered 24th February 2020) at paragraph [33] (Wallbank J (Ag)).

4.3 The overlap between strike out and summary judgment

[77] Both sides appear to be in agreement that since both a strike out and summary judgment application cannot be successful at the same time, the strike out application falls to be dealt with first, and if the outcome is that the claim is struck out, then there are no proceedings remaining for summary judgment to be entered in favour of the successful defendant: see, e.g., **Didier v Royal Caribbean Cruises**.¹⁵

[78] For the purposes of the strike out application, the facts alleged by the Claimants are assumed to be true, whereas for the purposes of the summary judgment application, no such assumption is made and evidence is admissible to show that the allegations are fanciful: see e.g., **Libyan Investment Authority v. King**.¹⁶

[79] In **Allsop v. Banner Jones Ltd**,¹⁷ the English Court of Appeal held that there was otherwise no material difference between the tests for strike out and summary judgment and used the term ‘reasonable arguability’ to refer to both.

5. The ‘*ex tunc*’ point

[80] I have already outlined the genesis of the dispute over whether this Court’s setting aside of the Amendment Deed is to be treated as taking effect from 2nd May 2018, the date of the Order setting it aside, or whether it should be treated as never having taken effect, i.e., from the date of its execution, 31st May 2016.

[81] The Claimants approached this issue by considering whether it had been this Court’s intention, at the hearing on 2nd May 2018, to treat the Amendment Deed as a nullity from the outset. The Claimants conclude from a study of the transcript that the Court left this question open for eventual later determination; that is to say, that at that hearing the Court was not intending to treat the Amendment Deed as a nullity from the outset.

¹⁵ SLUHC VAP 2014/024 (Unreported, delivered 6th June 2016) at paragraph [29], [31] (Pereira CJ).

¹⁶ [2020] EWCA Civ 1690, [2021] 1 WLR 2659 at paragraph [96] (Arnold LJ).

¹⁷ [2021] EWCA Civ 7, [2022] Ch 55 at paragraph [7] (Marcus Smith J, with whom Arnold and Lewison LJ agreed).

- [82] To this extent, the Claimants were correct: this Court, by Justice Adderley, did not approach the question now before the Court. That was not a question the Court needed to decide on that occasion. The learned Judge left this open.
- [83] Estera, for its part, did not limit itself to what the Court did or did not do, and/or did or did not intend, at the hearing on 2nd May 2018. Estera looked at the legal position.
- [84] Estera referred to a passage in **Lewin on Trusts**¹⁸ and a Jersey Royal Court case, **Re Strathmullen Trust**,¹⁹ as authority for a proposition that an order setting aside a trust operates *ex tunc*. There will be numerous references in this Judgment to various editions of **Lewin on Trusts**. For convenience, I shall refer to this textbook as '**Lewin**'.
- [85] The passage Estera relies on in **Lewin** reads as follows (without footnotes):

"It is well established that voluntary dispositions, whether involving a settlement or the exercise of a power, can be rectified or set aside as a result of an operative mistake. The court may, in its equitable discretion, rectify or rescind a settlement where there is a voluntary transaction by which one party intends to confer a bounty on another, where the donor did not intend the transaction to have the effect it did. For this purpose a unilateral mistake on the part of the settlor suffices since gifts are outside the law's special concern for the sanctity of contracts. But the mistake must on the particular facts of the case be of sufficient gravity to make it unjust (or unfair or unconscionable) to leave the mistaken document or disposition uncorrected. The burden is on the person seeking to rescind the trust or other voluntary disposition to show some substantial reason why the deed ought to be set aside. An order operates *ex tunc* so the settlement will be deemed always to have been in its rectified state or, if rescinded, never to have been made at all, likewise the exercise of a power of appointment. For equity to intervene it must be proved that the settlement fails to express the real intention of the settlor. In *Re Butlin's Settlement Trusts*, Brightman J. set out as follows:

"In the absence of an actual bargain between a settlor and trustees: (i) a settlor may seek rectification by providing that the settlement does not express his true intention, or the true intention of himself and any party with whom he has bargained, such as a spouse in the case of an ante-nuptial settlement; (ii) it is not essential for him to prove that the settlement fails to express the true intention of the Trustees if they have not bargained; but (iii) the court may in its discretion decline to rectify a settlement against a protesting trustee who objects to rectification."

- [86] The passage from **Re Strathmullen Trust** that Estera relies upon reads as follows:

¹⁸ (20th edn., Sweet & Maxwell 2023) 5-071.

¹⁹ [2014] JRC 056 at [28]-[29].

“28. In the circumstances, we are satisfied that the trust should be set aside on the grounds of mistake and be declared to have been invalid pursuant to art. 11 of the Law. The effect of this, as set out by Birt, Bailiff in *In re Onorati Settlement* ... is that under the proper law which governs the trust, the trust now having been avoided, it is as if it never existed.

29. In the premises, we declare that the trust is invalid and is set aside on the ground of mistake. As a consequence, the trustee holds the trust fund as bare trustee for the representor and all the assets of the trust, including all profit derived from such assets, are declared at all times to have been held on bare trust for the representor.”

[87] **In re Onorati Settlement**²⁰ is a decision of the Jersey Royal Court, given by Sir Michael Birt, Kt., Bailiff, with whom Jurats Kerley and Milner concurred. The Royal Court there set aside, and declared invalid, a deed of appointment made in 2010 by a trustee who had failed to have regard to the adverse tax consequences of the deed. At paragraph 47 of the judgment, Sir Michael Birt ruled:

“...the consequence of our decision is that, under the proper law which governs the Trust, the 2010 deed having been avoided, it is as if it never existed.”

[88] He proceeded to explain that this conclusion was in line with English law, as explained in the United Kingdom Supreme Court case of **Pitt v Holt**²¹ and the earlier English case of **AC-v-DC**.²²

[89] Against this background, we have to ask ourselves whether this Court, by Adderley J., set aside the Deed of Amendment on 2nd May 2018 as a result of ‘an operative mistake’ (to use the language adopted by **Lewin**). We also have to ask ourselves whether the Deed of Amendment fell within ‘voluntary dispositions, whether involving a settlement or the exercise of a power’.

[90] The answer to the latter question would appear on the facts of the present case to be straightforward. Assuming Estera had been validly appointed as Trustee of the R & S Trust, Estera voluntarily (i.e., not as a result of a contractual agreement either with the putative Settlor, Igor, nor with the beneficiaries Roman and Sofiia) exercised a power to convert the Trust into a VISTA Trust.

[91] The answer to the question of whether Adderley J. set it aside as a result of ‘an operative mistake’ is less straightforward as a matter of law. The United Kingdom Supreme Court in **Pitt v Holt** devoted nine closely reasoned paragraphs²³ to the question ‘What is a mistake?’

²⁰ 2013 JLR 182.

²¹ Also known as *Futter-v-Futter* [2013] UKSC 26 at [129] and [130] (Lord Walker).

²² [2013] 15 ITELR 811 at [31] (Mostyn J).

²³ [2013] UKSC 26 at [104] to [113] (Lord Walker).

[92] The preamble to the Order of 2nd May 2018 pertinently records the basis upon which the Court set aside the Deed of Amendment:

“...Estera executed it under the false understanding that the Beneficiaries Roman and Sofia (acting through her guardian, Mrs. Ieremeieva) knew and approved of the conversion of the Trust into a VISTA trust...”

[93] We can conclude from this that Estera executed the Deed of Amendment as a consequence of having had a ‘false understanding’ as to the Beneficiaries’ state of knowledge and consent – conversely, that if Estera had been aware that the Beneficiaries did not know about the intended conversion to a VISTA trust and that they had not consented to it, Estera would not have executed that Deed.

[94] It thus appears (and indeed, to be rather obvious) that the said ‘false understanding’ was ‘operative’ in the execution of the Deed of Amendment.

[95] But was such a ‘false understanding’ a ‘mistake’?

[96] The United Kingdom Supreme Court in **Pitt v Holt** observed at paragraph 107 that other law lords (Lord Esher MR and Kay LJ) ‘commented that there was no legal definition of ‘mistake’’. That said, a number of distinctions fall to be made. Thus, at paragraph 105:

“Forgetfulness, inadvertence or ignorance is not, as such, a mistake, but it can lead to a false belief or assumption which the law will recognise as a mistake. The Court of Appeal of Victoria has held that mistake certainly comprehends “a mistaken belief arising from inadvertence to or ignorance of a specific fact or legal requirement”: Ormiston JA in *Hookway v Racing Victoria Ltd* [2005] VSCA 310, (2005) 13 VR 444, 450.”

[97] The distinction drawn here between things which are not a mistake and things which are goes to the question (with which the United Kingdom Supreme Court was primarily concerned with in **Pitt v Holt**) of what sorts of errors enable a court to set aside a voluntary settlement or exercise of a power. That is not a question we need to concern ourselves with in the present case; indeed, this Court cannot because the Order of 2nd May 2018 stands. Whether or not Adderley J. was right or wrong to have set aside the Deed of Amendment, including whether there had been a sufficient, or the ‘right’ kind of, ‘mistake’ to have enabled him to do so is no longer open for debate: that issue is moot.

[98] The issue that concerns us here is slightly different. It is whether Estera’s ‘false understanding’ falls within the understanding of the word ‘mistake’ expressed in paragraph 105 of **Pitt v Holt**, as including ‘a mistaken belief arising from inadvertence to or ignorance of a specific fact or legal requirement’.

- [99] Estera's ignorance of the Beneficiaries' state of knowledge and consent was itself not a 'mistake', but that ignorance did lead to Estera having a false belief or assumption that the Beneficiaries knew and approved of the conversion of the Trust into a VISTA trust. Thus, in my respectful judgment, the law recognizes Estera's false belief or assumption about the Beneficiaries' knowledge and approval as a 'mistake'.
- [100] Where this takes us is that Estera's conversion of the Trust into a VISTA trust was a voluntary disposition, which was set aside as a result of an operative mistake. As explained in **Lewin**,²⁴ and as persuasively ruled in **Re Strathmullen Trust**,²⁵ and **In re Onorati Settlement**,²⁶ Adderley J's order of 2nd May 2018 setting aside the Deed of Amendment had the effect in law of setting aside that Deed as if it had never been made.
- [101] On that basis, the Claimant cannot maintain a case that Estera's conduct of its putative trusteeship was governed by VISTA until the Deed of Amendment was set aside on 2nd May 2018.
- [102] Thus, the case pleaded by the Claimants in their Amended Statement of Claim of 7th December 2018 - that if the Trust had been valid, the Deed of Amendment Deed would also be valid, and that Estera had breached the provisions of VISTA, and in particular section 8 of VISTA, by way of wilful default – cannot be maintained.
- [103] That claim cannot be cured by amendment because Estera's putative trusteeship was either governed by VISTA or it was not, and the answer to that question turns on the '*ex tunc* point', which is a point of law. It cannot be cured, nor its merits increased, by allowing further evidence, nor through further disclosure, nor through a trial process.
- [104] That claim therefore is, in my respectful judgment, incurably hopeless and ought to be struck out.

6. Trustee *de son tort*

- [105] The next major area of contention concerns the legal position if the Trust is invalid. It arises because the Claimant has explained in a Response to a Request for Further Information, thus in pleaded

²⁴ (20th edn., Sweet & Maxwell 2023) 5-071.

²⁵ [2014] JRC 056 at [28]-[29].

²⁶ 2013 JLR 182.

form, that if the Trust is invalid, then the Claimant seeks to hold Estera liable as a constructive trustee in the form of a trustee *de son tort*.

[106] The Claimant submitted in its skeleton for the hearing:

“64. The concept of a “*trustee de son tort doctrine*” is an elusive one. There are situations where historic cases or textbooks have used that phrase. But on a true analysis, it should be viewed as a phrase that has been used in certain situations where a constructive trusteeship has been found to exist. It is not a test that has to be met in order to be a constructive trustee.

65. The factual situation pleaded in the Amended S/C is without direct precedent (as far as Cs are aware). It is clear from the pleading that Cs do not suggest (assuming the Trust is invalid) that D1 has (for instance) intermeddled in a valid trust and thereby made itself liable. Rather, in a situation where D1 has found itself the owner of someone else’s property then a label is needed to describe the duties to be ascribed to it, hence the offering of the two formulations. See for example *Jasmine Trustees v Wells* [2007] EWHC 38 (Ch); [2008] Ch 194, which points out that a trustee *de son tort* is obliged to hold property for beneficiaries, but that it is wrong to treat him as a trustee of a settlement: he is a trustee of the trust property which is vested in him.

66. D1 places reliance on answers “11” and “12-14” of Cs’ Response to D1’s RFI. Cs respectfully submit that, taken in the context of the pleading and the other answers in that Response, it is clear that the intention was to have a convenient shorthand for the facts and matters pleaded.

67. That being the case, the premise underlying D1’s points about the applicability of the “doctrine” are not in point. ...”

[107] The Claimant goes on to submit that the irrelevance of the ‘doctrine’ of trusteeship *de son tort* has certain consequences in respect of the parties’ pleaded cases.

[108] It can thus be seen that in the Claimants’ skeleton, their Counsel did not address in any detail what the elements of the concept of trustee *de son tort* are.

[109] The Claimants’ starting point is that the concept of trusteeship *de son tort* is ‘an elusive one’. As we shall see, that is not entirely correct. As we shall see, the core of that concept is clearly established, even though the outer limits have been left open.

[110] The Claimants had proffered a discursive narrative in their Response to Estera’s RFI as to why the Claimants said that Estera was a trustee *de son tort*. It is fair to say that whenever someone declines to be drawn into answering specific questions and instead offers a discursive account, this immediately raises red flags of a possibility that he cannot answer those specific questions without

exposing heresy in his own position. Such an approach inevitably invites close scrutiny. What one gets from the Claimants' narrative, was that they were saying that Estera was a trustee *de son tort* because Mr. Lagur had 'constituted himself as trustee *de son tort* and/or as constructive trustee when he purported to act as trustee of the Trust and to assume the office of trustee in respect of the Trust Fund'. In other words, the Claimants were saying that Estera's 'trusteeship' was based upon Mr. Lagur's. The Claimants did not, though, explain why they said Mr. Lagur was a trustee *de son tort* or a constructive trustee.

- [111] In their skeleton argument for the present hearing, the Claimants (somewhat remarkably as well) referred to only one case, **Jasmine Trustees v Wells**.²⁷ That was a decision of the English High Court, Chancery Division, by Mann J.
- [112] The Claimants rely upon this to explain the *effect* of a trusteeship *de son tort* (in saying that this case 'points out that a trustee *de son tort* is obliged to hold property for beneficiaries, but that it is wrong to treat him as a trustee of a settlement: he is a trustee of the trust property which is vested in him') but not the *elements* that constitute a trusteeship *de son tort*.
- [113] It should be noticed that the reference given to this case by the Claimants (as precisely replicated in the footnote below) omitted reference to any particular paragraphs in the judgment. The paragraphs which speak to the effect of a trusteeship *de son tort* in that case were, as the Headnote points out, paragraphs 42—48, 50, 51.
- [114] It would be remiss not to observe, however, that those paragraphs should be read together with paragraphs 39 to 41 of Mann J's decision – which the Claimants' Counsel did not take the Court to.
- [115] At paragraphs 39 to 41 Mann J quoted at length from a decision of Millett LJ in the English Court of Appeal authority **Paragon Finance plc v D B Thakerar & Co**²⁸ in which Millett LJ explained that a trustee *de son tort* 'really is a trustee', a position to be contrasted with a different type of constructive trustee, namely where equity imposes a remedy upon a person who has become involved in fraud. This is presented in **Paragon Finance** as a distinct dichotomy.

²⁷ [2007] EWHC 38 (Ch); [2008] Ch 194.

²⁸ [1999] 1 All ER 400, 408j—409g.

[116] That this dichotomy should be distinct was important in **Jasmine Trustees** because that case concerned liability to capital gains tax of a 'trustee of the settlement'.²⁹ Trustees of a settlement were there to be contrasted with persons who acted as if they were trustees in relation to the trust property in question, but who were not 'trustees of the settlement', and thus treated differently for tax purposes. As Mann J stated at paragraph 42:

"However, the question in this case is not whether the *de facto* trustees are trustees; it is whether they should be treated as being trustees of the settlement."

[117] Where an eventual tax liability arises, it is important that clear limits are expressed. It would be most unsatisfactory for it to remain uncertain whether someone is or is not liable to taxation.

[118] Another area in which it is important to be clear in relation to the applicable concept of trusteeship is limitation. Indeed, many of the reported cases concerning trusteeship *de son tort* concern either taxation or limitation. At risk of stating the obvious, clarity in relation to limitation is important, because the application of limitation periods deprives a claimant of the right to bring a claim, with potentially far reaching consequences.

[119] It is instructive to set out the whole passage, as quoted by Mann J, concerning trusteeship *de son tort*:

"38 Thus the scheme of the Act is that trustees are charged on gains in accordance with sections 1 and 2, but that the settlement is looked to, via the concept of its trustees, as a separate chargeable body by virtue of sections 69 and 65. The concept of "trustees of the settlement" is therefore an important one. It is undefined in the legislation.

39 At first sight it might be thought to be obvious who the trustees of the settlement are for the purposes of these provisions: they are those who have been properly appointed to that office. However, Mr Rowley says that it is not that simple. He says that the *de facto* trustees in the present case were trustees *de son tort*. Such persons are a species of constructive trustee, and they are of the first type in the categorisation of constructive trustees in *Paragon Finance plc v D B Thakerar & Co* [1999] 1 All ER 400, 408j—409g and are, therefore, 'real' trustees. Via that route they become trustees of the settlement for capital gains tax purposes

40 In the *Paragon Finance* case Millett LJ was considering constructive trusteeship in the context of limitation of actions. He referred to the equitable rule that a trustee was accountable without time limit. The passage appearing in Mr Rowley's skeleton argument was the following, at pp 408—409:

"the expressions 'constructive trust' and 'constructive trustee' have been used by equity lawyers to describe two entirely different situations. **The first covers those cases already**

²⁹ See *Jasmine Trustees v Wells* at paragraphs 37 and 38.

mentioned, where the defendant, though not expressly appointed as trustee, has assumed the duties of a trustee by a lawful transaction which was independent of and preceded the breach of trust and is not impeached by the plaintiff. The second covers those cases where the trust obligation arises as a direct consequence of the unlawful transaction which is impeached by the plaintiff.

A constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of property (usually but not necessarily the legal estate) to assert his own beneficial interest in the property and deny the beneficial interest of another. **In the first class of case, however, the constructive trustee really is a trustee. He does not receive the trust property in his own right but by a transaction by which both parties intend to create a trust from the outset and which is not impugned by the plaintiff. His possession of the property is coloured from the first by the trust and confidence by means of which he obtained it, and his subsequent appropriation of the property to his own use is a breach of that trust.** Well-known examples of such a constructive trust are *McCormick v Grogan* (1869) LR 4 HL 82 (a case of a secret trust) and *Rochefoucauld v Boustead* [1897] 1 Ch 196 (where the defendant agreed to buy property for the plaintiff but the trust was imperfectly recorded). *Pallant v Morgan* [1953] Ch 43 (where the defendant sought to keep for himself property which the plaintiff trusted him to buy for both parties) is another. **In these cases the plaintiff does not impugn the transaction by which the defendant obtained control of the property. He alleges that the circumstances in which the defendant obtained control make it unconscionable for him thereafter to assert a beneficial interest in the property.**

The second class of case is different. It arises when the defendant is implicated in a fraud. Equity has always given relief against fraud by making any person sufficiently implicated in the fraud accountable in equity. In such a case he is traditionally though I think unfortunately described as a constructive trustee and said to be liable to account as constructive trustee. **Such a person is not in fact a trustee at all, even though he may be liable to account as if he were. He never assumes the position of a trustee, and if he receives the trust property at all it is adversely to the plaintiff by an unlawful transaction which is impugned by the plaintiff. In such a case the expressions 'constructive trust' and 'constructive trustee' are misleading, for there is no trust and usually no possibility of a proprietary remedy; they are nothing more than a formula for equitable relief**: *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 1 WLR 1555 at p 1582 per Ungood-Thomas J." ...

41 Mr Rowley's thesis was that the de facto trustees in the present case must have been constructive trustees; they were not constructive trustees in the second of Millett LJ's senses because there was no question of dishonesty or fraud in what they did. Therefore they must fall within the first of his categories. Accordingly, they fall to be treated as actual trustees, because that is what they actually are; using the words of Millett LJ in the *Paragon Finance* case, Mr Rowley says that a constructive trustee of the first kind 'really is a trustee'. Therefore they are capable of being trustees for the purposes of the 1992 Act. In a real sense they were acting as trustees of the settlement, and should be treated as being trustees of the settlement within section 69, with the consequential result on the residence of the trust that he contends for. Millett LJ would have held that a trustee *de son tort* was a trustee within the meaning of the Limitation Act 1980

42 I do not consider that this case works for Mr Rowley in the way in which he says it does. It can be accepted that a trustee *de son tort* is a kind of constructive trustee: Millett LJ says as much in the paragraph preceding those cited by Mr Rowley. Such a trustee does not really take the trust property in the consensual manner referred to by Millett LJ in his description of the first type, but insofar as the trustee *de son tort* has property which he holds in his own name he will be a trustee of that property for the ultimate beneficiaries. To that extent it can be accepted that a trustee *de son tort* of that kind 'really is a trustee'. **However, the question in this case is not whether the de facto trustees are trustees; it is whether they should be treated as being trustees of the settlement. The status of a trustee *de son tort* is limited. He will be liable for breach of trust much as a properly appointed trustee would be but the doctrine is more about liabilities than anything else. The trustee *de son tort* will be obliged to hold the property for, and to account to, the beneficiaries, but on the other side of the coin will not have the powers of the trustee conferred by the settlement:** see my answer to question (c) below. It would be contrary to principle to allow such a person to arrogate powers to himself by virtue of his 'intermeddling', even if that intermeddling is innocent.

43 All this demonstrates that while a trustee *de son tort* may be described as a trustee of trust property vested in him, it is not necessarily or naturally correct to describe him as a trustee of the settlement. One would expect those words more naturally to describe the actual trustees. So if one had a body of identifiable properly appointed trustees under a settlement, and a different body of persons who have been acting as if trustees but who have not been validly appointed, and were to ask the question 'Who are the trustees of the settlement?', the natural answer would be that the first group are and the second group are not. Mr Rowley asked the rhetorical question: if the de facto trustees are not the trustees of the settlement then what are they trustees of? If the question is a relevant one then the answer is that they are trustees of the trust property which they happen to have vested in them; they are not trustees of the settlement. That dichotomy is the significant one. The settlement is the abstract concept; the trust property is the physical or quasi-physical subject of the settlement. The concept 'trustees of the settlement' means the trustees in relation to the whole abstract concept; the concept of being trustee of property is a narrower one describing the relationship of the person to the property." (Emphasis added.)

[120] What can be seen from this is that two classes of cases can be identified and contrasted:

- (1) where a person has assumed the duties of a trustee by a lawful transaction which was independent of and preceded the alleged breach of trust, and the transaction by which that person assumed duties as a trustee was a lawful transaction that is not impeached by the plaintiff, and by reason of these factors such a person really is a trustee; and
- (2) where a person is not a trustee of a trust but is held liable in equity to account as a constructive trustee as a remedy for fraud.

- [121] At the hearing, the Claimants prayed in aid another English law authority, **High Commissioner for Pakistan in the United Kingdom v Prince Muffakham Jah and others**,³⁰ ('Jah') a decision of the English High Court, Chancery Division, which concerned limitation. The Claimants relied on this case as authority for a proposition that a person can be treated as a trustee *de son tort* even where the property in his possession is not property that is held on some kind of underlying trust.
- [122] The Claimants relied on **Jah** to counter Estera's position that for a person to be constituted a trustee *de son tort* there has to be an underlying express trust.
- [123] The material facts of **Jah** can conveniently be stated from the headnote:

"Immediately following India's annexation of Hyderabad in 1948, the former finance minister of the Government of Hyderabad transferred a sum slightly in excess of £1m to an account at a United Kingdom bank in the name of the High Commissioner of Pakistan in the United Kingdom, who received it on the instructions of the Foreign Minister of Pakistan. The transfer was ostensibly made on behalf of the ruler of Hyderabad, the seventh Nizam. Shortly thereafter, the Nizam instructed the bank to reverse the transfer on the ground that it had been made without his authority, but in the absence of the account holder's agreement, the bank refused to comply with the instruction. Proceedings were brought in 1954 by the Nizam against the High Commissioner and the bank, but were stayed following Pakistan's assertion of sovereign immunity. In 2013 Pakistan waived that immunity when it commenced proceedings against the bank, through its High Commissioner, asserting that it was absolutely entitled to the fund. The Union of India, the eighth Nizam and the eighth Nizam's brother, all of whom claimed to be the seventh Nizam's successor in title, were joined to the proceedings as interpleader claimants. They contended, *inter alia*, that the fund was held on trust for the seventh Nizam and his successors in title by the High Commissioner; alternatively, that the transfer had been unauthorised, which provided the basis for a claim against Pakistan in restitution. Pakistan contended that the restitution claim was time-barred;

...

Held:

...

(3) That the fund had been held by the first High Commissioner of Pakistan in the United Kingdom on behalf of Pakistan and thereafter by his successors as High Commissioner; that it was not held absolutely for Pakistan but on constructive trust for the seventh Nizam, there being nothing in the involvement of sovereign states to prevent a trust from arising; that it followed that the seventh Nizam was beneficially entitled to the fund and those claiming in right of the Nizam were entitled to have the sum paid out to their order; and that, on the facts, the interpleader claimants' alternative claim in restitution also succeeded (post, paras 240, 251, 257—259, 265, 271, 340—341)."

³⁰ [2019] EWHC 2551 (Ch).

[124] The Claimants referred to and relied in particular upon the learned Judge's reasoning contained in the following passages in the judgment, the circumstances of which the Claimants say are materially analogous to the present case:

"243 As I have noted, the Princes and India contended for a trust on one of three bases: express trust; constructive trust; and resulting trust. I consider these three types of trust in turn below, and, in light of the facts as I have found them, state my conclusions as to the basis upon which the Fund is held.

...

247

... no ... express trust came into being.

(c) Constructive trust

(i) The law

248 The English law regarding constructive trusts and constructive trusteeship is notoriously woolly or, as Lewin describes it, 'an elusive creature' (Lewin on Trusts, 19th ed (2015), para 7-010). In *Carl Zeiss Stiftung v Herbert Smith & Co (No 2)* [1969] 2 Ch 276, 300, Edmund-Davies LJ noted: 'English law provides no clear and all-embracing definition of a constructive trust. Its boundaries have been left perhaps deliberately vague so as not to restrict the court in technicalities in deciding what the justice of a particular case might demand.'

249 As a result, the books agree that 'Constructive trusts can arise over a wide variety of situations' (Hanbury & Martin, *Modern Equity*, 21st ed (2018), para 12-006; see also Lewin, para 7-015), but there is little consensus over what, exactly, these situations are. The Princes and India relied upon what has been termed a constructive trust of 'the first kind': (1) Lewin describes a constructive trust of 'the first kind' in the following terms (Lewin at para 7-011): 'Constructive trusts of the first kind arise where persons have accepted or assumed the role of a trustee by transactions not impeached by the claimant, independently of, and preceding, any breach of duty. Such a constructive trustee really is a trustee. He does not receive the trust property in his own right, but by a transaction which was intended to create a trust from the start. The trustee's possession of the property is coloured from the first by the trust and confidence by means of which he obtained it, and any subsequent appropriation of the property to his own use is a breach of that trust.' (Emphasis supplied.)

Snell describes this sort of trust as one imposed on property to give effect [to] a person's intention to make a gift to another or to act as an express trustee, but where the formalities necessary to give effect to the gift or the express trust have not been fully complied with (Snell's *Equity*, 33rd ed (2015), para 21-021).

(2) A trusteeship *de son tort* (Lewin, para 7-017) is one example of a constructive trust of the first kind. As to this form of constructive trust, Lewin says this (at para 42-101):

If a person by mistake or otherwise assumes the character of trustee when it does not really belong to him, he becomes a trustee *de son tort* and he may be called to account by the beneficiaries for the money he has received under the colour of the trust. A trustee *de son*

tort closely resembles an express trustee and is a constructive trustee of the first kind in the classification of constructive trusts we have given earlier in this work. The principle is that a person who assumes an office ought not to be in any better position than if he were what he pretends: he is accountable as if he had the authority which has been assumed. While it is essential, if a person is to become a trustee *de son tort*, that he consciously takes the office of trustee, it does not matter whether he knows all the trusts or the extent of his powers. For it is a trustee's duty to acquaint himself with the trusts and his powers upon his taking office, and a trustee *de son tort* can be in no better position. (Footnotes omitted.)

(ii) A constructive trust of the first kind generally

250 This is not a case where it can be said that there was an intention to create a trust, but where the necessary formalities to do so have not been complied with. As I have found, there was no intention on the part of Nizam VII to create any kind of trust. Had there been such an intention, an express trust would have arisen (see para 229 above). However, such an intention to create a trust is not required where the constructive trust alleged is a trusteeship *de son tort*.

(iii) A trustee *de son tort*

251 I find that Rahimtoola, in his capacity as High Commissioner, was a trustee *de son tort*. The label is at least in this case a misnomer for Rahimtoola cannot be criticised for accepting the obligations of trustee in circumstances where unknown to him Moin had no authority. It is in this case clearer to say that Rahimtoola, as High Commissioner, bona fide accepted the obligations to act as trustee for Nizam VII, in circumstances where it appeared (particularly given that the letter evincing his intention to act as trustee was dated 15 September 1948, when Moin still had an official capacity) that Moin had authority to create this trust on behalf of Nizam VII. I accept India's submission in para 37 of her written submissions:

"All that is required for a finding of such a trust in this case is a conclusion that there was an intent on the part of the transferee that beneficial ownership was not to pass, and that the Fund would therefore be held on trust. If it were held, for example, that Rahimtoola or Pakistan had assumed the responsibility of acting as a trustee (by which it is meant that they had no intention to take beneficially), but for some reason they did not take as an express trustee then a constructive trust of this kind would arise and they would be a trustee *de son tort* (see Lewin at paras 7-015, 7-017, 42-101) . . . a finding of such an assumption of responsibility by Rahimtoola or Pakistan is entirely justified on the facts now before the court. A finding of such a trust may, moreover, be made without any finding as to the intention of the transferor."

[125] Estera disagreed. Estera submitted that the trustee *de son tort* doctrine has the following essential features:

- (1) It requires the prior existence of an express trust;
- (2) It requires the voluntary assumption of the role of trustee of that trust;

(3) It is liability as a *constructive trustee* (i.e., a person deemed to be a trustee by operation of law).

(4) However, it is necessary to distinguish between two different types of constructive trustee:

- (i) 'True' trustees, who have lawfully assumed fiduciary obligations in relation to trust property but without a formal appointment; and
- (ii) Persons who never assumed and never intended to assume the status of a trustee but are required by equity to account as if they were trustees, because they dishonestly assisted in misapplication of funds by a trustee, or received trust assets knowing that the transfer to them was in breach of trust.

[126] Liability as a trustee *de son tort*, says Estera, is in the first category and not in the second category.

[127] Estera contends that (as a fifth feature) since liability as a trustee *de son tort* is in the first category of constructive trustees, it does not depend on any dishonesty or want of probity. The liability of a trustee *de son tort* is strict (subject to the application of any exoneration provision). Estera also contends that (as a sixth feature) a person can only be a trustee *de son tort* in respect of (i) trust property; (ii) that he has received. Thus, he or she cannot be liable in respect of a failure to exercise other powers under a trust settlement.

[128] Estera supports these propositions with reference to the following authorities.

[129] **Thomas and Hudson: The Law of Trusts** (2nd edn., Oxford University Press 2010) 30.04 (hereinafter for convenience, '**Thomas & Hudson**') explains the trustee *de son tort* doctrine in these terms (with particular emphasis on the words and phrases emphasized below):

"... Where a person who has not been officially appointed as a trustee of an express trust interferes with or involves himself in the business of **the trust** so as to appear to be acting as a trustee, then **that person shall be construed to be a trustee of that trust**. On the basis that trustees *de son tort* are not expressly declared by the settlor to be trustees but rather are deemed to be constructive trustees by operation of law, due to their meddling **with trust affairs**, they are therefore constructive trustees. Smith L.J. [in *Mara v. Browne* [1896] 1 Ch at 209] stated the nature of this form of constructive trust in the following way:

'... if one, not being a trustee and not having authority from a trustee, takes upon himself to intermeddle with trust matters or to do acts characteristic of the office of trustee, he may therefore make himself what is called in law trustee of his own wrong – i.e. a trustee *de son tort*, or, as it is also termed, a constructive trustee'.

Therefore, a trustee *de son tort* is a trustee who has become classified as such **because he intermeddled with trust business**. What does not emerge from this formulation set out by Smith, LJ is the usual prerequisite that the trustee *de son tort* must have trust property in his possession or control before this form of constructive trust will obtain. If the property were not vested in the defendant then the appropriate form of liability would be that of a dishonest assistant and not a constructive trustee bearing proprietary obligations. A dishonest assistant ... is one who assists in a breach of trust in a manner in which an honest person would not have acted or who is reckless as to some risk being occasioned to the trust fund. ... While the responsibilities of constructive trustees will not always equate to those of an express trustee, it has been held that because a trustee *de son tort* acts as though an express trustee then the trustee *de son tort* is to be treated as bearing all the obligations of an express trustee.” (Emphasis added.)

[130] Estera remarks that most of this passage from the earlier edition of the textbook was quoted with approval in the Royal Court of Jersey case of **Cunningham v. Cunningham**³¹ per Deputy Bailiff Birt at paragraph [23].

[131] As regards the first four features (viz, the requirement of an express trust; voluntary assumption of the role of trustee and liability as a constructive trustee in the first category of such trustees), Estera contends that the following authorities are especially instructive:

(1) The concept of a trustee *de son tort* appears to have come into existence by analogy with an earlier concept: the executor *de son tort*. It is described in **Williams, Mortimer and Sunnucks: Executors, Administrators & Probate** (22nd edn., Sweet & Maxwell 2023) 5-36 in the following terms:

“A person not lawfully appointed executor or administrator and without title to a grant may by reason of his own intrusion upon the affairs of the deceased be treated for some purposes as having assumed the executorship. Such an intermeddler is called a tort executor or an executor *de son tort* (i.e. of his own wrong). The concept is derived from the principle that a person who has assumed authority where he has none is accountable as if he had that authority”.

(2) The way in which the concept of a trustee *de son tort* was initially derived from this doctrine is apparent from the early authorities. An example is **Pearce v. Pearce**³² (a case of a claim against a Mrs. Williams who had been invalidly appointed a trustee), where the position was described by the court in this way:

³¹ 2009 JLR 227.

³² (1856) 22 Beav. 248.

“She was never regularly appointed trustee, but she acted as such, and may said to have been in the nature of a trustee *de son tort*, if that expression may be borrowed from the case of an executor, and in that character she can only be answerable for the monies she actually received”.

- (3) In **Taylor v. Davies**,³³ Viscount Cave held that trustees *de son tort* are actual trustees, describing such persons as follows:³⁴

“though not originally trustees, [they] had taken upon themselves the custody and administration of property on behalf of others; and though sometimes referred to as constructive trustees, they were, in fact, actual trustees, though not so named.”

- (4) Likewise, in **Paragon Finance Plc. v. D B Thakerar & Co**,³⁵ Millett LJ (as he then was) held that a constructive trustee in the first category is ‘*really is a trustee*’ and such a trustee includes a trustee *de son tort*. In **Jasmine Trustees Ltd v. Wells & Hind**,³⁶ Mann J affirmed, by reference to that *dictum*, that insofar as the trustee *de son tort* has property which he holds in his own name, he ‘really is a trustee’. Similarly, in **Dubai Aluminium Co Ltd. v. Salaam**³⁷ at [138], Lord Millett held that trustees *de son tort* should be characterised as ‘*de facto* trustees’:

“[...] Substituting dog Latin for bastard French, we would do better today to describe such persons as *de facto* trustees. In their relations with the beneficiaries they are treated in every respect as if they had been duly appointed. **They are true trustees** and are fully subject to fiduciary obligations. Their liability is strict; it does not depend on dishonesty”. (Emphasis added.)

- (5) In **Williams v. Central Bank of Nigeria**³⁸ at [9], Lord Sumption JSC explained the distinction between the two categories of constructive trustee in these terms:

“... The first comprises persons who have lawfully assumed fiduciary obligations in relation to trust property, but without a formal appointment. They may be trustees *de son tort*, who without having been properly appointed, assume to act in the administration of the trusts as if they had been; or trustees under trusts implied from

³³ [1920] AC 636, 651.

³⁴ As quoted with approval by Lord Millett in **Dubai Aluminium Co Ltd. v. Salaam** [2002] UKHL 48, [2003] 2 AC 366 at [138].

³⁵ [1999] 1 All ER 400, 408-409 (CA).

³⁶ [2007] EWHC 38 (Ch), [2008] Ch 194 at [42].

³⁷ [2002] UKHL 48, [2003] 2 AC 366.

³⁸ [2014] UKSC 10, [2014] AC 1189.

the common intention to be inferred from the conduct of the parties, but never formally created as such. These people can conveniently be called *de facto* trustees. They intended to act as trustees, if only as a matter of objective construction of their acts. They are true trustees, and if the assets are not applied in accordance with the trust, equity will enforce the obligations that they have assumed by virtue of their status exactly as if they had been appointed by deed. [...] In its second meaning, the phrase “constructive trustee” refers to something else. It comprises persons who never assumed and never intended to assume the status of a trustee, whether formally or informally, but have exposed themselves to equitable remedies by virtue of their participation in the unlawful misapplication of trust assets. Either they have dishonestly assisted in a misapplication of the funds by the trustee, or they have received trust assets knowing that the transfer to them was a breach of trust. In either case, they may be required by equity to account as if they were trustees or fiduciaries, although they are not. These can conveniently be called cases of ancillary liability. The intervention of equity in such cases does not reflect any pre-existing obligation but comes about solely because of the misapplication of the assets. It is purely remedial.” [emphasis added].

- (6) As **Lewin** also explains (§8-011): In the first category, the court vindicates the relief granted by reference to a pre-existing trust or fiduciary relationship. Thus:

“Constructive trusts of the first kind arise where a person has accepted or assumed the role of a trustee by transactions not impeached by the claimant, independently of, and preceding, any breach of duty. Such a constructive trustee really is a trustee.”

Thus, a trustee *de son tort* is a ‘true trustee’: Ibid, §8-017. He or she does not claim the trust property beneficially but rather is ‘a fiduciary with control of the property of another, though not necessarily its title, and is subject to the same obligations as an ordinary express, rather than constructive, trustee’: Ibid, §8-016. This is to be contrasted with a constructive trust of the second kind, where the expression ‘constructive trust’ is no more than a formula for equitable relief: see eg, **Selangor United Rubber Estates Ltd v. Cradock (No.3)**³⁹ at 1582, per Ungood-Thomas J.

- (7) The trustee *de son tort* doctrine thus takes as its starting point the existence of a real role – that is, the role of trustee in respect of a valid and effective trust, with real beneficiaries. The trustee *de son tort* cases either involve:

³⁹ [1968] 1 WLR 1555.

- (a) The situation where there has been an invalid appointment as trustee over a genuine trust (**Pearce v Pearce** being a typical example); or
- (b) Agents or others connected with a genuine trust purporting to act as trustees or otherwise intermeddling when, in fact, they held no such position (see, eg, **Blyth v. Fladgate**,⁴⁰ where a trustee put some bills under the control of a firm of solicitors, the trustee died and before substitute trustees were appointed, the solicitors sold the bills and invested the proceeds in a mortgage. The solicitors were held to have become constructive trustees by dealing with the trust property then within their control).⁴¹

[132] Estera contends that the logic of the doctrine is therefore that there has been a consent to act as a trustee of an actual trust or that the person has ‘taken it upon themselves’ to act as a trustee for persons who are actual beneficiaries.

[133] That analysis, says Estera, also fits with a fundamental principle of the law of fiduciaries, that a fiduciary relationship is a voluntary relationship, arising where someone undertakes to act in the interests of another or places themselves in a position where they are obliged by equity to act in the interests of another. As Sir Peter Millett, writing extra-judicially, said in ‘Restitution and Constructive Trusts’:⁴²

“If the trustee is to be treated as a fiduciary this must be because he has knowingly subjected himself to fiduciary obligations. These are not created by the separation of the legal and equitable titles, though they may be created by the same circumstances which gave rise to the separation. But where the only relationship between the parties, who may not even know of each other’s existence, is that one holds the legal title and the other is the equitable owner, there can be no fiduciary relationship.”

[134] Estera submitted that the trustee *de son tort* doctrine imposes fiduciary duties, and thus it should only do so in a way that is consistent with what has voluntarily been taken on. It argued that if what

⁴⁰ [1891] 1 Ch 337.

⁴¹ Also see the discussion in *Dubai Aluminium* at [132]-[138].

⁴² LQR 1998 114 (Jul) 399-418.

has voluntarily been taken on is, on analysis, illusory (because it is a role within a fabricated structure with no legal effect) then there can be no duties imposed by the doctrine.

- [135] Estera argued that this approach is consistent with that adopted in the case of an executor *de son tort*. One cannot be such an executor if the person whose estate one purports to represent is still alive. As Master Matthews held in **Haastrup v. Okorie**:⁴³

“... it is of the essence of the doctrine of executor *de son tort* that the deceased must already have died by the time of the acts complained of. If A purports to act as B's personal representative at a time when B is still alive, A may (depending on the circumstances) engage liability to B, but absent special circumstances A engages none to those who would inherit from B on B's death. This is because you cannot inherit anything from a living person: *nemo est haeres viventis*. Thus acts alleged to have been done by A during B's lifetime cannot constitute A an executor *de son tort*, even if it were alleged that A (even mistakenly) intended at the time to assume that responsibility”.

- [136] Estera extrapolated that just as the ‘heirs’ of a living person can have no interest and that consequently there can be no executor *de son tort*, so too there can be no beneficiaries of a fake trust and no trustee *de son tort* can exist who owes duties to them.

- [137] Estera urged that the requirement of an actual trust relationship for the purposes of a trustee *de son tort* claim was recently endorsed by the ECSC Court of Appeal in **Dinning v Hope-Ross**⁴⁴ at [39], holding that:

“... in the absence of any express pleaded trust relationship, there can also be no sustainable argument that the respondents were trustees *de son tort* – that is constructive trustees by virtue of intermeddling with trust property as defined by Lord Neuberger in *Williams v Central Bank of Nigeria*”.

- [138] Estera observed that in the English High Court case of **High Commissioner for Pakistan in the United Kingdom v. Prince Muffakham Jah**,⁴⁵ Marcus Smith J held that a person was a trustee *de son tort*, even though he also rejected the contention that the funds were held on express trust. However, there does not appear from the report of that case to have been any argument on the point as to whether a person could be a trustee *de son tort* absent such a trust and nor does the Judge address in his judgment the relevant authorities (such as those cited above). Rather, the Judge

⁴³ [2016] EWHC 12 at [80].

⁴⁴ AXAHC VAP 2020/0005 & 0006 (unreported, delivered 30th April 2021)(Farara JA (Ag)).

⁴⁵ [2019] EWHC 2551 (Ch), [2020] Ch 421 at [251].

appears there to have accepted counsel's submissions, which Estera submitted were wrong in this regard.

[139] As regards the fifth feature (strict liability), Estera observed that it is spelt out by Lord Millett in his *dictum* in **Dubai Aluminium** at paragraph 131(4). It follows from:

- (1) The fact that they are actual (or *de facto*) trustees (and not constructive trustees in the second category). Therefore, the touchstone of their liability is the same as that of an express trustee; and
- (2) The principle that a person who assumes an office not to be in any better position than if he were what he pretends. He has the same duties as a true trustee and is accountable as if he had the authority which has been assumed: see **Lewin**, (20th ed, 2020), §42-101.

[140] Estera says the analogy here with the concept of *de facto* directors is obvious. The doctrine is concerned with the imposition of personal liability on a person where there is a role which they have taken on, in practical terms, without having been *de jure* appointed. Where someone conducts themselves in that way, and thus voluntarily takes on the responsibilities of the relevant role, they will not be heard to say that they did not owe the duties of that role to the relevant principal by virtue of not having been duly appointed in law to the relevant role.

[141] As regards the sixth feature (i.e., a trustee *de son tort* is only liable in respect of trust property he has received), Estera submits:

- (1) The accountability of a trustee *de son tort* is limited to property which he has received. In general, receipt means the acquisition of legal ownership or the right to obtain legal ownership, and lesser forms of control are insufficient: see **Lewin**, §42-103; the passage from **Thomas & Hudson** set out in §129 above; and **Pearce v. Pearce**. Those are the only assets in respect of which they have voluntarily assumed such responsibility as to enable fiduciary doctrine to apply.
- (2) Even where the trustee *de son tort* doctrine applies and a valid trust exists with beneficiaries to whom duties are owed, it does not result in the trustee *de son tort* actually having the powers granted to express trustees under the relevant trust instrument. Although he is a trustee of the trust property, he is not a trustee of the settlement and accordingly does not

(in the absence of express provision in the trust instrument) have the powers conferred by the settlement on a trustee of the settlement: see **Jasmine Trustees v. Wells & Hind**⁴⁶ and **Lewin** at §42-106.

(3) As Mann J held in the **Jasmine Trustees** case at [42] (and see also [56]):

“The status of a trustee *de son tort* is limited. He will be liable for breach of trust much as a properly appointed trustee would be but the doctrine is more about liabilities than anything else. The trustee *de son tort* will be obliged to hold the property for, and to account to, the beneficiaries, but on the other side of the coin will not have the powers of the trustee conferred by the settlement [...] It would be contrary to principle to allow such a person to arrogate powers to himself by virtue of his “intermeddling”, even if that intermeddling is innocent.”

[142] Estera says that to the six features of the doctrine identified above, the following further ones may be added.

[143] Seventh, as a matter of English law, a trustee *de son tort* comes within the scope of section 61 of the United Kingdom Trustee Act 1925, which provides the power to relieve a trustee from personal liability; see **Lewin**, §42-107. That passage reads as follows:

“Relief from liability

We consider that a trustee *de son tort* comes within the scope of section 61 of the Trustee Act 1925, and that may assist him where he acts on an invalid appointment or the like, reasonably believing that he was validly appointed in the first place and hence that appointments made by him would be valid. It is doubtful, however, whether a trustee exemption clause in a trust instrument in favour of a ‘trustee’ would be construed so as to cover a trustee *de son tort*.”

[144] Section 61 of the United Kingdom Trustee Act 1925 provides:

“If it appears to the court that a trustee, whether appointed by the court or otherwise, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the commencement of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which he committed such breach, then the court may relieve him either wholly or partly from personal liability for the same.”

⁴⁶ [2007] EWHC 38 (Ch), [2008] Ch. 194 at paragraphs [42]-[43] (Mann J.).

[145] The equivalent provision under BVI law is section 63 of the Trustee Act 1961 and is in identical terms. Estera contends that the same approach ought therefore to apply under BVI law.

[146] Finally, says Estera, if a trustee *de son tort* has acted in good faith, believing himself to have been duly appointed, he is entitled to indemnity for costs and expenses as if he were a duly appointed trustee: see **Travis v. Illingworth** ⁴⁷ and **Lewin**, §§42-101, 19-038.

[147] Estera argues on the basis of its analysis summarized above that the Claimants' trustee *de son tort* claims are misconceived. First, this is because:

- (1) As mentioned, a person can only be liable as a trustee *de son tort* in respect of a role he or she voluntarily assumed. The only role that Estera voluntarily took on was that of trustee to the R&S Trust;
- (2) The trustee *de son tort* doctrine requires that there be a *genuine* trust, in respect of which the trustee *de son tort* is an actual trustee; and
- (3) Yet, all of the Claimants' trustee *de son tort* claims are premised on the R&S Trust instrument being a fabrication or a sham and there being no such trust. Estera cannot have been an *actual trustee* in respect of an illusory or non-existent trust.

[148] Estera submits that this reasoning disposes of the Claimants' trustee *de son tort* claims in their entirety.

[149] Estera argues that it makes no difference to refer to Estera owing 'fiduciary duties'. This is because:

- (1) As **Underhill and Hayton: Law of Trusts and Trustees** (20th edn., Lexis Nexis 2022) explains at 29.2, the term 'fiduciary duty' is commonly used in two different overlapping senses. Often it is used to mean 'a duty to avoid conflict of interest that is owed by one who

⁴⁷ [1868] WN 206.

has undertaken to act for another and in whom trust and confidence have been reposed'. The other is 'a duty owed by trustee or analogous to a trustee'.

- (2) In this case, the Claimants make no allegation in the first sense of fiduciary duty (at least now they have abandoned their allegation that Estera dishonestly assisted Messrs Lagur and Ivakhiv to the detriment of Roman and Sofiia). The use of 'fiduciary duty' here is only in the second category (ie, referring to a duty owed by an alleged trustee). This then begs the same question – which is whether Estera is a trustee *de son tort* or not.
- (3) Moreover, says Estera, those trustee *de son tort* claims could not be rescued or resurrected by the Claimants instead seeking to re-characterise them as a constructive trust claim, involving Estera's conscience being affected. This is for several reasons:
 - i. A trustee *de son tort* claim is a constructive trust claim but it is in the first category of constructive claim as described above (thus requiring the *prior* existence of a trust and the receipt of trust property). The premise of the Claimants' claim is that there is no such trust.
 - ii. Moreover, in each of these three claims, the Claimants' case is that Estera is a trustee *de son tort* and its liability as a constructive trustee is as such a trustee *de son tort*. Thus, they have pleaded claims only in the first category of constructive trust and not the second.
 - iii. The Claimants cannot advance any new claim in the second category of constructive trust claim. A claimant may not rely without permission (or consent) on any allegation or factual argument not set out in the claim: see CPR 8.8. A claimant certainly cannot be permitted to advance an unpleaded claim in fraud or dishonesty – which is what a claim in the second category would amount to. Any allegation of dishonesty must be distinctly alleged

and as distinctly proved and must be sufficiently particularised: see, e.g., **Three Rivers**⁴⁸ at [184]-[186] per Lord Millett.

- iv. In any event, the Claimants have (rightly but belatedly) abandoned any allegation that Estera acted dishonestly. The trustee *de son tort* claims are essentially claims for alleged negligent breach of trust.
- v. Further, and also in any event, there would be no proper evidential basis for seeking permission to advance a claim in the second category of constructive trust (which doubtless explains why the Claimants abandoned their original allegations of dishonesty against Estera in the first place). The evidence is that Estera was unaware of any issue over the validity of the R&S Trust until 27th March 2017. That evidence is unchallenged.

[150] Estera argued that all the trustee *de son tort* claims made by the First Claimant (Mrs. Ieremeieva) are misconceived. This is likewise because Estera could owe no duties to Mrs. Ieremeieva - since she is not a beneficiary of that purported trust.

[151] Additionally, argued Estera, none of the trustee *de son tort* claims are concerned with steps taken with assets under the control of Estera. The 'VISTA Conversion Claim' is concerned with the exercise of a power of amendment. The 'Rights Waiver Claim' is concerned with rights held by companies within the trust, but not with any rights vested in the trust. The 'Failure to Inform Claim' is concerned with a purported failure to contact Mrs. Ieremeieva or Roman. For this additional reason the trustee *de son tort* doctrine cannot assist the Claimants and all the claims in relation to it should be struck out.

[152] Estera argued a plethora of other points, which are not necessary for me to address here.

6.1 Trustee *de son tort*: Discussion

[153] A number of preliminary points ought to be stated.

⁴⁸ *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1.

- [154] I remind myself that the present applications concern strike-out or summary judgment. Although the parties are in agreement that the fundamental facts are not in dispute and are not likely to change through further disclosure and further evidence by the time the claim as a whole comes to trial, this is not a trial – mini or plenary – of preliminary issues.
- [155] This is important to keep in mind, because, in the context of a strike-out application, ‘[s]triking out is a draconian step or ‘nuclear option’ and ought only to be deployed sparingly, in the clearest of cases’: **Hope-Ross v. Dinning**.⁴⁹
- [156] In the context of a summary judgment application, it is also important to keep in mind the guidance in **EasyAir Ltd v. Opal Telecom Ltd**,⁵⁰ that where a summary judgment application gives rise to a ‘short point of law or construction’, the court can and in principle should, if all the material evidence is available, ‘grasp the nettle and decide it’.
- [157] In the context of a strikeout application, CPR 26.3(1)(b)⁵¹ enables the Court, in its case management discretion, to strike out a statement of case or part of a statement of case if it appears to the Court that the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending the claim.
- [158] This entails that the Court has to have regard to what a party has pleaded.
- [159] The Claimants explained in their Response to Estera’s RFI, that their case is that Estera is liable as a trustee *de son tort* and that such liability is in the nature of a constructive trust (per Response 11). At Responses 12-14 the Claimants explained that Estera’s liability as constructive trustee arose through it constituting itself as a trustee *de son tort*.
- [160] The Claimants explained at Response 8 that their case is that at the time of the amendment deed (i.e. 31st May 2016) the assets which had purportedly been settled upon trust pursuant to the R & S Trust had been held on a constructive trust.
- [161] The Claimants explained at Responses 9, 10, (a) that that constructive trust arose because ‘Mr Lagur constituted himself as trustee *de son tort* and/or as constructive trustee when he purported to act as trustee of the Trust and to assume the office of trustee in respect of the Trust Fund’. The Claimants

⁴⁹ AXAHC VAP 2020/0005 & 0006 (unreported, delivered 30th April 2021) at paragraph [21] (Farara JA (Ag)).

⁵⁰ [2009] EWHC 339 (Ch) at paragraph [15] (Lewison J).

⁵¹ The provision is identical in both the 2000 and 2023 editions of the CPR.

asserted in the same response, by way of the next sentence that '[t]he relevant trust was a constructive trust.'

- [162] The Claimants explained, at Response 9, 10, (b) and (c) that Estera had taken various steps in preparation for assuming office as trustee prior to its execution of the DORA on 31st May 2016, and then on that date Estera did so by entering into the DORA. The Claimants explained at 9, 10, (d) that Estera 'thereby constituted itself a trustee *de son tort* and/or constructive trustee'.
- [163] This pleaded case raises an issue of law. The issue is whether these factual pleaded circumstances satisfy legal requirements to render Estera a trustee *de son tort*.
- [164] This is a discrete point of law.
- [165] If the Claimants can show that they have a reasonably arguable case that the legal requirements are satisfied, then the appropriate direction from the Court would be to allow this part of the Claimants' case proceed to trial.
- [166] If the Claimants do not show that they have such a reasonably arguable case, then this part of Claimants' pleaded case (that Estera is liable to the Claimants as that kind of constructive trustee, a trustee *de son tort*), is able, in the Court's discretion, to be struck out (unless there are other reasons for not doing so).
- [167] In principle, the Court's present task is to identify what the legal requirements for a trusteeship *de son tort* are and to apply them to the very short and indeed (for the purposes of the strike out application) undisputed facts as presented by the Claimants.
- [168] From a review of the authorities and practitioners' texts as presented by the parties, the essence of the concept of a trustee *de son tort* appears to be well settled, such that it could not, with accuracy, be described as a developing area of law. Peripheral concepts, such as knowing receipt and dishonest assistance, are considerably more controversial. The Court is not being asked to rule on such matters here.
- [169] The application of the concept of trusteeship *de son tort*, i.e., whether a given set of facts falls within it, is also more controversial. More specifically, there is room for argument over whether trusteeship *de son tort* requires there to be an underlying valid trust. A number of high-ranking authorities, such as **Paragon Finance** (EWCA) and **Williams v Central Bank of Nigeria** (UKSC), can be read as at

least assuming there should be an underlying valid trust. In **Jah**, the English High Court found a trusteeship *de son tort* apparently without an underlying valid trust.

[170] In theory, this is a ‘short’ point of law, and so I will endeavor to rule on it now.

[171] Having summarized the essential starting line and factual parameters of the issue, namely the Claimants’ pleaded case, it is here apt to observe that Estera contends that it has a knock-out point. Estera contends that this part of the Claimants’ case must fail because the legal requirements for a trusteeship *de son tort* include the need for there to exist a real role of trustee in respect of a valid and effective trust, with real beneficiaries, and, if the R & S Trust was invalid, there was no such valid and effective trust here. Estera referred to such a valid and effective trust as an ‘express trust’.

[172] The Court must therefore decide to what extent, if at all, Estera is right about this, and if Estera is not, where this leaves the Claimants’ case that Estera was a trustee *de son tort*.

[173] Estera takes as the starting point for its analysis a decision of our Court of Appeal, **Hope-Ross v. Dinning**,⁵² whence Estera also appears to have taken its reference to the requirement for there to be an ‘express’ trust. The Court of Appeal there stated:

“... in the absence of any express pleaded trust relationship, there can also be no sustainable argument that the respondents were trustees *de son tort* – that is constructive trustees by virtue of intermeddling with trust property as defined by Lord Neuberger in **Williams v Central Bank of Nigeria**”.

[174] Lord Neuberger was the President of the United Kingdom Supreme Court.

[175] It is, of course, trite that this Court is bound by decisions of our Court of Appeal. One would immediately think that this therefore lays down a legal requirement for there to be an ‘express pleaded trust relationship’ for a trusteeship *de son tort* to arise.

[176] There are, however, several factors which suggest, and strongly so, that the Court of Appeal was not laying down such a rule.

[177] The first is that the Court of Appeal offered no analysis, nor set of ingredients, for what constitutes a trustee *de son tort*.

⁵² AXAHCVP 2020/0005 & 0006 (unreported, delivered 30th April 2021) at paragraph [39] (Farara JA (Ag)).

- [178] Secondly, it is not immediately understandable which passage(s) of Lord Neuberger's judgment in **Williams v Central Bank of Nigeria** was/were being referred to. This is for two reasons: (a) the learned Justice of Appeal did not include in his judgment the paragraph number of Lord Neuberger's judgment he had in mind; and (b) Lord Neuberger did not, in fact, offer a definition of a trustee *de son tort* which included a requirement for an 'express pleaded trust relationship'.
- [179] Thirdly, in **Hope-Ross v Dinning**, it did not matter that our Court of Appeal dealt with such brevity the concept of trustee *de son tort*, because in that case there was nothing on the facts that took the bank in question outside the normal contractual regime that generally obtains between a bank and its customer.
- [180] Fourthly, in **Hope-Ross v Dinning**, our Court of Appeal was doing no more than applying what it perceived to be principles propounded by Lord Neuberger in **Williams v Central Bank**. It would thus be wrong to see **Hope-Ross v Dinning** as somehow going further than Lord Neuberger had gone in **Williams v Central Bank**. The Court of Appeal's reference to an 'express' trust must be taken as using the term 'express' as meaning the type of trust Lord Neuberger had in mind in **Williams v Central Bank**, and not something else.
- [181] This of course begs the question, what Lord Neuberger did say about trustees *de son tort* there.
- [182] In short, of present relevance, Lord Neuberger, at paragraph 54 of his judgment, adopted the definition of a trustee *de son tort* used by **Lewin**, 18th ed (2008), para 42-74:
- "If a person by mistake or otherwise assumes the character of trustee when it does not really belong to him, he becomes a trustee *de son tort* and he may be called to account by the beneficiaries for the money he has received under the colour of the trust. A trustee *de son tort* closely resembles an express trustee. The principle is that a person who assumes an office ought not to be in any better position than if he were what he pretends: he is accountable as if he had the authority which has been assumed."
- [183] There is nothing explicit here speaking to a requirement for there to be an 'express pleaded trust relationship'.
- [184] Lord Neuberger was not alone in addressing trusteeship *de son tort* in **Williams v Central Bank**. Lord Sumption, who gave the leading judgment of the United Kingdom Supreme Court, at paragraph 9, included trustees *de son tort* in a class which also comprises 'persons who have lawfully assumed fiduciary obligations in relation to trust property, but without formal appointment' and 'trustees under

trusts implied from the common intention to be inferred from the conduct of the parties, but never formally created as such'. He described trustees *de son tort* as persons who 'assume to act in the administration of the trusts as if they had been' formally appointed. These three groups of persons within the same class he described further as '*de facto* trustees' and by saying '[t]hey intended to act as trustees, and if the assets are not applied in accordance with the trust, equity will enforce the obligations that they have assumed by virtue of their status exactly as if they had been appointed by deed.'

[185] Lord Sumption distinguished this type of constructive trusteeship from the purely remedial constructive trusteeship imposed by equity on a wrongdoer. He completed his paragraph 9 by adopting a *dictum* of Millett LJ in **Paragon Finance**: 'it is "the distinction between an institutional trust and a remedial formula – between a trust and a catch-phrase".'

[186] In **Williams v Central Bank**, Lord Hughes concurred with the judgment of both Lord Neuberger and Lord Sumption (who agreed with each other's judgments also).

[187] What we thus see here, at least in the judgment of Lord Sumption, is reference to a trustee *de son tort* being a type of 'institutional trust' (in contradistinction to a label for equitable relief which is not in reality a trust).

[188] Since Lord Neuberger referred to and adopted a short passage from **Lewin**, it is apt that we look at that pre-eminent practitioner's textbook to understand the passage in its wider context, as treated there.

[189] The passage in **Lewin** quoted by Lord Neuberger is to be found in the 2020, 20th edition in the same wording at paragraph 42-101. The only difference is that in this later edition, the sentence 'A trustee *de son tort* closely resembles an express trustee' is finished with this added: 'and is a constructive trustee of the first kind in the classification of constructive trusts we have given earlier in this work (see paragraphs 8-010 et seq.)'. This is a merely organizational, logistic addition to point the reader to an earlier chapter and not an addition of substance.

[190] Turning to chapter 8, we read in its introductory paragraph (8-001) the following:

"This chapter is concerned in general terms with the creation of trusts by operation of law, which we have briefly described in Chapter 1 as trusts which are not express trusts and consist of resulting, implied and constructive trusts."

[191] At 8-011, the learned editors of **Lewin** identified the existence of two classes of constructive trust. They introduced this classification as follows:

“A distinction must be drawn between the constructive trust which arises by operation of law, and the imposition by the court of the liability to “account as constructive trustee” by way of remedy. In the former case, the court vindicates the relief granted by reference to a pre-existing trust or other fiduciary relationship. Such constructive trusts are often called institutional trusts, arising from some pre-existing fiduciary relationship before and apart from any breach of trust or of duty. Lord Browne-Wilkinson has put it thus: (*Westdeutsche Landesbank Girozentrale v Islington L.B.C.*, [1996] AC 669] at 714-715, HL. See too *Re Polly Peck International (No. 5)* [1998] 3 All ER 812 at 823 -827, CA.)

“Under an institutional constructive trust, the trust arises by operation of law as from the date of the circumstances which give rise to it: the function of the court is merely to declare that such trust has arisen in the past. The consequences that flow from such trust having arisen (including the possibly unfair consequences to third parties who in the interim have received the trust property) are also determined by rules of law, not under a discretion.”

In such a case, the defendant is a trustee in the sense that equity treats him as holding the property concerned on trust for the claimant, and the defendant is not necessarily treated like an express trustee for the plaintiff in other ways. Constructive trusts of the first kind arise where persons have accepted or assumed the role of a trustee by transactions not impeached by the claimant, independently of, and preceding, any breach of duty. Such a constructive trustee really is a trustee. He does not receive the trust property in his own right, but by a transaction which was intended to create a trust from the start. The trustees’ possession of the property is coloured from the first by the trust and confidence by means of which he obtained it, and any subsequent appropriation of the property to his own use is a breach of that trust. (*Paragon Finance plc v D. B. Thakerar & Co.* [1999] 1 All ER 400 at 409B-C CA; *Williams v Central Bank of Nigeria* [2014] UKSC 10; [2014] 2 WLR 355 at [9]-[11], [55]; *High Commissioner for Pakistan in the United Kingdom v Prince Muffakham Jah* [2019] EWHC 2551 (Ch) at [249].)”

[192] The learned editors then went on to describe constructive trusts of the second kind, at paragraph 8-012. They explained that these ‘constructive trusts’ are a ‘personal remedy’ (with reference to **Paragon Finance plc v D. B. Thakerar & Co.** at 409.) They explained:

“The defendant is, perhaps misleadingly, said to be compelled to “account as constructive trustee”, but this only means that the defendant must account as if he were, or in the same manner as, a trustee, which he is not in any sense. (*Williams v Central Bank of Nigeria*, above, at [74]-[80].) The expression “constructive trustee” here is nothing more than a formula for equitable relief. (*Selangor United Rubber Estates Ltd v Cradock (No.3)* [1968] 1 WLR 1555 at 1582, per Ungood-Thomas J.)”

- [193] It can be seen that the learned editors of **Lewin** updated previous editions of their work to include these references to **Williams v Central Bank of Nigeria**.
- [194] Paragraph 8-016 explains that there are also two categories of institutional trusts – trusteeships *de son tort* and ‘those where the trustee is a quasi trustee’. Paragraph 8-018 explains that ‘quasi trustees’ include company directors or other fiduciaries with possession or control of property for someone else, but not being true trustees because property is not vested in them.
- [195] It is apparent that in **Paragon Finance, Williams v Central Bank of Nigeria** and in other cases (such as **Jah**), the English courts have quoted parts of these explanations included in **Lewin**’s summation of the law in this area. I have quoted the whole passage(s), so far as relevant, so that one can have a more complete overview of the overall treatment.
- [196] What we thus see from the taxonomy of ‘constructive trusts’ adopted by **Lewin**, is that:
- (1) A trusteeship *de son tort* is not an express trusteeship but one that arises by operation of law;
 - (2) Trusts that arise by operation of law include constructive trusts;
 - (3) Constructive trusts are of two kinds – ‘institutional trusts’ and ‘a formula for equitable relief’;
 - (4) In the case of ‘institutional trusts’, relief is granted by reference to a pre-existing trust or other fiduciary relationship;
 - (5) Trusteeships *de son tort* are a kind of institutional trust.
- [197] Seen in light of this overview, it can be readily appreciated that the definition of a trustee *de son tort* as quoted by Lord Neuberger cannot be taken as a free-standing, complete definition.
- [198] The first part of that definition is that:
- “If a person by mistake or otherwise assumes the character of trustee when it does not really belong to him, he becomes a trustee *de son tort* and he may be called to account by the beneficiaries for the money he has received under the colour of the trust.”
- [199] To this must be added that the relief (of calling him to account) is granted ‘by reference to a pre-existing trust or other fiduciary relationship’ and moreover, that he must ‘have accepted or assumed the role of a trustee by transactions not impeached by the claimant, independently of, and preceding, any breach of duty’. These three elements, as summarized in this and the preceding paragraph, are the constituent parts of a trustee *de son tort*.

[200] Considered against these requirements, and in respect of Estera's submission that there has to be an underlying express trust, it can be seen that for a trusteeship *de son tort* to arise, there is no requirement for there to be or have been an 'express' trust, if by that expression is meant a formally created trust. The requirements are more general than this. They require there to have been some pre-existing trust or other fiduciary relationship.

[201] Having related the requirements, it can immediately be seen that the Claimants' pleaded case falls short of satisfying them. In particular:

- (1) If the R & S Trust is invalid, the Claimants plead no other trust or other fiduciary relationship that pre-existed Estera's assuming the office of trustee. The Claimants plead that Estera took various steps which constituted Estera as a trustee *de son tort*. But this itself is not enough: there also has to be some pre-existing trust or other fiduciary relationship.
- (2) The Claimants assert that there was a pre-existing trust, in the shape of a constructive trust, because 'Mr Lagur constituted himself as trustee *de son tort* and/or as constructive trustee when he purported to act as trustee of the Trust and to assume the office of trustee in respect of the Trust Fund'. There are a number of fatal problems with this contention. As we have seen, for Mr. Lagur to have been a trustee *de son tort*, there would have to have been a pre-existing trust or fiduciary relationship. The Claimants have not pleaded any, and moreover, on the facts presented by the Claimants, such pre-existing trust or fiduciary relationship could not have been the R & S Trust if it had been invalid as a forgery or as a sham. Furthermore, the Claimants impeach the transactions by which Mr. Lagur purportedly assumed the trusteeship of the R & S Trust as tainted by fraud or its creation as a sham trust. Mr. Lagur therefore does not satisfy the requirements for a trustee *de son tort*. His 'constructive trusteeship' fares no better. On the facts as pleaded by the Claimants, if Mr. Lagur was not a trustee *de son tort* (and it is clear that he cannot have been), then his 'constructive trusteeship' must have been of the second kind, i.e. 'nothing more than a formula for equitable relief', 'imposed where no fiduciary relationship previously existed', and not as a trustee, 'which he is not in any sense' (Cf: **Lewin**, 7-012, and the authorities cited there). Thus, it is pellucid that equity's treatment of Mr. Lagur does not amount to the existence of a pre-existing trust or fiduciary relationship, leaving the Claimants with no such

trust or fiduciary relationship to rely upon for the constitution of Estera as a trustee *de son tort*.

- (3) The Claimants must also show that Estera 'accepted or assumed the role of a trustee by transactions not impeached by the claimant, independently of, and preceding, any breach of duty'. Fatally for the Claimants, they cannot. This is because the Claimants impeach the very basis for Estera's purported trusteeship, namely the validity of the R & S Trust as a fraudulent forgery or as a sham.

[202] Putting a finger on the pulse of the Claimants' error, it is that the Claimants failed to appreciate the difference between 'constructive trusts' of the 'first kind' and 'constructive trusts' of the second kind. The authorities are clear that where there is no formally created underlying trust, then, for a trust *de son tort* to arise, there has to be a 'constructive trust' of the 'first kind' (or some other fiduciary relationship) and the existence of a 'constructive trust' of the 'second kind' will not do, because the latter is not a real trust.

[203] A question arises, what then of the Claimants' argument that in **Jah**, the English High Court found a trusteeship *de son tort* without the existence of a 'constructive trust' of the 'first kind'? A number of observations can be made, including the following:

- (1) **Jah** is a first instance decision, and for that reason it is less persuasive in this Court than decisions of the England and Wales Court of Appeal (e.g. **Paragon Finance**) and the United Kingdom Supreme Court (e.g. **Williams v Central Bank of Nigeria**);
- (2) **Jah** is an extremely long decision. Whilst this is testimony to the immense legal complexity pertaining to a single, small act done by flustered men in a hurry without legal advice, it is also understandable that the learned Judge devoted his analytical attention to other important issues needing to be decided. If (as it does) it takes much time and effort to read **Jah**, it would have taken far more to write it. Some brevity in places on certain points is thus readily understandable, particularly when these are covered a long way into the document. This said, it is correct to say that in relation to trustees *de son tort*, the learned Judge did not proffer a step-by-step analysis, nor one that made in-depth reference to caselaw authorities. It is thus impossible to see how he reached the conclusions he did on this point. He was at pains to explain that there was no pre-existing constructive trust, and no intention to create a formal trust, but somehow his conclusion emerged that there was a trustee *de son tort*,

from a general recounting of a swirl of factual circumstances and legal submissions. Thus, with the greatest respect to the learned Judge, with whose position I completely empathize, there is no discernible analysis that this Court could 'follow' here.

- (3) That said, the decision in **Jah** is consistent with the analysis propounded by **Lewin**. In the next section of the judgment, the learned Judge, at paragraphs 252 to 254, explained and found that there had been a 'resulting trust'. It is to be recalled, of course, that **Lewin** classified resulting trusts along with constructive trusts (of the 'first kind') as trusts arising by operation of law.⁵³ On that basis, in **Jah**, there was a pre-existing 'other fiduciary relationship', in the form of this resulting trust. The learned Judge did not, on *that* basis, make his finding that there was a trustee *de son tort*. But had he done so, and assuming he had been correct with his finding of a resulting trust, then the trustee *de son tort* in that case would have been supported and understandable. Thus, in a nutshell, in my respectful judgment, on the facts of **Jah**, the learned Judge had been right to find there was a trustee *de son tort*, but for a reason that he had not adverted to.

[204] The Claimants have no reasonably arguable case that Estera assumed liability as a trustee *de son tort* if the R & S Trust was invalid. I do not see how the shortcomings in this part of the Claimants' pleaded case could be remedied. Nor do I see any other reason why, nonetheless, this part of the Claimants claim should proceed to trial. It ought, and will, therefore be struck out.

[205] The striking out of these parts of the Claimants' statements of case thus renders the alternative application for summary judgment, and other arguments advanced by Estera in support of its strike-out application, otiose.

7. The Fees Claim

[206] The Claimants also make an independent claim that, if the Trust is a fabrication or a sham, Estera is liable to account for its fees.

[207] This is pleaded at paragraph 171 of the Claimants' Amended Statement of Claim as follows:

"Further and in any event, Estera is liable to account for the fees which it has wrongly charged to the Trust Fund and/or to reconstitute the Trust Fund in respect thereof".

⁵³ Lewin, 8-001.

[208] Estera contends that this claim too is baseless. Estera says that the starting point is that a trustee is entitled to an allowance for the work it has carried out in good faith in administering the assets. In this regard Estera relies upon the principle in **Re Berkeley Applegate**.⁵⁴ In any event, says Estera, the fees paid to Estera were never paid from the Trust Fund (rather, the payments were made from companies associated with the Continuum Group). Estera says it cannot be obliged to 'reconstitute' the Trust Fund with sums that fund never paid out.

[209] Subsequent to the first draft of this judgment being circulated to Counsel for their review, learned Counsel for Estera sought clarification of the Court's view on this latter point, which learned Counsel for Estera stressed was separate from the **Re Berkeley Applegate** issues. At a further hearing on 3rd June 2024, I directed the parties to file brief submissions summarizing their respective positions.

[210] Estera explained that its position is as follows:

- (1) Estera maintains that it can have no obligation to 'reconstitute' the Trust Fund with monies that the Trust Fund never paid.
- (2) In the hearing on 3rd June 2024, the Court raised (in summary) the issue of (i) whether the Trust Fund might have some implied restitutionary obligation, owed to the companies which paid the fees to Estera; and (ii) if so, whether Estera might in turn owe some obligation to the Trust Fund. However, this is not part of the Claimants' pleaded case. If it had been, then the Claimants would have had to explain on what legal basis and under what system of law it arose. It would also be necessary to address whether any of the paying companies had ever asserted any such claim against the Trust Fund.
- (3) This restitutionary case has not been addressed in the evidence before the Court on the Application; for the simple reason that it is not part of the Claimants' case.
- (4) Disposal of the summary judgment/strike out application on the Fees Claim is important to Estera since, if it were dismissed, Estera would no longer be party to the proceedings. This would also, in turn, affect whether Estera should be indemnified in advance for its costs of

⁵⁴ In re Berkeley Applegate (Investment Consultants) Ltd. (In Liquidation) Harris v Conway & Ors [1989] Ch 32 (Nugee J.).

providing any disclosure in respect of Claimants' claim against the Second and Third Defendants.

- (5) Accordingly, Estera respectfully invites the Court to deal with this matter in the following practical manner: the Court is invited to deliver judgment on the Application in the terms of the original draft judgment, save (a) to provide (in the original [211]) that Estera's application for strike out of/summary judgment on the Fees Claim (on the basis of the reconstitution point identified in the last two sentences of the original [208]) is not dismissed and Estera has liberty (if so advised) to restore it and file further evidence on that point (to which the Claimants would be entitled to file evidence in reply); (b) that the conclusion reached in the original [209]-[210] is subject to the foregoing; and (c) that the original [216] be updated accordingly.

[211] The Claimants' position is as follows:

- (1) The original draft judgment made it clear that the Court appreciated that the **Re Berkeley Applegate** issues were separate from the restitution issues, and that the Court had dealt with the restitutionary issues, thus no further clarification is required.
- (2) Insofar as it is said that the payment of money by companies within the Trust structure does not in law give rise to any obligation to reconstitute the Trust Fund:
 - a. Estera cited no authority for that proposition;
 - b. The proposition is not logical, in circumstances where the value of the Trust is precisely because of its holdings in subsidiaries.

Disputes over this proposition are not suitable for summary determination.

- (3) Issues of fact need to be explored at trial – including identifying the companies which made the payments and whether they were within the trust structure (as to which Estera has no pleaded case). Further, Estera makes it clear that it invoiced its fees to Yudelle, which is a company within the purported Trust. There would need to be consideration of whether any obligation arose between Yudelle (or another company within the purported Trust structure)

and the other companies. In other words, evidence is required to see if fees were ultimately borne by entities in the trust structure.

- (4) There are also issues of quantum in relation to payment from a company called Glenmore, a company within the Trust structure.
- (5) Although the overall amount of fees in question may be too small as to be significant in the overall scheme of the matter (approximately US\$74,000) serious issues for determination arise.

[212] I am satisfied that the Fees Claim is not suitable for strikeout or summary judgment. The legal and factual issues that go to the merits of this claim are, in my respectful judgment, too complex to be dealt with summarily. The Claimants' claim for repayment of fees cannot, or may not, be answered by a short point that because this Court has ruled against the Claimants on the '*ex tunc* point' and the 'trustee *de son tort* point' then there is no wrongdoing which can ground the claim for repayment of fees. Even if that argument is right, this does not necessarily mean that Estera (if the Court were to find that it was not a trustee of a valid trust) would automatically be entitled to the fees it has charged, or wishes to charge, in respect of its 'trusteeship'. Whilst Estera seeks to invoke the **Re Berkeley Applegate** principle, it is clear from that case that the Court's jurisdiction to require an allowance to be made for costs incurred by the putative officeholder, and for skill and labour expended, is a discretionary one. Questions the Court would have to determine, when exercising its discretion, include whether the work done had been of substantial benefit to the putative trust property and to the putative beneficiaries. These are issues of law and fact. The Court would also have to grapple with, and decide the relevance or otherwise, of the fact, on its face extraordinary for an independent professional trust company, that Estera did not reach out to the putative beneficiaries of the R & S Trust for some nine (9) months following its purported appointment. This at first sight extraordinary circumstance calls into question whether Estera was indeed acting in good faith when it did work for which it charged fees. There are also procedural issues whether Estera should be treated as having brought a crossclaim for the purposes of the **Re Berkeley Applegate** jurisdiction. There would be evidential issues concerning quantum, if any fees are allowable at all, and what, in the factual circumstances of this case, would a reasonable allowance be.

- [213] In relation to the restitution claim, I accept the Claimants' position. Estera's contention that payment of its fees from a company within the Trust structure, or from a company outside the Trust structure, does not constitute payment from the Trust gives rise to legal issues of principle. The Court has not been taken to any authority on these points. If there is no authority on the point, the Court would be faced with the difficult question of resolving whether Estera and the Claimants – or neither – are right. With respect to the arguments pressed by learned Counsel for Estera, it seems at first sight to be somewhat contrary to common sense to treat the Trust as legally and financially unaffected if a Trustee's fees are paid either from a company within the Trust structure, or by way of some kind of advancement from a person or entity outside the trust structure. These are questions which are complex and unsuitable for determination on a strikeout or summary judgment application. Estera are correct that the pleadings and evidence are currently scarce. But it is also correct that the parties have not yet filed witness statements for use at a trial that can fill out the pleadings.
- [214] Then there are issues of fact, including of quantum. Whilst I understand Estera's keen interest in ceasing to be involved further in this matter, these issues of law and fact are not suitable for determination in the context of a strikeout and/or summary judgment application.
- [215] I am also not enamoured of Estera's 'practical' suggestion of, in effect, leaving its strikeout/summary judgment application in abeyance with the possibility of filing further evidence. That drifts too close, in my respectful judgment, to the eventuality of a mini trial. Such a proposal seeds the field for the various facets of the fees claim to mushroom into a piece of satellite litigation, doing mere lip-service to its origins as a strikeout/summary judgment application. I remain of the view that trial is the appropriate forum in which these issues of law and fact should be argued over, with the benefit of document disclosure and production, and witness evidence, and resolved in a plenary trial setting.
- [216] It is over-ambitious for Estera to seek a summary determination of these legal and factual issues in the context of a strikeout and summary judgment application.
- [217] The Fees Claim should therefore go to trial.

8. The security for costs application

- [218] Lastly, in relation to the security for costs claim included in Estera's Amended Notice of Application which Estera stated it was not at that time pursuing in a letter dated 20th December 2022 and which

it has not sought to revive, I agree with the Claimants that that part of Estera's application should be dismissed. An applicant has no right to revive part of an application which it has chosen not to pursue when the rest of his application has been called on for hearing. There is a public interest in finality to litigation. It is also procedurally unfair to leave a respondent to an application without good reason *in terrorem* of a filed but deliberately not pursued application.

9. Disposition

[219] The Court finds that the Deed of Amendment is to be treated as having been set aside from the date Estera executed it (i.e. 31st May 2016), thus '*ex tunc*'.

[220] The Claimants have no reasonably arguable case that Estera assumed liability as a trustee de son tort if the R & S Trust is found to have been invalid. In the circumstances of this case, the Court will order that those parts of the Claimants' case founded on their contention that Estera assumed liability as a trustee de son tort be struck out.

[221] Estera's security for costs application will stand dismissed.

[222] The Claimants' 'Fees Claim' will be directed to be resolved at trial.

[223] The Court will, unless the parties can reach agreement, hear the parties further on:

- (1) Which parts of the Claimants' various statements of case are to be struck through;
- (2) Costs;
- (3) Further case management directions;
- (4) The precise terms of the order upon judgment;
- (5) Any other consequential matters.

[224] I take this opportunity to thank the parties' legal representatives for their assistance in relation to this matter.

Gerhard Wallbank
High Court Judge

By the Court

Registrar