

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2024/0017

BETWEEN:

[1] **TETIANA IEREMEIEVA**

[2] **ROMAN YEREMEIEV**

Appellants

and

[1] **ESTERA CORPORATE SERVICES (BVI) LIMITED**

Respondent

[2] **SERGII LAGUR**

[3] **STEPHAN IVAKHIV**

[4] **SOFIIA YEREMEIEVA**

Second to Fourth Defendants

Before:

The Hon. Mde. Vicki-Ann Ellis

Justice of Appeal

The Hon. Mr. Eddy Ventose

Justice of Appeal

The Hon. Mde. Esco L. Henry

Justice of Appeal

Appearances:

Ms. Hannah Ilett with Ms. Jennifer Jenkins and Ms. Sophie Christodoulou for the Appellants

Mr. Robert Weekes KC with him Mr. James Walmsley, Ms. Claire Goldstein, and

Ms. Victoria Lissack for the Respondent

2024: December 10;

2026: February 12.

Interlocutory Appeal - Commercial Law – Rule 26.3(1)(b) of Civil Procedure Rules 2000 – Case management powers under rule 26.3 of Civil Procedure Rules 2000 – Striking out of statement of claim – Reasonable grounds for bringing the claim – Whether pleadings disclosed reasonable grounds for bringing claims – Trust – Constructive trust - Trustee de son tort – Sham trust - Impact of forged documents – Assumption of fiduciary responsibility – Institutional and remedial trust – Virgin Islands Special Trusts Act – Trust Deed set aside – Equitable mistake – Ex tunc effect – Exercise of judicial discretion – Whether the learned judge erred in law by concluding that the appellants’ statements of claim disclosed no reasonable grounds for bringing the claims against the respondent - Whether the learned judge was correct in his treatment of the ex tunc effect of the order setting aside the Deed of Amendment

This is an interlocutory appeal brought by the appellants, the widow, personal representatives and heirs of the late Mr Igor Ieremeieva ("Igor" or "the deceased"), against the decision of a judge of the Commercial Division in which he struck out all claims against the respondent in this appeal, Estera Corporate Services (BVI) Ltd ("Estera"), save for a claim for recovery of fees.

Igor was a Ukrainian businessman whose interests in a group of Cypriot and BVI companies known as the Continuum Group were said to be worth between US\$150 million and US\$200 million. Following Igor's death on 13th August 2015, the second and third defendants produced a trust instrument dated 21st August 2014 ("the R&S Trust"), under which Igor's children were named as beneficiaries and which purported to govern shares in fifteen companies (10 which are said to be incorporated in BVI and 5 in Cyprus).

On 23rd May 2016, Estera was appointed trustee of the R&S Trust by a Deed of Appointment and Replacement, and on the same day executed a deed amending the trust ("the Deed of Amendment") so as to bring it within the scope of the Virgin Islands Special Trusts Act, 2003 ("VISTA"). By order dated 2nd May 2018, Adderley J set aside the Deed of Amendment and directed Estera to remain neutral as to the validity of the R&S Trust.

The appellants commenced proceedings against Estera on alternative bases. The appellants alleged that the R&S Trust was a fabrication created after Igor's death or, a sham. If the R&S Trust was invalid, they alleged that Estera was liable as a trustee de son tort and for breach of fiduciary duty. If, on the other hand the R&S Trust was valid, they alleged breaches of fiduciary and statutory duties under VISTA.

Estera thereafter applied to strike out the appellants' claims against it ("the Strike Out Application"). In his judgment granting the Strike Out Application, the learned judge held that the trustee de son tort claims were misconceived in law on the basis that such liability could not arise in the absence of a valid trust or fiduciary relationship, and that the claims founded on VISTA were unsustainable because the Deed of Amendment had been set aside *ex tunc*, with the effect that it was to be treated as having never existed.

Being dissatisfied with that decision, the appellants appealed. The grounds of appeal were, in summary, that the learned judge erred in striking out the trustee de son tort claims at an interlocutory stage; erred in holding that such claims could not arise where the underlying trust was alleged to be invalid or a sham; erred in holding that the Deed of Amendment having been set aside operated *ex tunc* so as to defeat the VISTA claims; and erred in the exercise of his discretion on strike-out.

Estera filed its counter notice of appeal in which it sought to move this Court to uphold the order of the lower court on different and/or additional grounds to those contained in the judgment.

The issues on both the appeal and counter notice of appeal were whether the trustee de son tort claims were reasonably arguable and suitable for determination at trial; whether the learned judge was correct in his treatment of the *ex tunc* effect of the order

setting aside the Deed of Amendment; and whether the strike-out orders should be upheld.

Held: allowing the appeal in part; setting aside the learned judge's decision to strike out those parts of the appellants' case founded on the contention that Estera assumed liability as a trustee de son tort, but declining to interfere with the decision of the court below in respect of the ex tunc limb of the appeal; dismissing the counter-notice of appeal, and making no order as to costs that:

1. The court, in the exercise of its case management powers under CPR 26.3(1)(b), has a discretion to strike out a statement of claim or any part thereof where it is shown that the statement of claim discloses no reasonable ground for bringing the claim. It is settled that an appellate court will not lightly interfere with the exercise of a discretionary case management power. In order to successfully challenge the exercise of the court's discretion, the appellants must therefore discharge the heavy burden of showing that the learned judge was wrong in the exercise of his discretion to strike out the appellants' claims in the sense that the decision to strike out the claims was plainly wrong or falls outside the generous ambit within which reasonable disagreement is possible.

Rules 1.2 and 26.3(1)(b) of the **Civil Procedure Rules 2000** applied; **Michel Dufour and others v Helenair Corporation Limited and others** (1996) 52 WIR 188 applied; **Ian Hope-Ross v Martin Dinning** AXAHCVAP2020/0005 & 0006 (delivered 30th April 2021, unreported) applied; **Ian Peters v Robert George Spencer** ANUHCVAP2009/0016 (delivered 22nd December 2009, unreported) considered.

2. In this case, the appellants alleged inter alia, that Estera knowingly accepted appointment, exercised control over trust assets, and acted in a trustee-like capacity in circumstances said to involve fabrication or fraud. The appellants' case is (at least in part) premised on the basis that the R&S Trust is invalid. If that is so, then there is no extant operative other than a constructive trust which would have arisen when Estera purported to act as trustee (when it would have had no authority to do so) and become an intermeddler. The appellants' case is that these allegations, if established, were capable in law of supporting liability as a trustee de son tort. The learned judge determined that in order to advance a reasonably arguable case, the appellants would have had to show that Estera accepted or assumed the role of trustee by transactions not impeached by the appellants, independently of a preceding any breach of duty. He concluded that they could not because they impeach the very basis of the respondent's purported trusteeship.
3. There is sufficient conflation of all categories of institutional constructive trusts (trustee de son tort, quasi trustees and fiduciary duty trusts) such as to leave open questions as to the circumstances where a trusteeship de son tort can be imposed. A review of the dicta afforded by the English apex judgment in **Mitchell v Al Jaber** gives much force to the appellants' argument that this area of the law remains dynamic and that the judge

erred in principle when he determined no reasonably arguable case could be advanced on the appellants' pleaded case. This critical judgment makes plain that the trustee de son tort liability is not based on a narrow, technical construction of a 'settled' doctrine. Rather it is a developing area of the law based on the arrogation of fiduciary power over property over which the trustee would have assumed custody and administration. The learned judge therefore erred in concluding that the trustee de son tort claims were doomed to fail as a matter of law.

Mara v Browne [1896] 1 Ch 199 considered; **Barnes v Addy** (1874) LR 9 Ch App 244 considered; **Dubai Aluminium Co Ltd v Salaam** [2003] 2 AC 366 considered; **Paragon Finance PLC v DB Thakerar & Co** [1999] 1 All ER 400 considered; **Carl Zeiss Stiftung v Herbert Smith & Co and another (No. 2)** [1969] 2 Ch. 276 considered; **Selangor United Rubber Estates Ltd v Cradock (a bankrupt) and others (No. 3)** [1968] 1 WLR 1555 considered; **High Commissioner for Pakistan in the United Kingdom v Prince Muffakham Jah** [2019] EWHC 2551 (Ch) considered; **Mitchell v Sheikh Mohamed Bin Issa Al Jaber (No 2)** [2025] UKSC 43 considered.

4. While at common law a claim can be struck out if an exclusion clause renders the claim legally untenable, there are two issues which militate against this in the present case. Firstly, it remains to be seen whether the appellants can persuade the trial court that on the construction and the scope of the exoneration/exclusion clause, the alleged conduct amounting to breach of trust at paragraphs 106 and 171A to 176 of the amended statement of claim, is not captured by the said clause. Secondly, in light of the manner in which the appellants' case has been advanced, it is indeed relevant that there is some doubt as to whether trustee exemption clauses in a trust instrument in favour of a trustee are to be construed so as to cover a trustee de son tort. Moreover, the application of the doctrine of trustee de son tort does not depend on the intermeddler having title to the trust property but it is sufficient that the trustee has command or control over the relevant assets. The appellants' amended statement of claim sets out in different paragraphs, at least in part, their case that Estera assumed command and control of the property. Wholistically, the arguments advanced in Estera's counter notice of appeal do not disgorge the appellants' success on the trustee de son tort limb of the appeal and could not be said to reach the threshold which would entitle a judge to exercise his discretion to strike out the claim.

Pinewood Technologies Asia Pacific Ltd v Pinewood Technologies PLC [2023] EWHC 2506 considered; **Smith v Chief Constable of Sussex** [2008] EWCA Civ 39 considered; **Mitchell v Sheikh Mohamed Bin Issa Al Jaber (No 2)** [2025] UKSC 43 considered.

5. The proper approach to the interpretation of a court order is, broadly, to apply the principles of statutory interpretation. Accordingly, the common

starting point is the natural and ordinary meaning of the words used in light of the syntax, context and background in which those words were used. The words of the 2018 Order are therefore to be given their natural and ordinary meaning and are to be construed in view of these principles. In construing the 2018 Order, the learned judge had before him the terms of the actual order, the transcript of proceedings from the 2nd May 2018 hearing and the legal submissions of both sides. It is clear that the learned judge considered the actual natural and ordinary meaning of the wording employed in the recitals of the 2018 Order and determined as a matter of law, that not only was a false understanding that the beneficiaries to the Trust knew and approved of its conversion to a VISTA trust but also that the law recognises Estera's false belief or assumption about the beneficiaries' knowledge and approval as a mistake.

R v Evans [2004] EWCA Crim. 3102 applied; **Feld v The Secretary of State for Business, Innovation and Skills** [2014] EWHC 1383 (Ch) applied; **Sans Souci Limited v VRL Services Limited** [2012] UKPC 6 applied.

6. While the strike out remedy is limited to plain and obvious cases where there was no point in having a trial, it may also obtain where the judge is satisfied that striking out will obviate the necessity for a trial or will substantially reduce the burden of preparing for trial or the burden of the trial itself. Having come to the conclusion which he did on the operative mistake issue, the learned judge then considered the appellants' pleaded case and determined that the case could not be maintained. Further, the claim could not 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. The appellants failed to demonstrate that setting aside a deed on the ground of mistake does not, necessarily, as a matter of law operate ex tunc. In any event, the critical question is whether the Deed of Amendment is to be treated as having existed for the purposes of the imposition of duties under VISTA. From all accounts, the whole point of the setting aside was to undo the conversion of the Trust to a VISTA trust. Accordingly, if the conversion to a VISTA trust is to be treated as not having been effective then it stands to reason that: i) the R&S Trust is to be treated as having been a VISTA trust; and ii) Estera cannot be treated as having been under the duties of section of VISTA.

Pitt v Holt [2013] 2 AC 108 considered; **Allan v Rea Brothers Trustees Ltd.** [2002] EWCA Civ 85 distinguished.

JUDGMENT

Introduction

[1] **ELLIS JA:** This is an interlocutory appeal against the order and judgment of Wallbank J dated 18th June 2024 in which the learned judge granted an application by Estera Corporate Services (BVI) Limited (“Estera” or “the respondent”) to strike out the appellants’ claims against it (“the Strike Out Application”) save and except the appellants’ claim to recover from Estera, fees it charged as a professional trustee for managing the relevant trust (“the Fees Claim”), and ordered that the appellants pay Estera’s costs of the Strike Out Application.

[2] The claim against Estera was struck out under two bases. Firstly, that the appellants do not have a reasonably arguable case that Estera assumed liability as a trustee de son tort if the trust in question is found to have been invalid and secondly, that a relevant Deed of Amendment ought to be treated as set aside from the date of its execution by the respondent.

[3] To put this appeal into context, it is necessary to provide a summary of the background to the matter.

Background

[4] The parties in this matter concern primarily on the one hand, the personal representatives and heirs of Ukrainian businessman, Mr. Igor Ieremeieva (“Igor” or “the Deceased”) and his business associates on the other. The Deceased was the owner of significant shares, held in various Cypriot and BVI companies which were incorporated to hold the Deceased’s interests in various businesses operating in Ukraine. Collectively, these companies were referred to as the Continuum Group. The value of the Deceased’s interest in the Continuum Group is estimated to be worth around US\$150-\$200 million. The second and third respondents, Mr. Sergii Lagur and Mr. Stephan Ivakhiv, respectively also have interests in the Continuum Group.

- [5] The first appellant, Mrs. Ieremeiveva, is the widow of Igor, who died on 13th August 2015.
- [6] At the core of the dispute between the parties is the validity of a trust instrument presented to the appellants by Mr. Lagur and Mr. Ivakhiv on 16th February 2016 and which was purportedly executed by the Deceased prior to his death (the purported trust will hereafter be referred to as “the R&S Trust” or “the Trust”). The declaration of trust stated its date of execution as 21st August 2014 and named the Deceased’s children, Mr. Roman Yeremeiev and Ms. Sofia Yeremeiev as the intended beneficiaries. The Trust assets include shares in 15 companies, 10 of which are stated to be incorporated in the BVI and 5 in Cyprus.
- [7] The declaration of trust also named the Deceased as the first trustee and made provision for the appointment of Mr. Lagur as the trustee on the occasion of Igor’s death or incapacity. It further provided for the appointment of a new trustee by Mr. Lagur, or, failing appointment by him within 6 months, by Mr. Ivakhiv. On such appointment, Mr. Ivakhiv would become Protector of the Trust.
- [8] The Trust also contained an exclusion of liability clause in terms that:
- “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.”
- [9] Following Igor’s death in August 2015, Mr. Lagur ostensibly became the trustee of the Trust.
- [10] It appears that Mr. Lagur and/or Mr. Ivakhiv approached Estera about Estera accepting appointment as trustee of the Trust.

[11] On 31st May 2016, Estera and Mr. Ivakhiv executed a Deed of Appointment and Replacement (“the DOAR”) whereby Estera assumed the role of trustee of the R&S Trust and was thereafter registered as the legal owner of the relevant shares save and except for the deceased’s 1% interest in OWG Oil West. On the same date, Estera and Mr. Ivakhiv entered into a deed which sought to amend the Trust (“the Deed of Amendment”) and convert it into a trust subject to the Virgin Islands Special Trusts Act (“VISTA”).

[12] The appellants took great issue with the trust deed, claiming that it was a fabrication created by Mr. Lagur and Mr. Ivakhiv. The appellants contend that Estera would have made no attempt to contact neither Roman or Sofiia, the purported beneficiaries of the Trust, before accepting the trusteeship and converting the Trust to a VISTA trust. 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 disclosing its appointment as Trustee.

Proceedings in the court below

[13] The appellants commenced proceedings against Mr. Lagur and Mr. Ivakhiv via a statement of claim in which they sought *inter alia* an order that the Trust be set aside as a forgery. The appellants’ primary case was that this forgery would have been 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 and has the effect of delaying the heirs’ access to their inheritance. They cited a number of factors which they submitted made it unlikely that Igor would have established this Trust, and, conversely, likely that Mr. Lagur and Mr. Ivakhiv were its creators after Igor’s death. They also contended 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 appellants also contended by way of an independent claim that, if the Trust is a fabrication or a sham, Estera is liable to account for its fees.

[14] In the alternative, the appellants claimed, if the Trust was not a forgery, and was indeed established by the deceased, it was a sham as the deceased had

at all times conducted himself, and indeed lived his life, as if the Trust did not exist.

[15] As against Estera specifically, the appellants alleged that Estera owed fiduciary duties towards Roman and Sofiia and had acted in willful and dishonest breach of trust in executing the Deed of Amendment and they are not exonerated by clause 9.1 of the Trust Deed. In essence, the claim against Estera was initially grounded in allegations of: 1.) dishonest assistance; 2.) wilful and dishonest breach of fiduciary duties; and 3.) wilful and/or dishonest breach of trust.

[16] Shortly after issue of the claim, the appellants sought and obtained a receivership order over the assets of the Trust. An application for directions was thereafter made by Estera in January 2018. At a hearing on 2nd May 2018, Adderley J ordered that the Deed of Amendment be set aside and prohibited Estera from taking any steps to defend the validity of the R&S Trust; ordering that Estera is to be neutral as to the principal issue in dispute in the proceedings, to wit, the validity of the Trust.

[17] This 2018 Order of Adderley J was not appealed.

[18] On 22nd November 2018, Estera applied for summary judgment and/or to strike out the claims as originally brought against it. On 7th December 2018, the appellants filed an amended statement of claim in which they sought orders premised on whether the trust was valid or invalid. The appellants pleaded that if the Trust had been valid, the DOAR and the Deed of Amendment would also be valid, and that Estera had breached the provisions of VISTA, in particular, 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. The appellants contended that if the Trust was invalid, that Estera had acted in breach of its fiduciary duties and/or breach of trust towards Igor's personal representative and his estate.

- [19] A request for information (“RFI”) was served by Estera seeking to ascertain the nature of the new claims brought about by the amended statement of claim. On 22nd March 2019, Estera renewed its summary judgment/strike out application to dismiss the new claims advanced in the amended statement of claim. The hearing of this strike out application was later adjourned by consent in order to facilitate settlement discussions between the parties. These settlement discussions subsequently broke down.
- [20] The matter did not progress thereafter until a further case management conference on 2nd February 2022. The proceedings were eventually stayed for some time as a result of the ongoing tension between Russia and Ukraine.
- [21] The Strike Out Application was eventually heard on 17th and 18th October 2023. On 18th June 2024, the learned judge delivered judgment in the matter. The learned judge with the exception of the Fees Claim struck out all the claims against Estera which were premised on the Trust being invalid on the grounds that they were based on a trusteeship de son tort and were misconceived in law.
- [22] In respect of those claims which were premised on the Trust being valid, the learned judge found that the claims must fail ex tunc in light of the order of Adderley J dated 2nd May 2018.
- [23] Prior to the delivery of the learned judge’s judgment, the parties were furnished with a copy of a draft of the judgment on 5th May 2024. A further case management conference was held on 3rd - 4th June 2024 and the finalised judgment handed down shortly thereafter.
- [24] While the Strike Out Application advanced several grounds upon which the claims ought to have been struck out, the learned judge did not consider and therefore did not rule on them on the basis that the principal claims were struck out on the aforementioned bases.

[25] In respect of the remaining Fees Claim against Estera, it was ordered by the learned judge that this claim should not be addressed until after the trial of the claim against Mr. Lagur and Mr. Ivakhiv. The learned judge ordered that if the Trust is found to be valid, the Fees Claim would fail, if the Trust is found to be invalid, then directions of the Fees Claim will be given.

[26] This trial has been listed for February 2026 over the course of six weeks.

The appeal

[27] Leave was granted to the appellants by the learned judge on 3rd June 2024 to appeal against the order of the court below. In their notice of appeal filed on 25th June 2024, the appellants categorised their grounds of appeal under two main heads namely: 1) the trustee de son tort issue and; 2.) the ex tunc issue. The trustee de son tort grounds of appeal were that:

(1) “The Court erred in holding that the question whether it was reasonably arguable that Estera could be a trustee de son tort was a ‘short question of law’ that was suitable for determination on a strike out application, rather than to be determined at trial in the (sic) light of consideration of the particular facts. In particular:

(a) The Court erred in holding that trusteeship de son tort was well settled and could not be described as a developing area of law;

(b) The Court failed adequately to take into consideration the flexible nature of equity and its continued evolution in response to different situations where justice so requires;

(c) The Court erred in failing to take into consideration the novel factual and legal scenario which pertains on the assumption that appellant’s allegation that the trust was a fabrication is correct. In summary, on that assumption Mr. Lagur fabricated a trust deed, and under colour of that document had assets of the purported trust transferred into his ownership and/or gained control over those assets. Mr. Lagur has never claimed that he owned or controlled those assets in his own right. Mr. Lagur was a true trustee and assumed to act as trustee.

(d) Likewise, the Court erred in failing to take the fact that Mr. Lagur was a true trustee and assumed to act as such into account when considering the position of Estera. The Court should have concluded that there was (at the least) a reasonable argument that there was no obstacle, as a matter of law and on the particular facts, to Estera being regarded as a trustee de son tort. Moreover, in consequence of that

purported succession Estera had trust assets transferred into its name and assumed to act as trustee, and was on any footing itself a trustee. Estera has never claimed that it owned the relevant assets in its own right.

(e) The Court failed to “stand back” and ask itself the question whether the law would be deficient if it did not provide a solution for such a factual situation.

(2) The Court erred in holding that there must ‘have been some pre-existing trust or other fiduciary relationship’ before a trusteeship de son tort and/or other ‘category 1’ constructive trust may arise.

(3) The Court further erred in holding that, if there were such a requirement (which appellants deny) that appellants had no reasonable argument that Mr. Lagur held the assets on a ‘category 1’ constructive trust. In particular, the Court erred in finding that a constructive trust/trusteeship de son tort could only arise where there was a prior transaction, unimpeached by appellants.

(4) The Court erred in holding both that the correct finding in High Commissioner for Pakistan in the **United Kingdom v Prince Muffakham Jah** was that there was a trustee de son tort by reason of a prior resulting trust, but simultaneously stating that it did ‘not see how the shortcomings in this part of the appellants’ pleaded case could be remedied.’ The assets were clearly not held beneficially by either Mr. Lagur or Estera. If, contrary to appellants’ case, there is no ‘category 1’ constructive trust in respect of Mr. Lagur, it would follow that there must be some other form of trust, and the Court should have considered whether to give appellants the opportunity to amend their claim accordingly.”

[28] The ex tunc grounds of appeal were that:

(5) “The Court erred in holding that the order of Adderley J dated 2 May 2028 set aside the Deed of Amendment as a result of operative mistake. The order setting aside the Deed of Amendment was made with the agreement of all parties (including the trustees and the beneficiaries), and on the objective interpretation of the order the issue of mistake was neither being considered nor ruled upon.

(6) Further or alternatively, the Court erred in holding that the order of Adderley J dated 2 May 2018 set aside the Deed of Amendment as from the date of its execution (ex tunc). On its true construction, the question of the date from which the Deed of Amendment was set aside was not addressed.

(7) The Court erred in concluding that there was no reasonable argument that, if the Deed of Amendment was set aside ex tunc, Estera might

nonetheless owe, and be in breach of, duties under the **Virgin Islands Special Trust Act, 2003**, until the date of the set aside order.

- (8) Further or alternatively, if and insofar as the Court found that the effect of order setting aside the Deed of Amendment is that it is treated for all purposes as though it never existed, the Court erred.”

[29] Estera filed its notice of opposition on 5th July 2024. On 24th July 2024, Estera filed its counter notice in which it sought to move this Court to uphold the order of the lower court on different and/or additional grounds to those contained in the judgment, namely:

- (1) “The decision of the learned Judge to dismiss the trustee de son tort claims (i.e., the claims made by the Appellants on the basis, which is denied, that Estera was a trustee de son tort) should be upheld on the additional ground that:

(a) A person can only be a trustee de son tort if they voluntarily assume a role or office in respect of a genuine trust;

(b) On the premise (which applies in relation to all the trustee de son tort claims) that the R&S Trust is invalid, Estera did not voluntarily assume any such role or office;

(c) Accordingly, none of those claims are reasonably arguable and/or all are bound to fail and/or the Amended Statement of Claim does not disclose any reasonable ground for bringing them and therefore they should be struck out pursuant to CPR, r.26.3(1)(b); and

(d) Alternatively, for the same reasons the Appellants do not have a real prospect of succeeding on any of the trustee de son tort claims and therefore summary judgment should be granted on them in favour of Estera, pursuant to CPR, r.15.2(a).

- (2) Further or alternatively, the decision of the Judge to dismiss the trustee de son tort claims should be upheld on the additional ground that:

(a) If (which is denied) Estera were a trustee de son tort, Estera would have the effective benefit of the exoneration clause under the R&S Trust;

(b) The trustee de son tort claims pleaded by the Appellants against Estera would necessarily be defeated by Estera having such benefit; and

(c) Paragraphs 1(c) and 1(d) above are repeated mutatis mutandis.

- (3) Further or alternatively, the decision of the Judge to dismiss the trustee de son tort claims should be upheld on the additional ground that:

(a) A trustee de son tort can only be liable in respect of steps taken by it with trust property that it has received and is in control of;
(b) The trustee de son tort claims pleaded by the Appellants against Estera do not concern steps by Estera in respect of trust property received by it and in its control; and
(c) Paragraphs 1(c) and 1(d) above are repeated mutatis mutandis.

(4) Further or alternatively, the decision of the Judge to dismiss all the trustee de son tort claims against the First Appellant (Mrs Ieremeiva) should be upheld on the additional ground that: (a) If (which is denied) the trustee de son tort doctrine could apply in the context of an illusory or non-existent trust and if (which is denied) Estera were such a trustee; (b) Then Estera could only have duties as a trustee de son tort that are consistent with the terms of the R&S Trust; (c) Therefore, Estera could not have owed any duties to Mrs Ieremeiva, since she was never a beneficiary of the R&S Trust; and (d) Paragraphs 1(c) and 1(d) above are repeated mutatis mutandis.”

[30] Estera also challenged the trustee de son tort grounds advanced by the appellants on the basis that many of the points which they sought to raise on appeal are new or involved a challenge to evaluative findings made by the learned judge without identifying any cogent grounds upon which this Court could properly interfere.

Preliminary Point – New or fresh arguments

[31] The matter came on for hearing before the Court on 9th and 10th December 2024. Before hearing the substantive grounds of appeal, the Court addressed as a preliminary point, the possibility of the grounds of appeal set out in the appellants’ submissions filed on 25th June 2024 revealing potential new points on appeal.

[32] Learned counsel Mr. Weekes KC advanced that grounds 2, 3 and 4 were entirely new points not argued below and were therefore not available to the appellants without an application to advance those grounds being made and granted by the Court.

- [33] The appellants argued that for the most part, the complaints made by Estera in relation to the so called “new points” do not in fact involve new points at all. However, if the Court were to reach a contrary view, the appellants’ position is that the Court should exercise its discretion to hear any new points in this appeal. Ms. Ilett, counsel for the appellants, relied on the cases of **WIN Business (Caofeidan) Limited & Anor v Anadarko China Holdings 2 Company**¹ and **Notting Hill Finance Ltd v Sheikh**² in support of this contention.
- [34] The appellants argued that the learned judge’s third pre-condition for trusteeship de son tort – that the person accepted or assumed the role of a trustee by transactions not impeached by the claimant (independently of and preceding any breach of duty) was covered by its grounds of appeal and specifically spelled out in ground 3. Moreover, it is, in the appellants’ submission, clear from the judgment that the learned judge’s conclusion in relation to unimpeached transactions formed part of his analysis in relation to constructive trusts and the need for a pre-existing trust or fiduciary relationship. Thus, if the latter falls, so does the former.
- [35] The appellants submitted that there is a reasonable argument that Estera (and Mr. Lagur) are ‘true’ constructive trustees. Counsel posited that when considering the distinction between first and second category constructive trustees (or true trustees, and those that are not true trustees), the dichotomy between ‘impeached transactions’ on the one hand, and ‘intention to act as trustee’ on the other, is insufficient where, as in this case, both are present. Counsel submitted that an impeached transaction is not a bar to them being trustees de son tort.
- [36] Counsel for the appellants accepted that ground 4 is a new point not advanced in the proceedings below but submitted it could not have been raised and the issue emerged for the first time in the judgment and was foreclosed by the same judgment. However, Ms. Ilett urged that the learned judge also found that **High Commissioner for Pakistan in the United Kingdom v Prince**

¹ BVIHCMAP2022/0004 (delivered 5th July 2023, unreported).

² [2019] EWCA Civ 1337.

Muffkham Jah and others³ could have been correctly decided on the basis of a resulting trust. If that is the case, and if there is no constructive trust as the learned judge found, then in the appellants' case it follows that a resulting trust would also save the appellants' case here. Accordingly, the appellants argue that the court should have given the appellants the opportunity to amend rather than taking the nuclear strike out approach.

[37] As a matter of law, the case does not have to be exceptional before a new point may be argued on appeal, and whether or not to permit such a new point may depend upon where such new point lies on the spectrum between pure points of law that can be argued on the findings of the judge below, and those which, had they been raised below, might have changed the course of the evidence given at trial.

[38] Counsel for Estera, reiterated that new points may not be taken on appeal unless permission is sought and obtained to so do and cited the decision of **WIN Business (Caofeidon) Limited & Anor v Anadarko China Holdings Company**⁴ in support of this submission. In deciding whether to grant permission for new points to be taken, the Court will take into account the prejudice caused to parties and to the Court by infringement of the principle of finality in litigation.

[39] Learned counsel Mr. Weekes KC identified a number of considerations which may cause overwhelming prejudice in the matter; two of which are based on the vintage of different aspects of the proceedings below. Mr. Weekes KC *inter alia* pointed out that: 1.) the claim was issued 7 years ago in 2017; 2.) the appellants have had two bites at the cherry of preventing the claim being struck out; 3.) the strike out application was served over five years ago in 2019; 4.) Estera would be wrongly deprived of a judgment at first instance on those new points; 5.) if allowing any new point ultimately meant that the application was dismissed, there would be serious procedural implication in

³ [2019] EWHC 2551 (Ch).

⁴ BVIHCMAP2022/0044 (delivered 5th July 2023, unreported).

the matter, namely that the respondent would not be able to participate in the trial scheduled for February 2026.

Ruling on Preliminary Point

[40] The Court determined that ground 2 should be permitted to be advanced. The Court determined that an amendment was unnecessary as the matters raised in ground 2 had been foreshadowed in the grounds set out in the notice of appeal filed on 25th June 2024 (in particular, set out in paragraph 9 under the heading – “Details of the Findings Challenged and Grounds of Appeal”). The Court, however, determined that the appellants’ submissions should be limited to the way in which the matter was set out in the appellants’ grounds of appeal and in the pleaded case in the court below.

[41] With respect to ground 3, the Court was again satisfied that this was not a new point and was minded to let the arguments advance as they were set out, in particular, in paragraph 10 under the heading – “Details of the Findings Challenged and Grounds of Appeal”. The Court again made clear that the appellants were confined to pursue their arguments consistent with the way the case is pleaded in the court below.

[42] With respect to ground 4, the Court was of the view that this was an entirely new point that should not be permitted to be advanced on appeal. The Court was not persuaded by the reasons advanced by the appellants to explain why the point was not raised before nor was the Court persuaded by the arguments advanced regarding the question of prejudice. That ground of appeal was accordingly not permitted to be advanced before the Court.

[43] The remaining grounds of appeal will now be considered.

The trustee de son tort point

Ground 1

Appellants’ submissions

[44] The essence of the appellants’ argument under Ground 1 is that the learned judge erred in holding that the question of whether Estera could be a trustee

de son tort was a short question of law suitable for determination on a strike out application. Learned counsel for the appellants relying on the cases of **Ian Hope-Ross v Martin Dinning et al**⁵ submitted that 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.

[45] Ms. Ilett submitted that as the law of equity is flexible, capable of adapting to changing facts and new situations, the strike out amounts to stifling its natural development to factual situations before they have been fully explored at trial. The law regarding constructive trusts and constructive trusteeship is notoriously woolly and thus is not suitable for strike out proceedings. The boundaries of constructive trusts have been left deliberately vague so as to not restrict the court in technicalities in deciding what the justice of the particular case might demand. Ms. Ilett grounded this submission on the cases of **High Commissioner for Pakistan in the United Kingdom v Prince Muffakham Jah**⁶ and **Mitchell v Sheikh Mohamed Bin Issa Al Jaber**.⁷ Learned counsel argued that the **Jah** decision was representative of the flexibility of the area of law for though it had been in the past generally regarded as a requirement for trusteeship de son tort that there be a prior fiduciary relationship, the court in that case held that there was a trusteeship de son tort without there being any prior relationship.

[46] In summary, counsel for the appellants submitted that the claim is based upon an assumption that the R&S Trust Deed was a fabrication designed to benefit Mr. Lagur and Mr. Ivakhiv. As part of the fraud, Mr. Lagur voluntarily accepted trusteeship of the assets while not purporting to own the assets in his own right. Mr. Lagur gained ownership and/or control over those assets, and passed legal ownership to Estera who voluntarily accepted trusteeship over the assets. It would therefore be a deficiency in the law if having voluntarily

⁵ AXAHCVP2020/0005 & 0006 (delivered 30th April 2021, unreported).

⁶ [2019] EWHC 2551 (Ch).

⁷ [2024] EWCA Civ 423.

taken on the duties of the respective trustees, Estera can now say that because the true beneficial owners are the true heirs of the Deceased, that whatever breaches of duty which may have been committed, they are essentially wiped clean.

- [47] In all the circumstances, the appellants submitted that the learned judge erred in determining that the matter was suitable for strike out as this is a complex legal issue in a developing area of law. There is a reasonable argument that there is no obstacle, as a matter of law and facts, to Estera being regarded as a trustee de son tort.

Respondent's submissions

- [48] Learned counsel for the respondent in response submitted that ground 1 of the appeal ought to fail for two threshold reasons. First, the learned judge's decision to rule on the point of law before him was either the exercise of a case management discretion or involved a judicial evaluation and accordingly, the principles informing appellate restraint would apply. Learned counsel reminded the Court that case management decisions and/or judicial evaluation should only be interfered with if there was an error of a kind that would justify interference, for example where the decision was made after taking into account an irrelevant factor or failing to take into account a relevant factor or was otherwise blatantly wrong. Counsel asserted that no such error has been demonstrated in this case and that the appellants have failed to identify any flaws in the judge's evaluation which would justify upsetting such evaluation.
- [49] Estera's secondary argument under ground 1 is that the court's reticence about ruling on points of law in areas where the law is under development is essentially based on the principle that it is better for areas of controversial law to be addressed on facts as found, rather than facts as assumed. In this case however, the point of law is whether the trustee de son tort doctrine requires a pre-existing trust/fiduciary relationship. Counsel pointed out that the learned judge did not identify any uncertainty on the facts or evidence that required investigation at trial.

[50] More conclusively, counsel submitted that the learned judge was correct in finding that the concept of trustee de son tort is clearly established and he submitted that a review of the authorities and practitioners' texts presented by the parties revealed that 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.

[51] Learned counsel Mr. Weekes KC also challenged the appellants' reliance on the cases of **Jah** and **Mitchell v Al Jaber**. Mr. Weekes KC submitted that the question before the court in this case related to the case as pleaded. The learned judge considered how the appellants decided to put their case by reference to their pleadings as well as their response to Estera's RFI and determined that the pleaded case sought to be advanced was bound to fail since it missed critical constituent elements of such trusteeship.

Appellants' reply

[52] In reply, the appellants urged that the judge's order and judgment are not to be categorised as a case management decision. The determination of the judge that the relevant question was a 'short question of law' is not, in the appellants' submission, an evaluative decision in the sense that that term is used in determining the manner and threshold for appeal. Relying on the case of **IBM United Kingdom Holdings Ltd v Dalgleish**,⁸ the appellants argued that even if the decision to proceed to determine the Strike Out Application was a judicial evaluation, the appellants' position is that this Court is entitled to conclude that the learned judge was wrong.

Ground 2

[53] Under ground 2 of their appeal, the appellants aver that there is no requirement for a pre-existing trust or fiduciary relationship in a trusteeship de son tort. A trusteeship de son tort is a category one constructive trust and the key requirement, is simply that the relevant person has voluntarily assumed the role of trustee. Placing reliance on the well-known practitioner's text **Lewin**

⁸ [2017] EWCA Civ 1212.

on **Trusts**,⁹ counsel for the appellants submitted that a constructive trustee has the same duties as a true trustee and is accountable as if he had the authority which has been assumed.

[54] Counsel submitted that the learned judge though holding that it is not necessary for a finding of trusteeship de son tort that there was a pre-existing express trust, the court ought to have gone further and held that there was no requirement for a pre-existing trust or fiduciary relationship. Ms. Ilett referred the Court to three cases in support of this submission, namely **Jah, Lyell v Kennedy**¹⁰ and **Mitchell v Al Jaber**.

[55] She further argued that Estera voluntarily assumed the role and character of trustee in this case and held the assets knowing they were the property of another. It is therefore not open to Estera to seek to avoid liability for breach of duty on the basis that it was not a trustee. The law as it presently stands, does not require that there be a pre-existing fiduciary relationship, and accordingly, there is no impediment to a finding that Estera was a trustee de son tort.

Respondent's submissions

[56] Estera argues that the learned judge was correct in his identification of the three conditions for the existence of a trusteeship de son tort and finding that a pre-existing trust/fiduciary relationship is a pre-condition for a trusteeship de son tort to arise.

[57] Counsel for the respondent also sought to impugn the appellants' reliance on the authorities of **Jah, Lyell v Kennedy** and **Mitchell v Al Jaber** and argued that these authorities do not justify a reversal of the learned judge's conclusion that there must be some prior trust or fiduciary relationship to which a trusteeship de son tort can attach.

Ground 3

Appellants' submissions

⁹ 19th ed (2015).

¹⁰ (1889) 14 AC 437.

- [58] Under ground 3 of their appeal, the appellants argue that even if a finding of trustee de son sort is dependent on a pre-existing fiduciary relationship, they nonetheless have a real prospect of successfully arguing that Mr. Lagur was a category 1 constructive trustee.
- [59] While Ms. Ilett accepted that although the court below appropriately did not explore at the hearing all the possible ways in which Mr. Lagur might be a constructive trustee (as he took no active role in the Strike Out Application) the court erred in finding that he could never be a category 1 constructive trustee. This, counsel for the appellants argued, was due to the court's erroneous focus on an unimpeached prior transaction.
- [60] Placing reliance on the cases of **Paragon Finance PLC v D B Thakerar & Co (a firm)**¹¹ and **Williams v Central Bank of Nigeria**,¹² the appellants submitted that there is a dichotomy between those constructive trusts which are trusts properly so called, and those (dishonest assistance and knowing receipt) which are mere formulae for equitable relief. 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, the constructive trustee really is a trustee who receives the trust property in his own right by a transaction by which both parties intend to create a trust from the outset and which is not impugned. However, the circumstances in which the defendant obtained control make it unconscionable for him thereafter to assert a beneficial interest in the property. The second category on the other hand, arises when the respondent is implicated in a fraud. Such 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.

¹¹ [1999] 1 All ER 400.

¹² [2014] UKSC 10.

[61] The appellants also relied on the case of **Selangor United Rubber Estates Ltd v Cradock (a bankrupt) and others (No. 3)**¹³ in support of their contention and submitted that Mr. Lagur was a Category 1 constructive trustee in light of the following circumstances: 1.) he has never claimed ‘to act in his own right’, but took from the first as a trustee; 2.) he did so voluntarily, having himself (on the assumption that the trust is invalid) fabricated the Trust Deed; and 3.) there having been no trust or fiduciary relationship prior to his assuming the role of trustee, his taking control of the property was neither dishonestly assisting another’s breach of trust, nor knowingly receiving trust funds.

[62] Thus, counsel for the appellants submitted, even if an existing fiduciary relationship were required it is reasonably arguable that Mr. Lagur was a Category 1 constructive trustee, and consequently there is a reasonable argument that, Estera, was a trustee de son tort.

[63] Summarising the argument, counsel submitted that where the learned judge found that because there was fraud, or because there was no unimpeached transaction, Mr. Lagur could not be a constructive trustee of the 1st category, and therefore there could not be a real trust in relation to which Estera could have become a trustee de son tort, there is at the very lowest a reasonable argument that he was in error.

Respondent’s submissions

[64] In response to the appellants’ contention that the learned judge was wrong to conclude that Mr. Lagur was not a Category 1 constructive trustee, Mr. Weekes KC advanced that this is misconceived. Learned counsel submitted that the appellants’ argument is contrary to their pleaded case as the appellants did not plead in the court below that Estera became the trustee of a trust other than the R&S Trust. The appellants have not pleaded that any constructive trust was imposed in respect of Mr. Lagur for any reason other than him being a fraudster ex hypothesi in their primary case

¹³ [1968] 2 All E.R. 1073.

[65] He argued that a constructive trust would not necessarily be imposed by reason of the alleged fraud. Rather, when property is transferred or money is paid pursuant to a contract, gift or other transaction induced by fraudulent misrepresentation, beneficial title passes to the recipient unless and until the transaction is rescinded. If the transaction is rescinded, then beneficial title to any remaining traceable property is revested in the transferor/payer by means of a constructive (or possibly resulting trust). This does not enable the transferor to pursue personal claims in breach of trust, in respect of dispositions which occurred prior to rescission at a time when the recipient was not yet a constructive trustee.

[66] Further or in any event, Mr. Weekes KC submitted, a constructive trust imposed in response to fraud would be a Category 2 constructive trust and Estera has not intermeddled with that alleged constructive trust. Estera only purported to act in connection with the R&S Trust. Estera could not, in these circumstances be a trustee de son tort, since the relevant preceding trust (i.e., an alleged constructive trust of which Mr. Lagur was the trustee) was a different trust.

Appellants' reply

[67] In reply, the appellants maintained that as a means of distinguishing between first and second category constructive trustees (or true trustees, and those that are not true trustees), the dichotomy between 'impeached transactions' on the one hand, and 'intention to act as trustee' on the other, is insufficient when, as in this case, both are present. Counsel for the appellants concluded that there is a reasonable argument that Estera (and Mr. Lagur) are constructive trustees and an impeached transaction is not a bar to them being trustees de son tort.

[68] Ms. Ilett also argued in reply that Estera's contention that the appellants failed to plead that it intended to take on the role as a trustee de son tort of the constructive trust, is of no moment and asserted that to give rise to a

trusteeship de son tort, it was sufficient that Estera took on a role as trustee of the Trust.

The Ex tunc point

Ground 5

Appellants' submissions

[69] Counsel for the appellants submitted that it is impossible to discern in the 2018 Order, or in the materials from the hearing on 2nd May 2018, any consideration of the legal 'operative mistake' when setting aside the Deed of Amendment.

[70] She further submitted that while the judge in the court below was correct to say that Adderley J 'left open' the question of whether his order had the effect that the Deed of Amendment was a nullity from the outset, the learned judge erred in going on to conclude that that question could or should properly be addressed as a matter of analysing the consequences of the 2018 Order.

[71] Relying on the case of **Pan Petroleum AJE v Yinka Folawiyo Petroleum CO Ltd and others**,¹⁴ learned counsel submitted that a court order is to be interpreted objectively. She submitted that on the face of the 2018 Order, it was not intended to prejudice the appellants' claims nor the respondents' defences. Instead, the obvious intention was that the appellants' claims relating to the validity and effectiveness of the Deed of Amendment would and should proceed to be determined at trial.

[72] Counsel urged that the 2018 Order was intended to have a narrow effect. In the circumstances, the learned judge below erred in his exercise of discretion under rule 26.3(1)(b) of the Civil Procedure Rules ("CPR"). He should have concluded in limine that given the narrow intended scope of the 2018 Order, the appellants' relevant claims should proceed to determination at trial, consistent with Adderley's J intention.

Respondent's submissions

¹⁴ [2017] EWCA Civ 1525.

[73] The respondent submits that it is clear that on the terms of the 2018 Order, that the Deed of Amendment was set aside for mistake. Further, there must be a proper basis to set aside a trust deed. Placing reliance on the case of **Pitt v Holt**¹⁵ Mr. Weekes KC argued that the only basis for such a setting aside on the facts of this case is that the court was setting aside the Deed of Amendment for causative mistake, that is to say, equitable rescission for mistake as that doctrine has been explained in the aforementioned authority.

Ground 6

Appellants' submissions

[74] Ground 6 of the appellants' appeal is closely related to ground 5. Under this ground however, the appellants argued that the learned judge went beyond the limited materials in the case before him in concluding that setting aside an order for mistake operates *ex tunc*.

Respondent's submissions

[75] Mr. Weekes KC in his submissions on behalf of Estera urged that the effect of setting aside a transaction for mistake is indeed to automatically set it aside '*ex tunc*'. Accordingly, the learned judge was correct in his analysis. This is also consistent with general principle and equity: the doctrine of equitable rescission is centrally concerned with relief for the consequences of entering into a transaction as a result of a mistake. It is therefore apt that where the principle is engaged the effect is that the transaction is not to be treated as having occurred; that is the response that relieves the mistaken disponer from the consequences of the mistake.

Ground 7

Appellants' submissions

¹⁵ [2013] UKSC 26.

- [76] Under ground 7, the appellants submitted that even if the Order had the effect of setting aside the Appointment Deed, 'ex tunc', the learned judge below erred in concluding that the appellants cannot maintain a case that Estera's conduct of its putative trusteeship was governed by the VISTA until the Deed of Amendment was effectively set aside on 2nd May 2018.
- [77] In respect of the 'deemed' effect of the set aside, Ms. Ilett argued, it is well established in law that 'deeming' must have its limitations. Learned counsel relied on **Commissioners for Her Majesty's Revenue and Customs v DCC Holdings (UK) Ltd**,¹⁶ and **Fowler v Revenue and Customs Commissioners**.¹⁷ Noting that there should be a degree of fact-sensitivity as to where the limits of the effects of deeming provisions are to be found, these cases Ms. Ilett, argued, bore strong parallels to the circumstances in the instant matter. The appellants highlighted that it is not an inevitable consequence of the 2018 Order that the appellants should be deprived of any possibility of relief in relation to defaults by the respondent which took place in the period prior to the date of the 2018 Order.

Respondent's submissions

- [78] The respondent took issue with the appellants' argument under this ground arguing that it lacked logic. Counsel submitted that Estera only owed duties under VISTA because the Deed of Amendment was made, converting the Trust to a VISTA trust. If the effect of setting aside that deed is that the deed is to be treated in law as never having been made, then it must follow that Estera must also be treated as never having been subject to those duties. Arguing in alternative terms, counsel submitted that if the court must proceed on the basis that the deed never existed, how can Estera be subject to duties imposed by a deed that did not exist?
- [79] Learned counsel also took issue with the appellants' suggestion that the BVI court should treat an 'ex tunc' set aside as if it were a 'deeming provision' in a

¹⁶ [2010] UKSC 58.

¹⁷ [2020] UKSC 22; [2020] 1 WLR 2227.

statute. He submitted that this approach is unsupported by any authority and further that there is no proper basis for such an argument as the law of equitable mistake is not a matter of statutory interpretation.

Ground 8

Appellants' submissions

- [80] Counsel for the appellants submitted that if and to the extent that the judge below found that Adderley J's order meant that the Deed of Amendment was treated for all purposes as though it never existed, then this was a clear error. Counsel argued that there is a difference of both emphasis and substance created if the word 'all' is implied. It is absolute in a way which is inconsistent with the flexible principles of equity. To treat something as for all purposes as not having existed would be inconsistent with the case law on statutory deeming, with which there are strong parallels. The appellants relied on the judgment in **Allan v Rea Brothers Trustees Ltd**¹⁸ in support of this argument.

Respondent's submissions

- [81] Mr. Weekes KC submitted that the rationale for the setting aside was to undo the conversion of the Trust to a VISTA trust, because the court was satisfied that it was based on a mistake. If the conversion to a VISTA trust is to be treated as not having been effective: (i) the R&S Trust cannot be treated as having been a VISTA trust; and (ii) Estera cannot be treated as having been under the duties of section 8 of VISTA.

Analysis and Conclusion

Appellate Restraint

- [82] The court, in the exercise of its case management powers under CPR 26.3(1)(b), has a discretion to strike out a statement of case or any part thereof where it is shown that the statement of case discloses no reasonable ground for bringing or defending a claim. This appeal requires this Court to interrogate the exercise of the learned judge's discretion in striking out parts of the appellants' claims in the court below. The appeal therefore engages the

¹⁸ [2002] EWCA Civ 85; (2002) 4 ITELR 627.

well-known principles set out in cases such as **Michel Dufour and others v Helenair Corporation Limited and others**,¹⁹ where a comprehensive statement of principle is set out in the judgment of Sir Vincent Floissac CJ in the following terms:

“We are thus here concerned with an appeal against a judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate court is satisfied (1) that in exercising his or her judicial discretion, the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; and (2) that, as a result of the error or the degree of the error, in principle the trial judge’s decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.”

- [83] This appellate approach has consistently been adopted in numerous decisions of this Court including **Peter Toussaint et al v Martine Johnson (Representative of the Estate of Peter Michael Barnard)**,²⁰ and **America 2030 Capital Limited et al v Sunpower Business Group PTE Ltd et al**²¹ which underpin this Court’s jurisdiction to review a lower court’s exercise of a case management discretion.

Applicable Law - Strike Out Applications

- [84] The power to strike out a statement of claim or part of a statement of claim where it is shown that the statement of claim or part of it does not disclose any reasonable ground for bringing or defending a claim is an important tool in the artillery of the court in the exercise of its case management power. CPR 26.3(1)(b) provides as follows:

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

(b) the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim...”.

¹⁹ (1996) 52 WIR 188.

²⁰ SLUHCVP2018/0024 (delivered 16th September 2020, unreported).

²¹ SKBHCVP2020/0015 (delivered 30th October 2020, unreported).

[85] It is now settled that the discretion to strike out must be exercised in accordance with law and with a view to furthering the overriding objective. The central principles which underpin the court's jurisdiction to strike out all or part of a statement claim are equally well settled. These principles have been helpfully summarised by Farara JA in **Ian Hope-Ross v Martin Dinning et al**²² 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."²³
- (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.²⁴
- (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.²⁵
- (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.²⁶

²² AXAHCVP2020/0005 & 0006 (delivered 30th April 2021, unreported).

²³ CITCO Global Custody NV v Y2K Finance Inc. SLUHCVP2008/022 (delivered 19th October 2009, unreported).

²⁴ Ian Peters v Robert George Spencer ANUHCVP2009/016 (delivered 22nd December 2009, unreported); Tawney Assets Limited v East Pine Management Limited and others BVIHCVP2012/007 (delivered 17th September 2012, unreported).

²⁵ CITCO Global Custody NV v Y2K Finance Inc. SLUHCVP2008/022 (delivered 19th October 2009, unreported) at para.13, and Martin Didier G.C et al v Royal Caribbean Cruises Ltd. SLUHCVP2014/0024 and 2015/0004 (delivered 6th June 2016, unreported) per Pereira CJ at para. 28.

²⁶ Ian Peters v Robert George Spencer ANUHCVP2009/0016 (delivered 22nd December 2009, unreported) per Creque JA; see also HRH Prince Abdulaziz Bin Mishal Bin Abdulaziz Al Saud v Apex Global Management Ltd and another [2014] UKSC 64.

- (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.²⁷

[86] It follows that in order to successfully challenge the learned judge's exercise of discretion, the appellants must convincingly demonstrate that the learned judge was wrong in the exercise of his discretion to strike out parts of the appellants' claim in the sense that the decision to strike out was plainly wrong or falls outside the generous ambit within which reasonable disagreement is possible.²⁸

The trustee de son tort appeal

[87] The success of grounds 1 and 2 of the appellants' appeal and indeed the success of their claim in the court below rests on their case as pleaded in their statement of claim in the court below. At paragraphs 7 – 9 of their written submissions lodged in this appeal, they summarise the claims for relief in the following terms:

“7. Cs seek not simply the transfer of the Assets to them, but also redress for breaches of duty committed by D1, D2 and D3. In outline, Cs put their case on two alternate bases:

- 7.1. First, on the basis that the R&S Trust is invalid; and
- 7.2. Second, on the basis that the R&S Trust is valid.

8. In either case, Cs assert that D1, D2 & D3 owe fiduciary duties, although the exact nature of those duties and to whom they are owed differs according to whether the R&S Trust is valid or invalid.

9. As regards D1, Cs' claims fall under 3 heads:

- 9.1. If the R&S Trust is valid, claims for breach of its duty/obligation under section 8 of VISTA;
- 9.2. If the R&S Trust is invalid:

²⁷ Pereira CJ in the Attorney General of Saint Lucia v Darrel Montrope SLUHCVP2019/0021 (delivered 9th July 2020, unreported). 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.

²⁸ Ian Peters v Robert George Spencer ANUHCVP2009/0016 (delivered 22nd December 2009, unreported).

- 9.2.1. Claims for breach of fiduciary duty on the basis that D1 is a trustee *de son tort*, including breaches relating to the entry into a Deed of Amendment dated 31 May 2016 (**the Amendment Deed**) which purported to convert the R&S Trust into a VISTA trust, waiving Yudelle's pre-emption rights, and failing to inform Cs about the trust; and
- 9.2.2. Claims in relation to fees paid to D1 during its tenure as trustee (**the Fees Claim**)."

[88] This summary does dovetail with the actual pleadings advanced by the appellants in the court below. At paragraph 56 of their statement of claim²⁹ they plead the following:

"It is the Claimants' primary case that the Trust was fabricated after the death of Igor in accordance with the wishes of Mr Lagur and Mr Ivakhiv. In the alternative if (contrary to the primary case) the Trust was executed by Igor and Mr Lagur during the lifetime of Igor it was a sham executed without any genuine intention on the part of either Igor or Mr Lagur of constituting an irrevocable trust in the terms of the Trust, the intention of Igor and Mr Lagur being to deceive third parties (in particular the heirs of Igor in the event of his death or Mrs Ieremeieva in the event of divorce) into believing that a genuine trust had been constituted. In support of such contentions the Claimants will rely in particular on the following facts and matters...."

[89] Thereafter, the appellants set out a litany of factors which they say justify the conclusion that the Trust was in fact invalid. After considering the written and oral legal submissions of the parties, the learned judge ultimately concluded that:

"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."

²⁹ See paragraphs 164A – 164E at pages 1279 to 1281 and paragraphs 166 -174 at pages 1281 to 1291 of the Hearing Bundle. They set out the alternative claims made in respect of the respondents concluding with a lengthy prayer which is also set out in alternative terms.

[90] It follows, that the central issue to be determined is whether the learned judge wrongly struck out these parts of the appellants' claim on the basis that they failed to disclose a reasonably arguable case. More particularly, this Court must consider whether this part of the appellants' claim 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.

[91] A person who intermeddles with and assumes the management of trust property becomes a trustee by construction. That person is said to be a trustee de son tort. A trustee de son tort, being a person who is not properly appointed as trustee and does not have the authority to act in a trustee capacity, is a category of constructive trust. In **Mara v Browne**,³⁰ Smith LJ explained the position in the following terms:

“Now, what constitutes a trustee de son tort? It appears to me 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 thereby make himself what is called in law a trustee of his own wrong - i.e., a trustee de son tort, or, as it is also termed, a constructive trustee.”

[92] This passage explains in brief terms what was adverted to in the now well-known judgment of Lord Selborne LC in **Barnes v Addy**³¹ in which he observed:

“Those who create a trust clothe the trustee with a legal power and control over the trust property, imposing on him a corresponding responsibility. That responsibility may no doubt be extended in equity to others who are not properly trustees, if they are found either making themselves trustees de son tort, or actually participating in any fraudulent conduct of the trustee to the injury of the cestui que trust. But, on the other hand, strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps of which a Court of Equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they

³⁰ [1896] 1 Ch 199 at 209.

³¹ (1874) LR 9 Ch App 244 at 251.

assist with knowledge in a dishonest and fraudulent design on the part of the trustees.”

[93] This passage has been cited with approval in many decisions, most recently in **Dubai Aluminum Co. Ltd v Salaam**³² where Lord Millett described a trustee de son tort as ‘a person who, though not appointed to be a trustee, nevertheless takes it upon himself to act as such and to discharge the duties of a trustee on behalf of others.’

[94] A trusteeship de son tort has been described by notable English commentators as a type of constructive trust.³³ Unfortunately, the law relating to constructive trust has been difficult to follow over the last century. In his judgment in **Carl Zeiss Stiftung v Herbert Smith & Co and another (No. 2)**³⁴ Edmund Davies LJ described the position in the following terms:

“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 by technicalities in deciding what the justice of a particular case may demand.”

[95] This signifies that the law relating to constructive trusts remains somewhat unsettled with vacillating analyses which have tended to confuse rather than edify. The appellants have placed significant reliance on this fact which they say supports the contention that the learned judge in the court below should not have struck out these parts of their claim on the basis that no reasonably arguable case could be made out.

[96] However, although there remains considerable room for development in the law of constructive trusts, what is clear is that there are currently only two established categories of cases where the imposition of a constructive trust by operation of law is recognised in English common law. The learned authors of **Halsbury’s Laws of England**³⁵ provide a most concise explanation:

³² [2003] 2 A.C. 366.

³³ Lewin on Trusts Vol.1 20th Edition at paragraph 8.017.

³⁴ [1969] 2 Ch. 276 at page 300.

³⁵ Volume 98 (2024) at paragraph 123; and see: Lewis on Trusts paragraph 8-010.

“There are two distinct types of constructive trust, namely: (1) the institutional constructive trust; and (2) the remedial constructive trust. Only the first of these is presently recognised as valid in English law.

Under an institutional constructive trust the trust arises by operation of law as from the date of the circumstances which make the property owner liable to the constructive trust over their property: the function of the court is merely to declare that such trust has arisen in the past. The consequences that flow from such a trust having arisen (including the possible disadvantageous consequences to third parties who in the interim have received the trust property) are also determined by rules of law, not under a discretion. The constructive trust is a substantive institution, in principle like any other trust. Express trusts and constructive trusts are two species of the same genus.

In relation to the remedial constructive trust, in some jurisdictions the view is taken that express and constructive trusts are distinct concepts and not two species of a single genus. The court first determines the question of liability and then considers what is the appropriate remedy, the remedial constructive trust being regarded as a judicial remedy giving rise to an enforceable obligation: the extent to which it operates retrospectively to the prejudice of third parties lies in the discretion of the court. It depends for its very existence on an order of the court, such order being creative rather than simply confirmatory. As the law presently stands the courts in England cannot vary proprietary rights by means of a remedial constructive trust, except where they have statutory authority to do so.”

[97] Lord Browne-Wilkinson in **Westdeutsche Landesbank Girozentrale v Islington London Borough Council**³⁶ (with whom Lord Glynn at 713 and Lord Lloyd at 738 agreed) also distinguished between a “remedial” constructive trust and the “institutional” constructive trust. In relation to “institutional” constructive trusts, Lord Browne-Wilkinson observed that:

“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 possible unfair consequence to third parties who in the interim have received the trust property) are also determined by rules of law, not under a discretion.”

³⁶ [1996] AC 669 at 714

[98] Lord Browne-Wilkinson further observed that:

“A remedial constructive trust, as I understand it, is different. It is a judicial remedy giving rise to enforceable obligation: the extent to which it operates retrospectively to the prejudice of third parties lies in the discretion of the court.”

[99] The relevant and critical point of distinction which arises in respect of institutional constructive trusts is that such trusts 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 in the sense that 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 essence of the institutional constructive trust is that there are circumstances which arose, which cause the element of unconscionability to arise, and pursuant to which a constructive trust should be imposed. The trustee's possession of the property is said to be “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”.³⁷

[100] A remedial constructive trust, on the other hand, may be imposed with a degree of judicial discretion. The court first determines the question of liability and then considers what is the appropriate remedy. It depends for its very existence on an order of the court, such order being creative rather than simply confirmatory.³⁸

[101] The identification of the significant difference between the institutional class of constructive trust and that of the remedial “constructive trust” was cited by Millett LJ in the English Court of Appeal decision in **Paragon Finance PLC v DB Thakerar & Co (a firm)**. These conjoined appeals both arose out of an alleged mortgage fraud relating to the sale of flats in Docklands. The plaintiff in both actions – Paragon Finance plc ('Paragon') – was the mortgage lender and

³⁷ See Lewin on Trusts at paragraph 8-011.

³⁸ Halsbury's Laws of England Volume 98 (2024) paragraph 123.

the defendants were two firms of solicitors who had acted both for Paragon and for the purchasers. It was alleged that the various flats were purchased indirectly from the vendors on a sub-sale via an interposed person and at an inflated price. The purchasers defaulted on the various loans from Paragon, who recovered the flats and then resold them but at a substantial loss. Paragon commenced actions against the solicitors alleging breach of contract, breach of duty of care and breach of fiduciary duty. The plaintiff argued, inter alia, that no limitation period applied to the proposed amended claims based on fraudulent breach of trust and intentional breach of fiduciary duty. The plaintiff relied on s. 21 of the Limitation Act 1980 which provides that “no period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action – (a) In respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy;...”

[102] Section 38 of the 1980 Act provided that 'trust' and 'trustee' should have the same meaning as in the Law of Property Act 1925, and that Act extended the meaning to implied and constructive trusts. The plaintiff alleged that the defendants held the mortgage advances as constructive trustees for the plaintiff and that no limitation period applied to an action based upon this breach of constructive trust.

[103] Millett LJ held that there was no constructive trust and thus no relevant 'trust' within the meaning of the section 21 of the Limitation Act 1980, so that the plaintiff should not be allowed to amend to bring an action in fraud outside the ordinary limitation period laid down by the Act. The essence of the court's reasoning was that there was a significant difference between the institutional class of constructive trust and that of remedial 'constructive trusts'. As His Lordship expressed it:

“Regrettably, however, the expression ‘constructive trust’ and ‘constructive trustee’ have been used by equity lawyers to describe two entirely different situations. The first covers those cases already mentioned, where the defendant, although 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. ... 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'** [Emphasis added]

[104] This critical point of distinction (highlighted above) is central to the dispute in this appeal as it was in the judgment in **Selangor United Rubber Estates Ltd v Cradock (a bankrupt) (No. 3)**.³⁹ In that case, a bank issued several drafts in relation to a company takeover, which involved illegalities of which the bank was unaware, and when the company subsequently went into liquidation, the receiver sued for recovery of the sums on the basis that the bank was either a constructive trustee or negligent in the performance of its duties to the company, its customer. Ungood-Thomas J found that the bank ought to have known that the company's money was being used to purchase its own shares

³⁹ [1968] 1 WLR 1555.

so that it was both negligent and a constructive trustee for the company in respect of the funds.

[105] Although the outcome in **Selangor** has been criticised on the grounds that in the circumstances it was unrealistic for the bank to suspect the true nature of the transactions, the following statement of principle has been supported in later cases:⁴⁰

“It is essential at the outset to distinguish two very different kinds of so-called constructive trustees: (1) Those who, though not appointed trustees, take upon themselves to act as such and to possess and administer trust property for the beneficiaries, such as trustees de son tort. Distinguishing features for present purposes are (a) they do not claim to act in their own right but for the beneficiaries, and **(b) their assumption to act is not of itself a ground of liability (save in the sense of course of liability to account and for any failure in the duty so assumed), and so their status as trustees precedes the occurrence which may be the subject of claim against them.** (2) Those whom a court of equity will treat as trustees by reason of their action, of which complaint is made. Distinguishing features are (a) that such trustees claim to act in their own right and not for beneficiaries, and (b) no trusteeship arises before, but only by reason of, the action complained of.”⁴¹ [Emphasis added]

[106] If there were any doubt as to the correctness of Millett J’s analysis in **Paragon**, then His Lordship as a member of the English House of Lords explicitly reiterated and applied his earlier reasoning in his judgment **Dubai Aluminum**⁴² (with which Lord Hutton and Lord Hobhouse as to these matters concurred). At paragraphs 138 – 143, the learned judge observed:

...“trustee de son tort”; that is to say, a person who, though not appointed to be a trustee, nevertheless takes it upon himself to act as such and to discharge the duties of a trustee on behalf of others. In *Taylor v Davies* [1920] AC 636, 651, Viscount Cave described such persons as follows:

" 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."

⁴⁰ *Williams v Central Bank of Nigeria* [2014] AC 1189 at paragraph [9].

⁴¹ [1968] 1 WLR 1555 at 1579.

⁴² [2003] 2 A.C. 366 at paragraphs 138 – 143.

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. Like express trustees they could not plead the Limitation Acts as a defence to a claim for breach of trust. Indeed, for the purposes of the relevant provision (section 25(3) of the Supreme Court of Judicature Act 1873 (36 & 37 Vict c 66)), which distinguished between property held on express trusts and other trusts, they were treated by the courts as express trustees. That is why the action in *Mara v Browne* was not statute-barred.

In the same case, however, Viscount Cave identified a very different kind of "constructive trustee", at p 651:

"But the position ... of a constructive trustee in the usual sense of the words—that is to say, of a person who, though he had taken possession in his own right, was liable to be declared a trustee in a court of equity—was widely different ..."

Taylor v Davies was not a case of fraud but it was followed and applied in **Clarkson v Davies [1923] AC 100, which was. In the latter case the Lord Justice Clerk (Scott Dickson) explained, at p 110, that the distinction was between a trust which arose before the occurrence of the transaction impeached and a claim which arose only by reason of that transaction. In the former case the defendant is treated as a trustee even though not expressly appointed as such; in the latter case he is a stranger to the trust at the time of the transaction.**

Referring to these cases in *Paragon Finance plc v DB Thakerar & Co* [1999] 1 All ER 400, 408-409 in the Court of Appeal, I drew attention to the fact, which was becoming increasingly overlooked, that the expressions "constructive trust" and "constructive trustee" were used by equity lawyers to describe two entirely different situations. One was the situation which the claimants unsuccessfully contended had arisen in *Mara v Browne*. The other is the situation which arose in present case.

Unlike HB in *Mara v Browne* [1896] 1 Ch 199, Mr Amhurst did not assume the position of a trustee on behalf of others. He never had title to the trust funds or claimed the right to deal with them on behalf of those properly entitled to them. He acted throughout on his own or his confederates' behalf. **The claim against him is simply that he participated in a fraud. Equity gives relief against fraud by making any person sufficiently implicated in the fraud accountable in equity. In such a case he is traditionally (and I have suggested unfortunately) described as a "constructive trustee" and is said to be "liable to account as a constructive**

trustee". But he is not in fact a trustee at all, even though he may be liable to account as if he were. He never claims to assume the position of trustee on behalf of others, and he may be liable without ever receiving or handling the trust property. If he receives the trust property at all he receives it adversely to the claimant and by an unlawful transaction which is impugned by the claimant. He is not a fiduciary or subject to fiduciary obligations; and he could plead the Limitation Acts as a defence to the claim.

In this second class of case the expressions "constructive trust" and "constructive trustee" create a trap. As the court recently observed in *Coulthard v Disco Mix Club Ltd* [2000] 1 WLR 707, 731 **this "type of constructive trust is merely the creation by the court ... to meet the wrongdoing alleged: there is no real trust and usually no chance of a proprietary remedy". The expressions are "nothing more than a formula for equitable relief":** *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 1 WLR 1555, 1582, per Ungood-Thomas J. I think that we should now discard the words "accountable as constructive trustee" in this context and substitute the words "accountable in equity".

The distinction between the two kinds of constructive trustee is of critical importance in the present context." [Emphasis added]

[107] At this juncture, it is important to note that (although there appears to be a general dearth of legal authorities specifically addressing this issue) the English distinction between category 1 "institutional" constructive trusts and category 2 "remedial" constructive trusts has been considered and applied in the BVI case law.⁴³ Given the origins and evolution of the legal system (including the law of trusts) in the Virgin Islands, I am grateful for the guidance afforded by the case law and other legal authorities which would have been cited and for the careful collation and examination of so many of the relevant judgments on this subject during the course of the hearing of this appeal.

[108] The appellants have asked this Court to pay special regard to the judgments in **High Commissioner for Pakistan in the United Kingdom v Prince Muffakham Jah**⁴⁴ and **Mitchell v Al Jaber**⁴⁵ which they say demonstrate that

⁴³ See: *Comodo v Renaissance Ventures Ltd* BVIHC(Com) 0045/2013, per Green J at [53] (which expressly cites *Paragon Finance and Williams*) and *Zhao Long v Endushantum Investments Co Ltd* BVIHC (Com) 151/2017 per Green J at [22]-[23].

⁴⁴ [2019] EWHC 2551 (Ch).

⁴⁵ [2023] EWHC 364 (Ch).

the boundaries of the law on constructive trusts are deliberately flexible so as not to restrict the court in technicalities in deciding what the justice of the case demands.

[109] I am not satisfied that the former case carries the import advanced by the appellants or can otherwise be determinative of this appeal. Having reviewed the judgment in **Prince Muffakham Jah** it is clear that while it (perhaps incautiously) references the woolly boundaries of law of constructive trusts, the reasoning does not deviate from the now well settled analysis of Lord Millett. At paragraph 249, Marcus Smith J of the English High Court would have observed:

“As a result, the books agree that “[c]onstructive trusts can arise over a wide variety of situations”, 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.”

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."

- [110] Moreover, the long standing dispute in **Prince Muffakham Jah** raised a wide range of legal issues, including procedural and evidential points, justiciability, conflicts, trusts and restitution, illegality and limitation, in a remarkable historical context. The dispute began in 1948 when the sum of GBP one million pounds was transferred by the then Minister of Finance (MOIN) from an account to the Government of Hyderabad to an account in the name of Rahimtoola then High Commission of the United Kingdom for Pakistan. The authority of MOIN to make this transfer and the capacity in which Rahimtoola held the funds were disputed issues. Hyderabad's status as a sovereign state of the Union of India and the sovereign immunity of Pakistan were inter alia the subject of collateral proceedings. However in 2013, Pakistan commenced proceedings against the Bank for payment of the Fund asserting a beneficial interest. The Princes and India joined the proceedings and the dispute then focused on whether Pakistan or Nizam VII was entitled to the Fund at the time of the transfer. The Princes asserted the existence of an express trust, a constructive trust (including trusteeship de son tort), or a resulting trust based on the unauthorised nature of the Transfer by MOIN. They contended that MOIN acted without authority from their father in effecting the transfer.

[111] The learned judge scrutinised the evidence relating to the transfer and found that it had been effected without explicit authority. Instead, he found that the purpose of the transfer was to safeguard the Fund from falling into India's hands following Hyderabad's annexation. This safeguarding was consistent with a transfer on trust rather than an absolute transfer. The judge concluded that Rahimtoola received the Funds on Trust for the Nizam VII and his successors in title either as a constructive trustee or under a resulting trust since no express trust arose due to lack of authority by the Nizam VII to MOIN. The court rejected Pakistan's contentions of absolute entitlement, non-justiciability, illegality and limitation.

[112] The judge's actual reasoning as it relates to his finding on the trusteeship de son tort is noteworthy. He observed:

"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.'
[Emphasis added]

[113] That decision clearly resolved a long-standing dispute over the Fund. However, it cannot be ignored that it is a first-instance decision which has not been tested on appeal. Moreover, given the cursory and precipitous analysis which informed the judge's ultimate conclusions on this issue who so obviously conflicted with the apparent wholesale adoption of the established general principles, I am satisfied that the ruling can have no broader precedent beyond the parties, but instead should be regarded as focusing on the specific facts and legal context of that case.

[114] I am therefore not satisfied that there is any basis upon which the learned judge's treatment of this authority can be impugned and I am compelled to note that the appellants have not, in this notice of appeal raised any direct challenge in that regard.

[115] **Mitchell v Al Jaber** on the other hand is a seminal case which carried much import but which unfortunately would not have been addressed by the judge in the court below. At the date of the hearing of this appeal, the parties would have cited the appellate judgment delivered by the Court of Appeal of England and Wales and reported in [2024] EWCA Civ 423. This judgment was appealed to the United Kingdom Supreme Court (UKSC) and on 24th November 2025 the UKSC would have handed down its judgment on the appeal.⁴⁶

[116] The case concerned complex issues of fiduciary duty, equitable compensation and the existence of unpaid vendor's liens in the context of company restructuring under BVI law. In this case, the director had caused MBI International & Partners Inc ("MBI") to transfer the shares at a time when he did not have the requisite authority or power to do so (given that his powers as a director would have largely ceased at the point MBI entered liquidation in 2011). The director further asserted that he could not be liable for breach of duty as an intermeddler on the basis that he had not personally received the shares, but rather had caused MBI to transfer them to another group company. However, the court confirmed that company property can be the subject of

⁴⁶ Mitchell v Sheikh Mohamed Bin Issa Al Jaber (No 2) [2025] UKSC 43.

intermeddling without ever being in the hands of the intermeddler. Company property is not vested in the directors but is under their stewardship and control, and therefore equitable principles are applied by analogy to trusts where directors improperly deal with company property. The sheikh's case, however, is that he did not owe any fiduciary duty to the Company.

[117] In his grounds of appeal when seeking permission to appeal to the UKSC, the sheikh focused his challenge on the argument that he could not be liable as an intermeddler in the company's affairs unless he had received and held title to the company's property. That argument was presented only as an answer to a case which based his liability on an analogy with a trustee de son tort (i.e. a trustee in his own wrong). It was submitted that the Court of Appeal, in imposing liability because the sheikh had intermeddled by pretending to be a fiduciary, had adopted "an entirely novel approach" by imposing liability on the sheikh as if he were a trustee de son tort and treating as irrelevant that he had never received the Company's property.

[118] In handing down its judgment,⁴⁷ the UKSC framed the relevant issue in the following terms:

"The principal focus of the appeal has moved to an argument that liability as an intermeddler or de facto fiduciary would arise only if a person voluntarily assumed the office of a fiduciary. A person could only become accountable for the functions and duties of a fiduciary if those functions and duties were legally capable of being discharged. It was asserted that a person cannot owe fiduciary duties if he does not have fiduciary powers. The Sheikh had no such powers because his powers as a director of the Company had ceased to have effect on the commencement of the winding up pursuant to section 175 of the IA 2003. 33. The Sheikh also argues that a single indivisible act (ie signing the share transfer forms for the 2016 Share Transfers) cannot both create a fiduciary duty and be a breach of that duty." [Emphasis added]

[119] The United Kingdom Supreme Court (Lords Hodge, Briggs and Sales with whom Lords Stephens and Richards agreed) upheld the Court of Appeal's finding on this issue concluding that fiduciary duties are not confined to well

⁴⁷ [2025] UKSC 43 at [32].

established categories of relationship such as trustee and beneficiary, company director and company, principal and agent, and solicitor and client but can arise ad hoc, including where there is an undertaking of fiduciary duty by the presumed fiduciary in circumstances where he or she has not made any conscious undertaking or considered the interests of the person to whom that duty is owed, and indeed has acted contrary to that person's interests.

[120] Applying the judgment in **Soar v Ashwell**,⁴⁸ the UKSC further held that if persons, although not appointed as trustees, take upon themselves the custody and administration of property on behalf of others, they are actual trustees and are fully subject to fiduciary obligations. It is not necessary that a person who has taken upon himself a fiduciary power to deal with property has title to or possession of that property before he can come under a fiduciary duty. It follows that where the sheikh pretended to be a director with authority to transfer the 891K shares, the fact that the recipient of the misappropriated 891K shares was a company under the sheikh's control rather than the sheikh, is irrelevant to his liability as a fiduciary in respect of that transaction.

[121] At paragraphs 44 - 47 their Lordships considered the long standing authorities for this approach in the older case law concerning liability arising when a person acts as an executor de son tort or a trustee de son tort and at paragraphs 48 – 50 is the following critical analysis:

“48. The doctrines of executor de son tort and trustee de son tort are common law doctrines in their origin: see Charles Harpum, “The Stranger as Constructive Trustee (Part 1)” (1986) 102 LQR 114. The common law principle from which the doctrine of trustee de son tort derived was that a person who wrongfully intermeddled with the assets of the deceased and thereby usurped the functions and assumed the authority of an executor was liable as an executor de son tort to the extent of the property that came into his hands.

49. **Nonetheless, the common law has developed.** As Newey LJ records in paras 4446 of his judgment, **there is case law which holds that an intermeddler does not need to have title to or possess property to incur liability as an executor de son tort.** In *New York Breweries Company Ltd v The Attorney General* [1899] AC 62 the House of Lords addressed a test case on liability to probate

⁴⁸ [1893] 2 QB 390.

duty where an English company had transferred title to some of its shares and debentures to the American executors of a deceased shareholder domiciled in New York at their request when it should have transferred them to an English executor if one had been appointed. The case was concerned principally with the interpretation of provisions in the Stamp Act 1797 (37 Geo 3 c 90), the Crown Suits Act 1865 (28 & 29 Vict c 104) and the Customs and Inland Revenue Act 1881 (44 Vict c 12), but the Earl of Halsbury LC at pp 68-69 and 71 and Lord Shand at p 76 treated the company as an executor de son tort which had intermeddled with the shares and debentures by registering them in the names of the American executors. Similarly, in *Inland Revenue Comrs v Stype Investments (Jersey) Ltd* [1982] Ch 456, which concerned a claim by the Revenue for payment of capital transfer tax, the transfer by the Jersey-based nominee of the late Sir Charles Clore of the proceeds of sale of land in England to his personal representatives in Jersey and not to his personal representative in England amounted to intermeddling, making the defendant liable to the tax as an executor de son tort. See Templeman LJ giving the judgment of the Court of Appeal at p 474.

50. It is not necessary that a person who has arrogated to himself a fiduciary power to deal with property has title to or possession of the property before he can come under a fiduciary duty. As Lord Esher MR stated in *Soar v Ashwell* it is sufficient that he has 'exercised command or control' over it." [Emphasis added]

[122] At paragraph 53, the UKSC addressed the sheikh's submission that before a person can be treated as a fiduciary there needs to be in existence something like a trust. Counsel for the sheikh would have argued that in 2016, the Company held both the legal title and beneficial interest in the 891K shares. The sheikh, while remaining a director de jure, had ceased to have any discretionary powers in relation to the Company's property after it was placed in liquidation and so absent such powers, there could be no trust. Counsel would have cited in support, the Canadian case of **Galambos v Perez**.⁴⁹

[123] However, the UKSC was not persuaded by this argument, finding that the case is far removed from the line of authority in which a person has arrogated to himself a power which is fiduciary in nature. The UKSC found that it is inherent in this line of authority that the person is not an executor, trustee or director and so does not, as a matter of law, possess the power which he or she purports to exercise and held that:

⁴⁹ [2009] 3 SCR 247.

“...the principle is as stated by Bowen LJ in *Soar v Ashwell* (para 43 above) and by Lewin on Trusts (para 45 above), that a person who assumes an office ought not to be in a better position than if he were what he pretends. That principle when applied to this case means that the Sheikh falls to be treated as if he were a director of the Company whose powers had not been removed by section 175 of the IA 2003.”

[124] Moreover, the UKSC then went on to summarily dismiss the sheikh’s further argument that the court must first identify whether a person has assumed fiduciary duties before inquiring whether there are any acts of breach because the same act cannot be both an assumption of duty and a breach of that duty. Counsel for the sheikh would have advanced that the Court of Appeal erred in conflating accountability and liability by treating his signature of the share transfer forms in the 2016 Share Transfer as both rendering him a fiduciary and amounting to a breach of that duty.

[125] Importantly, at paragraph 55 of the judgment, the UKSC was equally dismissive of this argument, holding that:

“The arrogation to oneself of a fiduciary power may render a person accountable as a fiduciary without involving any breach of fiduciary duty. But there is no reason why that arrogation of a fiduciary power may not itself involve a breach of fiduciary duty at one and the same time.”

[126] When addressing the United Kingdom Supreme Court’s judgment in this case, counsel for the appellants would have submitted that it is at least reasonably arguable that it is not necessary for a finding of trusteeship *de son tort* that there was a pre-existing express trust or fiduciary relationship at all. Their reliance on **Mitchell v Al Jaber** would have been criticised on the basis that it is not concerned with the quintessential element of this case – that the person acting in good faith in a role that does not exist (i.e. a trustee, if there was no valid trust). Moreover, they would have argued that the learned Judge was correct to hold that a preexisting trust/fiduciary relationship is a precondition for trusteeship *de son tort*.

[127] Just prior to delivery of this judgment, counsel for the parties submitted supplemental notes which addressed this important judgment. They were

reviewed and both proved helpful. However, I do not accept that **Mitchell v Al Jaber** has little or no import in these proceedings as has been suggested by the respondent. The United Kingdom Supreme Court judgment includes valuable discussions on the trustee de son tort doctrine. The fact that that court was not addressing a sham or invalid trust does not diminish its import.

[128] In my judgment, the dicta afforded by the apex judgment in **Mitchell v Al Jaber** gives much force to the appellants' argument that this area of the law remains dynamic and that the judge would have erred in principle when he determined no reasonably arguable case could be advanced on the appellants' pleaded case.

[129] It remains to be seen how this recent addition to the jurisprudence will be considered and applied. However, this critical judgment makes plain that the trustee de son tort liability is not based on a narrow, technical construction of what the respondent would like to call 'settled' doctrine. Rather it is a developing area of the law based on the arrogation of fiduciary power over property over which the trustee would have assumed custody and administration.

[130] Although the parties in an exchange of written submissions appear to advance alternative framings of the appellants' pleaded case, I am satisfied that they are ultimately paraphrasing each other. What is clear is that that the appellants in their pleaded case have alleged that Estera owed fiduciary duties. It is also not in dispute that Estera would have largely held title to the relevant property.

[131] Moreover, at least in part, the appellants' case is premised on the basis that the R&S Trust is invalid. If that is so, then there is no extant operative other than a constructive trust which would have arisen when Estera would have purported to act as trustee (when it would have had no authority to do so) becoming an intermeddler. The learned judge would have determined that in order to advance a reasonably arguable case, the appellants would have had to show that the respondent accepted or assumed the role of trustee by transactions not impeached by the appellants, independently of preceding any

breach of duty. He concluded that they could not because they impeach the very basis of the respondent's purported trusteeship.

[132] There is, in my view, sufficient conflation of all categories of institutional constructive trusts (trustee de son tort, quasi trustees and fiduciary duty trusts) such as to leave open questions as to the circumstances where a trusteeship de son tort can be imposed. Thankfully these questions do not need to be definitively answered here. This Court is only obliged to consider whether there is any basis to interfere with the learned judge exercise of discretion to strike out the relevant parts of the appellants' statement of claim.

[133] I am compelled to reiterate the well-established principle that striking out a litigant's statement of case is a draconian step or 'nuclear option' and ought only to be deployed sparingly, in the clearest of cases. Having considered the dicta in the Supreme Court decision of **Mitchell v Al Jaber**, I am not satisfied that this presented as a clear case. It is clear that where the law is in a state of development, it will usually be inappropriate for a court to decide legal issues in a novel situation such as has been presented here.

[134] In my view it follows that grounds 1 and 2 of the appeal have reached the threshold which warrants interference by this court and should be upheld.

Respondent's Counter Notice

[135] Counsel for Estera submitted that in the event that the Court is of the view that the grounds of appeal in respect of the trustee de son tort issue were meritorious, there are other reasons why the appellants' claim should be rejected. These additional reasons are advanced substantively and in the alternative. Given the findings herein I am obliged to consider the additional issues raised in this counter notice.

[136] First, Estera argued that a trusteeship de son tort can only attach to a true trustee role or office that is assumed by the person in question. The only office in respect of which Estera purported to act was the trusteeship in connection with the R&S Trust. Where, the premise of the appellants' trustee de son tort

claims centers on the fact that the R&S Trust did not exist, Estera argued that there was no true trustee office in respect of which it purported to act. Therefore, the trustee de son tort claim must fail for this reason.

[137] In short, the concept of trustee de son tort takes as its starting point the existence of a genuine trustee role or office. The only role or office in respect of which Estera assumed to act was the role of R&S Trustee, which *ex hypothesi* was not a genuine one. Estera contends that the appellants' trustee de son tort case is only made on the premise that the R&S Trust was invalid - but that premise disposes of the case: if invalid, there is no valid role or office of trustee to that trust. If the Trust does not exist, there is no genuine office or role of trustee in respect of it.

[138] In responding to this contention, the appellants submitted that it is first necessary to clarify that it is not the appellants' case that Estera is a trustee de son tort of the R&S Trust which is assumed to be invalid. Rather, it has always been their case that Estera is a trustee de son tort of a constructive trust – a constructive trust that arises in the novel circumstances of this case. That constructive trust imposed duties and obligations on Estera, some of which mirror or reflect the duties and obligations under the R&S Trust, however, the exact terms of the constructive trust will be a matter for the court below at trial based on the facts found at trial.

[139] The appellants further argued that there does not need to be any pre-existing trust or fiduciary relationship for a trusteeship de son tort to arise. The question is whether Estera has voluntarily assumed the role or office of trustee. Relying on **Lewin on Trusts**, the appellants urged that even in cases concerning pre-existing express trusts, the duties and liabilities of a trustee de son tort do not necessarily mirror the terms of the express trust.

[140] The respondent in robust reply submissions takes issue with the appellants' iteration of their case.

[141] Having reviewed the parties' respective written submissions, it is clear that they are not ad idem as to the actual case to be decided by the court. However, I am not satisfied that the appellants' case lacks the clarity suggested by Estera. The position is made clear in the appellants' response to Estera's RFI which addressed the basis of liability.⁵⁰ This was considered at length in submissions made by counsel for Estera in the court below⁵¹ and so there can be no misunderstanding of the appellants' case.

[142] Ultimately, Estera's arguments here are premised on the broader submission that there needs to be a valid pre-existing trust or fiduciary relationship for a trustee de son tort to arise. For the reasons which have been set out above, I am not satisfied that this submission could be said to have such force as to disgorge the appellants' case and warrant the application of the draconian strike out remedy.

[143] Secondly, Estera argued that the learned judge's decision should be upheld on the additional ground that assuming that Estera was a trustee de son tort, it would have the benefit of the exoneration clause under the R&S Trust which would effectively defeat the appellants' trustee de son tort pleaded claims. More particularly, Mr. Weekes KC averred, it is a fundamental principle of the law of fiduciaries, that a fiduciary relationship is a voluntary relationship. Therefore, Estera could not be held in equity to standards that it is not to be taken to have voluntarily assumed and must be treated in equity as having the benefit of the exoneration clause under the R&S Trust. The respondent buttressed this submission with the case of **Allan v Rea Brothers**. Counsel noted that in hastily abandoning their claim in dishonesty against Estera, they can no longer make the case that Estera was guilty of willful wrongdoing. They have therefore abandoned any claim that would not be defeated by the exoneration clause under the R&S Trust.

⁵⁰ Paragraphs 9 and 10 Claimants' Response to the First Defendant's Request for Information filed 14th January 2019 at page 1358 of the Hearing Bundle.

⁵¹ See pages 27 – 34 of the Transcript of Proceedings before the court below dated 4th June 2024 - at pages 1035-1042 of the Hearing Bundle.

[144] The appellants argued in response that to succeed on this ground, Estera must show that the appellants have no reasonable argument to the effect that the exoneration clause under the Trust wouldn't apply. This the appellants argue, Estera would be unable to do at this stage of the proceedings. Further, it is doubtful whether trustee exemption clauses in a trust instrument in favour of a "trustee" are to be construed so as to cover a trustee de son tort. Moreover, trustees de son tort are trustees of property, not of the settlement.⁵²

[145] There can be no doubt that at common law, a claim can be struck out if an exclusion clause renders the claim legally untenable, meaning it discloses no reasonable grounds for bringing the action. If the clause clearly excludes liability for the type of loss claimed, the court may rule the claim has no real prospect of success. See: **Pinewood Technologies Asia Pacific Ltd v Pinewood Technologies PLC**.⁵³ However, there are at least two issues which militate against this. First, having expressly pleaded that "If the Trust is valid (a) Estera is liable for breach of trust as more fully set out in paragraphs 106 and 171A to 176 below (such liability not being excluded by the exoneration provisions)"⁵⁴ it remains to be seen whether the appellants can persuade the trial court on the construction and the scope of the exoneration/exclusion clause that the conduct alleged at paragraphs 106 and 171A to 176 is not captured.

[146] Secondly, in my view, given the way in which the appellants' case has been advanced, it is indeed relevant that there is some doubt as to whether trustee exemption clauses in a trust instrument in favour of a trustee are to be construed so as to cover a trustee de son tort.⁵⁵ I find much force in the appellants' argument that striking out the claim at this stage would *without more* be peremptory or premature and I remind myself that the test is whether

⁵² *Jasmine Trustees v Wells* [2007] EWHC 38 (Ch), [2008] Ch 194.

⁵³ [2023] EWHC 2506.

⁵⁴ See paragraph 102 of the Amended Statement of Claim at page 1255 of the Hearing Bundle.

⁵⁵ *Lewin on Trusts* at paragraph 42-107; the rationale appears to be that while a de son tort trustee is liable for breaches of trust as if they were a properly appointed trustee, they are deemed to have intermeddled without authority, and therefore cannot be seen to rely on the protections designed for authorized trustees within the trust instrument.

the claim is bound to fail, so that even a case 'fraught with difficulty' will not be struck out.⁵⁶

[147] The respondent further argued that the decision to dismiss the trustee de son tort claims should be upheld on the additional ground that a trustee de son tort can only be liable in respect of steps taken by it in regard to trust property that it has received or controls. It contends that claims pleaded against Estera which comprise the trustee de son tort complaint do not concern (i) property received by Estera; (ii) nor steps taken with property under Estera's control.

[148] Like the appellants, I find it passing strange that Estera does not dispute that legal title in the various companies held by the Trust has been transferred into its name. Given that the property is held on trust, it is difficult to see on what basis Estera asserts that their actions in relation to the purported R&S Trust did not "concern" the property. In any event, the dicta in **Mitchell v Al Jaber** now makes plain that the application of the doctrine does not depend on the intermeddler having title to the trust property. Rather, it is sufficient that the trustee have command or control over the relevant assets and in that regard I have noted paragraphs 88 – 93, 108, 118 J and 119 of the appellants' amended statement of claim which sets out at least in part their case that Estera assumed command and control of the property. It is also at least arguable that Estera's admission that it suggested and approved the conversion of the trust into a VISTA Trust and instructed and approved one of the companies to waive pre-emption rights over at least one of the trust assets would be enough to satisfy this requirement.

[149] Finally, Estera contends that assuming that the trustee de son tort doctrine could apply in the context of an illusory or non-existent trust and as Estera is such a trustee then Estera could only have duties as a trustee de son tort that are consistent with the terms of the R&S Trust.

⁵⁶ see: *Smith v Chief Constable of Sussex* [2008] EWCA Civ 39, [2008] PIQR P12; *K v Central and North West London Mental Health NHS Trust* [2008] EWHC 1217 (QB), [2008] PIQR P19).

[150] The role that Estera has voluntarily assumed is that of R&S Trustee and its beneficiaries do not include the first appellant. Therefore Estera could not have owed any duties to Mrs. Ieremeiva as she was never a beneficiary of the R&S Trust. Counsel further argued that even if the concept of trustee de son tort could somehow apply to a non-existent trust, the trusteeship must nonetheless still be referable to a role that Estera has voluntarily assumed and so any duties must still be owed to the beneficiaries (and not a third party, such as the first appellant).

[151] Again, this argument is premised on Estera's characterization of the appellants' case. The appellants reiterate that their position is not that the trustee de son tort doctrine applies so as to make Estera a trustee de son tort of the R&S Trust but that it applies so as to make Estera a trustee de son tort in relation to the constructive trust that arises in the circumstances of this case. The beneficiaries of that constructive trust are the heirs and/or the estate of Igor which would include the first appellant, Mrs. Ieremeveia. The appellant further submitted that the precise duties and liabilities of Estera as trustee de son tort in relation to this constructive trust will, in the appellants' submission, be a matter for trial.

[152] Given the reasoning and the conclusion reached in respect of the trustee de son tort appeal, I am not able to concur with Estera's submissions. Certainly, this argument could not be said to reach the threshold which would entitle a judge to exercise his discretion to strike out the claim.

[153] For the reasons set out herein, I am not satisfied that any of the grounds advanced in Estera's counter notice of appeal disgorges the appellants' success on this limb of the appeal. Accordingly, I would dismiss the counter notice.

The ex tunc appeal

[154] Grounds 5 – 8 of the appellants' notice of appeal relate to the ex tunc issue. The arguments in support of these grounds stem from the terms of the 2018 Order made by Adderley J following the hearing of a directions application. It

is, I think, important to set out the relevant terms of that order. At page 3 of the order the following recitals are recorded:

“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 Sofia (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) Sofia and
- b) The children and remoter issue of Roman and Sofia

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.”

[155] This Order has not been appealed by either side. Unfortunately, the parties herein are not *ad idem* as to its meaning, intent and import. The learned judge summarised the contrasting positions at paragraphs [67] – [68] of his judgment:

“[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*’. 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*’).

[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’.”

[156] On appeal, the parties’ arguments essentially address the interpretation of the 2018 Order and unfold in the following way:

- i. Whether the order was set aside for operative mistake;
- ii. Whether the order effectively set aside the Amendment Deed ex tunc;
- iii. Whether the effect of the setting aside of the Amendment Deed is to treat it for all purposes as if it never existed.

General Principles - Interpretation of Court orders

[157] In **R v Evans**⁵⁷ the English Court of Appeal determined that the proper approach to interpretation of a court order is, broadly, to apply the principles of statutory interpretation. At paragraphs 15 of the judgment Dyson LJ noted:

“[15] In our judgment, the observations by Lord Reid and Lord Hoffmann apply equally to the interpretation of a court order as they do to a statute. We can see no basis for drawing a distinction between them. In each case, the question whether a word or phrase is being used in its ordinary sense or in a special sense is a question of law. But if as a matter of law the word or phrase is being used in its ordinary sense, then it is for the tribunal of fact to apply that meaning to the facts as found.”

[158] This case was later considered and applied by Edward Murray J in **Feld v The Secretary of State for Business, Innovation and Skills**.⁵⁸ The critical excerpt from the court’s *ratio* is found at paragraphs 27 – 29 of the judgment:

“[27] **In a court order; one is concerned with the intention of the court in making the order, and this is closer to the exercise involved in construing the intention of the legislature when enacting a statute than it is to construing the intention of parties to a contract.** On the other hand, it would be a rare and unusual case where a person to whom a statutory provision was to be applied (in a civil or criminal proceeding where the meaning of the statutory provision was at issue) had been involved in the drafting of that provision. But where a court order is to be applied to a person, such as Mr Feld, who had a hand in drafting the terms

⁵⁷ [2004] EWCA Crim. 3102.

⁵⁸ [2014] EWHC 1383 (Ch).

of the order, the court should be entitled to have regard, as part of the exercise of construing the order, to what that person could reasonably have been thought to have intended in drafting the order in a particular way, as far as that may be objectively determined on the basis of the evidence presented to the court.

[28] **The interpretation of a court order cannot be entirely assimilated to the exercise of interpreting a contract nor can it be entirely assimilated to the exercise of interpreting a statute. In all three cases, however, the common starting point is the natural and ordinary meaning of the words used in light of the syntax, context and background in which those words were used. What additional principles and factors come into play as part of the court's exercise of interpretation will depend on the nature of the writing to be interpreted (contract, court order or statute) and, of course, will be highly dependent on the facts of the specific case. ...**

[29] Dyson LJ, as already noted, confirmed in *Evans* that these observations also apply to interpretation of a court order. It is quintessentially the job of the relevant tribunal to carry out this exercise based on its findings of fact on the basis of the evidence it accepts." [Emphasis added]

[159] The approach of the Privy Council in the case of **Sans Souci Limited v VRL Services Limited**⁵⁹ is also instructive. In that case, Lord Sumption described the correct approach to the construction of a judicial order as follows:

"...the construction of a judicial order, like that of any other legal instrument, is a single coherent process. It depends on what the language of the order would convey, in the circumstances in which the Court made it, so far as these circumstances were before the Court and patent to the parties. The reasons for making the order which are given by the Court in its judgment are an overt and authoritative statement of the circumstances which it regarded as relevant. They are therefore always admissible to construe the order. In particular, the interpretation of an order may be critically affected by knowing what the Court considered to be the issue which its order was supposed to resolve." [Emphasis added]

[160] Applying these authorities, I am therefore satisfied that the words of the 2018 Order are therefore to be given their natural and ordinary meaning and are to

⁵⁹ [2012] UKPC 6.

be construed in light of the syntax, their context, including their historical context and with regard to the object of the Order.⁶⁰

[161] In their written submissions, the appellants submitted that on its terms, it is impossible to discern in the 2018 Order, or in the materials from 2nd May 2018, any consideration of ‘operative mistake’ when setting aside the Deed of Amendment. The chain of reasoning of the judge below was not a determination of ‘operative mistake’, nor was it appropriate to characterise it as such. He further submitted that in addition to the express terms of the 2018 Order, the transcript of the 2nd May 2018 hearing demonstrates that there was no intention to treat the Deed of Amendment as having been a nullity from the outset.⁶¹ He submitted that transcript records demonstrates Mr. Ham QC (counsel then on record) representing that the Deed of Amendment was liable to be set aside, and that there was no benefit to fighting that. The 2018 Order was characterised as a sort of compromise which did not trespass on the issues for resolution in the main proceedings.

[162] Estera on the other hand argues that it is clear beyond doubt on the terms of the 2018 Order that the Deed of Amendment was set aside for mistake. Counsel argued that the court does not have some roving jurisdiction to set aside trust deeds as a matter of judicial discretion and so there must be some proper basis for such a setting aside to be ordered. In this case, the only basis (the appellants do not appear to suggest any other candidate) is that the court was setting aside the Deed of Amendment for causative mistake, that is to say, equitable rescission for mistake as that doctrine has been explained in **Pitt v. Holt**.⁶²

[163] Estera further argued that the issue of whether the order sets aside the Deed of Amendment ex tunc does not fall to be determined on the basis of objective interpretation but rather as a matter of law. In that regard, counsel for Estera

⁶⁰ The same approach has been adopted by this Court in *Emmerson International Corporation v ABC Grandeservus Limited* BVIHCMAP2019/0017 (delivered 30th September 2020, unreported) and *Yao Juan v Kwok Kin Kwok et al* BVIHCMAP 2018/0042 (delivered 1st June 2021, unreported).

⁶¹ See pp.14-16 and pp.22-24 of the transcript.

⁶² [2013] UKSC 26.

argued that as a matter of law the effect of setting aside a transaction for mistake is automatically to set it aside 'ex tunc' and he cited a number of judicial authorities (relied upon by the learned judge) which appear to make that position plain.⁶³ Counsel noted that the appellants do not identify a single authority to the contrary (i.e. for the proposition that a setting aside for mistake does not operate "ex tunc"). Instead, Estera actually identified further and higher authority supporting the judge's analysis, by citing the dictum of Lord Walker in **Pitt v Holt** at paragraph [130] that where a transaction is set aside in equity: "the Court is in effect deciding that a transaction of the specified description is not to be treated as having occurred".

[164] I agree that on its terms, the 2018 Order does not specifically address the legal principles relevant to 'operative mistake'. The term is also not referenced in the materials providing context to the Order. However, what is clear is that there must be some legal basis upon which a court could declare a Deed of Amendment to be set aside.⁶⁴ In the Virgin Islands, this includes operative mistake of sufficient gravity. Other grounds include fraud, misrepresentation, undue influence or lack of capacity by one of the parties.

[165] In construing the 2018 Order, the learned judge in the court below would have had before him the terms of the actual order, the transcript of proceedings for the 2nd May 2018 hearing and the legal submissions of both sides. The learned judge's salient reasoning as it relates to whether Adderley J set aside the Deed of Amendment for operative mistake is set out at paragraphs [89] – [99] of his judgment. It clearly reveals that the judge considered the actual natural and ordinary meaning of wording employed in the recitals to the 2018 Order (i.e. "...that the Deed of Amendment and [Replacement] 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 Sofia (acting through her guardian, Mrs. Ieremeieva) knew and approved of the conversion of the Trust into a VISTA trust..." and determined as **a matter of law** not only

⁶³ Re Strathmullan Trust [2014] JRC 056 at [28]-[29] and In Re Onorati Settlement (Judgment, [86], [87]) and also the Supreme Court in Pitt v. Holt.

⁶⁴ This is clearly accepted by counsel during the proceedings before Adderley J, see: pp 22 of the transcript of the 2nd May 2018 at lines 10-12.

that it was rather obvious that the said ‘false understanding’ was ‘operative’ but also that the law recognises Estera’s false belief or assumption about the beneficiaries’ knowledge and approval as a ‘mistake’.

[166] Estera has argued that the 2018 Order should be construed narrowly and that Adderley J was clearly content to have these matters reserved for determination in the main proceedings. There appears to be some force in this. I say this because the excerpt from recital quoted above continues with this important proviso:

“...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.”

[167] However, where causative or operative mistake is conceded by the parties and determined by the judge, this proviso can only be superfluous. I am unable to find any basis to interfere with the learned judge’s reasoning or disposition on this issue. I am certainly not persuaded that the appellants’ purported failure to grasp the full import of the express wording employed in drafting the terms of the 2018 Order could or should be used as an aid in interpreting the Order. I find no merit in that argument.

[168] In my view, the real issue between parties is whether the 2018 Order was intended to operate as a nullity from the outset, the starting point must again be the actual terms of the 2018 Order. Again, it is clear that the 2018 Order does not expressly address this issue. However, the transcript of proceedings is instructive. At pages 22- 24 of the transcript of 2nd May 2018, the following exchange is recorded:

“MR. HAM: ...Our client does not consider the Court should be adjudicating in any way the directions application upon the issues that arise in the Main Proceedings.

THE COURT: Sorry, where is that?

MR. HAM: Sorry, the second page of the letter, paragraph 5.2.

Our client does not in principle oppose to the steps being taken to set aside the Deed of Amendment. However, our client does not consider the Court should be adjudicating in any way the directions application upon the issues that arise in the Main Proceedings. For example, it

would not be appropriate to go further and recite, as requested by Roman, that it appears to the Court that the Deed of Amendment is invalid. The means by which and terms on which the Deed of Amendment is set aside, including the question of whether it was void or merely voidable, are matters arising in the Main Proceedings on which our client has an interest and on which he would wish to have the opportunity to be heard.

And as to that, in my respectful submission, backed with the issues, arise or might arise in the Main Proceedings, doesn't prevent the Court in these proceedings exercising its supervisory jurisdiction over trusts to —

THE COURT: The way that the draft Order is worded doesn't offend that.

MR. HAM: No.

THE COURT: It seems to be. It doesn't make any statement as to its invalidity or otherwise.

MR. HAM: No. It sets it aside.

THE COURT: Yes.”

[169] The appellants submit that applying an objective interpretation, this makes plain that the 2018 Order, which was intended to have a narrow effect and that Adderley J intentionally 'left open' the question of the Order, had the effect that the Deed of Amendment was a nullity from the outset. At paragraph [82] of his judgment, this premise appears to have been accepted by the learned judge:

“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.”

[170] However, in contending with the application before him, the learned judge was clearly not prepared to confine himself to what Adderley J would or would not have intended. Instead, he accepted the respondent's invitation to consider **the actual legal position**.

[171] I am not satisfied that this was the incorrect approach. When a judge considers an application to strike out a claim or part of a claim on the ground that the claim is not sustainable, he or she does so on the basis of the litigant's case as pleaded and on the assumption that the facts alleged are true.⁶⁵ This remedy is draconian and so striking out is limited to plain and obvious cases where there is no point in having a trial. This may obtain where the judge not

⁶⁵ Morgan Crucible Co. plc v Hill Samuel and Co. Ltd [1991] Ch 295 per Slade LJ.

only harbours doubts about the soundness of the pleading (where it fails to plead a complete claim or defence) or where the claim is bad in law and where he or she is satisfied that striking out will obviate the necessity for a trial or will substantially reduce the burden of preparing for trial or the burden of the trial itself.

[172] Having come to the conclusion which he did on the operative mistake issue, the learned judge then considered the appellants' pleaded case. At paragraphs [100]-[104] of the judgment, the judge applied his conclusions to the pleaded case and determined that the case (as pleaded) could not be maintained. This reasoning is premised on the judge's finding that in setting aside the Deed of Amendment, the 2018 Order had the effect in law of setting aside the Deed as if it had never been made. After considering the relevant case law⁶⁶, the judge concluded that:

“...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 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.”

[173] He further found that the 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. According to the learned judge, that part of the claim could not be cured, nor its merits increased, by allowing further evidence, nor through further disclosure, nor through a trial process.

[174] Where the argument involves a substantial point of law, the appellants can successfully oppose a strike out application by demonstrating that the point of law does not admit of a plain and obvious answer. In this case, they could do so by demonstrating that setting aside a deed on the ground of mistake does not, necessarily, as a matter of law, operate ex tunc.

⁶⁶ Re Strathmullan Trust [2014] JRC 056 at [28]-[29]; In re Onorati Settlement 2013 JLR 182.

[175] However, the appellants did not provide any authority which would support the proposition that setting aside a deed for mistake does not operate ‘ex tunc’. Instead, the appellants cited an authority (the dictum of Lord Walker in **Pitt v Holt**) where in rejecting a submission for HMRC that mistakes in respect of tax could not be set aside, Lord Walker said “if a transaction is set aside the court is in effect deciding that a transaction of the specified description is not to be treated as having occurred”. In my view, this could only strengthen and reinforce the learned judge’s analysis.

[176] Confronted with the gaps in their argument, the appellants’ strongest response is that unlike in this appeal, **Pitt v Holt** would have been finally determined following trial and not at the interlocutory stage. I am not satisfied that this argument carries sufficient force to set aside the learned judge’s reasoning and disposition.

[177] Finally, in grounds 7 and 8 of this appeal, the appellants argue that even if the Order had the (unintended) effect of setting aside the Deed of Amendment ‘ex tunc’ this would not automatically extinguish any defaults between the date of Deed and the 2018 Order. They contend that the judge erred in concluding that the appellants “cannot maintain a case that the respondent’s conduct of its putative trusteeship was governed by VISTA until the Deed of Amendment was set aside on 2nd May 2018”. They submitted that it would be unjust and/or absurd if that was taken to be the consequence of the 2018 Order.

[178] In illustrating their argument the appellants drew a parallel between the way in which courts treat with statutory deeming provisions⁶⁷ and the situation on this strike out application and submitted that it is not an inevitable consequence of the 2018 Order that appellants should be deprived of any possibility of relief in relation to defaults by the respondent (which must on a strike out be assumed to be capable of proof) which took place in the period prior to the date of the 2018 Order. They further argued that while the question of the “purpose of the fiction” does not arise in exactly the way it would in relation to a statute, one can draw a parallel with the objective intention of court in making the 2018 Order as there is no indication that Adderley J intended the 2018 Order to

⁶⁷ DCC v RCC [2010] UKSC 58; Fowler v RCC [2020] UKSC 22.

have the effect of extinguishing certain of the appellants' claims, let alone that he 'clearly' intended it to have that effect.

[179] The appellants further submitted that treating something as for all purposes as not having existed would be inconsistent with the case law on statutory deeming provisions, with which there are strong parallels. It unnecessarily boggles the mind to ignore things which in the real world happened and had lasting effects and goes further than the cases relied upon by the judge.

[180] Much like the learned judge, I have some difficulty in discerning the logic in this tiered argument. First, the appellants were unable to cite any authority for the proposition that equity should follow the specific approach to construction of statutory deeming provisions.

[181] Moreover, if, as has been suggested, the respondent only owed duties under VISTA because the Deed of Amendment was made, converting the R&S Trust to a VISTA trust, and the effect of setting aside that deed is that the deed is to be treated in law as never having been made, then it must follow that the respondent must also be treated as never having been subject to those duties. It seems incongruous that the respondent can be subject to duties imposed by a deed that did not legally exist. Logic prescribes that as a matter of law, neither party would have any legal obligation to the other under its terms.

[182] The appellants have however suggested that the dicta in **Allan v Rea Brothers Trustees Ltd.** should give some pause. It is the only authority offered in support of this contention. The appeal concerned events from 1994 – 1997 involving the management of two small, self-administered occupations pension schemes (the EW Scheme and the Basdring Scheme). Robert Walker LJ held that the trustees of a pension scheme (the EW Scheme) could recover the traceable proceeds of money (£300,000 - the proceeds of the AXA policies) wrongfully transferred into a second scheme, (the Basdring Scheme) but that one of the trustees of the second scheme was not personally liable to account for this money because there was never a time when it had known that the transfer was invalid and had also had the means of ascertaining what sum should be returned or of raising this sum.

[183] At paragraph 56 of the judgment, the judge observed:

“56. What were the duties of the trustee company during the period when it had no reason to suppose that the AXA policies were not part of the trust fund of the Basdring scheme? The only sensible answer is that its duties were those imposed on it by the general law of trusts and by the trust deed and rules of the Basdring scheme which it believed to be the documents regulating its trusteeship. The conclusion that the trustee company's acts and omissions can only sensibly be judged by the standards of its trusteeship of the Basdring scheme is powerfully confirmed, in this case, by Mr Allan's part in deceiving Mr Hesketh and the other officials of the trustee company into thinking that he was a genuine employee of Basdring bringing a valid transfer payment into the Basdring scheme; and by Mr Allan's failure to produce any evidence showing that the administrative powers and provisions of the EW scheme were materially different.”

[184] However, counsel for Estera submitted that this judgment is not on point and does not assist the appellants. Having reviewed the judgment, I am inclined to agree. The reasoning in paragraph 56 of the judgment makes clear the point of distinction with the present appeal.

[185] **Allan v Rea Brothers** concerned a purported transfer of assets from the EW pension fund to the Basdring Scheme that to the knowledge of at least one of the trustees of the EW fund was being conducted for an improper purpose of allowing a beneficiary to get access to his benefit before reaching retiring age, and thus was ineffective to transfer any beneficial interest in the asset at all. The court was not concerned with whether duties that were imposed via an amendment to a trust deed are to be treated as having applied, even after the amendment has been set aside *ex tunc*. Indeed, the court was not concerned about the validity of the trust at all.

[186] I am therefore inclined to agree with the respondent that the question that matters is whether the Deed of Amendment is to be treated as having existed for the purposes of the imposition of duties under VISTA. From all accounts, the whole point of the setting aside was to undo the conversion of the Trust to a VISTA trust. If the conversion to a VISTA trust is to be treated as not having been effective then it seems to me that: (i) the R&S Trust cannot be treated as

having been a VISTA trust; and (ii) Estera cannot be treated as having been under the duties of section 8 of VISTA. I would therefore dismiss this ground of appeal.

Conclusion

[187] It is clear from the above conclusions that I take the view that appellants have successfully demonstrated that the learned judge did err in the exercise of his discretion in striking out the relevant parts of the appellants' claim on the basis that they disclose no reasonable arguable case that Estera assumed liability as a trustee de son tort. However, I am equally satisfied that the appellants' ex tunc grounds of appeal have no merit and that there is no basis upon which this Court ought to interfere with the learned judge's decision, and this limb of the appeal should be dismissed. It follows that this appeal should be allowed in part.

Costs

[188] The general rule is that costs follow the event. In other words, a successful party will ordinarily be entitled to its costs. In this appeal, the parties have both been partially successful and would be entitled to their respective costs in the proceedings before this Court. I am therefore satisfied that the result should be costs neutral.

Disposition

[189] For all the above reasons, I would make the following orders:

- (1) The appeal is allowed in part.
- (2) The findings of the learned judge as it relates to the striking out of those parts of the appellants' case founded on the contention that Estera assumed liability as a trustee de son tort (the trustee de son tort limb of the appeal) are set aside.
- (3) The findings of the learned judge as it relates to the ex tunc limb of the appeal are affirmed.
- (4) The counter notice is dismissed.

(5) There is no order as to costs.

I concur.
Eddy D. Ventose
Justice of Appeal

I concur.
Esco L. Henry
Justice of Appeal

By the Court

Chief Registrar