THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2013-00212

BETWEEN

THE UNIVERSITY OF TRINIDAD AND TOBAGO

Claimant

AND

PROFESSOR KENNETH JULIEN

First Defendant

DR. RENE MONTEIL

Second Defendant

GISELLE MARFLEET

Third Defendant

SCOTT HILTON-CLARKE

Fourth Defendant

RAVINDRANATH MAHARAJ

Fifth Defendant

ERROL PILGRIM

Sixth Defendant

Before the Honorable Mr. Justice V. Kokaram

Date of Delivery: 11th April 2014

Appearances:

Mr. Vincent Nelson Q.C. and Mr. Gerald Ramdeen instructed by Mr. Varun Debideen for the Claimant

Mr. John Jeremie S.C. and Mr. Kerwin Garcia instructed by Ms. Kahaya Kesara Nanhu for the First Defendant

Mr. Douglas Mendes S.C. and Mr. Ravi Heffes-Doon for the Second Defendant

Mr. Stuart R. Young instructed by Mr. Anthony Bullock for the Third, Fourth and Sixth Defendants

JUDGMENT

Introduction

1. The Defendants are former members of the Board of Directors of the Claimant, the University of Trinidad and Tobago ("UTT"). The first Defendant was UTT's former President. For the most part these Defendants were members of the UTT Board over the period 2005 to November 2010.[1] The present Board of UTT resolved recently in 2012, after conducting a legal and financial audit of UTT's affairs, to commence an action against these directors for breach of their fiduciary duty and failure to exercise care, diligence and skill in the management of UTT's business affairs under section 99 of the Companies Act Chap. 81:01 and as a fiduciary in relation to two transactions. The first transaction was the entering into (and maintaining) a sub lease with Consolidated Services Limited (CSL) for a five year renewable lease for a residential/resort complex in Aripo ("the Aripo facility") at a monthly rental of TT$50,000.00.

2. UTT contends that this sub lease was defective and that the Defendants failed to carry out any due diligence searches before entering into this transaction. Further during the term of the sub lease they were advised by its legal department to terminate the sub lease as a result of the discovery of alleged defects in its title. The Defendants failed to terminate the lease. UTT as a result of the Defendants' alleged failure to act prudently, seeks the return of the sums of money paid in rental and for the cost of operating the Aripo facility for the duration of the term.

3. The second transaction relates only to the first Defendant. This transaction involved the accommodation of two guests at the Aripo Guest House, Reverend Juliana Pena and her companion. It is contended by UTT that the first Defendant in breach of his fiduciary duty instructed that those persons be accommodated there in the absence of any Board resolution approving UTT rates for those persons or approving of their accommodation in the said Guest House of personal guests of Board members, or accommodating visitors with no connection to UTT. The first Defendant paid for the accommodation personally and had those persons been charged the normal visitor rates it would have resulted in additional income to UTT of TT$126,393.00. As a result of the loss sustained on these transactions UTT claims declaratory relief that the Defendants are in breach of their fiduciary duties. UTT

[1] The Defendants were appointed as directors of UTT on or about 1st March 2005.

also seeks as against the Defendants damages in the sum of $10,899,999.10 the total sum of the rental and maintenance of the Aripo facility and additionally against the first Defendant the payment of the said sum of $126,393.00.

4. All the Defendants save for the 5th Defendant now seek to dismiss the claim against them in relation to the sub lease, the first transaction, pursuant to CPR rule 26.2(c) on the basis that there is no ground for bringing the claim, alternatively pursuant to CPR rule 15.2 (b) that there is no reasonable prospect of success on this claim. Both applications are draconian remedies. There is no gainsaying the wealth of judicial pronouncements locally, regionally and in the Commonwealth on the approach to be adopted when a Court is asked to dismiss a claim under these and similar provisions before there is further management of the claim towards a full trial.

5. Essentially, at the risk of over simplifying the relevant tests and the nuances of interpretation of the respective rules, the primary caveat in considering these applications is that the Court should not conduct a mini trial without giving the parties ample opportunity to present their evidence through witness statements, the process of disclosure and further information. In considering these applications which I shall conveniently refer to collectively as "applications to dismiss a claim", the Court is engaged in an exercise of discretion to give effect to the overriding objective. In so doing it seeks to achieve what is just in the circumstances of the case which invariably is to arrive at a decision which is not only economical in light of saving expense and properly allocating the parties' and Court's resources, but also giving due regard to equality of arms and proportionality of orders in the overall management of a case. One also bears in mind that trial dates are no longer shrouded in mystery or lies beyond the litigant's reach in the far horizon. Under the CPR trial dates are fixed and achievable in a relatively short space of time. A court is therefore always anxious not to strike out a claim prematurely. It is in this context that I view the well known tests of whether a claim discloses a ground for bringing the claim or whether there is any prospect of success in the claim. Both parties must be protected: the Claimant from being prematurely driven from the seat of judgment when its case deserves fuller investigation or the Defendants from expending unnecessary resources in defending a claim which is unmeritorious.

6. There is of course a fundamental difference between the two tests under CPR rule 26 and rule 15. When invoked simultaneously by a party the Court is engaged in an exercise of testing and assessing the strengths of the Claimant's case on what I will term a "soft" and then a more rigorous standard. If a claim discloses some ground for a cause of action it is not "unwinnable" and should proceed to trial. It may be a weak claim but not necessarily a plain and obvious case that should be struck out and the claimant "slips past that door". The Court is however engaged in a more rigorous exercise in a summary judgment application to determine of those weak cases, which may have passed through the "rule 26.2 (c) door" whether it is a claim deserving of a trial, whether the evidence to be unearthed supports the claim and whether there is a realistic as opposed to fanciful prospect of success. If there is none, the door is closed on the litigation and brings an end to its sojourn in this litigation.

7. In this case for the Defendants to succeed the Court must be satisfied either there is no ground for pursuing this claim for breach of fiduciary duty by UTT in relation to the sub lease. If there is some ground to pursue that claim that there is no realistic prospect of success at a trial. In reality it is a rolled up question to assess the strength of the Claimant's case and on this application the Defendant's application is made on a very simple, yet important point. Assuming for the purpose of this application that even if the Claimant can prove that the Defendants did breach their fiduciary duty to UTT in relation to the sub lease, is there a reasonable basis to assert or a realistic possibility of proving actionable loss suffered by UTT? If not there is no cause of action and the claim should be dismissed now. I have answered this question as follows:

> In relation to the claim that the Defendants breached their duty in entering into and maintaining the sub lease of the Aripo facility, accepting the Claimant's allegations to be true in relation to the entering into and continuing the sub lease, UTT's claim raises an arguable ground for bringing the claim for breach of trust and for equitable damages or compensation. Examining the facts and the applicable law at this stage, the prospect of success of UTT in maintaining a claim for declaratory relief and damages cannot be said to be fanciful and undeserving of the right to advance its case fully at trial. The issue of compensatable loss sustained by UTT cannot at this stage, without a fuller investigation of the facts at trial, be said to have no real prospect of success.

Factual backdrop: The Aripo facility

8. In the Claimant's statement of case it contends that the prospects of acquiring a lease of the Aripo facility came to light in a memorandum dated 21st December 2005 addressed to the President from Mr. Dave Bhajan the VP Capital Projects and Institutional Planning of UTT. In this memorandum, the question of finding a cost effective method of accommodating visitors and staff of UTT was assessed by Mr. Bhajan. He projected the cost of hotel accommodation for UTT visitors and staff over a five year period from 2006 to 2010 and compared it to the investment in a proposed five year lease for the Aripo facility. The location of the Aripo facility at the foothills of the Northern range was adjacent to Wallerfield and was said to readily serve the main UTT Campus, E-Teck development at Tamana, E-Teck Park, O'meara and other UTT campuses. The complex comprised: a main house of approximately 6,000 sq. ft. comprising 5 ensuite bedrooms, large living, dining and reception areas, kitchen, laundry and house-keeper room, one cottage with two ensuite bedrooms and kitchenette, one adjacent building with 4 one-bedroom suites, one house with two ensuite bedrooms and large living/kitchen area. This was all located on 10 acres of landscaped grounds, with swimming pool, "in a very lush, scenic location". He advised that there was a total savings and potential revenue to UTT over the period of a five year lease.

9. On 22nd December 2005 the Executive Committee of UTT agreed in principle to lease the Aripo facility for 5 years at a cost of $8.4million. The lease was made between UTT and CSL, the first and second Defendants were the signatories on behalf of UTT. There has been no complaint that the rental was exorbitant or excessive.

The Mohammed Report

10. However, short of one year later the corporate legal adviser of UTT, Ms. Celeste Mohammed sent a memorandum to the second Defendant entitled "Report on Title – Aripo Property", ("the Mohammed Report"). In that opinion, it is stated that she was asked to provide a legal opinion on UTT's options in (i) acquiring the freehold title to the Aripo complex or (ii) terminating the sub lease.

11. She made the following observations which are pleaded by UTT as material findings which should have triggered the prudent director to act in a manner to protect and safeguard the interests of UTT:
    a. CSL, as Lessee, went into possession of the property by virtue of Lease granted by the freeholder landlord, the Government of Trinidad & Tobago, for a term of 25 years commencing on 19th May, 1969, (the "Head Lease");
    b. The Head Lease expired on 18th May, 1994. A search at the offices of the Registrar General, Chief State Solicitors Department, did not reveal a renewal of the Head Lease;
    c. CSL continued in occupation of the Property following the expiration of the Lease and had been paying rent at the original 1969 rate of TT7,908.55 per annum;
    d. The existing use and occupation by UTT was in breach of the covenants contained in the Head Lease;
    e. The "Lease" (in fact a Sub-Lease) of the Property dated 1st February, 2006, did not identify in a satisfactory manner the UTT parcel of land;
    f. The Sub-Lease purports to grant a 5 year term, but reserves a monthly rent instead of a global 5 year rent, payable by monthly installments;
    g. The Sub-Lease was not a valid agreement because it had not been registered as required under the Landlord & Tenant Ordinance, Ch. 27, No.16, section 3;
    h. The Sub-Lease should be terminated on one month's notice and UTT should cease making further payments.

12. According to the Claimant upon the presentation of the Mohammed Report, the Defendants knew that in pursuance of their duty to exercise care, skill and diligence they were under a duty to terminate the sub lease.

13. The Claimant contends that instead of terminating the said lease the first Defendant advised the Board that the second Defendant had met with CSL and agreed to transfer its interest in the Aripo Complex. The Board authorized the second Defendant to "acquire the entire estate and to negotiate an agreement compensating CSL".

14. The Claimant alleges that the Aripo Guest House was unoccupied for a total period of 40 months, that is from October 2006 to 12 December 2007 and from 1st November 2008 to 31 January 2011 when the lease expired by effluxion of time. UTT continued to pay CSL the rent and continued to incur operating costs "when the Directors knew or ought to have known that the estate purportedly acquired under the sub lease was defective." In the meantime, Ms. Mohammed in April 2007 reminded the second Defendant of her advice that the lease should be terminated.

15. In these circumstances, the Claimant under the management of the new board of directors allege that the Defendants breached their duties and failed to exercise care and diligence and skill in:

    i. failing to ensure that prior to UTT entering into the Sub-Lease any or any adequate due diligence was carried out to ascertain whether CSL had the right to grant the Sub-Lease to UTT;

    ii. Executing the Sub-Lease when the First and/or Second Defendant knew or ought to have known that no or no adequate due diligence had been carried out into whether CSL had sufficient legal rights in the Aripo Guest House to grant the Sub-Lease;

    iii. Executing the Sub-Lease when the First and/or Second Defendant had been presented with no or no adequate evidence or information that CSL had title to the Aripo Guest House and could grant a valid Sub-Lease;

    iv. failing to resolve to terminate the Sub-Lease at or following the board meeting on 14th November, 2006, when the Mohammed Report was discussed;

    v. failing to resolve to refuse to make any further payments pursuant to the Sub-Lease when they knew that the title to the Aripo Guest House granted by CSL by the Sub-Lease was defective as set out in paragraph 7 above;

    vi. failing to mitigate UTT's losses, when the Aripo Guest House lay empty, by terminating the Sub-Lease in or about November, 2006, as recommended by Ms. Mohammed;

    vii. causing and/or permitting the Sub-Lease to continue until 31 January, 2011;

    viii. causing and/or permitting UTT to pay rent to CSL and incurring operating and capital expenditure expenses the period 2 February, 2006 to 31 January, 2011.

16. I do not understand these particulars to be particulars of the common law tort of negligence but of breach of the directors' fiduciary duties in relation to UTT. As a result of this breach, UTT alleged it suffered a loss. The particulars of loss and damage in the context of this application is important and is pleaded as follows:

"PARTICULARS OF LOSS AND DAMAGE

1. The rent paid during the period 1st February, 2006, to the 31st October 2010, at TT$50,000 per month;
2. Annual Operating Costs of the Aripo Guest House (full details of which will be given on disclosure herein) of TT$1,480,000. A true copy of the spreadsheet which shows the annual operating costs of the Aripo Guest House is hereto annexed and marked "F".
3. Capital Expenditure on the Aripo Guest House (full details of which will be given on disclosure herein) of TT$1,020,000. A true copy of the spreadsheet which shows the capital expenditure on the Aripo Guest House is hereto annexed and marked "F"."

17. As a result UTT seeks a declaration that the Defendants are in breach of their duty to exercise skill, care and diligence in the management and affairs of the Claimant by their decision to lease and failure to terminate the sub lease as well as compensation in the sum of approximately $10.9m.

18. The Defendants all raise similar Defences to this claim. Briefly their Defences are that: they deny that they are in breach of their duty to UTT for various reasons. The first and second Defendants contend that they acted on the skill and competence of the legal department to ensure there were no impediments regarding the granting of the sub lease. The Mohammed report did not advise that the occupation of the facility was unlawful. There was no clear non litigious method to terminate the sub lease during its term. There was no duty to terminate triggered by the Mohammed report and it was not presented to the Board due to its equivocal nature. The Defendant did take steps to mitigate or eliminate any prospect of a possible defect in the title of CSL. The third fourth and sixth Defendants additionally deny that they

had any knowledge of the Mohammed report at all or that they were members of the sub committees in charge of those matters.

19. For the purpose of the Defendants' application to dismiss the claim it is their defence on the question of loss which is material. They all contend that UTT did not suffer any loss as a result of any alleged default. They contend that the pleaded loss amounts to no loss as UTT gained the benefit of the lease for the full five year term. Their pleading on this point essentially was as follows:

"This Defendant denies that the guesthouse was unoccupied for the periods mentioned therein and puts the Claimant to strict proof of same. This Defendant says that the Claimant retained possession of the facility throughout the term of the lease and used it to, inter alia:

a. Host meetings and other events held by the Claimant and others;

b. House the officers of the Claimant's Owners Representative Group ("ORG") which was a taskforce comprising employees of the Claimant whose role was to monitor the construction of the Claimant's main campus situate at the Tamana IntecK Park, Wallerfield.

Further, and in any event, whether or not the lease was defective, the Claimant's occupation of the facility during the term of the lease was not interrupted whether because of any defect in the lease or otherwise and, to the extent that the facility was not occupied during any period of time, this was not due to any defect in the lease and the Claimant does not so allege.

……. this Defendant denies that the Claimant suffered the loss or damage pleaded or any loss or damage as a result of any of the matters pleaded in the Statement of Case and contends that:

a. The lease continued in full force and effect and expired by way of effluxion of time."

20. In other words therefore by following the logic of the Defence and as articulated in their submissions, this litigation essentially would represent a recovery from the directors of the

monies expended on the lease for which they benefited from undisturbed occupation. In my view it suggests that the litigation is therefore a double recovery for UTT gaining the full benefit of a lease now at the expense of the Directors' pocket.[2]

The approach on striking out and summary judgment applications

21. Both parties agree on the applicable tests in these types of applications where a Defendant applies to strike out a Statement of Case under CPR rule 26.2 (c) and in the alternative obtain summary judgment under CPR rule 15.2 (b). A striking out application is a draconian remedy only to be employed in clear and obvious cases where it is possible to demonstrate at an early stage before further management of the claim for trial that the allegations are incapable of being proved or the Claimant is advancing a hopeless case, either accepting the facts as pleaded as proven or as a matter of law. See Caribbean Court Civil Practice 2011, **Mc Donald Corporation v Steel** [1995] 3 AER 615. Zuckerman on Civil Procedure, A. Zuckerman p 279.

22. On a summary judgment application the Court must be satisfied that there is no realistic or fanciful prospect of success based on the facts that are presently available or realistically forthcoming either in documentary or oral evidence if the case is further managed to a trial. See Zuckerman p 282, **S v Gloucestershire Council v Tower Hamlets Borough Council** [2000] 3 AER 346.

23. I pause here however to make a few observations of my own on these tests prompted as it were from the submissions in reply made by the second Defendant and the Claimant.

[2] **Reverend Pena and her companion**
The claim against the first Defendant is also made on the basis that he permitted Rev Pena and her companion to be accommodated at the Aripo Guest House where there was no evidence of any association between them and the work of the UTT. Such accommodation was afforded to them, in the absence of any Board resolution to do so, where the rates charged were not the normal rates charged to visitors, where they were afforded concessionary rates paid for by the first Defendant. UTT contends by his action the first Defendant was not acting honestly and in good faith in the interest of UTT "by the ordinary standard of reasonable and honest people". UTT's loss suffered thereby is alleged to be the difference in the rates which it would have received if she was a legitimate visitor in the sum of $126,393.00. This claim is not made being made against the other Defendants and the First Defendant's application to strike out the claim does not relate to this aspect of the claim. For the purposes of the first Defendant's application therefore, it seeks the dismissal by striking out or by summary judgment of only that part of the claim that relates to the sub lease and to manage to trial the claim in relation to this transaction.

The rolled up Striking out and Summary Judgment applications

24. In my view I agree with the observations made in **Swain v Hillman** [2001] 1 All ER 91 that there is an obvious relationship between CPR rule 26.2 (c) and rule 15. They are both summary proceedings that seek to bring a premature end to proceedings without the opportunity being given for the parties or the Court to fully investigate the facts and the law at a trial. The premise of both applications is that it would be a waste of the parties' and Court's resources to do otherwise and that further management to trial is an uneconomical, un-proportionate response to the nature of the case presented by the litigant. The approach maintains the equality of arms between a litigant spared the further expense of a hopeless or weak case and a Defendant's right not to be harassed by such cases. The assessment in both cases is an exercise of the Court's case management powers to give effect to the overriding objective. See CPR rules 1.2, 25.1 (a) (b) and (h). See also the judgment of Jamadar JA in **Real Time Systems Ltd v Renraw Investments Ltd** CA Civ. 238 of 2011. The Court makes a broad judgment after considering the available possibilities and concentrates on the intrinsic justice of a particular case in the light of the overriding objective. See **Walsh v Misseldine** [2001] CPLR 201. In examining the tests in a rolled up application one may look at the individual trees but then must step back to "look at the forest" in making an overall assessment of the case.

25. In **Belize Telemedia v Magistrate** 75 WIR 143 Conteh CJ observed:

> "[15] An objective of litigation is the resolution of disputes by the courts through trial and admissible evidence. Rules of court control the process. These provide for pre-trial and the trial itself. The rules therefore provide that where a party advances a groundless claim or defence, or no defence, it would be pointless and wasteful to put the particular case through such processes, since the outcome is a foregone conclusion.
>
> [16] An appropriate response in such a case is to move to strike out the groundless claim or defence at the outset.
>
> [17] Part 26 on the powers of the court at case management contains provisions for just such an eventuality. The case management powers conferred upon the court are meant to ensure the orderly and proper disposal of cases. These in my view, are central to the

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

[20] It is important to bear in mind always in considering and exercising the power to strike out, the court should have regard to the overriding objective of the rules and its power of case management. It is therefore necessary to focus on the intrinsic justice of the case from both sides: why put the defendant through the travail of full blown trial when at the end, because of some inherent defect in the claim, it is bound to fail, or why should a claimant be cut short without the benefit of trial if he has a viable case?"

26. Lord Woolf MR in **Swain** (supra) importantly identifies the utility of a summary judgment application within the overriding objective:

"It is important that a judge in appropriate cases should make use of the powers contained in Part 24. In doing so he or she gives effect to the overriding objectives contained in Part 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose and I would add generally that it is in the interests of justice. If a claimant has a case which is bound to fail, then it is in the claimant's interest to know as soon as possible that that is the position. Likewise if a claim is bound to succeed a claimant should know that as soon as possible."

27. In **Three Rivers District Council v Bank of England** (No. 3) [2001] UKHL 16 Lord Hope of Craighead considered the rolled up question of whether a claim should be struck out or whether it should be dismissed and summary judgment entered for a defendant to be really encompassing two different tests, the practical effect is the same.

"91. The difference between a test which asks the question "is the claim bound to fail?" and one which asks "does the claim have a real prospect of success?" is not easy to determine. In Swain v Hillman at p 4 Lord Woolf explained that the reason for the contrast in language between rule 3.4 and rule 24.2 is that under rule 3.4, unlike rule 24.2, the court generally is only concerned with the statement of case which it is alleged discloses no reasonable grounds for bringing or defending the claim. In Monsanto plc v Tilly, The Times, 30 November 1999; Court of Appeal (Civil Division) Transcript No.

1924 of 1999; Stuart Smith LF said that rule 24.2 gives somewhat wider scope for dismissing an action or defence. In Taylor v Midland Bank Trust Co Ltd he said that, particularly in the light of the CPR, the court should look to see what will happen at the trial and that, if the case is so weak that it had no reasonable prospect of success, it should be stopped before great expense is incurred.

92. The overriding objective of the CPR is to enable the court to deal with cases justly: rule 1.1. To adopt the language of article 6.1 of the European Convention for the Protection of Human Rights and fundamental Freedoms with which this aim is consistent, the court must ensure that there is a fair trial. It must seek to give effect to the overriding objective when it exercises any power given to it by the Rules or interprets any rule: rule 1.2. While the difference between the two tests is elusive, in many cases the practical effect will be the same. In more difficult and complex cases such as this one, attention to the overriding objective of dealing with the case justly is likely to be more important that a search for the precise meaning of the rule. "

28. I consider the approach in "dismissing" a claim under a rolled up application of striking out and summary judgment such as this one as adopting at the same time a "soft" and "hard" or more robust approach in the assessment of a Claimant's case. The governing caveat of course is that a Court must not, regardless of the nature of its assessment, embark upon a mini trial requiring the resolution of the minutiae of detail in evidence or the applicable law to disputed facts only available at a full blown trial.[3] If there is a legally determinable claim based upon

[3] "95. The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognized exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before the trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf said in Swain v Hillman, at p 95, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all." Per Lord Steyn, **Three Rivers District Council and others v Bank of England** [2001] 1 All ER 269.

the Claimant's facts, then the Court must consider the available evidence in assessing the prospect of success. See *Caribbean Civil Court Practice Note 23.23* and **Chief Constable of Kent v Rixon** [2000] AER 476.

29. The enquiry under CPR rule 26.2 (c) is in my view the soft approach where the language of rule 26(2) (c) is so generous that so long as the statement of case discloses a ground for bringing the claim it cannot be struck out. The Court of Appeal and Privy Council in **Real Time** CA Civ. 238 0f 2011 and [2014] UKPC 6 respectively added a new dimension to the curative powers available in lieu of the draconian measure.

30. There are two features of the rule in our jurisdiction which distinguishes it from the former Order 18 rule 19 RSC that is deserving of note. First in the former rule it explicitly provided for the Court's power to be exercised both curatively and robustly in that the power was cast both in terms to strike out "or amend". No such curative power was expressly included in rule 26, although arguably the effect of rule 1.3 (giving effect to the overriding objective) and **Real Time Systems Ltd v Renraw Investment Ltd** [2014] UKPC 6 suggests that the Court may have such curative powers to allow an amendment. In my view such powers are restricted however to the strictures of Part 20 and are not at large as the former Order 18 rule 19 suggests. In this case there is no application for an amendment, the Claimant stands or falls on his pleaded case.

31. Second the power to strike out under the Order 18 r 19 RSC was available where there was no "reasonable cause of action". Those words were replaced in CPR rule 26.2 (c) by "no ground for bringing a claim". Interestingly the rule does not retain the word "reasonable ground" as it does in the equivalent rule in the UK rule 3.4. In my view the wording of our rule may suggest that it is wider than that previously cast and does certainly encompass "no reasonable cause of action". It does not suggest however that it is a mere pleading issue where the Court is restricted to an examination of the pleadings alone. Evidence may be accepted. This in my view is borne out by the fact that the drafters of this rule omitted deliberately the stricture in Order 18 rule 19 that a Court shall not receive any evidence when deciding whether a statement of claim is to be struck out on the ground of no reasonable

cause of action. Further the system of pleadings under the new rules contemplates the reception of documentary evidence where documents may be attached to the pleading.

32. It is clearly possible for the Court to receive evidence to clearly dismiss certain documentary evidence that are foundational pillars to claim in a CPR r 26.2 (c) application. As May LJ observed in **S v Gloucestershire County Council** [2001] 2 WLR at 936 there is "no longer an embargo on the court considering evidence but the application relates centrally to the statement of case." In a claim such as this one for example I am not restricted by the pleadings. Certainly of course accepting all the facts in the statement of case as being proven and testing whether it demonstrates a complete cause of action is the starting point. I do not accept therefore that the CPR rule 26.2 (c) applications are restricted to a pleading issue, although inexorably they generally have been so decided. For this reason the learning on this rule for other jurisdictions and pre CPR should be looked at with some degree of caution.

33. It is indeed worthy of note of this soft approach, especially in the context of this case that a case will not be struck out in an area of developing jurisprudence and where the facts need to be to be investigated before conclusions can be drawn about the law. **Farah v British Airways plc and the Home Office** (2000) Times 26 January. In **Partco Group Ltd v Wragg** [2002] EWCA Civ. 594. This "soft approach" is further explained in Zuckerman:

> "A strike out decision may also be criticized on an entirely different ground: that the court was in error in deciding that the issues did not require investigation by the normal procedural process. In certain circumstances it would be appropriate to allow an issue to be aired at the trial even if the court believes that the claim or defence is groundless. For instance, even though the court considers an allegation of sexual abuse farfetched, it may be desirable to allow the allegation to be tested at the trial. See S v Gloucestershire County Council. Similarly the court may allow proceedings to go forward in order to enable the court to clarify an uncertain point of law."

34. Similarly the recent Privy Council decision of **Real Time** adopted such a soft approach.

35. On a summary judgment application however the assessment is more robust which I refer to as the "robust approach". It now calls upon a more thorough examination of the available facts and the law even if there are difficult issues. See **Trinidad Home Developers Ltd v**

IMH Investments Limited [2003] UKPC 85. It will call for the resolution of discrepancies in the evidence where possible without conducting a mini trial. It calls for an assessment of the possibility and plausibility of evidence to support a claim in an assessment of whether there is no real prospect of succeeding or defending the claim. Lord Woolf MR in **Swain v Hillman** observed that the words no real prospect of being successful do not need amplification, they speak for themselves. "The word real directs the court to the need to see whether there is a "realistic" as opposed to a fanciful" prospect of success". The chances of success should not be speculative nor all surmise and Micawberism[4]. Whether a party has a real prospect of success depends generally on an assessment of two matters, whether the party has a real prospect of success on the basis of the facts that are known at the time and second on whether there is a real prospect that some additional support for the party's case would emerge if the case followed the normal procedural route. I note on this point that the UTT's claim is premised on knowledge of facts which it were "kept in the dark" and only came to light upon an internal audit.

36. In **Western Union Credit Union Co-operative Society Limited v Corrine Amman** Civ. App. 103/2006 Kangaloo JA (relying on the case of **Toprise Fashions Ltd. v Nik Nak Clothing Co. Ltd, Nik Nak (1) LTD, Anjum Ahmed** [2009] EWHC 1333 which re-produced the judgment of Morgan J from the case of **Federal Republic of Nigeria v Santolina Investment Corp** [2007] EWHC 437) noted the following in reference to applications for summary judgment:

> *"- The court must consider whether the Defendant has a realistic as opposed to fanciful prospect of success: Swain v Hillman [2001] 2 AER 91.*
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> - *A realistic defence is one that carries some degree of conviction. This means a defence that is more than merely arguable: ED &F Man Liquid Products and Patel [2003] EWCA Civ 472 at 8. In reaching its conclusion the Court must not conduct a mini trial Swain v Hillman [2001] 2 AER 91.*
>
> - *This does not mean that the court must take at face value and without analysis everything the Defendant says in his statements before the court. In*

[4] See **Lady Anne Tennant v Associated Newspapers Group Limited** (1979) FSR 298 per Sir Robert Megarry VC

some cases it may be clear there is no real substance in the factual assertion made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel EWHC 122. However in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment but also the evidence which can reasonably be expected to be available at trial Royal Brompton NHS Trust v Hammond (No 5) [2001] EWCA Cave 550.

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

37. The Defendants' applications to dismiss the claim seek to demonstrate that there is no ground for this claim and no chance of success where it failed to demonstrate a loss to UTT that is attributed to the alleged breach of duty. Importantly therefore if there is an arguable claim of loss the Court must be also satisfied that such a claim bears a reasonable and not speculative or fanciful prospect of succeeding at a trial or upon a fuller investigation of the facts and the law. If it does not it will be dismissed.

The Defendants' application-the absence of loss

38. Cast in different terms all the Defendants have examined the question of the alleged loss as not amounting to an actionable breach and not raising a ground for the claim or one with a realistic prospect of success. The main argument of the Defendants, with no disrespect to their full written submissions, may be summarized in the following simple terms. Assuming that it was imprudent to enter into the sub lease, assuming that is was imprudent and a breach of duty not to terminate the lease at the earliest possible opportunity, assuming for the

moment that it was a decision in which the directors failed in their duty to UTT as prudent directors; UTT being in possession of and having the use and occupation of the Aripo facility, simply did not suffer any loss or damage arising from this act. It is contended that they received the benefit of their bargain, a full five year term of the lease. This issue was formulated in different ways by the Defendants. The Claimant failed to prove loss arising from a breach rendering the claim without merit and its cause of action incomplete. The lease having expired by effluxion of time with UTT enjoying no challenge to its entitlement to possession of the premises, there was no disadvantage to UTT casually connected to the alleged failure to investigate or terminate the lease. The alleged breach of duty is therefore not actionable without proof of loss. In support of this contention the second Defendant relies heavily on the authority of **Nestle v Westminster Bank plc** (1994) 1 All ER 118 and **Jameson v Central Electricity Generating Board** [2000] 1 AC 455.

39. It is also submitted that there is no practical utility in the orders for declaratory relief to declare that the Defendants breached their duty as there is no actual or real loss. See **Williams Construction Limited v Blackman** [1995] 1 WLR 102.

40. Further that UTT having discovered the alleged defect in title continued to occupy the premises and thereby mitigated its loss fully. See **British Columbia v Canadian Forest Product Limited** 2004 Carswell 1278.

41. UTT's response on the issue of loss was in essence as follows. First the directors are under a duty to properly utilize the funds of UTT. It should not engage in expenditure that is unnecessary or which can be avoided. The Defendants must not waste the company's resources. UTT was not obtaining the benefit for which it contracted in giving up occupation of the property. The causal reason for non-occupation was the lack of good title. If the Defendants' acted on the advice given to them, UTT would have saved approximately three years rent and expenses. Second there was no contractual basis for UTT to have entered into the sub lease. There was a defect due to the fact that CSL had no power to grant a sub-lease at all and no interest for UTT to acquire or even to subsequently purchase. CSL had no transmissible right of tenancy as the tenancy at will terminated upon the sub lease. See Goff and Jones Unjust Enrichment (8^{th} ed). Third, UTT vacated the premises yet continued to pay

the rent when they should have discontinued the payment. Finally applying the "Hampshire Land Principle" or the "adverse interest rule" the Defendants who for the purposes of this application are assumed to have been in breach of its duty cannot be allowed to remain silent with regard to its breach and then upon effluxion of time say that UTT's right of action was compromised due to the directors own lack of candour. Indubitably the director would have benefitted from his own wrong by seeking to advance the argument that there was no loss due to the effluxion of time. UTT contends that it had insufficient knowledge after November 2006 to be able to exercise any rights to mitigate its loss by terminating the sub lease and holding the Defendant's culpable. See **Moore Stephens v Stone Rolls Limited** [2009] UKHL 39.

Paying for the Aripo Facility for five years-The evidence of loss

42. I must confess that the evidence that there was no loss as alleged by the Defendants is not at this stage unequivocal. It is true that the five year lease expired by effluxion of time and that for the duration of the sub lease there was no challenge by any third party or the owner as to its validity or title. UTT pleads its loss in its statement of case as the continued payment of rent and expenditure on the Aripo facility. However it is contended that there were periods when the property was unoccupied.

43. In paragraph 5and 6 of the Monteil affidavit and paragraphs 7 and 8 of the Nahu affidavit the evidence essentially in support of the Defendant's application is that:

> "The claimant had possession of, enjoyed the use of and occupied the facility for the entire term of five years of the lease. At no time was the Claimant entitlement to possession of the facility challenged. The defendants attended a number of meetings and other corporate function (including Christmas parties) at the facility.
>
> A function unit of UTT's employees (Owners Representative Group) has its offices in a renovated cottage at the facility from around the second quarter of 2008 until sometime in December 2010. This was a task force comprising employees of the Claimant whose role was to monitor the construction of the Claimant's main campus at the Tamana ETeck Park, Wallerfield."

44. The Defendants contend that as the entire case is hinged upon the defect of title of the lease, the Defendants simply received what they bargained for which was the lease, defects notwithstanding. The lease expired after five years by effluxion of time. For the duration of the lease UTT benefited with undisturbed possession, held meetings and functions and housed the offices for the ORG. On the assumption therefore that there was any breach of duty by the directors in causing the Claimant to enter into a lease with a defective title this breach of duty did not cause the Claimant to suffer loss or disadvantage or detriment at all. There is no difference had the title been a good one.

45. In response UTT in its affidavit in response by its Deputy Chairman, Kwasi Mutema contends that the Defendants knew that significant sums were being paid by UTT in respect of rent and maintenance in respect of a property of which the landlord was "not authorized to sub-let the property to UTT for either residential or commercial purposes". The Minutes of 14th November 2006 which it is alleged do not disclose the full extent of the discussion reveal that "despite this knowledge the directors did not resolve to seek to terminate the defective lease but continued paying rental and maintenance to UTT's financial detriment until the termination of the sub lease in January 2011." In referring to a Board meeting on 14th November 2006 when the Aripo facility was discussed. The following relevant extract of the minute is relied upon by UTT to demonstrate that despite its knowledge that UTT was suffering loss due to its inability to occupy the Aripo facility it continued to pay rent and maintenance despite the defective lease.

"LEASE OF THE UTT FACILITY AT ARIPO

3.6 The Chairman advised that occupying the facility at Aripo had turned out to be highly problematic due to several robberies that had occurred at the facility in the last three months. As a result UTT was forced to find, at additional expense, alternative accommodations for staff who resided at the Aripo facility as well as for visitors to the UTT.

3.7 The Board heard that it was discovered after some investigation, that the Landlord was in breach of the headlease as he was not authorized to sub-let the property to UTT for either residential or commercial purposes. The Executive Director

reported that he had recently met with the Landlord and the Landlord had agreed to transfer his interest in the guest house and the entire one hundred and fifty acre estate to UTT.

3.8 The Board authorized the Executive Director to:

i. Acquire, subject to agreement by the Landlord, the entire one hundred and fifty acre estate from GORTT; and

ii. Negotiate an agreement for compensation with the Landlord that included paying tribute to the Landlord's father (deceased), for example, naming the facility in hour of the Landlord's father.

The Chairman noted that should UTT acquire the property one proposal that may be worth pursuing would be to construct a gated community of executive-type homes."

46. Further at paragraph 8 of his affidavit in reply filed on 22nd November 2013 he states that "I am advised by the Claimant's attorneys and verily believe that the Guest House was unoccupied from 21st October 2006 to 12th December 2007 and from 1st November 2008 to 31st January 2011".

47. The UTT's main contention however, is that if the Defendants acted prudently they would have terminated the lease a long time before its expiration. In other words, it failed to follow the advice of Ms. Mohammed to terminate the lease. The case therefore for the most part hinges upon the advice of Ms. Mohammed and whether in law and in fact the Directors should have complied with such advice. The issue of loss is inexorably linked with the knowledge and effect of the Mohammed report. The loss being the continued investment in a lease where if they acted prudently it would have ceased. The continued cost of the occupation therefore is a wasted cost if the directors were charged with the duty of avoiding unnecessary expenditure or expenditure which is not in the best interest of the company. This unnecessary cost alleged by UTT is supported by three main facts (a) failing to carry out a due diligence exercise evidence by seeking a report on title after the fact (b) failing to act on the report (c) failing to act on advice to terminate. What was meant by the directors in their meeting that this lease was problematic and if so why not end it rather than negotiate for purchasing the entirety of its interest. Why continue to spend money on this lease? This is the

question being asked by the UTT which is concerned over the prudent use of its resources. It is important to note that no allegation is being made by UTT that they would have obtained cheaper rates elsewhere or that the lease was not at a good or reasonable rent. It is simply an unnecessary cost.

48. The situation is compounded by the fact that there was an opportunity to terminate it easily when it lay unoccupied. At that point it is UTT's case that the right to terminate clearly arose and the continued necessity to rent the premises is questionable.

49. Significantly, the Mohammed Report raises the question that CSL never had the capacity to give the lease in the first place and was unjustly enriched by the rent paid. See **The Law of Restitution (7th Ed.)** by Lord Goff and Gareth Jones. It is UTT"s case that, so defective was it, it is doubtful they would be able to purchase CSL's interest who had none. The case therefore raises the question that acting prudently these rent payments were a loss which would have been recouped from CSL rather than embracing the transaction. UTT indeed explored the purchase of CSL's interest but that never came to fruition, perhaps for this very same reason they were unable to do so as they did not get what they bargained for. That is a matter for trial. Significantly the case of UTT is that these directors knew of the defect and hid it from the attention of other directors who could have terminated the lease and take some other action. That is also a matter to be tried.

50. In my view after consideration of the evidence, the pleadings and the submissions I am not persuaded by the Defendants that this is a deserving case to put to end prematurely. There are a number of issues that need further investigation and UTT's claim cannot at this stage be characterized as unarguable nor as one that is fanciful with no realistic prospect of success.

Loss associated with breach of a fiduciary duty

51. There is an arguable cause of action of breach of the Defendants fiduciary duty. For the purposes of the application the Defendants assume for the sake of argument that its failure to terminate the lease and its decision to enter into the sub lease is a breach of their duty of care and diligence. It should also be assumed for the sake of argument that the Mohammed report and her reminder did trigger a fiduciary duty by the directors to act in the best interests of UTT.

52. UTT's claim that it wasted its expenditure on this lease represents its loss and in my view having regard to the very nature of the breach of trust this claim for compensation arising out of the breach deserves further investigation. It will be overly pedantic in my view to simply say at this stage there is no evidence of loss and so there is no cause of action, where UTT got what they bargained for, obtained albeit in breach of the directors' fiduciary duty. The Defendants' submissions are essentially that their breach caused no loss. The issue of causation however is a triable issue.

53. Further in my view to pursue a claim for a loss no matter how small resulting from the failure to take corrective action cannot be characterized as fanciful or unrealistic. A fundamental question is the issue of equitable compensation in light of proven breaches of duty. Ultimately even if damages at this stage may be telegraphed as de minimis or nominal that on its own would not give the Defendants the right to end the matter prematurely. Although it may be the basis for the parties to pursue alternative dispute resolution mechanisms.

54. To determine if the loss is genuinely a wasted expense should be investigated at the trial to investigate the purposes of the lease and whether indeed UTT got its value for that bargain.

55. Further, the importance of proving loss in a claim for breach of trust in my view must be examined contextually and is connected with the nature of the breach alleged.

56. An action in negligence is complete by interweaving the three strands of duty of care, breach of that duty and damage caused by that breach. This proposition is unarguable. In **Jameson v Central Electricity Board** [2000] 1 AC 455, the House of Lords examined the liability of joint tortfeasors and the question whether the loss suffered by a claimant is satisfied by one out of several joint tortfeasors the liability of the other is extinguished "the plaintiff has a separate cause of action against each of them for the same loss. But the existence of damage is an essential part of the cause of action in any claim for damages. It would seem to follow as a matter of principle that once the claim has been satisfied by one of several tortfeasors his cause of action for damages is extinguished." See **S v Gloucestershire CC** (ibid) where May LJ narrowed the question in simple terms that the critical question in a particular case is the composite one whether the scope of the duty of care in the circumstances of the case is such

to embrace damage of the kind which is allegedly incurred, in this case UTT's wasted cost of a continued expenditure.

57. UTT's case is however not a simple case of negligence. It is an alleged breach of trust and breach of fiduciary duty of the Defendants as directors of the UTT. Different considerations may arise altogether with the interplay of trust principles alive when the Court's equitable jurisdiction is invoked. A breach of trust in itself is a violation of an equitable obligation; the remedy for it therefore lies in equity and must be sought in a court of equitable jurisdiction. As Chadwick LJ explained in **Harrison v Harrison** (2002) 1 BCLC 162:

> "a company incorporated under the Companies Act is not trustee of its own property; it is both legal and beneficial owner of that property (ii) that the property of a company so incorporated cannot lawfully be disposed of other than in accordance with the provisions of its memorandum and articles of association (iii) that the powers to dispose of the company's property conferred upon the directors by the articles of association must be exercised by the directors for the purposes and in the interests of the company and (iv) that in that sense the directors owe fiduciary duties to the company in relation to those powers and a breach of those duties is treated as breach of trust."

58. Any act by a trustee with reference to the trust property in contravention of the equitable duties imposed on him by the creation of the trust or in excess of those duties and any neglect or omission on his part to fulfill those duties constitutes a breach of trust. See Halsbury's Laws of England Volume 98 para 665.

59. To some extent, in some cases liability of the trustee is said to be strict such as where the trustee misapplies trust property in an unauthorized fashion his strict obligation is to restore the trust property to its state or value as if he had specifically performed his duties in the proper fashion. See Halsbury Laws of England Vol. 98 para 679. In **Nestle v National Westminster Bank plc** (supra) it is made plain that in cases where loss is sustained as a result of a failure to diversify a trust fund or to conduct regular periodic reviews or the portfolio of investments when a trustee acting with due care and skill would not have so failed, compensation will be payable by the trustee if it is possible to prove that the loss flowed from such failures. Despite evidence in **Nestle** of grave and serious breaches of trust

by the Defendant's bank in failing to conduct periodic reviews of the balance of investments entrusted to it, the Court of Appeal held that the beneficiary failed to prove she suffered a loss as a result of the breach of duty and the claim was dismissed. Importantly, in that case the claim was dismissed after a full blown trial and Dillon LJ opined on ways in which a loss could have been proven by the plaintiff so that "fair compensation" could have been properly assessed. See page 1269 of his judgment. Staughton LJ and Legatt LJ both were of the view that having proved that trustee made decisions that should not have been made in the management of the fund and loss resulted, it would be appropriate to order an inquiry as to the loss suffered by the trust fund. Legatt LJ further stated:

> "The essence of the bank's duty was to take such steps as a prudent businessman would have taken to maintain and increase the value of the trust fund. Unless it failed to do so, it was not in breach of trust. A breach of duty will not be actionable, and therefore will be immaterial, if it does not cause loss. In this context I would endorse the concession of Mr. Nugee for the bank that "loss" will be incurred by a trust fund when it makes a gain less than would have been made by a prudent businessman. A claimant will therefore fail who cannot prove a loss in this sense caused by breach of duty. So here in order to make a case for an inquiry, the plaintiff must show that loss was caused by breach of duty on the part of the bank."

60. This case was applied in **Target Holdings Limited v Redferns** [1996] AC 421 where it is alleged the Claimants suffered loss due to its attorney's breach of fiduciary duty. It is a useful case in that it was an application for summary judgment where the trial judge gave leave to defend a breach of trust claim on condition of payment into court of the sum of $1m. The House of Lords upheld the decision. Its explanation of trust principles and the relevance of loss should be noted. See page 434[5].

[5] The equitable rules of compensation for breach of trust have been largely developed in relation to such traditional trusts, where the only way in which all the beneficiaries' rights can be protected is to restore to the trust fund what ought to be there. In such a case the basic rule is that a trustee in breach of trust must restore or pay to the trust estate either the assets which have been lost to the estate by reason of the breach or compensation for such loss. Courts of Equity did not award damages but, acting in personam, ordered the defaulting trustee to restore the trust estate: see *Nocton v. Lord Ashburton* [1914] A.C. 932, 952, 958, *per* Viscount Haldane L.C. If specific restitution of the trust property is not possible, then the liability of the trustee is to pay sufficient compensation to the trust estate to put it back to what it would have been had the breach not been committed: *Caffrey v. Darby* (1801) 6 Ves. 488; *Clough v. Bond* (1838) 3 M. & C. 490. Even if the immediate cause

61. In **Gwembe Valley Development v Koshy and others** [2003] EWCA Civ. 1048 the dynamics of equitable compensation was discussed on this issue of whether a director is to be held personally liable to pay compensation to a company where as a result of a breach of fiduciary duty the company suffered loss. As Mummery LJ observed there is a need to prove causation where compensation is sought. "Liability is not unlimited. There is no equitable by pass of the need to establish causation". There is however no united front on the appropriate approach to causation in claims for equitable compensation. This is discussed in the article **Equitable Compensation** (2003) 119 LQR p 268 and **Swindle v Harrison** [1997] 4 AER 705 referred to in **Gwembe**.

> "Proving a causal link between non-disclosure and loss can be somewhat speculative, given the court must consider what would have happened had the relevant facts been properly disclosed but this is no reason to reject the jurisdiction to award equitable compensation in these cases. That sort of analysis is undertaken regularly in assessing damages in contract and tort claims so as to place the claimant in the same position as he would have been in if he had not sustained the wrong as well as in claims for breach of trust. Indeed the need for such an analysis was one reason given by the Court of Appeal for refusing summary judgment recently in a case involving claims for breach of trust and fiduciary duty. See **Wight v Olswang** [2001] W.T.L.R. 291."

62. In my view it is premature at this stage to make a determination as to the loss incurred by UTT caused by the breach of a fiduciary duty in advance of evidence at the trial. UTT makes it plain that had the facts been properly disclosed UTT would not have continued with the investment in the Aripo Complex. In that case there arguably was a loss of a wasted cost. Quantifying that loss is a different matter. It would be one thing to say that there is no loss

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of the loss is the dishonesty or failure of a third party, the trustee is liable to make good that loss to the trust estate if, but for the breach, such loss would not have occurred: see *Underhill and Hayton, Law of Trusts & Trustees* 14th ed. (1987), pp. 734-736; *In re Dawson, decd.*; *Union Fidelity Trustee Co. Ltd. v. Perpetual Trustee Co. Ltd.* [1966] 2 N.S.W.R. 211; *Bartlett v. Barclays Bank Trust Co. Ltd. (Nos. 1 and 2)* [1980] Ch. 515. Thus the common law rules of remoteness of damage and causation do not apply. However there does have to be some causal connection between the breach of trust and the loss to the trust estate for which compensation is recoverable, viz. the fact that the loss would not have occurred but for the breach: see also *In re Miller's Deed Trusts* (1978) 75 L.S.G. 454; *Nestle v. National Westminster Bank Plc.* [1993] 1 W.L.R. 1260.

caused by the breach it is another to say that the loss is de minimis and nominal damages should be awarded.

63. Additionally, there is no certainty at this stage that UTT could have validly taken over the lessee's interest having regard to the Mohammed report. If it could not then the alleged agreement with the CSL to transfer its interest to UTT is an empty one. More so, such an empty agreement is made against the backdrop of CSL receiving the benefit of UTT's continued payments for a lease or an interest, if the Mohammed report is right, which never passed to it in the first place. Even so the agreement to transfer the interest of CSL as a donation cannot at this stage be said to be evidence of no loss being sustained by UTT when it is being alleged that CSL had no interest in the lease to begin with.

64. A further matter deserving of investigation is the contention by the Defendants that UTT enjoyed the full benefit of what it bargained for by remaining in occupation of the Aripo complex. While it is true that its entitlement to possession was undisturbed it cannot be asserted with any conviction at this stage on the face of the Defendant's own evidence that UTT was continually in occupation of the Aripo facility entirely or in part. It is unclear from the limited affidavit evidence at this stage as to (a) the periods when the Aripo complex or parts thereof were unoccupied (b) the reason for that state of affairs (c) the actual cost sustained by UTT to accommodate its staff and guests elsewhere for that period (d) the reason why the Defendants persisted after 2006 to pay for both the rental of the sub lease and other accommodation when it was not serving its purpose and in the face of advice to terminate the lease. I accept the criticisms of Mr. Mutema's lack of personal knowledge of the occupancy of the Aripo facility. However even at a summary judgment application I cannot simply disregard his statement at this stage without weighing it with other available evidence. I do not agree that it lacks probative value. What it does is lock horns with the parties on a question of fact at an early stage of the proceedings and it will be wrong to dismiss the allegation lightly without testing both the Claimant and the Defendants on this issue.

65. Finally the declarations sought are not on first blush to be lightly refused and I would not characterize it as academic if the expenditure was truly unwarranted. This needs full

investigation of the facts of the effect of the Defendants' breach of trust if that claim is made out.

Conclusion

66. Looking at the case in the round striking out this claim at this stage is too draconian a remedy and is disproportionate to the issues that require investigation. There is an arguable claim of breach of fiduciary duties which has caused a loss to UTT. It is a claim which is not speculative or fanciful but deserves further examination and the full benefit of disclosure and evidence. The application helpfully raises the red flag on certain aspects of the evidence and certainly at a later stage perhaps and the exchange of witness statements a further assessment of the case can be made by the Court in the exercise of its case management powers. It would however be premature to dismiss it at this stage. The Defendants' applications therefore fail. The assessed costs of this application are to be paid by the Defendants save the fifth in default of agreement.

Further management

67. I shall now in the interest of time set out general directions for the further management of this claim. Parties are to return to me by next week if they wish to vary this timetable.

68. Parties to give standard disclosure by filing and serving their list and copies of documents on or before 1st June 2014.

69. The Claimant to file and serve a bundle of agreed and un-agreed documents, indicating where necessary any limitation on that agreement on the ground of admissibility; the agreed statement of facts and the agreed statement of the issues by all parties that are to be determined in this claim, on or before 1st July 2014.

70. The parties to file and exchange their witness statements on or before 1st September 2014.

71. Parties to file and serve their procedural applications in particular to make evidential objections on or before 19th September 2014 with a short note in support of the application.

72. Pre Trial review is scheduled for 16th October 2014 in POS04, Hall of Justice, Knox Street, Port-of-Spain at 9:30a.m.

73. Parties to file their written submissions on the agreed issues on or before 17th November, 2014.

74. The Claimant to file its trial bundle on or before 24th November, 2014.

75. Trial window fixed for 3rd to 5th December 2014 in POS03, Hall of Justice, Knox Street, Port-of-Spain at 9:30a.m.

76. In the event that the Claimant needs to assess its costs, that assessment would be determined by this Court without a hearing pursuant to the following directions: The Claimant must first file and serve a statement of costs and supporting brief arguments. The Defendants must file and serve its notice of objections with their supporting arguments within 14 days of service of the Claimant's statement and liberty to the Claimant to reply, on authorities only, within 14 days. Costs shall be assessed within 14 days of the time limited for the submission of the Claimant's reply.

Vasheist Kokaram

Judge