

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION
2014/CLE/gen/2019
BETWEEN**

**(1) THE PRIVATE TRUST CORPORATION LIMITED in its capacity as trustee
of the Herbert Angus Ripley settlement (“the Ripley Trust”)**

(2) ELCID FIFTY-FIVE LIMITED

(3) JANST LIMITED

(4) BHP ADVISORS FUND LIMITED

Plaintiffs

AND

(1) EFG BANK & TRUST (BAHAMAS) LIMITED

(2) GEMINORUM LTD.

(3) FORNACIS LTD.

Defendants

AND

(1) BHP BAHAMAS LIMITED

(2) SCOTT C. DOREY

(3) MARC E. WADE

(4) LBI GROUP HOLDINGS LTD.

(5) NIIHAU LTD.

Third Parties

Before Hon. Chief Justice Sir Ian R Winder

**Appearances: Stephen Wilson KC with Damian Neville for the Plaintiffs
John Wilson KC with Berchel Wilson for the Defendants**

17 August 2022

DECISION

WINDER, CJ

This is the Plaintiffs' application for leave to re-amend their Statement of Claim.

1. The action was commenced by specially indorsed Writ of Summons on 23 December 2014.

2. The Statement of Claim was first amended without leave on 18 March 2015. The action sought (on the defendants' account¹):

- (i) Negligent misrepresentations by EFG and EFG Directors (paragraphs. 22 - 30) relying only on representations in writing made in the promotional material.
- (ii) Fraudulent and willful breach of trust by EFG only (paragraphs 31 - 33) relying only on EFG's duty to ensure prudent management of the trust assets and breach of that duty by acting for improper purposes and willful misconduct.
- (iii) Breach of contract by EFG only as administrator of the Fund (paragraphs. 34 - 36).
- (iv) Breach of statutory duties by EFG only as administrator of the Fund (paragraphs 37 - 39).
- (v) Claims by all Plaintiffs against all EFG Defendants as directors and administrator for negligence and breach of fiduciary duties (paragraphs 40 46).

3. The Plaintiffs have applied, by Summons dated 18 February 2022 for permission to file and serve a Re-Amended Statement of Claim. The proposed Re-Amended Statement of Claim, by any objective account, is extensive. It spans some 76 pages.

4. The Defendants, not surprisingly, oppose the amendments which come 7 years since the last amendment on 18 March 2015. The Defendants say² that the proposed amendments:

- (i.) impermissibly raises new causes of action which do not arise from substantially the same facts.

¹ See paragraph 8 of the Defendant's written submissions

² See paragraph 2 of the Defendant's written submissions

- (ii.) impermissibly raises new causes of action that are now statute barred (if the Proposed Amendment is allowed, it would unjustly deprive the Defendants of their limitation defences). (In addition, the Defendants have supplied in summary form a Table which illustrates each of the new causes of action on the Proposed Amendment and the limitations grounds for refusal of same.)
- (iii.) causes prejudice to the Defendants which prejudice far outweighs any purported need for the Plaintiffs to amend, such that it would be unjust and unfair if amendment was permitted. Plaintiffs' excessive delays in making the Amendment Application exacerbates this prejudice to the Defendants. Such egregious and prejudicial delay is inexcusable.
- (iv.) is a clear abuse of process having regard to the lateness of the application, the reasons given and the overall procedural history of the Action.

5. The Defendants further contend³ that:

[15.] The Plaintiffs' Affidavit gives no reason or insufficient reasons for this late Amendment Application. While it condescends to issues regarding the Liquidator's communication with EFG on the books and records of the Fund and the Statement of Affairs that alone cannot account for the reason that the Amendment Application is only now being made 7 years after filing the Action.

[16.] The Defendants contend that the new causes of action raised by the Plaintiffs in the Proposed Amendment do not arise from the same or substantially the same facts as the Original Pleading and are a distinctly different series of new factual assertions relied on by the Plaintiffs. Moreover, the new causes of action are now statute barred as the statutory limitation periods for those various new causes of action have now expired and permission to amend will deprive the Defendants of limitation defences and otherwise occasion prejudice to the Defendants which cannot be compensated in costs such as the Defendants' access to witnesses and documents now required to defend the Proposed Amendments thereby impairing the Defendants' ability to adequately prepare its defence or obtain a fair trial of the issues.

6. The Plaintiffs contend⁴ that on the true legal and factual position:

³ Paragraph 15 and 16 of the Defendants' submissions

⁴ Paragraph 8 of the Plaintiff's Submissions

(1) Properly analysed, the proposed amendments that are challenged do not constitute new causes of action (being variously, and simply inter alia:

- (a) repleading of existing facts;
- (b) the provision of further particulars of existing allegations;
- (c) further breaches of a previously pleaded duty (not amounting to a new cause of action); and/or
- (d) the alternative categorisation of an originally pleaded factual situation, as a further claim.

(2) ...

(3) In any event, given the matters already traversed in: (i) the ASOC; (ii) the F&BPs; (iii) the D&CC; and (iv) the 3rd Party Claim, to the extent any of the contested amendments is properly a 'new cause of action', in each case it plainly arises out of what are the "same facts or substantially the same facts (s/ssfs" for the purposes of O. 20, r. 5(5).

The Law

7. Order 20 rule 5 of the Rules of the Supreme Court provides:

"5. (1) Subject to Order 15, rules 6, 7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct. (2) Where an application to the Court for leave to make the amendment mentioned in paragraphs (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so. (5) An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment."

8. The Court of Appeal decision in *Bahamas Telecommunications Company Ltd. v. Island Bell Limited* [2017] 1 BHS J. No. 40 at paras [23] and [34] provides a useful discussion on the principles underpinning the grant of leave to amend:

[23] Bowen L.J in *Cropper v Smith* (1883) 26 Ch D. 700 at 710- 711 stated the general principles for granting leave to amend. He said:

"It is a well-established principle that the object of the Court is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights...I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters of controversy, and I do not regard such amendment as a matter of favour or grace...It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected if it can be done without injustice, as anything else in the case is a matter of right."

...

[34] As previously noted, such amendments should only be allowed if they can be done without injustice. In determining whether there is injustice, the court must consider the lateness of the application; the sufficiency of the reasons for the late application; whether a fair trial and the determination of the issues would be compromised by the granting of leave; and whether costs would compensate.

9. As indicated, the proposed amendment is 76 pages long and is being made some 7 years after the filing of the Original Pleading. I do accept that the recasting of a case at this stage should be looked at on its face as presumptively prejudicial and only the best of reasons ought to permit such action. Where the amendment will better set out the claim however, it is certainly to be welcomed.

10. The only method of dealing with the application, albeit tedious, is to consider each amendment in context, in light of the rules laid out above. I will utilize the sections and groupings which the parties have adopted in the schedule to their applications.

Section A – New Misrepresentation Claims (I accept that the Plaintiffs object to this description of the amendments)

11. The new proposed paragraph 21C(2) avers that EFG employees Dhaliwal and Morrison actively promoted the Fund. The Defendants (D) object on the grounds of limitation asserting that the Cause of Action (COA) accrued on knowledge of damage, 12 July 2018 [when SEGC was made bankrupt] or the COA accrued on knowledge of damage at 9 Sept 2015 [when Fund's documents delivered to Plaintiffs (P)]. P says that the proposed amendment: (1) provides further particulars of the existing: (i) claim in negligent misstatement (see e.g. Amended Statement of Claim (ASOC) paragraphs 27 & 28); and/or (ii) averments of promotion and solicitation (see ASOC paragraphs 21, 23(8); Further & Better Particulars (F&BPs) paragraphs 21 and 33; and D&CC para. 35); and/or (2) arises from s/ssfs: (see e.g. ASOC paragraphs 21, 22, 23(8), and [33]; F&BPs (same paras; and D&CC paragraphs 29 and 35).

12. The new proposed paragraph 21C(4) avers that the EFG Defendants made representations as proposed administrator. D objects on the grounds of limitation asserting that the COA accrued on knowledge of damage: 12 July 2018 [when SEGC was made bankrupt] or COA accrued on knowledge of damage 9 Sept 2015 [when Fund's documents delivered to Ps]. P says that the proposed amendment: (1) provides further particulars of the existing claim in negligent misstatement (see e.g. ASOC paragraphs 27 & 28); and/or (2) arises from s/ssfs: (see e.g. ASOC paragraphs 27; D&CC paragraphs 29 and 31).

13. The new proposed paragraphs 21C(6) 26(2) and 29(2) aver that EFG Defendants were aware/ought to be aware that the Plaintiffs would rely on representations in contemplating investment and in deciding to retain and not to redeem their shares. D objects on the grounds of limitation asserting that the COA accrued on knowledge of damage: of damage: 12 July 2018 [when SEGC was made bankrupt] or COA accrued on knowledge of damage 9 Sept 2015 [when Fund's documents delivered to Ps]. P says that the proposed amendment (1) provide further particulars of the existing claim (see e.g. ASOC paragraphs 26-28); (2) are an alternative categorization of an existing pleaded

factual situation (see e.g. ASOC paragraphs 21 & 26); and/or (3) arise from s/ssfs (see e.g. ASOC paragraphs 21-28; F&BPs paras, 6, 10 & 12(iii); D&CC paragraphs 24(1), 28, 29 & 31).

14. The new proposed paragraph 21D(1) aver that the EFG Defendants' duty arose from an assumed responsibility for the accuracy of representations. D objects on the grounds of limitation asserting that the COA accrued on knowledge of damage: 12 July 2018 [when SEGC was made bankrupt] or COA accrued on knowledge of damage 9 Sept 2015 [when Fund's documents delivered to Ps]. P says that the proposed amendment: (1) provides further particulars of an existing pleaded duty, (see e.g. ASOC paragraphs 27 & 28); and/or (2) arises from s/ssfs (see e.g. ASOC paragraphs 21–28; F&BPs paragraphs 6 & 10; D&CC paragraphs 29-31).

15. The Proposed paragraph 21D(2)(b) avers that the EFG Defendants' duty arose from a sufficiently proximate relationship with the Plaintiffs. D objects on the grounds of limitation asserting that the COA accrued on knowledge of damage: 12 July 2018 [when SEGC was made bankrupt] or COA accrued on knowledge of damage 9 Sept 2015 [when Fund's documents delivered to Ps]. P says that the proposed amendment: (1) provides further particulars of an existing pleaded duty, (see e.g. ASOC paragraphs 27 & 28); and/or (2) arises from s/ssfs (see e.g. ASOC paragraphs 21–28; F&BPs paragraphs 6 and 10; D&CC paragraphs 29-31).

16. The proposed paragraph 21D(2)(c) avers that EFG Defendants duty arose from a reasonably foreseeable loss caused by error of representations. D objects on the grounds of limitation asserting that the COA accrued on knowledge of damage: 12 July 2018 [when SEGC was made bankrupt] or COA accrued on knowledge of damage 9 Sept 2015 [when Fund's documents delivered to Ps]. P says that the proposed amendment: (1) Provides further particulars of an existing pleaded duty, (see e.g. ASOC paragraphs 27 & 28); and/or (2) arises from s/ssfs: (see e.g. ASOC paragraphs 21–28; F&BPs paragraphs 6 & 10; D&CC paragraphs 29-31).

17. The new proposed paragraphs 21F(2) and (3) aver that the EFG Defendants breached the duty of care by virtue of failing to take adequate steps to establish the truth of the statements, failing to communicate a change of circumstances which rendered the statements false. D objects on the grounds of limitation asserting that the COA accrued on knowledge of damage: 12 July 2018 [when SEGC was made bankrupt] or COA accrued on knowledge of damage 9 Sept 2015 [when Fund's documents delivered to Ps]. P says that the proposed amendments (1) plead breaches of an existing pleaded duty (not being a new cause of action) (see e.g. ASOC paragraphs. 27 & 28); and/or (2) arise from s/ssfs (see e.g. ASOC paragraphs 21–28; F&BPs paragraphs 6 & 10; D&CC paragraphs 29, 31 & 35).

18. The new proposed paragraphs 21G and 21H aver that all representations pleaded in respect of statements made by Dhaliwal, Morrison and Dorey in September 2008, Autumn 2008, at the start of 2009, in early 2009. D objects on the grounds of limitation asserting that the COA accrued on knowledge of damage: 12 July 2018 [when SEGC was made bankrupt] OR COA accrued on knowledge of damage 9 Sept 2015 [when Fund's documents delivered to Ps]. P says that the proposed amendments: (1) provide further particulars of an existing pleaded claim (see e.g. ASOC paragraphs 21-23; and F&BPs para. 6); and/or (2) arise from s/ssfs (see e.g. ASOC para. 21-23; F&BPs paragraphs 6 & 12(iii); D&CC paragraphs 23–25 & 35).

19. The proposed paragraph 23B avers that the Ripleys did not contest EFG' s decision to sell or pledge trust assets. D objects on the grounds of limitation asserting that the COA accrued on knowledge of damage: 12 July 2018 [when SEGC was made bankrupt] OR COA accrued on knowledge of damage 9 Sept 2015 [when Fund's documents delivered to Ps]. P says that the proposed amendment: (1) provides further particulars of an existing pleaded claim and/or alternative categorisation of an existing pleaded factual situation (see e.g. ASOC paragraphs 21-23); and/or (2) arises from s/ssfs (see e.g. ASOC paragraphs 21-23; F&BPs para. 6; D&CC para. 35).

20. The proposed amendments to paragraphs 23C, 23D, 23E, 23F, 23G respectively; para. 23H aver a series of further statements by the EFG Defendants on 15 September

2009; 1 October 2009 and 26 October 2009 and reliance on such statements as pleaded. D objects on the grounds of limitation asserting that the COA accrued on knowledge of damage: 12 July 2018 [when SEGC was made bankrupt] or COA accrued on knowledge of damage 9 Sept 2015 [when Fund's documents delivered to Ps]. P says that the proposed amendments: (1) provide further particulars of an existing pleaded claim and/or alternative categorisation of an existing pleaded factual situation (see e.g. ASOC paragraphs 21-24); and/or (2) arise from s/ssfs (see e.g. ASOC paragraphs 21-24; F&BPs paragraphs 6 & 10; D&CC paragraphs 23-26, 31 & 35).

21. The new proposed amendments to paragraphs 23I, 23J, 23K, 23L & 23M aver a series of further statements by Dhaliwal and/or Morrison in late 2009 early 2010, early March 2010, 13 May 2010 and reliance on such statements as pleaded. D objects on the grounds of limitation asserting that the COA accrued on knowledge of damage: 12 July 2018 [when SEGC was made bankrupt] or COA accrued on knowledge of damage 9 Sept 2015 [when Fund's documents delivered to Ps]. P says that the proposed amendments: (1) provide further particulars of an existing pleaded claim and/or alternative categorisation of an existing pleaded factual situation (see e.g. ASOC paragraphs 21-24; F&BPs para. 10); and/or (2) arise from s/ssfs (see e.g. ASOC paragraphs 21-24, & 37(7); F&BPs paragraphs 10 & 12(iii); D&CC paragraphs 23-26, 31 & 35).

22. The new proposed amendments to paragraphs 24(2A), 24(5) & 24(6) aver that Statements made on 27 September 2010, 2 November 2010 and March 2011 as pleaded. D objects on the grounds of limitation asserting that the COA accrued on knowledge of damage: 12 July 2018 [when SEGC was made bankrupt] or COA accrued on knowledge of damage 9 Sept 2015 [when Fund's documents delivered to Ps]. P says that the proposed amendments: (1) provide further particulars of an existing pleaded claim and/or alternative categorisation of an existing pleaded factual situation, (see e.g. ASOC para. 24); and/or (2) arise from s/ssfs (see e.g. ASOC para. 24; F&BPs para. 10; D&CC para. 26).

23. Having examined the amendments considered the submissions of the parties as to these amendments in this section, I am satisfied that they ought to be allowed as they

merely elucidate the claim already made in the existing claim and already reacted to by the Defendants as seen in the exchanges in the Defence and Counterclaim, Further and Better Particulars requests etc. Where limitation issues may arise I am satisfied that they arise out of the same or substantially the same set of facts and there is no appreciable prejudice to the Defendants.

SECTION B – CLAIMS IN MISREPRESENTATION (I accept that the Plaintiffs object to this description of the amendments)

24. The new proposed paragraph 33P(1) avers that EFG Defendants' duty arose from an assumed responsibility for the accuracy of representations. D objects on the grounds of limitation asserting that the COA accrued on knowledge of damage: 12 July 2018 [when SEGC was made bankrupt] or COA accrued on knowledge of damage 9 Sept 2015 [when Fund's documents delivered to Ps]. P says that the proposed amendment: (1) provides further particulars of an existing pleaded claim and/or alternative categorisation of an existing pleaded factual situation, (see e.g. ASOC paragraphs 21–29); and/or (2) arises from s/ssfs (see e.g. ASOC paras 21–29; F&BPs para. 6; D&CC paragraphs 29-31). The proposed new 33P(2)(a) & (b) avers that EFG Defendants' duty arose from a sufficiently proximate relationship with the Plaintiffs or from a reasonably foreseeable loss caused by error of representations. D objects on the grounds of limitation asserting that the COA accrued on knowledge of: 12 July 2018 [when SEGC was made bankrupt] or COA accrued on knowledge of damage 9 Sept 2015 [when Fund's documents delivered to Ps]. P says that the proposed amendments: (1) provide further particulars of an existing pleaded claim and/or alternative categorisation of an existing pleaded factual situation, (see e.g. ASOC paragraphs 27–29); and/or (2) arise from s/ssfs (see e.g. ASOC paragraphs 21–28; F&BPs para. 6; D&CC paragraphs 29-31).

25. The proposed new paragraphs 33R, 33R7 aver that in reliance on those representations Janst retained and did not redeem its shares in the Fund. D objects on the grounds of limitation asserting that the COA accrued on knowledge of: 12 July 2018 [when SEGC was made bankrupt] or COA accrued on knowledge of damage 9 Sept 2015

[when Fund's documents delivered to Ps]. P says that the proposed amendment: (1) provides further particulars of an existing pleaded claim and/or alternative categorisation of an existing pleaded factual situation, (see e.g. ASOC paragraphs 27–29); and/or (2) arises from s/ssfs (see e.g. ASOC paragraphs 21–28; F&BPs para. 6; D&CC paragraphs 29-31).

26. The proposed new paragraph 33O and 33V avers that EFG failed to inform of changes of substance in the Fund. D objects on the grounds of limitation asserting that the COA accrued on knowledge of: 12 July 2018 [when SEGC was made bankrupt] or COA accrued on knowledge of damage 9 Sept 2015 [when Fund's documents delivered to Ps]. P says that the proposed amendment: (1) provides alternative categorisation of an existing pleaded factual situation (see e.g. ASOC paragraphs 27– 28, 34–36, 37(1), (4) & (8), 40 & 41; and F&BPs paragraphs 16-20); and/or (2) arises from s/ssfs (see e.g. matters above; and D&CC paragraphs 35, 39, 41, 44 & 45).

27. The new proposed paragraph 12H avers that Janst liquidated stock market public security investments to invest in the Fund. D objects on the grounds of limitation asserting that the COA accrued on knowledge of: 12 July 2018 [when SEGC was made bankrupt] or COA accrued on knowledge of damage 9 Sept 2015 when Fund's documents delivered to Ps]. P says that the proposed amendment: (1) provides further particulars of an existing pleaded claim and/or relates to a claim to a remedy and does not constitute a new cause of action (see e.g. ASOC paragraphs 21-30; F&BPs para. 16); and (2) arises out of s/ssfs (see e.g. ASOC paragraphs 21-30; F&BPs para. 16; D&CC 23–32); and/or (3) is an allegation that will be supported by evidence from P3 and requires no (or insignificant further) investigation by the Defendants.

28. The new proposed paragraph 12L(1)(2) avers that representations were by Dorey in Canada and Janst relied on the continued involvement of Melanie Clarence of EFG Canada Para. 12L(1)(2). D objects on the grounds of limitation asserting that the COA accrued on knowledge of: 12 July 2018 [when SEGC was made bankrupt] or COA accrued on knowledge of damage 9 Sept 2015 [when Fund's documents delivered to Ps]. P says that the proposed amendment: (1) provides further particulars of an existing

pleaded claim (pertaining to P3's investment in the Fund) (see e.g. ASOC paragraphs 21-30; F&BPs para. 16) and/or relates to a claim to a remedy and does not constitute a new cause of action; and/or (2) arises out of s/ssfs: (see e.g. ASOC paragraphs 21 & 36; F&BPs para. 6); and/or (3) is an allegation that will be supported by evidence from P3 and requires no (or insignificant further) investigation by the Defendants.

29. The new proposed paragraph 33I avers that Elcid and the Ripley Trust were not informed of the in specie Janst investment and it remains unclear how the \$7million alleged to have been invested by Janst was disbursed to the Fund. D objects on the grounds of limitation asserting that the COA accrued on knowledge of: 12 July 2018 [when SEGC was made bankrupt] or COA accrued on knowledge of damage 9 Sept 2015 [when Fund's documents delivered to Ps]. P says that the proposed amendment: (1) repeats, or pleads further particulars of an existing pleaded claim, (see e.g. ASOC para. 36); and/or (2) arises out of s/ssfs (see e.g. ASOC para. 36; D&CC para. 40); and/or (3) is an averment as to the Plaintiffs' knowledge that requires no investigation or evidence on the part of Ds.

30. The new proposed paragraphs 33L and 33M aver that in order to induce Janst's investment EFG made a series of fraudulent misrepresentations. D objects on the grounds of s.41 Limitation Act asserting that the COA accrued no later than 9 Sept. 2015. P says that the proposed amendments: (1) repeat or provide further particulars of an existing pleaded claim, (see e.g. ASOC paragraphs 23-28); and/or (2) arise out of s/ssfs (see e.g. ASOC pars. 23-28; D&CC paragraphs 25-30).

31. Having examined the amendments and considered the submissions of the parties as to these amendments in this section, I am satisfied that they ought to be allowed as they merely elucidate the claim already made in the existing claim and already reacted to by the Defendants as seen in the exchanges in the Defence and Counterclaim, Further and Better Particulars requests etc. Where limitation issues may arise I am satisfied that they arise out of the same or substantially the same set of facts and there is no appreciable prejudice to the Defendant.

SECTION C New breach of trust claims

32. The new proposed paragraphs 31(4), 32A, 33A(2), 33A(3) avers that EFG had alleged conflict of interests and duty to keep accurate accounts. D objects on the grounds of s.5 Limitation Act (and not s.33) - Date of Breach April 2009 Knowledge: COA accrued by 16 August 2013 at earliest or 9 Sept 2015 at latest. P says that the proposed amendments: (1) provide further particulars of an existing pleaded claim (being simply trite duties owed by a party in the role of trustee) (see e.g. ASOC paragraphs 1, 31, & 32); and/or (2) arise out of s/ssfs (see e.g. ASOC paragraphs 1, 23(8), 31-33, 40; F&BPs para. 12; D&CC paragraphs 35-37).

33. The new proposed paragraph 33A(1) avers that EFG advised the Ripley Trust to invest in the Fund and/or failed to seek redemption of the Ripley Trust shares as pleaded. D objects on the grounds of s.5 Limitation Act (and not s.33) COA accrued by 16 August 2013 at earliest or 9 Sept 2015 at latest. P says that the proposed amendment: (1) provides further particulars of an existing pleaded claim and/or alternative categorisation of an existing pleaded factual situation (see e.g. ASOC para. 33); and/or (2) arises out of s/ssfs (see e.g. ASOC para. 33; D&CC paragraphs 35-37).

34. The new proposed paragraph 7(2) aver that EFG acted as investment manager/advisor for the Ripley Trust. D objects on the grounds of s.5 Limitation Act (and not s.33) Date of Breach = date of subscription Knowledge: COA accrued by 16 August 2013 at earliest or 9 Sept 2015 at latest. P says that the proposed amendment: (1) provides further particulars of an existing pleaded claim and/or alternative categorisation of an existing pleaded factual situation: (see e.g. ASOC paragraphs 31-33; F&BPs para. 12(iii); and/or (2) arises out of s/ssfs (see e.g. ASOC paragraphs 31-33; F&BPs para. 12(iii); D&CC paragraphs 34-37).

35. The new proposed paragraphs 12B, 12C aver that Dhaliwal and Morrison gave ongoing and repeated advice and insistence, advising the Ripleys to liquidate investments and sell blue chip stock of the Ripley Trust, pledge assets and invest same in the Fund. D objects on the grounds of s.5 Limitation Act (and not s.33) Date of Breach = date of

subscription Knowledge: COA accrued by 16 August 2013 at earliest or 9 Sept 2015 at latest. P says that the proposed amendments: (1) plead further particulars of an existing pleaded claim (see e.g. ASOC paragraphs 21 & 33; F&BPs paragraphs 6 & 10); and/or (2) relate to a claim to a remedy and do not constitute a new cause of action; and/or (3) arise out of s/ssfs (see e.g. ASOC paragraphs 21, 31-33; F&BPs paragraphs 6 & 10; D&CC paragraphs 34-37).

36. The new proposed paragraph 39E avers that the EFG Directors and or EFG were trustees of the Fund's assets. D objects on the grounds of s.5 Limitation Act (and not s.33) COA accrued by 13 June 2014 removal at earliest OR 9 Sept 2015 at latest. P says that the proposed amendment: (1) provides further particulars of an existing pleaded claim (see e.g. ASOC para. 10); and/or (2) is the simple articulation of trite law that directors occupy a position as quasi-trustees of the company they serve as directors of: (see e.g. *Re Lands Allotment Co* [1894] 1 Ch 616 at 63).

37. Having examined the amendments and considered the submissions of the parties as to these amendments in this section, I am not satisfied that they ought to be allowed. They appear to go beyond merely elucidating the claim already made in the existing claim and reacted to by the Defendant in the exchanges in the D&CC & F&BP. In some cases the amendments appear to adding claims which deprive the Defendant of a valid limitation defence. Notwithstanding the discretion to make the amendments in such cases, the Court will not exercise its discretion to do so. At this stage of proceedings, some 7 years since the filing of the Amended Statement of Claim it would be unfair to the Defence to be put in a position to have to try to answer these new claims on the evidence now available to them. The reasons advanced for the late application, essentially of ineffective assistance of previous Counsel, does not, in my view, properly excuse the tardiness of the Plaintiffs and ultimate prejudice to the Defence. The Court will not allow these amendments.

SECTION D New breach of contract claims or breach of statutory duty

38. The proposed new paragraph 40(11) avers that there was a failing to establish effective internal controls for financial reporting; design programs to prevent or control fraud. D objects on the grounds that the 6 year Limitation: s.5(1) expired COA Accrued 24 August 2010 [Suspension of the Fund]. P says that the proposed amendment: (1) pleads further breach of already pleaded duties (not being a new cause of action) (see e.g. ASOC paragraphs 33, 37(1), (4) & (6), and 40; F&BPs para.16; and/or (2) arises out of s/ssfs (see e.g. ASOC paragraphs 37(4) & (6); F&BPs para. 16; D&CC paragraphs 41 and 44).

39. The new proposed paragraph 40(12) avers that there was a failing to establish adequate policies to safeguard the Fund's investments. D objects on the grounds that the 6 year Limitation: s.5(1) expired COA accrued date of breach: 24 August 2010. P says that the proposed amendment: (1) pleads further breach of already pleaded duties (not being a new cause of action) (see e.g. ASOC paragraphs 33, [37(1), (4), & (6) and 40; F&BPs para. 16); and/or (2) arises out of s/ssfs (see e.g. ASOC paragraphs 37(4) & (6); F&BPs para. 16; D&CC paragraphs 41 & 44).

40. The new proposed paragraphs 40(13), 13M and 20A avers that there was a failing to demand sums payable under terms of the NPI Agreement. D objects on the grounds that s.5(1) of the Limitation Act has expired COA accrued date of breach: 24 August 2010. P says that the proposed amendments: (1) plead further breach of already pleaded duties (not being a new cause of action) (see e.g. ASOC paragraphs 37, & 40; F&BPs para. 16); and/or (2) arise out of s/ssfs (see e.g. ASOC paragraphs 37 & 40; F&BPs para. 16; D&CC paragraphs 41 & 44).

41. The new proposed paragraph 40(14) avers that there was a failing to act to best protect the interests of the Fund. D objects on the grounds of s.5 of the Limitation Act - 6 year Limitation has expired COA accrued date of breach: 24 August 2010. P says that the proposed amendment: (1) pleads further breach of already pleaded duties (not being a new cause of action) (e.g. ASOC paragraphs 37 & 40; F&BPs para. 16; and/or (2) arises out of s/ssfs (see e.g. ASOC paragraphs 37 & 40; F&BPs para. 16; D&CC paragraphs 41 & 44).

42. The proposed new paragraph 41(17) avers a failing to procure transfer of assets from SEGC. D objects on the grounds of s.5 Limitation Act - 6 year Limitation has expired COA accrued date of breach: 24 August 2010. P says that the proposed amendment: (1) pleads further breach of already pleaded duties (not being a new cause of action) (see e.g. ASOC para. 41); and/or (2) arises out of s/ssfs (see e.g. ASOC paragraphs 15 & 41; D&CC paragraphs 35 & 45).

43. The proposed new paragraphs 45A and 1A aver a failure to keep adequate accounting records and/or deliver adequate records to the Liquidator of the Fund. D objects on the grounds of the 6 year Limitation: s.5(1) expired COA accrued date of breach: 24 August 2010. P says that this is a pleading point (explaining Ps' inability to provide further particulars of the 'Improper Payments'). The Liquidator was only appointed in April 2018. Without prejudice to the foregoing, the proposed amendments: (1) repeat or provide further particulars of an existing pleaded claim, (see e.g. ASOC paragraphs 37(4) & (6)); and/or (2) arise out of s/ssfs (see e.g. ASOC paragraphs 37(4) & (6); D&CC para. 41).

44. The proposed new paragraphs 34A and 34B aver an implied term to give business efficacy to Administrator's Agreement that EFG would exercise reasonable care and skill of a competent experienced Administrator and to take reasonable care to prevent foreseeable economic loss. D objects on the grounds of the 6 year Limitation: s.5(1) expired COA accrued date of breach: 24 August 2010. P says that the proposed amendments: (1) provide alternative categorisation of an existing pleaded factual situation (see e.g. ASOC para. 34); and/or (2) arise out of s/ssfs (see e.g. ASOC paragraphs 34 & 37(8); D&CC para. 41(8)).

45. Having considered the submissions of the parties as to the amendments in this section I am not satisfied that they ought to be allowed. They appear to go beyond merely elucidating the claim already made in the existing claim and reacted to by the Defendant as seen in the exchanges in the D&CC & F&BP. In some cases the amendments appear to adding claims which deprive the Defendant of a valid limitation defence.

Notwithstanding the discretion to make the amendment in such cases, the Court will not exercise its discretion to do so. At this stage of proceedings, some 7 years since the filing of the Amended Statement of Claim it would be unfair to the Defence to be put in a position to have to try to answer the claim on the evidence now available to them. The reasons advanced for the late application, essentially of ineffective assistance of prior Counsel does not, in my view, properly excuse the tardiness of the Plaintiffs and prejudice the Defence. The Court will exercise its discretion to not allow the amendments.

SECTION E New negligence claims/breach of fiduciary duties

46. The new proposed paragraph 40(11)(a) avers that there was a failure to establish and/or maintain any effective internal control over financial reporting; D objects on the basis that this is subject to s.13 Limitation Act COA accrued on knowledge of damage: 12 July 2018 [when SEGC was made bankrupt] OR COA accrued on knowledge of damage 9 Sept 2015 [when Fund's documents delivered to Ps]. P says that the proposed amendment: (1) pleads further breaches of already pleaded duties (not being a new cause of action) and/or provides further categorisation of matter traversed in Section D above; and/or (2) arises out of s/ssfs (see e.g. ASOC paragraphs 37(1), (4) & (6); F&BPs para. 16; D&CC paragraphs 41 & 44).

47. The new proposed paragraph 40(11)(b) avers that there was a failure to design and/or implement any or any adequate programs and controls to prevent and detect fraud; D objects on the basis that this is subject to s.13 Limitation Act COA accrued on knowledge of damage: 12 July 2018 [when SEGC was made bankrupt] OR COA accrued on knowledge of damage 9 Sept 2015 [when Fund's documents delivered to Ps]. P says that the proposed amendment: (1) pleads further breaches of already pleaded duties (not being a new cause of action) and/or provides further categorization of matter traversed in Section D above; and/or (2) arises out of s/ssfs (see e.g. ASOC paragraphs 37(1), (4) & (6) and 40; F&BPs para. 16; D&CC paragraphs 41 & 44).

48. The new proposed paragraph 40(11)(c) avers that there was a failure to identify and/or ensure that the Fund complied with the laws and regulations applicable to its

activities. D objects on the basis that this is subject to s.13 Limitation Act COA accrued on knowledge of damage: 12 July 2018 [when SEGC was made bankrupt] OR COA accrued on knowledge of damage 9 Sept 2015 [when Fund's documents delivered to Ps]. P says that the proposed amendment: (1) pleads further breaches of already pleaded duties (not being a new cause of action) and/or provides alternative categorisation of an existing pleaded factual situation: (see e.g. ASOC paragraphs 35–41); and/or (2) arises out of s/ssfs (see e.g. ASOC paragraphs 35–41; F&BPs para. 16; D&CC pars. 41, 44, 45 & 47).

49. The new proposed paragraph 40(11)(d) avers that there was a failure to safeguard the Fund's assets. D objects on the basis that this is subject to s.13 Limitation Act COA accrued on knowledge of damage: 12 July 2018 [when SEGC was made bankrupt] OR COA accrued on knowledge of damage 9 Sept 2015 [when Fund's documents delivered to Ps]. P says that the proposed amendment: (1) pleads further breaches of already pleaded duties (not being a new cause of action) and/or provides further categorisation or matter traversed in Section D above; and/or (2) arises out of s/ssfs (see e.g. ASOC paragraphs 37(1) (4) & (6) and 40; F&BPs para. 16; D&CC paragraphs 41 & 44).

50. The new proposed paragraph 40(12) avers that there was an otherwise failing to put in place and/or put into operation any, or any adequate, policies to ensure that the Fund's investment objectives could be achieved and/or to safeguard the Fund's investment of its assets; and/or D objects on the basis that this is subject to s.13 Limitation Act COA accrued on knowledge of damage: 12 July 2018 [when SEGC was made bankrupt] or COA accrued on knowledge of damage 9 Sept 2015 [when Fund's documents delivered to Ps]. P says that the proposed amendment: (1) pleads further breaches of already pleaded duties (not being a new cause of action) and/or provides further categorisation of matter traversed in Section D above; and/or (2) arises out of s/ssfs (see e.g. ASOC paragraphs 37(1), (4) &(6) and 40; F&BPs para. 16; D&CC paragraphs 41 & 44).

51. The new proposed paragraph 40(13) avers that there was a failing to demand and/or account for sums due and payable to the Fund under the terms of the NPI

Agreement or agreements entered into between the Fund and various members of the SEGC. D objects on the basis that this is subject to s.13 Limitation Act COA accrued on knowledge of damage: 12 July 2018 [when SEGC was made bankrupt] or COA accrued on knowledge of damage 9 Sept 2015 [when Fund's documents delivered to Ps]. P says that the proposed amendment: (1) pleads further breaches of already pleaded duties (not being a new cause of action) and/or provides further categorisation of matter traversed in Section D above; and/or (2) arises out of s/ssfs (see e.g. ASOC paragraphs 37 & 40; F&BPs para. 16; D&CC pars. 41 & 44).

52. The new proposed paragraphs 40(11)– (14)12 avers that there was a failing to act to best protect the Fund's interests in circumstances in which they were aware or and/or as soon as they became aware of, the matters pleaded at paragraphs 33A(1)(a) to (r) above. D objects on the basis that this is subject to s.13 Limitation Act COA accrued on knowledge of damage: 12 July 2018 [when SEGC was made bankrupt] or COA accrued on knowledge of damage 9 Sept 2015 [when Fund's documents delivered to Ps]. P says that the proposed amendment: (1) pleads further breaches of already pleaded duties (not being a new cause of action) and/or provides further categorisation of matter traversed in Section D above (see e.g. ASOC para. 40); and/or (2) arises from s/ssfs (see e.g. ASOC paragraphs 37 & 40); D&CC paragraphs 41 & 45).

53. The new proposed paragraphs 41(1A) avers that there was a failing at any material time to acquire and maintain any sufficient knowledge of the Fund's business and assets to enable them properly to discharge their duties. D objects on the basis that this is subject to s.13 Limitation Act COA accrued on knowledge of damage: 12 July 2018 [when SEGC was made bankrupt] or COA accrued on knowledge of damage 9 Sept 2015 [when Fund's documents delivered to Ps]. P says that the proposed amendment: (1) provides further particulars of an existing pleaded claim (trite duties of a company director, not being a new cause of action) (see e.g. ASOC para. 41; F&BPs para. 16)(i)); and/or (2) arises from s/ssfs (see e.g. ASOC para. 41; F&BPs paragraphs 16(i), 26; D&CC paragraphs 41 & 45).

54. The new proposed paragraph 41(1B) avers wrongly delegating operation of the Fund to EFG Bahamas and BHP Bahamas. D objects on the basis that this is subject to s.13 Limitation Act COA accrued on knowledge of damage: 12 July 2018 [when SEGC was made bankrupt] or COA accrued on knowledge of damage 9 Sept 2015 [when Fund's documents delivered to Ps]. P says that the proposed amendment: (1) pleads further breach of already pleaded duty (not being a new cause of action) (see e.g. ASOC para. 41); and/or (2) arises from s/ssfs (see e.g. ASOC para. 41; D&CC para. 45).

55. The new proposed paragraph 41F avers the continuing to make and/or authorise the making of payments by the Fund in any circumstances in which it was aware, or should reasonably have been aware of failure to calculate NAV. D objects on the basis that this is subject to s.13 Limitation Act COA accrued on knowledge of damage: 12 July 2018 [when SEGC was made bankrupt] or COA accrued on knowledge of damage 9 Sept 2015 [when Fund's documents delivered to Ps]. P says that the proposed amendment: (1) provides further particulars of an existing allegation; (2) pleads further breach of already pleaded duty (not being a new cause of action); and/or (3) provides alternative categorisation of an existing pleaded cause of action: (see e.g. ASOC para. 41); and/or (4) arises from s/ssfs (see e.g. ASOC para. 41; D&CC paragraphs 37(7), 41 & 45).

56. The new proposed paragraph 41(3A) avers that there was a failure to obtain security from SEGC. D objects on the basis that this is subject to s.13 Limitation Act COA accrued on knowledge of damage: 12 July 2018 [when SEGC was made bankrupt] OR COA accrued on knowledge of damage 9 Sept 2015 [when Fund's documents delivered to Ps]. P says that the proposed amendment: (1) provides further particulars of an existing allegation; (2) pleads further breach of an already pleaded duty (not being a new cause of action); and/or (3) provides alternative categorisation of an already pleaded cause of action: (see e.g. ASOC pars. 41); and/or (4) arises from s/ssfs (see e.g. ASOC para. 41; D&CC paragraphs 37(7), 41 & 45).

57. The new proposed paragraph 41(3B) avers that there was a failure to obtain payment of interest on the promissory notes. D objects on the basis that this is subject to s.13 Limitation Act COA accrued on knowledge of damage: 12 July 2018 [when SEGC

was made bankrupt] or COA accrued on knowledge of damage 9 Sept 2015 [when Fund's documents delivered to Ps]. P says that the proposed amendments (1) provides further instances or particulars of existing allegations; (2) pleads further breach of already pleaded duty; and/or (3) provides alternative categorisation of an existing pleaded cause of action: (see e.g. ASOC para. 41); and/or (4) arises from s/ssfs (see e.g. ASOC para. 41; D&CC paragraphs 37(7), 41 & 45).

58. The new proposed paragraph 41(3C) avers that there was a failure to enforce repayment of the promissory notes. D objects on the basis that this is subject to s.13 Limitation Act COA accrued on knowledge of damage: 12 July 2018 [when SEGC was made bankrupt] or COA accrued on knowledge of damage 9 Sept 2015 [when Fund's documents delivered to Ps]. P says that the proposed amendment: (1) provides further instances or particulars of existing allegations; (2) pleads further breach of already pleaded duty; and/or (3) provides alternative categorisation of an existing pleaded cause of action: (see e.g. ASOC para. 41); and/or (4) arises from s/ssfs (see e.g. ASOC para. 41; D&CC pars. 37(7), 41 & 45).

59. Having examined the amendments and considered the submissions of the parties as to these amendments in this section, I am not satisfied that they ought to be allowed. They appear to go beyond merely elucidating the claim already made in the existing claim and reacted to by the Defendants as seen in the exchanges in the D&CC & F&BP. In some cases the amendments appear to adding claims which deprive the Defendant of a valid limitation defence. Notwithstanding the discretion to make the amendment in such cases, the Court will not exercise its discretion to do so. At this stage of proceedings, some 7 years since the filing of the Amended Statement of Claim it would be unfair to the Defence to be put in a position to have to try to answer the claim on the evidence now available to them. The reasons advanced for the late application, essentially of ineffective assistance of Counsel does not, in my view, properly excuse the tardiness of the Plaintiffs and prejudice the Defence. The Court will not allow the amendments.

60. The new proposed paragraph 45A avers that there was a failure to deliver adequate records to the Liquidator. D objects on the basis that this is subject to s.13

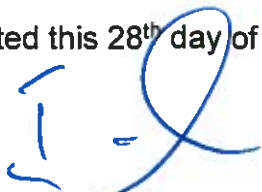
Limitation Act as COA first accrued 9 Sept 2015 after the date of the Writ. P says that this is not pleaded as cause of action. Without prejudice to the foregoing, the Liquidator was only appointed in April 2018. This claim in my view is better left for the liquidation process rather than this action.

Conclusion

61. For the avoidance of doubt, I propose to allow the proposed amendments in sections A and B above but refuse the proposed amendments in sections C, D and E. The amendments are to be made within 21 days of the date hereof. The Defendants to have 21 days to respond to the amendments and amend their pleadings, if necessary.

62. The Defendants shall be paid their reasonable costs associated with the amendments. I propose to make an order that the Defendants be entitled to 75% of their costs of the application to amend, unless submissions seeking some order are laid over within the next 21 days.

Dated this 28th day of February AD 2023



Sir Ian R. Winder Kt.
Chief Justice