In the matter of the Esteem Settlement and the No. 52 Trust
ROYAL COURT (Birt, Deputy Bailiff): April 14th, 2000
Civil Procedure—pleading—striking out—only if plain and obvious claim will not succeed that pleading to be struck out—if pleading discloses cause of action or raises question fit for decision, weakness of case not ground for striking out, particularly if uncertain and developing field of law
Trusts—donor's residuary rights—"lifting veil" of trust—possible that Jersey law will in future recognize doctrine of "lifting veil" of trust to give remedy to victim of fraud
Trusts—constructive trusts—"remedial constructive trusts"—possible that Jersey law will in future recognize doctrine of remedial constructive trust for victim of fraud
Trusts—public policy—hidden objective—by Trusts (Jersey) Law 1984, art. 10(2)(b)(ii), trust may be invalid as contrary to public policy if for unstated purpose of putting assets beyond reach of creditors
Civil Procedure—pleading—matters to be pleaded—matters of law to be pleaded if necessary to clarify nature of claim

The second and third defendants sought to strike out part of the plaintiff company's particulars of claim and counterclaim.

The plaintiff company had brought proceedings seeking to enforce a judgment it had obtained in separate proceedings. The judgment had required the first defendant (in the present proceedings), who had been a director of the plaintiff, to repay money he had obtained by fraud from the company. The plaintiff was unable to enforce the judgment against the first defendant since the proceeds of the fraud had been placed in two trusts and he therefore sought to enforce the judgement against the assets of these trusts.

The beneficiaries of the trusts included the first defendant and his wife and son, the second and third defendants. The second and third defendants were not parties to the fraud though their claim was through the first defendant who, it was alleged, effectively controlled the trusts.

In its particulars of claim the plaintiff submitted, *inter alia*, that (a) as the trusts were under the control of the first defendant the court was entitled to "lift the veil" of the two trusts in order to provide it with a remedy; (b) the court could impose a remedial constructive trust upon the assets in the two trusts so that they were held upon trust for it as a defrauded creditor; and (c) the trusts were not valid pursuant to art. 10(2)(b)(ii) of the Trusts (Jersey) Law 1984 as they were contrary to public policy. The second and third defendants brought the present proceedings seeking to strike out the above aspects of the plaintiff's claim.

They submitted that (a) the plaintiff could not succeed since (i) a trust had to be recognized and enforced unless it was a sham, which was not alleged in the present case, and further that "lifting the veil" applied only to companies and not to trusts, (ii) even if, as a matter of principle, the court could impose a remedial trust it should not do so in the circumstances of the case since the second and third defendants were in no way involved in the fraud, and (iii) art. 10(2)(b)(ii) was concerned only with the purpose and objectives of a

trust as set out in the terms of the trust deed and provided these were not contrary to public policy the trust would not be invalidated; and (b) inadequate pleading of a number of issues meant that part of the plaintiff's claim should be struck out, since various causes of action did not emerge clearly from the claim, *e.g.* art. 10 was not mentioned in the claim and it only became clear that the plaintiff was relying on that article in the prayer for relief.

The plaintiff submitted that (a) the causes of action should not be struck out since (i) while there was no Jersey case in which the court had "lifted the veil" of a trust so as to enable the creditors of a settlor to have recourse to assets in a trust that was otherwise valid, this was a developing field of law and the court might choose to look through the trust structure and treat the assets as if they were the settlor's, particularly since there was fraud involved, (ii) although there was no Jersey case in which a remedial constructive trust had been imposed, it was open to the court to do so and, moreover, it should do so in the present circumstances since the title of the second and third defendants depended on the person who had committed the fraud and they would be unjustly enriched if they benefited from his fraud, and (iii) under art. 10(2)(b)(ii) of the Law, the trust was invalid in that it was contrary to public policy for a trust to be established for the purpose of putting assets beyond the reach of defrauded creditors; and (b) it was not necessary to attach a specific legal label to a cause of action provided that the pleading sufficiently disclosed the nature of the cause of action upon which the claim was based, which was the case here.

Held, ordering the amendment of the plaintiff's pleadings:

(1) It was only where it was plain and obvious that the claim could not succeed that recourse would be had to the court's summary jurisdiction to strike out and it was therefore not the court's duty to decide whether it found in favour of the plaintiff but rather whether it was certain that its claims would fail. Provided that a statement of claim or particulars disclosed some cause of action or raised some question fit to be decided by a judge or jury, the mere fact that a case was weak was not a ground for striking it out. This was particularly so in uncertain and developing fields of law such as those in the present case (page 127, line 33 – page 128, line 1).

(2) The plaintiff's novel proposition in relation to "lifting the veil" of the trusts should be tested against actual facts found after a trial rather than on a hypothetical basis. The cases relied upon by the plaintiff illustrated that courts elsewhere were taking a new approach to this problem. It was not so overwhelmingly clear that the plaintiff's claim would fail that it should be prevented from adducing evidence in support of its case and arguing its proposition in full. The cumulative effect of the matters pleaded by the plaintiff might satisfy a court that the trusts were under the effective control of the settlor and that it was appropriate to "lift the veil" of the trusts. The "lifting the veil" claim would therefore not be struck out (page 135, line 35 – page 136, line 8; page 136, lines 19–32).

(3) It was also arguable that Jersey law might recognize the doctrine of remedial constructive trust. The court should hear the evidence and reach conclusions on the conduct of all relevant parties. Having done so, it could then consider whether Jersey law recognized such a remedy and if so whether it could be applied to the present case. The court would therefore also decline to strike out the claim in relation to the remedial constructive trust (page 141, lines 20–40).

(4) Similarly, the plaintiff's submission that the trust should be declared invalid under art. 10(2)(b)(ii) as contrary to public policy was not untenable. Since it was arguable that a court could have regard to the intentions of the settlor and the trustee as well as to the written terms of the trust deed, the plaintiff's argument that the circumstances surrounding

the two trusts revealed that they were contrary to public policy was not necessarily hopeless. The court would therefore decline to strike out the plaintiff's claim in relation to art. 10(2)(b)(ii) (page 143, lines 1–10).

(5) The purpose of the pleading was to give fair notice of the case which the defendants needed to meet and to clarify the issues between the parties. To achieve that it was usually necessary to make clear the legal basis of the claim, though there was otherwise no strict requirement that matters of law be pleaded. That had not been done in the present case and consequently the claim was not as helpful as it should have been. The defects in the claim were such as to embarrass the fair trial of the action, but they were not sufficient to justify striking out the whole claim and the court would exercise its alternative power to order the amendment of the pleadings (page 143, line 39 – page 144, line 29; page 148, line 45 – page 149, line 3; page 149, lines 12–24).

Cases cited:

(1) *Abdel Rahman* v. *Chase Bank (C.I.) Trust Co. Ltd.*, 1991 JLR 103.

(2) *Company, Re a*, [1985] BCLC 333.

(3) *Cusack* v. *Scroop Ltd.*, 1996-98 MLR *N*–20, considered.

(4) *Fortex Group Ltd.* v. *MacIntosh*, [1998] 3 NZLR 171, considered.

(5) *Farah* v. *British Airways*, English Court of Appeal, December 6th, 1999, unreported, followed.

(6) *Golder* v. *Société des Magasins Concorde Ltd.*, 1967 J.J. 721.

(7) *Great Berlin Steamboat Co., In re* (1884), 26 Ch. D. 616.

(8) *Grupo Torras S.A.* v. *Sheikh Fahad Mohammed Al-Sabah*, English High Court, Q.B.D., July 29th, 1994, unreported.

(9) *International Credit & Inv. Co. (Overseas) Ltd.* v. *Adham*, [1998] BCC 134.

(10) *Macrae (née Tudhope)* v. *Jersey Golf Hotels Ltd.*, 1973 J.J. 2313, considered.

(11) *Metall & Rohstoff A.G.* v. *Donaldson Lufkin*, [1990] 1 Q.B. 391; [1989] 3 All E.R. 14; (1990), 133 Sol. Jo. 1200, considered.

(12) *Muschinski* v. *Dodds* (1985), 160 C.L.R. 583; 60 ALJR 52; 62 Aust. L.R. 429, considered.

(13) *Pettkus* v. *Becker*, [1980] 2 S.C.R. 834; (1980), 117 D.L.R. (3d) 257; 34 N.R. 384; 19 R.F.L. (2d), considered.

(14) *Polly Peck Intl. PLC (in administration) (No. 2), Re*, [1998] 3 All E.R. 812; [1998] 2 BCLC 185.

(15) *Private Trust Corp.* v. *Grupo Torras S.A.* (1997/98), 1 O.F.L.R. 443.

(16) *Snook* v. *London & W. Riding Invs. Ltd.*, [1967] 2 Q.B. 786; [1967] 1 All E.R. 518; (1967), 111 Sol. Jo. 71.

(17) *Wallersteiner* v. *Moir*, [1974] 1 W.L.R. 991; [1974] 3 All E.R. 217; (1974), 118 Sol. Jo. 464.

(18) *Westdeutsche Bank* v. *Islington L.B.C.*, [1996] A.C. 669; [1996] 2 All E.R. 961; [1996] CLC 990; (1996), 160 J.P. Rep. 1130; 146 New L.J. 877.

Legislation construed:

Trusts (Jersey) Law 1984, art. 10(2): The relevant terms of this article are set out at page 141, line 44 – page 142, line 3.

Texts cited:

Millett, *Equity—the road ahead*, 6 *King's College Law Journal* 1 (1995).

Supreme Court Practice 1999, vol. 1, para. 18/19/10, at 349; para. 18/7/11, at 315.

Underhill & Hayton, *Law of Trusts & Trustees*, 15th ed. at 165 (1995).

P.C. Sinel for the second and third defendants;

N. Journeaux for the plaintiff.

BIRT, DEPUTY BAILIFF: This is an application by Barbara Al-Sabah and Mishal Al-Sabah (the second and third defendants in the action, to whom I shall refer for the purposes of this summons as "the defendants") to strike out paras. 14–23 inclusive and the prayer for relief of the particulars of claim and counterclaim ("the claim") filed by the

plaintiff, Grupo Torras S.A. ("GT"). The case as pleaded appears to raise important issues as to the circumstances in which assets in a trust may be available to meet the claims of creditors of the settlor of the trust.

The application is brought on the grounds that the relevant parts of the claim should be struck out on all or any of the following grounds, namely:

(i) they disclose no reasonable cause of action;

(ii) they are scandalous, frivolous or vexatious;

(iii) they may prejudice, embarrass or delay the fair trial of the action; and/or

(iv) they are otherwise an abuse of the process of the court.

However, as the case developed, it became clear that the defendants rely mainly on (i) and to a lesser extent on the contention that certain aspects of the pleadings may embarrass a fair trial of the action.

The factual background

For the purposes of the summons, the facts as alleged in the claim must be taken to be true. Whether they are in fact true will, of course, not be known until any trial of this action takes place.

The relevant facts alleged can be summarized as follows. GT is a company incorporated under the law of Spain and is wholly owned by the Kuwait Investment Authority ("KIA") through its London office, known as the Kuwait Investment Office ("KIO"). KIO carries on the business of managing the investments and funds of the government of Kuwait. The first defendant, Sheikh Fahad Mohammed Al-Sabah ("Sheikh Fahad") was a director and the chairman of GT from June 1986 to May 26th, 1992. He was also at all material times until April 22nd, 1992 the chairman of KIO. GT alleges that between May 1988 and

October 1990 Sheikh Fahad defrauded GT of very substantial sums of money. On June 24th, 1999, in proceedings brought by GT against Sheikh Fahad and others in the High Court in England in relation to the alleged fraud, the court found for GT and made an award of damages against Sheikh Fahad and others in favour of GT in a total sum of approximately US$800m.

On August 21st, Sheikh Fahad, as settlor, established the Esteem Settlement under Jersey law. Abacus (C.I.) Ltd. ("Abacus"), a Jersey incorporated company, is the trustee of the Esteem Settlement which includes amongst its assets the entire issued share capital of Esteem Ltd., a company incorporated in Jersey. The Esteem Settlement also owns the founder shares of Ceyla Establishment, a Liechtenstein Anstalt. The beneficiaries of the Esteem Settlement are Sheikh Fahad, his wife Barbara (the second defendant), his son Mishal (the third defendant), any other children or remoter issue of Sheikh Fahad and any persons to whom such children or remoter issue are married. There is also a power to add to the class of beneficiaries.

On August 25th, Sheikh Fahad as settlor established the No. 52 Trust. Abacus was again the trustee. The beneficiaries of the No. 52 Trust are Sheikh Fahad, any children or remoter issue of Sheikh Fahad and any person added as a beneficiary by the trustees.

Paragraphs 9–13 of the claim relate to a proprietary claim. It is said that, out of the moneys stolen by Sheikh Fahad from GT, £4,417,666 was paid on April 1st, 1992 into the Esteem Settlement. of this sum, £3,150,000 was used to fund the purchase by Esteem Ltd. of the property 52 Cadogan Place, London. GT has obtained judgment against Esteem Ltd. in the English proceedings referred to earlier, and can enforce that judgment against the proceeds of sale of 52 Cadogan Place in England. However, GT brings a tracing claim in respect of the balance of £1,267,666 against Abacus as trustee of the Esteem Settlement. No point arises on that proprietary claim in the context of the present application.

Paragraphs 14–23 of the claim contain what is described as a non-proprietary claim. In para. 14 GT asserts that, as well as the Esteem Settlement and the No. 52 Trust (which are the subject of this action), Sheikh Fahad is "the settlor and/or the principal beneficiary of and/or

otherwise connected" with three other settlements. The first of these is the Bluebird Trust, established on December 17th, 1992 under the law of The Bahamas. The trustee is Private Trust Corporation. Sheikh Fahad is the primary beneficiary and the defendants are described as the residual beneficiaries. The second of these is the Better Trust, established on January 13th, 1993 under the law of The Bahamas. The trustee is Pictet Overseas Trust Company Ltd. Sheikh Fahad is the primary beneficiary and Mishal is described as the residual beneficiary. The third is the Comfort Trust established on February 12th, 1993 under the law of the Cayman Islands. The trustee is Bank of Butterfield International (Cayman) Ltd. Sheikh Fahad is the primary beneficiary.

The foundation for the non-proprietary claim is set out at paras. 15 and 16 of the claim which I quote in full:

"15. Sheikh Fahad has set up and/or used each of the Fahad Trusts:

(i) To purport to put out of his legal ownership his assets and/or property under his control (including assets stolen from GT) in an attempt to prevent those assets from being available to meet his obligations to GT arising from his fraud.

(ii) To ensure that those assets can be and are applied for his purposes as and when required by him, in particular to fund his lavish lifestyle in England and The Bahamas and to pay the fees of his various professional advisers, including legal advisers, instructed by Sheikh Fahad, *inter alia*, to seek to prevent GT from pursuing its claims against him and recovering its property.

16. Each of the Fahad Trusts has at all material times been operated in accordance with the wishes and instructions of Sheikh Fahad and/or has been under his effective control."

In the claim, the expression "the Fahad Trusts" is defined as meaning the Esteem Settlement, the No. 52 Trust and the three other settlements described above.

Having set out the essence of the case, paras. 18–22 then set out the matters relied upon by GT in support of the central allegations contained at paras. 15 and 16.

Paragraph 18 refers to the establishment of the No. 52 Trust. It alleges that the No. 52 Trust was set up with the intention of putting

moneys out of the reach of creditors and future creditors, including GT, while retaining the ability to use the trust property purportedly settled into the trust for his own purposes. In support of that allegation, it is pleaded that Sheikh Fahad knew that his activities at the KIO and GT were under investigation at the time that he established the No. 52 Trust in August 1992; that £4m. from his personal account was paid to the No. 52 Trust on August 25th, 1992; that cl. 20 of the trust deed enabled Sheikh Fahad to remove the trustees at his absolute discretion and without giving reasons; and that cl. 27 of the second schedule to the trust deed provided that the trustees were entitled not to disclose any matter relating to the No. 52 Trust, including its existence, to any of the beneficiaries.

Paragraph 19 relies upon certain alleged facts in relation to the administration of the No. 52 Trust, in order to show that the Trust was under the effective and substantial control of Sheikh Fahad. Apart from references back to the two provisions in the trust deed referred to at para. 12 above, two matters are relied on. First, it is said that as Abacus were the trustees of both the Esteem Settlement and the No. 52 Trust, the No. 52 Trust can be presumed to have been administered in the same way as the Esteem Settlement which (for the reasons set out in para. 21 of the claim) was under Sheikh Fahad's effective control. Secondly, it is stated that, apart from one payment to the Inland Revenue, all the payments out of the No. 52 Trust from the date of its establishment to April 5th, 1993 (being when the Royal Court made orders in respect of the Trust) were to or for the purposes of Sheikh Fahad and were made pursuant to communications from representatives of Sheikh Fahad. Specific reference is then made to various substantial payments to Sheikh Fahad in respect of legal fees incurred by him.

Paragraph 20 of the claim refers to the use of the Esteem Settlement as a depository for moneys stolen from GT and repeats the allegation concerning the £4,417,666 referred to at para. 7 above.

Paragraph 21 of the claim refers to the administration of the Esteem Settlement as showing that the settlement was under Sheikh Fahad's substantive and effective control and has been used for his benefit.

Matters relied upon are:

(i) That the three properties in London owned by Esteem Ltd. were occupied at all times by Sheikh Fahad and his family and friends,

including some family members and/or friends who were not beneficiaries of the Esteem Settlement.

(ii) He settled £5m. into the Esteem Settlement on March 1st, 1990 from an account to which stolen moneys were paid at other times.

(iii) The Esteem Settlement paid some £3,314,246 for expenses in relation to one of the properties owned by Esteem Ltd., namely 97 Dulwich Village, by settling invoices submitted by a company owned by KIO without any approach to or involvement of Abacus as trustee as to whether the settlement should be paying these invoices.

(iv) At the time of the purchase of 52 Cadogan Place by Esteem Ltd. in 1992, the solicitors acting for Esteem Ltd. (Messrs. Stephenson Harwood) clearly regarded Sheikh Fahad as the effective client and the trustees of the Esteem Settlement played no real part in the decision to buy, the instructions to the solicitors, or the implementation of the purchase.

(v) In December 1992, the Esteem Settlement paid some £6,960,452 to the Bluebird Trust. It is contended that this payment was made at the request of Sheikh Fahad and in order to put these moneys further out of reach of creditors. In a document in the English proceedings, Sheikh Fahad had referred to the moneys used to fund the Bluebird Trust as "my personal funds."

(vi) On July 30th, 1992 the Esteem Settlement paid an invoice addressed to Sheikh Fahad in respect of expenditure at the home of his brother, who was not a beneficiary of the settlement.

(vii) On completion of the purchase of 52 Cadogan Place, the settlor paid for expenditure which was properly the responsibility of the occupants, not the trustee.

(viii) The conduct of Abacus in earlier *Norwich Pharmacal* proceedings in Jersey showed that the Esteem Settlement is effectively under Sheikh Fahad's control in that Abacus regards Sheikh Fahad as the relevant person to consult and it only objected to the proposed order because Sheikh Fahad objected, and not for any independent reason concerning the Trust.

Finally, at para. 22 of the claim, in support of its case in respect of the Esteem Settlement and the No. 52 Trust, GT relies upon Sheikh Fahad's alleged use and control of the Bluebird Trust and the Comfort Trust as set out in detail in a schedule to the claim. In briefest summary, it is alleged in relation to the Bluebird Trust that it was funded from the Esteem Settlement; that the written terms of the trust deed contained specific provisions which made it clear that the trustee was likely to give effect to every wish of Sheikh Fahad; that the circumstances of the establishment of the Bluebird Trust suggested that Sheikh Fahad's purpose was to put assets out of reach of GT, whom he had defrauded; and that, in the administration of the trust, the trustee had regard to Sheikh Fahad's wishes without exercising its own independent judgment. In relation to

the Comfort Trust it is alleged that the trust was set up to distance the assets previously held by the Roger Trust from Sheikh Fahad; that the terms of the trust deed allowed control by Sheikh Fahad and/or use by Sheikh Fahad for his own purposes; that the administration of the trust showed that it funded Sheikh Fahad's use of a home in The Bahamas and a yacht and that the trustee paid whatever sums Sheikh Fahad wished it to pay.

Having set out the facts, the claim (subject only to para. 23 to which I shall return later) then moves straight to the prayer, which sets out the relief sought as follows:

> "(1) A declaration that the Esteem Settlement and the No. 52 Trust are invalid pursuant to art. 10 of the Trusts (Jersey) Law 1984 (as amended); and/or
>
> (2) A declaration that the assets held by Abacus as trustee of the Esteem Settlement and the No. 52 Trust are in law and/or equity the property of Sheikh Fahad; and/or
>
> (3) That the veils of the Esteem Settlement and the No. 52 Trust be lifted and the assets held by Abacus as trustee of the Esteem Settlement and the No. 52 Trust be treated for the purposes of GT's enforcement of its judgment against Sheikh Fahad in the English action as Sheikh Fahad's; and/or
>
> (4) A declaration that GT is entitled to enforce its judgment against Sheikh Fahad in the English action against the assets held by Abacus

as trustee of the Esteem Settlement and the No. 52 Trust; and/or

(5) A declaration that the assets held in the name of Abacus as trustee of the Esteem Settlement and the No. 52 Trust are held by them on remedial constructive trust for GT; and/or

(6) A declaration that in equity, Abacus as trustee of the Esteem Settlement and the No. 52 Trust are obliged to transfer the trust assets to GT . . .”

Principles to be applied on a striking out application

Many cases were cited to me but, in my judgment, the principles upon which the Royal Court should proceed in considering an application to strike out on the grounds that the pleading does not contain any reasonable cause of action are clear. The Royal Court has said on a number of occasions that, in such matters, it will apply the same principles as have been adopted by the English courts.

It is only where it is plain and obvious that the case cannot succeed that recourse should be had to the summary jurisdiction to strike out. To quote from para. 18/19/10 of 1 *The Supreme Court Practice 1999*, at 349: “so long as the statement of claim or the particulars disclose some cause of action, or raise some question fit to be decided by a Judge or jury, the mere fact that the case is weak, and not likely to succeed, is no ground for striking it out.”

This is particularly so in an uncertain and developing field of law. This has been the subject of comment in a number of cases recently. An example is to be found in the judgment of Chadwick, L.J. in *Farah* v. *British Airways* (5), in the Court of Appeal of England:

“The question raised on this appeal is whether the court can be certain at this preliminary stage in the action that—whatever, within the reasonable bounds of the claimant’s pleaded case, the actual circumstances in which the incorrect and inaccurate information was provided might be held to be after a trial—the question of law raised in the action would be answered in the negative.

As Lord Browne-Wilkinson observed in *Barrat* v. *L.B. Islington*, [1999] 3 W.L.R. 83, unless it is possible to give a certain and affirmative answer to the question whether the claim would be

bound to fail, the case is not one in which it was appropriate to strike out the claim in advance of trial. Lord Browne-Wilkinson went on to point out that in an area of the law which was uncertain and developing, it could not normally be appropriate to strike out. He emphasized the importance of the principle that the development of the law should be on the basis of actual facts found at trial and not on the basis of hypothetical facts assumed (perhaps wrongly) to be true on the hearing of the application to strike out. There are observations to the like effect in Lord Browne-Wilkinson's speech in *X (minors)* v. *Bedfordshire County Council*, [1995] 2 A.C. at 741 and in the judgment of Bingham, M.R. in *E (a minor)* v. *Dorset County Council*, at 694 in the same report."

The nature of the plaintiff's claim

In essence, GT wishes to be able to enforce its judgment against Sheikh Fahad against the assets in the Esteem Settlement and the No. 52 Trust. One starts from the standpoint that assets in a discretionary trust do not belong to the settlor or to any particular beneficiary and are therefore not available to creditors of the settlor or a particular beneficiary, save to the extent that the assets are in fact paid out of the trust to that beneficiary. There are, however, three conventional ways in which assets apparently in a trust might become available for creditors of the settlor. First, there may be a proprietary claim. In other words, the assets thought to be held in the trust in fact belong to someone else who has a better claim than the trustee. Such a claim is made in respect of the £4,417,666 stolen from GT by Sheikh Fahad and paid into the Esteem Settlement. Secondly, the gift of assets to the trust may be declared invalid or set aside. For example, applicable bankruptcy legislation may enable the court to set aside a gift made by a settlor within a certain period of a subsequent bankruptcy. Furthermore, principles of customary law will invalidate certain gifts made for the purposes of defeating creditors: see *Golder* v. *Société des Magasins Concorde Ltd.* (6). The exact limits of this aspect of Jersey law

remain to be developed. In particular, is the ability to set aside the gift limited to gifts made with the intention of defrauding known creditors at the time of transfer? In the present case, one can at any rate envisage the

possibility of such a claim in respect of all gifts to the Esteem Settlement or the No. 52 Trust made at any time after Sheikh Fahad started to defraud GT in 1988. Thirdly, the trust itself can be declared invalid. This may occur because of a breach of art. 10 of the Trusts (Jersey) Law 1984 ("the 1984 Law"). Alternatively, it may occur because the trust is in reality not a trust; it is a sham in the sense that it purports to be something which it is not (see *Snook* v. *London & W. Riding Invs. Ltd*. (16) and *Abdel Rahman* v. *Chase Bank (C.I.) Trust Co. Ltd.* (1)).

However, save for the claim in relation to art. 10 of the 1984 Law, GT's non-proprietary claim eschews any of the conventional grounds referred to above. GT does not attack any of the gifts to the trusts on the basis that they were intended to defraud known creditors, nor does it allege that the two trusts were shams.

Although the causes of action do not appear as clearly as they might from the pleading, the way in which GT puts its case has emerged more clearly from the skeleton argument and submissions made during the hearing. In essence, it puts its claim on the following three grounds:

(i) In the light of the facts, the court is entitled to "pierce the veil" of the two trusts in order to give a remedy to the victim of Sheikh Fahad's fraud.

(ii) The court should impose a remedial constructive trust upon the assets in the two trusts so as to hold the relevant assets upon trust for GT as the defrauded creditor of Sheikh Fahad.

(iii) The Esteem Settlement and the No. 52 Trust are invalid pursuant to art. 10(2)(b)(ii) of the 1984 Law as being contrary to public policy.

The contentions of the defendants

The defendants attack the claim at two levels:

(i) They argue that the first and second of the alleged causes of action referred to above do not exist under Jersey law and that, even if they do, the facts pleaded are not sufficient to succeed on any of the three grounds ("the substantive issues").

(ii) Secondly, they raise a number of pleading points ("the pleading issues").

(i) The substantive issues

The defendants argue forcefully that, absent a proprietary claim and absent any attack on the validity of the transfers of assets to the trust, a trust has to be recognized and enforced unless the trust is a sham, (*i.e.* it is a relationship masquerading as a trust but which is in reality a relationship of nominee or agent between settlor and trustee) or it is

declared invalid on any of the grounds set out in art. 10(2) of the 1984 Law. They assert that GT has not contended that either of the trusts is a sham, or that the gifts to them can be set aside. The two alleged causes of action of "lifting the veil" or "remedial constructive trust" simply do not exist.

(a) Lifting the veil

GT accepts that there is no case where a court has "lifted the veil" of a trust so as to enable the creditors of the settlor to have recourse against assets in a trust that is otherwise valid. However, it argues that this is a developing field and that where the assets are in the control and under the effective control of the settlor (because the trustee will in practice invariably do what the settlor says) and where the trust was set up or used to put assets out of the purported control of the settlor, but with those assets still remaining freely available for the settlor when required, the court may be able to look through the trust structure and treat the assets as if they were the settlor's, particularly where fraud is involved.

GT relies upon a number of cases. The first is *Wallersteiner* v. *Moir* (17). This was a complicated case and the facts and issues were far removed from the present case but Lord Denning said this ([1974] 1 W.L.R. at 1013):

> "Mr. Browne-Wilkinson, as amicus curiae, suggested that all these various concerns were used by Dr. Wallersteiner as a facade: so that each could be treated as his alter ego. Each was in reality Dr. Wallersteiner wearing another hat.
>
> Mr. Lincoln, for Dr. Wallersteiner, repudiated this suggestion. It was quite wrong, he said, to pierce the corporate veil. The principle enunciated in *Salomon v. Salomon & Co. Ltd.* [1897] A.C. 22 was

sacrosanct. If we were to treat each of these concerns as being Dr. Wallersteiner himself under another hat, we should not, he said, be lifting a corner of the corporate veil. We should be sending it up in flames.

I am prepared to accept that the English concerns—those governed by English company law or its counterparts in Nassau or Nigeria—were distinct legal entities. I am not so sure about the Liechtenstein concerns—such as the Rothschild Trust, the Cellpa Trust or Stawa A.G. There was no evidence before us of Liechtenstein law. I will assume, too, that they were distinct legal entities, similar to an English limited company. Even so, I am quite clear that they were just the puppets of Dr. Wallersteiner. He controlled their every movement. Each danced to his bidding. He pulled the strings. No one else got within reach of them. Transformed into legal language, they were his agents to do as he commanded. He was the principal behind them. I am of the opinion that the court should pull aside the corporate veil and treat these

concerns as being his creatures—for whose doings he should be, and is, responsible. At any rate, it was up to him to show that anyone else had a say in their affairs and he never did so ..."

It is fair to say that Buckley and Scarman, L.JJ. do not seem to have approached the case on this basis.

GT relies heavily on *Re a Company* (2). In that case, the plaintiff companies, which were in liquidation, brought an action against the defendant alleging deceit and breach of trust. There was evidence that the defendant, once he realized that the plaintiff companies were insolvent, arranged for his personal assets to be held by a network of interlocking foreign and English companies and trusts so that his true beneficial interests were concealed and the plaintiffs prevented from realizing the fruits of the proceedings brought against him. At first instance, the court granted wide-ranging *Mareva* injunctions in respect of the foreign trusts and companies. The defendant appealed. On the facts, the court concluded that the evidence was clear enough at that stage that ([1985] BCLC at 336) "the whole construction is but a facade used to place the English assets outside the reach of the first defendant's creditors,

including the plaintiffs ...” Cumming-Bruce, L.J. went on to say (*ibid.*, at 337–338) that—

> “The issue between the parties thus crystallized to a consideration of a distinction which was not, as far as we know, canvassed before the judge. The first defendant submitted that it was only if the evidence disclosed that the legal structure of the companies in which the first defendant had an interest (or the legal and equitable structure of trusts created at his instigation) was a complete sham that the court, exercising jurisdiction under s.37 of the Supreme Court Act 1981, would pierce the corporate veil and look beyond the legal entitlement to the English asset in question. Counsel for the plaintiffs contended that if, in the case of any corporation or trust, the court was satisfied that the legal structure had some reality but nonetheless was a vehicle over which the defendant exercised substantial or effective control, the *Mareva* injunction was appropriate in order to prevent disposal of English assets; and discovery by interrogatories was appropriate in order to ascertain the nature and extent of the first defendant’s interest once it was demonstrated (as it was) that the vehicles were directly or indirectly entitled to English assets.
>
> In our view the cases before and after *Wallersteiner v. Moir* ... showed that the court will use its powers to pierce the corporate veil if it is necessary to achieve justice irrespective of the legal efficacy of the corporate structure under consideration. As Lord Denning MR said ... the companies there identified were distinct legal entities and the principles of *Salomon v. Salomon* prima facie applied. But only prima facie. On the facts of the *Wallersteiner* case,

> the companies danced to Dr Wallersteiner’s bidding. Buckley, L.J. disagreed on the facts about the position of IFT, but Scarman, L.J. held that the evidence disclosed liability in Wallersteiner on the ground that he instigated the loan of £50,000.”

The court upheld the injunctions although it confined them to companies and trusts (*ibid.*, at 337) “over which the defendant exercised substantive and effective control.”

GT emphasizes two aspects of this case. First, the court appears not to

have drawn any distinction between companies and trusts. Secondly, it appears to have accepted that the evidence did not have to disclose a sham for the court to grant an injunction; only that the defendant had effective and substantive control over the relevant structures.

There have been further cases to like effect. For example, in *International Credit & Inv. Co. (Overseas) Ltd.* v. *Adham* (9), Robert Walker, J. agreed to appoint a receiver over assets within the English jurisdiction which were owned by a Liechtenstein trust. The judge said this ([1998] BCC at 137):

> "The passage to which I have just drawn attention shows that a *Mareva* injunction may indeed, in appropriate circumstances, operate as an order in rem, and such an order may be justified and indeed necessary where parties have the ability to switch real assets from one shadowy hand to another in such a way that it is difficult to keep track of where they are. That is the justification for orders which look through offshore companies in order to find the real assets—or which do, if you look, pierce the corporate veil, to use the vivid but imprecise metaphor which is sometimes used."

In relation to Sheikh Fahad himself, the English High Court had to consider at an earlier stage whether to maintain an *ex parte* injunction against him in relation to certain trusts, including the Esteem Settlement and the No. 52 Trust. In giving judgment in *Grupo Torras S.A.* v. *Sheikh Fahad Mohammed Al-Sabah* (8), Mance, J. said:

> "It is common ground that any discretionary trusts of which Sheikh Fahad was settlor and under which he is a potential beneficiary are *prima facie* to be regarded as quite separate in law from Sheikh Fahad; and that the assets of any such trusts fall *prima facie* to be distinguished from the assets of Sheikh Fahad. The *prima facie* position is therefore that it is only if and in so far as the trustees of any such trust actually exercise their powers in favour of Sheikh Fahad that his assets may be increased. The onus thus rests on the plaintiffs to justify the extension of any interlocutory relief, whether by way of injunction or disclosure order, to the trusts or trust assets. The precise circumstances in which such an extension could be justified were in dispute. Relevant guidance is afforded by

SCF Finance Co. v. *Masri* ([1985] 1 W.L.R. 876) and *Re a Company* ([1985] BCLC 333), both in the Court of Appeal. A further recent instance of such an extension is provided by *TSB Private Bank International S.A.* v. *Chabra* ([1992] 1 W.L.R. 231), a decision of Mummery J. In the first case, Lloyd, L.J., with whom Sir George Waller agreed, said ([1985] 1 W.L.R. at 884) that 'where a plaintiff invites the court to include within the scope of a *Mareva* injunction assets which appear on their face to belong to a third party, *e.g.* a bank account in the name of a third party, the court should not accede to the invitation without good reason for supposing that the assets are in truth the assets of the defendant.'"

Mance, J. then quoted the passage from *Re a Company* (2) and went on:

"The ultimate issue is not therefore the legal efficacy of the corporate or, in this case, trust structure under consideration. It is whether it is necessary, in order to achieve justice, to lift the veil of that structure and so to treat the assets of the company or trust as the defendant's. In a case where the structure cannot be entirely disregarded as a sham, a key question is likely to be whether it was in practice a vehicle over which the defendant exercised substantial or effective control. In both *Wallersteiner* v. *Moir* ([1974] 1 W.L.R. 991) and in *Re a Company* itself, the fact that the structure 'danced at the defendant's bidding' or 'to the defendant's tune' was central to the court's conclusion. In *TSB International* v. *Chabra*, Mummery, J. allowed the joinder of a company and upheld an injunction against it on the basis that there was 'a good arguable case' that some of the assets held in its name are the beneficial assets of Mr. Chabra either on the basis that the company holds them on trust or as nominee for him, or on the basis that the company is the convenient repository for Mr. Chabra's assets."

Mance, J. then went on to consider the alleged facts (it was, of course, only an interlocutory hearing) in some detail and concluded that there was evidence that the Esteem Settlement was dancing to Sheikh Fahad's bidding and that, in relation to the Esteem Settlement, "Sheikh Fahad is in reality the beneficial owner of it and its assets and their substantial and effective controller."

GT also relied on *Private Trust Corp.* v. *Grupo Torras S.A.* (15), a decision of the Court of Appeal in The Bahamas. That case also arose out of the activities of Sheikh Fahad. GT had obtained a *Mareva* injunction and accompanying disclosure orders in respect of the Bluebird Trust of which Private Trust Corporation (PTC) was the trustee. PTC appealed. The Court of Appeal upheld the injunction. In the course of his judgment, Gonsalves-Sabola, P., having said that a case had been made that the assets of the Bluebird Trust "are in fact Sheikh Fahad's assets," went on to say (1 O.F.L.R. at 451):

> "If it be established that the Bluebird Trust was a vehicle over which Sheikh Fahad exercised substantial or effective control, the Court would pierce the corporate structure of PTC and regard Sheikh Fahad as beneficial owner of the assets of the trust applying the principles recognized by Cumming Bruce LJ in *Re a Company* [1985] BCLC 333 and by Mummery J in *TSB Private Bank International SA v Chabra and Another* [1992] 1 WLR 231. *Re a Company* affirmed that the principles of *Salomon v Salomon* [1897] AC 22 which distinguish a company as a separate legal entity from its owners (the shareholders) apply only *prima facie* in a situation where, as in the former case, the company 'danced to the bidding' of some dominant shareholder. The court is not hobbled by the complexity of the legal structures into which a defendant has caused his funds to disappear so that only he or his agents could disentangle his personal interest, thus achieving a confusion against the contingency of a future judgment."

Mr. Journeaux argued that the only ground for granting a *Mareva* injunction in respect of what are apparently assets of a third party is that the assets may eventually be capable of being taken to satisfy a judgment against the defendant in the case. It must follow, so he argues, that, even in the absence of an allegation of sham, the court in each of the above cases was of the view that the plaintiff might be able to enforce a judgment obtained against the defendant against the assets in the trusts and companies concerned. It is a developing field and the claim should therefore not be struck out at this stage before the facts are known.

The response of the defendants is straightforward. The doctrine of

"lifting the corporate veil" applies only to companies. That is because a company is a legal structure, constituted by statute. The court cannot therefore say that it does not exist. The alternative is to lift the corporate veil when the court is satisfied that the company "dances to the bidding" of the defendant or is otherwise just his "puppet."

The position in relation to a trust is quite different. A trust does not have a separate legal personality created by statute or by law. There is no "veil" in the context of a trust. A claim on the part of GT must plead and prove either that the original disposition into the trust should be set aside or that what looks like a trust is not in truth a trust (*i.e.* it is a sham), because the trustees have colluded and agreed to hold the property not as trustees but as nominees or agents for the settlor. In order to prove a sham, it is necessary to satisfy the criteria set out clearly by Diplock, L.J. in *Snook* v. *London & W. Riding Invs. Ltd*. (16) ([1967] 1 All E.R. at 528):

> "As regards the contention of the plaintiff that the transactions between himself, Auto-Finance Ltd. and the defendants were a 'sham,' it is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different

> from the actual rights and obligations (if any) which the parties intend to create. One thing I think, however, is clear in legal principle, morality and the authorities (see *Yorkshire Railway Wagon Co. v. MacLure; Stoneleigh Finance Limited v. Phillips*), that, for acts or documents to be a 'sham,' with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating. No unexpressed intentions of a 'shammer' affect the rights of a party whom he deceived. There is an express finding in this case that the defendants were not parties to the alleged 'sham.' So this contention fails."

The defendants further contend that the cases relied upon by GT do not

suggest any self-standing cause of action of "lifting the veil." All of these were interlocutory hearings dealing with *Mareva* injunctions. When properly analyzed, there was in each case an allegation that the assets were in truth the assets of the relevant defendant. In the context of trusts, that meant an allegation that the assets were not in truth held on the terms of the trust but were held by the trustee as nominee or agent of the defendant, *i.e.* an allegation of sham. Although this may not have been expressly stated in each case, it must have been the underlying allegation. In the circumstances, say the defendants, it is no surprise that, at an interlocutory stage, the court should grant an injunction to freeze assets said to be the proceeds of fraud in case those assets are in due course held in law to be the assets of the defendant and therefore available for his creditors.

The defendants also rely on art. 10(1) of the 1984 Law which provides that, subject to the remaining provisions of art. 10 (which set out various grounds of invalidity), a trust shall be valid and enforceable in accordance with its terms. Article 3 is to like effect. A sham is not enforceable under these provisions because it is not, in truth, a trust. GT, they say, cannot succeed in the "lifting the veil" argument (or indeed the remedial constructive trust argument) unless it is contended that the "trusts" were not, in truth, trusts. To do that, GT must allege sham.

On the face of it, the defendants raise some powerful arguments. But I remind myself that it is not my duty to decide today whether I would find in favour of GT's alleged cause of action. I have only to decide whether I am certain that the claim is bound to fail (see *Farah* v. *British Airways* (5)). The claim certainly appears to be novel. But that does not mean that it must necessarily be struck out. The law develops by novel points being taken. On many occasions they fail but sometimes they are accepted, even if not at first. The comments in the cases relied upon by GT show that this is a developing area and courts are taking an approach which they would not have taken a number of years ago. Most importantly, I am in no doubt that the novel propositions of law put forward by GT should

be tested against the actual facts found after trial rather than on some hypothetical basis. In this respect I play close regard to the decisions of the English courts which have emphasized the importance of developing

the law on the basis of actual (not assumed) facts. In my judgment, this case is not so overwhelmingly clear that GT should be prevented from adducing the necessary evidence in support of its case and arguing its proposition in full on the basis of the facts as found following that evidence.

The defendants argue that, even if it is possible in law to pierce the veil of a trust, the facts alleged in the pleadings are insufficient for GT to have any realistic prospect of success. They say that all of the individual facts relied upon to show that the trusts were under the effective and substantial control of Sheikh Fahad were equally consistent with a properly administered trust. Thus, to take one example, the fact that non-beneficiaries occupied some of the properties was irrelevant. It would be perfectly in order for Sheikh Fahad, who was a beneficiary, to invite relatives to live with him. The property was still being made available for use by a beneficiary of the trust.

This judgment is already lengthy and I do not think it necessary to go through each of the alleged facts in turn. As I have already said, it is not for me to decide the merits of the case at present. In my judgment, it is arguable (and that is all that I have to be satisfied of) that the cumulative effect of the various matters pleaded may satisfy a court that the trusts were under the effective and substantial control of the settlor and that the general allegations set out in paras. 15 and 16 of the claim are justified. Although I have considered this matter afresh in the light of the submissions made to me, I note in passing that broadly the same alleged facts enabled Mance, J. to find that it was arguable that Sheikh Fahad was in reality the owner of the Esteem Settlement and its assets and their substantial and effective controller. I therefore decline to strike out the claim in relation to “lifting the veil” on the grounds that it discloses no reasonable cause of action.

(b) Remedial constructive trust

As an alternative, GT contends that the court can impose a remedial constructive trust upon the assets in the Esteem Settlement and the No. 52 Trust in favour of GT. The grounds for so doing are based upon the same facts as are relied upon for lifting the veil. In its skeleton argument, GT

asserted that it was entitled to a remedial constructive trust by reason of the following matters:

(a) the fraud practised on GT by Sheikh Fahad which resulted in judgment against him for US$800m;

(b) the fact that Sheikh Fahad has put his assets into the various trust structures which he controls and of which, at the same time, he enjoys the benefit; and

(c) unless the trust assets are available to meet GT's judgment, it will remain largely unsatisfied.

GT accepts that there is no decided case under Jersey law or English law where a remedial constructive trust has been imposed. However, Mr. Journeaux asserts that the remedy has been applied in certain Commonwealth jurisdictions and that the matter remains open under English law and Jersey law.

What is meant by a remedial constructive trust? A useful summary is to be found in the judgment of Tipping, J. in the Court of Appeal in New Zealand in *Fortex Group Ltd.* v. *MacIntosh* (4) ([1998] 3 NZLR at 172–173):

> "For present purposes, these three types of trusts can be described as follows. An express trust is one which is deliberately established and which the trustee deliberately accepts. An institutional constructive trust is one which arises by operation of the principles of equity and whose existence the court simply recognizes in a declaratory way. A remedial constructive trust is one which is imposed by the court as a remedy in circumstances where, before the order of the Court, no trust of any kind existed.
>
> The difference between the two types of constructive trust, institutional and remedial, is that an institutional constructive trust arises upon the happening of the events which bring it into being. Its existence is not dependent on any Order of the Court. Such order simply recognizes that it came into being at the earlier time and provides for its implementation in whatever way is appropriate. A remedial constructive trust depends for its very existence on the Order of the Court; such order being creative rather than simply confirmatory. This description should not be regarded as definitive

or as precluding further developments in this area of the law when greater refinement may be necessary."

In *Fortex*, the company failed to pay over contributions to a superannuation scheme. The contributions were payable partly by the employees and partly by Fortex as employer. The employees' contributions were deducted from their salaries. For about a year before its receivership, Fortex did not pay over any of the contributions of either type. They remained in the company's bank account and had the effect of reducing the company's bank overdraft below the level at which it would otherwise have been. The employees brought a claim contending that the court should impose a remedial constructive trust on Fortex's assets in respect of the contributions wrongfully not paid over to the scheme. There were secured creditors in respect of the assets in question. The court held that, assuming the doctrine of remedial constructive trust to be part of the law of New Zealand, it was necessary for there to have been unjust enrichment in circumstances where it would be unconscionable for the person who would otherwise have a property interest in the

subject-matter which would be affected by the imposition of a trust to rely upon those property rights. On the facts, the court held that the secured creditors had not been unjustly enriched, nor could it be said to be unconscionable for them to rely upon their secured rights. The court emphasized that it was the consciences of the secured creditors which had to be looked at (being the parties which would be deprived of rights by the imposition of a trust), not that of the defaulter, Fortex. Tipping, J. went on to say ([1998] 3 NZLR at 179):

"It is, therefore, unnecessary to discuss the several other points which were raised in argument, or to consider further the Court's power to impose a remedial constructive trust. Whether such power exists in New Zealand and if so, on what basis and in what circumstances, can await another case in which those issues necessarily arise. When the claim is for a money sum, the need for the plaintiff to seek a proprietary remedy will usually arise only when the defendant is insolvent. In such circumstances, the rights of parties other than the defendant are likely to be affected. If the plaintiff wishes to gain priority over those who would otherwise be entitled

to the defendant's assets, the court must be careful not to vary settled insolvency rules on too loose a basis. That said, there may be occasions, in the present field or others, when a proprietary remedy, such as the so-called remedial constructive trust, would be a useful weapon in equity's armoury."

It follows that the matter was expressly left open as a matter of New Zealand law.

In Australia and Canada, the remedial constructive trust has been recognized. In *Muschinski* v. *Dodds* (12) the majority of the High Court of Australia held that a remedial constructive trust could be imposed by the court. The parties, who were a man and woman living together, purchased land in their joint names on the basis of an agreement that the man would undertake certain works as his contribution. All the money was put up by the woman. The man did not carry out his works as it became impossible for him to do so as a result of outside events. The court held that it would be unconscionable for him to retain his half share in such circumstances and imposed a remedial constructive trust on his share (subject to allowance for any contributions he had made).

In *Pettkus* v. *Becker* (13) the parties lived together and jointly contributed funds to purchase some real property which was held in the name of the defendant. The majority of the Supreme Court of Canada held that the court could impose a remedial constructive trust to prevent unjust enrichment which, in a matrimonial context (which this was treated as), required an enrichment of one person, a corresponding deprivation of another, and no juristic reason for the enrichment.

In *Cusack* v. *Scroop Ltd.* (3), the Common Law Division of the Isle of Man High Court reviewed many of the relevant Commonwealth

authorities and held that it could impose a remedial constructive trust as a remedy for unconscionable conduct, notwithstanding that such a remedy had not been recognized by the courts of England and Wales. On appeal it was held that, on the facts, the defendant's conduct had not been unconscionable so that, even if the remedy existed at Isle of Man law, it could not be applied in the particular case. The Staff of Government Division expressly left the matter open, simply observing that the views of the High Court were only *obiter dicta*.

In relation to English law, GT argues that the matter remains open. In support, Mr. Journeaux referred me to *Metall & Rohstoff A.G.* v. *Donaldson Lufkin* (11) where Slade, L.J., giving the judgment of the court, said ([1990] 1 Q.B. at 479):

> "The extent to which a constructive trust can properly be treated as a remedy is far from clearly defined in the authorities. The position is stated thus in *Snell's Principles of Equity,* 28th ed. (1982), p.193:
>
> 'In some jurisdictions the constructive trust has come to be treated as a remedy for many cases of unjust enrichment; whenever the court considers that the property in question ought to be restored, it simply imposes a constructive trust on the recipient. In England, however, the constructive trust has in general remained essentially a substantive institution; ownership must not be confused with obligation, nor must the relationship of debtor and creditor be converted into one of trustee and cestui que trust. Yet the attitude of the courts may be changing; and although the constructive trust is probably not confined to cases arising out of a fiduciary relationship, it is far from clear what other circumstances suffice to raise it or how far it can be employed as a species of equitable remedy to enforce legal rights.'
>
> However, the authors of *Goff and Jones, The Law of Restitution*, 3rd ed. (1996), after a comprehensive review of the authorities, state their views at p.78:
>
> 'Equity's rules were formulated in litigation arising out of the administration of a trust. In contrast restitutionary claims are infinitely varied. In our view the question whether a restitutionary proprietary claim should be granted should depend on whether it is just, in the particular circumstances of the case, to impose a constructive trust on, or a equitable lien over, particular assets, or to allow subrogation to a lien over such assets.'
>
> While we have had the benefit of very full argument on almost all other aspects of the law involved in this case, we have neither heard

nor invited comprehensive argument as to the circumstances in which the court will be prepared to impose a constructive trust de

novo as a foundation for the grant of equitable remedy by way of account or otherwise. Nevertheless, we are satisfied that there is a good arguable case that such circumstances may arise and, for want of a better description, will refer to a constructive trust of this nature as a 'remedial constructive trust.'"

This approach is consistent with that of Lord Browne-Wilkinson in the House of Lords in *Westdeutsche Bank* v. *Islington L.B.C.* (18), where he said ([1996] A.C. at 716):

"Those concerned with developing the law of restitution are anxious to ensure that, in certain circumstances, the plaintiff should have the right to recover property which he has unjustly lost. For that purpose, they have sought to develop the law of resulting trusts so as to give the plaintiff a proprietary interest. For the reasons that I have given in my view such development is not based on sound principle and in the name of unjust enrichment is capable of producing most unjust results. The law of resulting trusts would confer on the plaintiff a right to recover property from, or at the expense of, those who have not been unjustly enriched at his expense at all, e.g. the lender whose debt is secured by a floating charge and all other third parties who have purchased an equitable interest only, albeit in all innocence and for value.

Although the resulting trust is an unsuitable basis for developing proprietary restitutionary remedies, the remedial constructive trust, if introduced into English law, may provide a more satisfactory road forward. The court by way of remedy might impose a constructive trust on a defendant who knowingly retains property of which the plaintiff has been unjustly deprived. Since the remedy can be tailored to the circumstances of the particular case, innocent third parties would not be prejudiced and restitutionary defences, such as change of position, are capable of being given effect. However, whether English law should follow the United States and Canada by adopting the remedial constructive trust will have to be decided in some future case when the point is directly in issue."

In response, the defendants referred me to *Re Polly Peck Intl. PLC (in administration) (No. 2)* (14). In that case the Court of Appeal struck out the claim that a remedial constructive trust could be imposed on the grounds that it would be inconsistent with the statutory scheme for the distribution of assets in an administration or liquidation of a company. However, Nourse, L.J. went further and held that, even if there was no question of insolvency, it was not seriously arguable that a remedial constructive trust could be imposed because the court could not vary property rights without an Act of Parliament conferring the necessary power. The defendant also relied upon an article by Sir Peter Millett entitled "Equity—the road ahead" in 6 *King's College Law Journal*, at 1. Sir Peter's final conclusion was (at 19):

> "I believe that there is neither room nor need for the remedial constructive trust. In my view it is a counsel of despair which too readily concedes the impossibility of propounding a general rationale for the availability of proprietary remedies. We need to be more ready to categorize wrongdoers as fiduciaries and to extend the situations in which proprietary remedies are made available on established principles."

Furthermore, the defendants argued that even if as a matter of principle the court might be able to impose a remedial constructive trust, it could not do so in the circumstances of this case. They point out that the persons who would be deprived of property would be the defendants as beneficiaries under the trusts. No allegation of fraud is made against them. There has been nothing unconscionable in *their* conduct which would justify a deprivation of their property rights. GT's response is that the defendants are volunteers and claim their title through Sheikh Fahad, who has committed a fraud. GT argues that it would therefore be open to the court to take the view that the defendants would be unjustly enriched by benefiting from Sheikh Fahad's fraud and that it would be unconscionable for them to rely upon their property rights as beneficiaries in such circumstances.

In my judgment it is eminently arguable that Jersey law may—I repeat may—recognize the doctrine of a remedial constructive trust. One only has to look at the division of opinion referred to above. Canada and Australia have adopted such a remedy. New Zealand has reserved its

position. The Isle of Man has at first instance adopted it, but that remains *obiter* because the appeal was allowed. In England, some judges have expressed the view that English law may be developed to adopt the principle, whereas others have expressed a view that it is not possible to do so by judicial action. It is in my view therefore arguable that Jersey law may develop such a remedy. Is it arguable that any such remedy might be available in the present case? It seems to me clear that, if the remedy does exist, its application must depend upon the court's view of all the facts. Is any enrichment involved unjust? Is the conduct of the relevant party or parties unconscionable so as to allow for the remedy? I am in no doubt that this is a case where the court cannot and should not reach a conclusion in the abstract. The court should hear the evidence and reach conclusions on the conduct of all the relevant parties. Having done so, it can then consider whether Jersey law recognizes such a remedy and, if so, whether it can be applied on the facts of this case. I therefore decline to strike out the claim in relation to remedial constructive trust on the grounds that it discloses no reasonable cause of action.

(c) Article 10 of the 1984 Law

Article 10(2) of the 1984 Law provides (so far as relevant):

"(2) A trust shall be invalid—

...

(b) to the extent that the court declares that—

...

(ii) the trust is immoral or contrary to public policy ..."

GT contends that it would be contrary to public policy for Jersey law to allow a settlor to establish a trust for the purpose of putting assets beyond the reach of the creditors whom he has defrauded; to keep substantial and effective control of the assets in the trust; and to ensure that, in practice, the assets can be made freely available to him but not to the victims of his fraud. Mr. Journeaux cited *In re Great Berlin Steamboat Co.* (7), where the court refused to enforce a trust which was intended to present to a third party the appearance that resources were available to the trustee when in fact they were not, because they were held on bare trust for the settlor.

Mr. Sinel argued that art. 10(2)(b)(ii) was concerned only with the purpose and objectives of a trust as set out in the terms of the trust deed. He referred to Underhill & Hayton, *Law of Trusts & Trustees*, 15th ed., at 165 (1995) for support. *In re Great Berlin Steamboat Co.* does not assist, he says, because the express terms and purposes of the trust were to give a misleading impression of the trustee's assets. GT's submission amounted to an attempt to extend the application of art. 10 beyond that for which it was intended. Jersey law provided perfectly satisfactory remedies to deal with dispositions into trust to avoid creditors, namely an *action paulienne* (see *Golder* v. *Société des Magasins Concorde Ltd.* (6)) and the claw-back provisions of Jersey bankruptcy law. Far from public policy being to invalidate a trust because the settlor had unsatisfied creditors, the public policy of Jersey was to permit a person to create a discretionary trust under which he may benefit and, provided the original disposition cannot be impugned under an *action paulienne* or the bankruptcy law, upon his subsequent insolvency his creditors will have no claim on the trust assets other than to the extent of his interest under the trust.

The court put to Mr. Sinel the example of a trust where the trust deed was in conventional form but where the trust was set up with the express intention on the part of both the settlor and the trustee that the trust should exercise its conventional investment or trading powers so as to run a brothel. In other words, the trust deed was in acceptable form but the clear intention of both the settlor and the trustee was that the trust should act contrary to public policy. Could such a trust be invalidated as being contrary to public policy? Mr. Sinel's response was that if the object or power of running a brothel was set out in the trust deed, the court could strike down the trust as being contrary to public policy; but if the trust deed was normal on the face of it, the fact that the settlor and the trustee intended that the sole activity of the trust should be to run a brothel was not sufficient and the trust could not be struck down as being contrary to public policy.

Mr. Sinel may well be right and I note that *Underhill* clearly has in mind the written terms of the trust deed. Nevertheless, I do not think that the contrary is unarguable. If it is arguable that the court can have

regard to the intentions of the settlor and the trustee as well as to the written terms of the trust deed, then I am further not willing to say that it is a hopeless argument on the part of GT to contend that the facts and circumstances surrounding these two trusts might enable the court to say that they are contrary to public policy. I therefore decline to strike out the claim in so far as it alleges a breach of art. 10 of the 1984 Law.

Summary on the substantive issues

In summary, I am not willing to strike out any of the three causes of action relied upon by GT. However, so that there is no misunderstanding, I repeat that I make no finding on the validity of any of these claims. That is for the future. My only function at this stage is to consider whether I am so certain that the claims will fail that I feel justified in striking them out so that GT is precluded from adducing its evidence and developing its legal arguments in the light of that evidence. For the reasons which I have given, I do not find myself in that position.

(ii) The pleading issues

(a) The main complaint

The defendant's main complaint in relation to pleading is that the various causes of action do not emerge at all clearly from the claim. GT recites various facts and then goes straight to the prayer. It is only in the prayer that one discovers that GT is relying upon art. 10 (although the prayer is silent as to which para. of art. 10), upon lifting the veil and upon remedial constructive trust. There are several other paras. of the prayer which cannot easily be related to any particular cause of action. It was only following receipt of the skeleton argument for the hearing that the way in which GT was putting its case became clearer.

In reply, Mr. Journeaux cited *Macrae (née Tudhope)* v. *Jersey Golf Hotels Ltd.* (10), where the court held that it is not necessary to attach a specific "legal label" to a cause of action provided that the pleading sufficiently discloses the nature of the cause of action upon which the claim is based. He says that he has pleaded all the material facts of the claim and that is sufficient. He does not have to plead law.

I have to admit to considerable sympathy with the point made by the defendants. As I read the claim before the hearing, I was left in some uncertainty as to the legal bases upon which GT was bringing its claim. I accept that it is not a strict requirement that matters of law be pleaded but, in my judgment, it is desirable to plead sufficient to make clear the nature of the claim. Indeed, in *Macrae* itself, the court went on to say (1973 J.J. at 2326):

> "That is not to say, however, that it is not desirable in a case such as this for a plaintiff to make clear beyond doubt the legal ground or grounds upon which he or she is proceeding, and we refer again to the passage from Halsbury already quoted ... A failure to do so may cause misunderstanding on the part of a defendant, who cannot be allowed to be prejudiced thereby."

Let us take the example of alleged negligence on the part of a solicitor in connection with his client's affairs. The same facts can give rise to a claim in breach of contract and tort. An adequate Order of Justice would deal with both of these separately. It would plead the contract, the implied term to exercise reasonable skill and care and then plead the facts upon which the alleged breach of the contractual term was based. The pleading would then outline the case in tort and would plead the details of any duty of care and any breach of that duty. No doubt the particulars of the breach could well be pleaded simply by referring back to the particulars of the breach of contract. The point is that the defendant would know that he faced a claim both for breach of contract and for tort and he would know the basis relied upon in respect of each claim.

The purpose of pleading is to give fair notice of the case which a defendant has to meet and to clarify the issues between the parties. To achieve this, it is usually necessary to make clear the legal basis of the claim. In my judgment, the claim in this case was not as helpful as it should have been in this process. It is only after the benefit of the skeleton

arguments that all has become clearer. I conclude that the defects in the claim are such as to embarrass the fair trial of the action because it does not make the basis of GT's claim sufficiently clear. I do not propose to strike out the non-proprietary part of the claim as a whole because I do not think it is defective to that extent. I will return later to the order which I propose to make.

(b) Paragraph 22 of the claim and the schedules

Paragraph 22 states that, in support of its claim in relation to the Esteem Settlement and the No. 52 Trust, GT relies upon Sheikh Fahad's use and control of the Bluebird Trust and the Comfort Trust. Details of the conduct relied upon is set out in the schedule. The defendants object and say that GT is pleading matters of evidence which should not properly fall within the pleadings.

Rule 6/8 of the Royal Court Rules 1992 provides that a pleading must contain, and contain only, the material facts on which the party pleading relies for his claim but not the evidence by which those facts are to be proved. "Material facts" are those facts which are necessary for the purposes of formulating a complete cause of action (see 1 *The Supreme Court Practice 1999*, para. 18/7/11 at 315). The subordinate facts which are the means of proving the material facts should not be pleaded.

In my judgment, facts in relation to the Bluebird Trust and the Comfort Trust are not "material facts" for the purposes of GT's claim in relation to the Esteem Settlement and the No. 52 Trust. Nothing done in relation to those foreign trusts forms any constituent element in the

cause of action in relation to Jersey trusts. Things done in relation to those foreign trusts may be evidence in relation to the Jersey settlements and may be admissible by way of similar fact evidence to support the evidence given in relation to the Jersey trusts. I express no view on whether such evidence would be admissible at trial. However, I am clear that the facts in relation to the foreign settlements are not material facts for the cause of action in this case but are merely evidence in support of those material facts. I therefore strike out para. 22 and the schedules on the grounds that they would embarrass a fair trial because they require the defendants to plead to evidence and not to material facts. It follows from the above that sub-paras. (2), (3) and (4) of para. 14 are also struck out.

(c) Paragraph 23 of the claim and sub-paras. (7) and (8) of the prayer of the claim

In this paragraph, GT alleges that the trustee of the Esteem Settlement and the No. 52 Trust should (if necessary with the direction of the court under art. 47 of the 1984 Law) exercise its discretionary power under each of the trusts so as to make a payment for the benefit of Sheikh Fahad of all the trust assets by paying the same to GT in reduction of Sheikh Fahad's indebtedness to GT. It is contended that reduction of this debt would be a benefit to Sheikh Fahad and the payment can therefore properly be made in the trustee's discretion.

The present proceedings arise in relation to an application on the part of the trustees of the two Jersey settlements for directions under art. 47, which application was brought by representation dated August 3rd, 1999. On November 4th, 1999, the court gave directions as to pleading.

Paragraph 1 of the Act of the Royal Court reads:

"1. Directed the plaintiff within three weeks of the date hereof, to file a pleading (the particulars of claim) making such claims as it has against the trustee or any other party setting out the relief which it seeks and against whom that relief is sought in relation to the following questions, namely:

(i) whether the Esteem Settlement is valid; and/or

(ii) whether the No. 52 Trust is valid; and/or

(iii) whether the trustee holds the assets which it currently holds, and is recorded in its books as holding, as trustee of the Esteem Settlement and the No. 52 Trust upon and subject to the terms of those trusts, or otherwise; and/or

(iv) whether the plaintiff has any valid claim to the said assets."

I do not think that a claim that the trustee should exercise its discretionary power to pay capital to a beneficiary is one which falls within (i) to (iv) above, which are concerned with whether the trusts are valid and whether GT has a claim against the trust assets.

Furthermore, by letter dated March 2nd, 2000, the trustee has indicated that it will be bringing a separate application for directions as to whether it should exercise its discretionary powers so as to make a capital distribution to GT for the benefit of Sheikh Fahad as suggested. The issue therefore falls to be decided in those proceedings for directions. Mr. Journeaux argued that, having been convened to these proceedings, GT is now entitled to seek the court's direction on this aspect of the matter. I disagree. He has been convened to argue about the matters covered by (i)

to (iv) of the order of the Royal Court made on November 4th. It will be for the court in the further proceedings for direction referred to to decide whether GT should be convened to the hearing of those proceedings. If it decides that GT should be convened, that would be the correct forum in which to argue the point made in para. 23 of the claim. If the court directs that GT should not be convened on this issue, it would be wrong for GT to be able to circumvent that decision by raising the issue in these proceedings. I conclude that para. 23 falls outside the issues which are the subject of the present application for directions and that the issue raised by para. 23 can and should be dealt with in the new application for directions by the trustee which will focus on that very issue. I therefore strike out para. 23 and sub-paras. (7) and (8) of the prayer.

(d) Detailed pleading points

Finally, I turn to a number of criticisms of detail made by the defendants. I will deal with these in summary form by setting out first the defendant's criticisms and then giving my decision.

(i) It is said that the prayer for the proprietary claim in para. 13 is in the wrong place and should be placed as normal at the conclusion of the pleadings, albeit distinguishing the relief sought in respect of the proprietary claim from the relief sought in respect of the non-proprietary claim. I agree.

(ii) It is said that in para. 14 the phrases "principal beneficiary" and "otherwise connected with" are too imprecise to plead to. I agree that they are imprecise but I think they can be dealt with by a request for particulars if this is thought necessary.

(iii) It is said that, in para. 15, the pleading should distinguish between

the Esteem Settlement and the No. 52 Trust in relation to the allegations and should also distinguish between "setting up" and "using." In connection with the latter contention, it is pointed out that the Esteem Settlement was set up on August 15th, 1981, which was some seven years before the pleaded defalcations began. As a result, the nature of the allegation in respect of the Esteem Settlement must, of necessity, be very

different from that of the No. 52 Trust and it is unfair and unreasonable to plead in this rolled-up manner. I agree with this criticism.

(iv) It is said that, in para. 15(1), the phrase "*to purport* to put out of his legal ownership . . ." is too vague and unspecific to plead to. Is the allegation by GT that Sheikh Fahad has put the assets out of his legal ownership but that this can be set aside? Or is the allegation that, although he attempted to put the assets out of his legal ownership, he has failed to do so, so that the assets remain in his legal ownership? This goes to the heart of the nature of GT's claim and GT must make clear which of these it is pursuing. It may be pursuing them both in the alternative but if so, this should be made clear. I agree with these criticisms.

(v) It is said that, in para. 15(1), the word "attempt" is unclear. If GT is saying that he did these things with the intention of preventing the assets from being available (which is the wording used in para. 18) the use of the word "attempt" is subject to the same criticism as is the use of the word "purport" referred to in (iv) above. It does not make the nature of GT's claim clear. I agree with this criticism.

(vi) It is said that references to "lavish lifestyle" in para. 15(2) are inappropriate and would prejudice the Jurats. I disagree.

(vii) It is said that, in para. 16, the references to "wishes" and

"instructions" are too imprecise and it is not clear which of the matters referred to later are said to be wishes and which are said to be instructions. In my view, this can be dealt with by a request for particulars if thought necessary.

(viii) It is said that, in para. 21(9)(iii), the reference to an opinion formed by Mance, J. in other proceedings is not a material fact in relation to these proceedings and is therefore not properly included in the pleadings. I agree and I order that it be struck out.

(ix) It is said that the only indication in the whole pleading that GT is relying upon art. 10 of the 1984 Law appears in sub-para. (1) of the prayer. However, the reference to art. 10 in the prayer does not indicate which particular provision of art. 10 is being relied upon. That article contains many different grounds for declaring a trust to be invalid. It has now emerged from the skeleton argument and the hearing that it is in fact only art. 10(2)(b)(ii) and, in particular, public policy within that provision which is being relied upon. That should therefore be made clear. Furthermore, the pleadings should give some indication of the nature of the public policy which is being relied upon and the respects in which the trusts are said to be contrary to that public policy. I agree with both of these criticisms.

(x) It has transpired that sub-para. (3) of the prayer (which is the only reference in the pleading to lifting the veil) sets out one of the three causes of action relied upon by GT. It is not clear how sub-paras. (2) and (4) relate to the pleading. It transpired from GT's skeleton argument that (2) and (4) are in fact to be read with (3). However, that does not appear from the pleading. If it is GT's case that, as a *result* of lifting the veil, the

court should make an order in the terms of (2) and/or (4), the pleadings should make that clearer. If, on the other hand, these two sub-paragraphs stand alone or are consequential orders sought if any of the other causes of action succeed, this should be clarified. I agree with these criticisms.

(xi) It is said that it is not clear what cause of action sub-para. (6) of the prayer refers to. Nor was this clarified during the hearing. GT should state the matters relied upon as giving right to the relief claimed in (6). I agree. It may, of course, be that the relief sought in this sub-para. arises out of more than one of the three causes of action. If so, that should be clarified. The difficulty with the present way of setting matters out is that some of the prayers seem themselves to be the statement of the cause of action whereas others seem to be merely consequential relief. It is not easy to follow.

(xii) During the course of his submissions, Mr. Sinel made a number of other comments in relation to the pleading but I do not think it necessary to deal with them in this judgment.

In its skeleton argument, GT referred to the Practice Direction of the Royal Court dated November 15th, 1998 to the effect that "... every application to strike out any claim or pleading under sub-paras. (b), (c) and (d) of Royal Court Rules, r.6/13 ... should be supported by affidavit." The defendants have not filed any evidence and, accordingly, GT contended in its skeleton that they should only be permitted to proceed under sub-para. (a) of r.6/13.

At the hearing, Mr. Sinel produced a printout of the website of the Judicial Greffe which purports to list all the Practice Directions of the court. The Direction of November 15th, 1988 is not on the list, from which he drew the conclusion that it had been revoked. I do not draw that

inference. Unless it has been specifically revoked, it remains in existence. I am not aware that it has been revoked and it accords with good practice and legal principle.

However, in this case, the only one of sub-para. (b), (c) or (d) relied upon by the defendants is that of "embarrassment" in sub-para. (c). The arguments arise entirely from the wording of the pleading. No evidence is necessary or relevant; only submissions by counsel. It is for that reason that I indicated during the hearing that I was willing to consider the defendants' submissions under sub-para. (c) without the need for evidence by way of affidavit.

Conclusion

On the substantive issues, I have held that GT is entitled to proceed with its case based upon lifting the veil, remedial constructive trust and art. 10(2)(b)(ii) of the 1984 Law. I have, however, made it clear that these causes of action did not emerge as clearly as they should have from the claim. Much has only fallen into place following the skeleton arguments

and the submissions during the hearing. The present pleading would embarrass a fair trial, and in my judgment the defendants are entitled to a better statement of GT's case.

I order that the passages dealing with the non-Jersey trusts (para. 14(2), (3) and (4), para. 22 and the schedules) and discretionary payments of capital to GT (para. 23 and sub-paras. (7) and (8) of the prayer) should be struck out as well as para. 21(9)(iii). In relation to the detailed points, I think that items (iii), (iv), (v), (ix), (x) and (xi) should be dealt with before the defendants are called upon to plead. The other matters can be dealt with by a request for particulars if GT does not deal with them

earlier.

The question arises as to what order I should make in the light of my findings. Rule 6/13(1) of the Royal Court Rules provides: “The Court may at any stage of the proceedings order to be struck out or amended any claim or pleading, or anything in any claim or pleading, on the ground that ...” There then follow the four grounds set out in para. 2 of this judgment. I have found that certain aspects of the present pleading would embarrass a fair trial. However, in my judgment, the deficiencies which I have identified in the claim are not sufficient to justify striking it out and I propose instead to exercise the alternative power to direct amendment. I am willing to hear counsel on the exact form of any such order but I am minded to order that GT should within one month file an amended claim in proper form so as to take account of the matters contained in this judgment.

Order accordingly.