[2021 Gib LR 431]

MATTIN v. DOMAIN VENTURE PARTNERS PCC LIMITED (in cell administration), JUNO FUND SERVICES LIMITED, DOMAIN MANAGEMENT LIMITED and ROACHE

SUPREME COURT (Dudley, C.J.): July 30th, 2021

2021/GSC/23

Civil Procedure—judgments and orders—summary judgment—may be granted if no real prospect of success and no other compelling reason why claim or issue should be disposed of at trial—summary judgment granted against claimant seeking injunction to prevent administrator of investor fund from dissipating assets, where administrator did not hold assets

The claimant brought a claim against the second defendant.

The claimant, an investor, brought a claim primarily against the fourth defendant. The first defendant, DVP, was a Gibraltar experienced investor fund and protected cell company which was now in cell administration. The second defendant was the administrator of the fund. The services to be provided by the second defendant were set out in the administration agreement. The services did not specifically include the service of default notices under the PPM.

The claimant advanced three claims against the second defendant: the injunction claim; the default notice breach claim; and the SPV maladministration claim.

In the injunction claim, the claimant sought an injunction preventing the second defendant from taking any steps to allow or assist in any distribution, charging, disposition, waiving, cancelling or transfer of, or dealing in, the assets of Cell A.

In the default notice breach claim, the claimant asserted that she was the only shareholder of Cell A shares who met all capital calls made by DVP. She contended that it was the second defendant's duty or responsibility to issue notices to any defaulted investor and that in failing to issue such notices the second defendant breached its duties towards the claimant giving rise to loss being suffered by the claimant. She claimed damages in negligence against the second defendant equivalent to such loss. The second defendant submitted *inter alia* that no authority had been identified that supported the proposition that a fund administrator owed a duty of care to an investor with whom it had no contractual relationship. It was also

submitted that the second defendant had not agreed or purported to act independently in relation to the issuing of default notices, which were the responsibility of the directors of DVP. It could not fairly, justly and reasonably be suggested that merely by entering into the administration agreement, the second defendant assumed a free-standing and independently enforceable duty to serve default notices on any defaulting investor.

The SPV maladministration claim, in so far as it concerned the second defendant, provided that the second defendant breached its obligations to hold at the registered office of each SPV the books of account which the directors were obliged to maintain; to ensure that the directors of the SPVs complied with their duties under the SPV articles to approve annual accounts and directors' annual reports; and to distribute directors' annual reports to the members of each SPV. It was claimed that the breaches of obligations had denied the claimant access to financial information and records to which she was entitled and which would have informed her investment decisions in relation to the DVP.

The second defendant applied to strike out the claim form and amended particulars of claim in so far as they advanced any claim against it, and alternatively applied for summary judgment in its favour.

Held, ruling as follows:

(1) The principles to be applied on an application for striking out were well known. In the context of the present application CPR r.3.4(2)(a) was engaged, which provided that "The court may strike out a statement of case if it appears to the court—(a) that the statement of claim discloses no reasonable grounds for bringing . . . the claim . . ." Statements of case that were suitable for striking out on this ground included those which raised an unwinnable case where continuance of the proceedings was without any possible benefit to the claimant and would waste resources on both sides (para. 6).

(2) The power to enter summary judgment on a claim or a particular issue under CPR r.24.2(a)(ii) required the court to be satisfied that the claimant "has no real prospect of succeeding on the claim or issue" and that "there is no other compelling reason why the case or issue should be disposed of at a trial" (r.24.2(b)). In the context of the present application, the following principles were particularly apposite: (i) the court must consider whether the claimant had a realistic as opposed to a fanciful prospect of success; (ii) realistic meant more than merely arguable; and (iii) if an application gave rise to a short point of law or construction and the court was satisfied that it had all the evidence necessary for the determination of the point and the parties had an adequate opportunity to address it in argument, then the court should deal with it (para. 7).

(3) Summary judgment would be granted in the second defendant's favour in respect of the injunction claim. The second defendant did not hold Cell A assets. Moreover, the cell administration order remained in place and the directors were therefore deprived of their powers and the Cell A assets were

under the administrator's control. Viewed from the perspective of the test for summary judgment, the claim for injunctive relief might be arguable but the prospects of its succeeding were fanciful. As there was no other compelling reason why this claim should be disposed of at trial, the second defendant should have judgment against the claimant on this issue (paras. 11–13).

(4) The application for strike out or summary judgment in so far as it related to the default notice claim would be refused. The default notice claim was fraught with difficulties and might even be improbable but it did not follow that it did not have a real prospect of success. In the context of a *Hedley Byrne* pure economic loss claim there was scope for the incremental development of novel categories. There was a need to concentrate attention on the detailed circumstances and the particular relationship between the parties which could not properly be undertaken other than at trial (paras. 23–24).

(5) The SPV maladministration claim was unwinnable and would therefore be struck out. The claim was predicated upon the principles in *Hedley Byrne* but it was unnecessary to consider their application in detail. The obligations to maintain accounts and circulate reports lay on the third defendant as director of the SPVs and it would be unrealistic and unfair to impose on the second defendant a separate duty of care to investors to police the actions of the third defendant or enforce compliance by the third defendant with its obligations as a director (paras. 28–29).

Cases cited:

(1) *Customs & Excise Commrs.* v. *Barclays Bank plc*, [2006] UKHL 28; [2007] 1 A.C. 181; [2006] 3 W.L.R. 1; [2006] 4 All E.R. 256, applied.

(2) *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.*, [1964] A.C. 465; [1963] 3 W.L.R. 101; [1963] 2 All E.R. 575; [1963] 1 Lloyd's Rep. 485, applied.

Legislation construed:

Civil Procedure Rules (S.I. 1998/3132), r.2.3: The relevant terms of this provision are set out at para. 10.

r.3.4(2)(a): The relevant terms of this provision are set out at para. 6.

r.24.2(a)(ii): The relevant terms of this provision are set out at para. 7.

r.24.2(b): The relevant terms of this provision are set out at para. 7.

K. Azopardi, *Q.C.* with *K. Power* (instructed by TSN) for the claimant;

The first defendant did not appear;

D. Eaton Turner with *C. Salter* and *J. Phillips* (instructed by Phillips) for the second defendant;

The third and fourth defendants did not appear.

1 **DUDLEY, C.J.:** This is an application by the second defendant ("Juno FS") to strike out the claim form and amended particulars of claim ("the

APOC") in so far as they advance any claim against it, and alternatively for summary judgment in its favour.

2 The claim brought by Christina Mattin is primarily directed against the fourth defendant, Iain Roache, and some of the broader background to the claim is set out in my judgment on an interlocutory application dated June 25th, 2021 (reported at 2021 Gib LR 348) upon which I rely. Juno FS did not feature in that application and I now set out by way of background Juno FS's role in the investment structure. I use the same abbreviations as in my earlier judgment, save that I now refer to the bid vehicles as "the SPVs."

Overview of Juno FS's role in the structure

3 DVP is an experienced investor fund, and a protected cell company which has been subject to a cell administration order since April 23rd, 2018. It issued a private placement memorandum in October 2011 which was subject to various amendments ("the DVP PPM") and which Mr. Eaton Turner very accurately describes as a long and complex document. Usefully, at s.3 it lists the "Principal Counterparties and Service Providers to the Company" and includes the following:

(a) five directors which includes IR, two persons licensed by the Gibraltar Financial Services Commission to be directors of experienced investor funds and the third defendant, DML, of which IR is a shareholder and director (DML is also the investment director of DVP);

(b) the company secretary is GT Fiduciary Servs. Ltd.;

(c) Juno FS (then called Grant Thornton Fund Administration Ltd.) is the administrator; and

(d) it identifies the fund's auditor, banker and legal advisors.

Section 3 then goes on to deal with the service providers to the SPVs, with the registry administration service provider being Famous Four Media Ltd., now in liquidation, which is a company of which IR was majority shareholder and director.

4 Juno FS's administration agreement with DVP was entered into on October 14th, 2011. Clause 2 provides:

> "2.1 The Fund hereby appoints [Juno FS] and [Juno FS] agrees to act as administrator of the Fund to provide the Services all upon the terms and conditions hereinafter contained and under the supervision of the Directors of the Fund.
>
> 2.2 [Juno FS] shall use due skill and care at all times and provide each element of the Services in accordance with the standards and practices reasonably expected of persons licensed to and engaged as a Collective Investment Scheme Administrator in Gibraltar

2.3 . . ."

The services referred to in cl. 2 are in turn to be found in "Schedule 1—List of Administration Services." It is an extensive, detailed list over three pages long which includes processing subscription applications, transfers and redemptions requests; disbursing payments to shareholders upon redemptions and arranging for transfer of moneys in connection with dividends declared; transferring moneys as instructed by the directors; ensuring the fund's compliance with anti-money laundering provisions; the production of bi-annual performance information; arranging for payment of directors' fees and expenses and other fees and expenses incurred by the fund; maintaining a register of shares; liaising with auditors; arranging for the issue, transfer, redemption and purchase of participating shares; and keeping the accounts of the fund and such financial books as required by law. With many of the functions having to be carried out in accordance with the PPM or with the approval of or as directed by the directors. Of note in the context of the claims advanced against Juno FS, the services do not specifically include the service of default notices under art. 46 of the PPM. Under the heading "Compliance with Directions, Etc," cl. 4 provides:

> "4.1 [Juno FS] shall, in carrying out its obligations, observe and comply with the Memorandum and Articles of Association of the Fund as from time to time amended, the Private Placement Memorandum and with applicable provisions of any offer relating to Participating Shares in the Fund distributed by or on behalf of the Fund and all lawful orders and directions given to it from time to time by the Fund and the laws of Gibraltar and any other applicable laws or regulations.
>
> 4.2 [Juno FS] shall in carrying out its obligations, be subject to the control and review of the Directors of the Fund and shall in all respects observe and comply with all reasonable and proper directions (including Proper Instructions as defined in Clause 5 below)."

Also of relevance to the submissions advanced, cl. 8.4:

> "The Fund acknowledges that the duties of [Juno FS] pursuant to this Agreement shall not include a duty to monitor or enforce the compliance of the Fund or any other person with any restriction or guideline imposed on the Fund by its Memorandum, Articles, Private Placement memorandum or by any law or regulation or otherwise with regard to the investments of the Fund. The Fund further acknowledges that [Juno FS] will not be, by virtue of the provision of services under this Agreement, an advisor or fiduciary to the Fund or any investor."

And the provisions at cl. 14 under the heading "Indemnity":

> "14.1 The Fund hereby undertakes to hold harmless and indemnify [Juno FS] against all actions, proceedings, claims, costs, demands and expenses which may be brought against, suffered or incurred by the [Juno FS] by reason of its performance in good faith of its duties under the terms of this Agreement except as shall arise from its wilful breach of duty hereunder or negligence on its part or on the part of its servants or agents and in particular (but without limitation) this protection and indemnity shall extend to any such items as aforesaid (not being attributable to wilful breach of duty or negligence aforesaid) as shall arise as a result of loss, delay, misdelivery or error in transmission of any cable or telegraphic communication or as a result of acting in good faith upon any forged transferor request for redemption of Participating Shares in the Fund.
>
> 14.2 [Juno FS] hereby undertakes to hold harmless and indemnify on a several basis the Fund against all actions, proceedings, claims, demands and costs and expenses which may be brought against, suffered or incurred by the Fund by reason of the negligence or wilful default of [Juno FS] in the performance of its obligations or duties hereunder."

5 CM's original claim against Juno FS was broader, but by the APOC, now advanced are the following three distinct claims:

(a) the injunction claim;

(b) the default notice breach claim; and

(c) the SPVs maladministration claim.

The law

Strike out

6 The principles to be applied on an application for strike out are well known. In the context of how the present application is advanced CPR r.3.4(2)(a) is engaged. It provides:

> "(2) The court may strike out a statement of case if it appears to the court—
>
> (a) that the statement of claim discloses no reasonable grounds for bringing . . . the claim . . ."

The commentary in the *White Book*, at para. 3.4.2 (2021) states:

> "Statements of case which are suitable for striking out on ground (a) include those which raise an unwinnable case where continuance of the proceedings is without any possible benefit to the respondent and would waste resources on both sides . . . A claim or defence may be struck out as not being a valid claim or defence as a matter of law . . .

> However, it is not appropriate to strike out a claim in an area of developing jurisprudence, since, in such areas, decisions as to novel points of law should be based on actual findings of fact . . ."

Summary judgment

7 The power to enter summary judgment on the whole of a claim or a particular issue under CPR r.24.2(a)(ii) requires the court to be satisfied that the claimant "has no real prospect of succeeding on the claim or issue" and that "there is no other compelling reason why the case or issue should be disposed of at a trial": r.24.2(b). The commentary in the *White Book*, at para. 24.2.3 (2021) succinctly sets out the principles derived from various authorities. In the context of the present application the following are particularly apposite:

(i) the court must consider whether the claimant has a "realistic" as opposed to a fanciful prospect of success;

(ii) "realistic" means more than merely arguable; and

(iii) if an application gives rise to a short point of law or construction and the court is satisfied that it has all the evidence necessary for the determination of the point and the parties have had an adequate opportunity to address it in argument, then the court should deal with it.

8 In some measure this is an application in which the overlap which can sometimes exist between a strike out and a summary judgment application is particularly evident, with the witness statement in support in effect asserting that the application is capable of being determined on the basis of pleadings and documentary evidence.

The injunction claim

9 CM seeks an injunction preventing Juno FS from taking any steps to allow or assist in any distribution, charging, disposition, waiving, cancelling or transfer of, or any dealing in the assets of Cell A, including Cell A's ordinary shares in the bid vehicles and the redeemable preference shares in the bid vehicles and any distributions or other produce thereof, except to the extent and in such manner as may be sanctioned by the court. Mr. Eaton Turner properly characterizes the nature of the relief sought as having the appearance of an interim injunction, akin to a freezing order. Although no interlocutory relief has been sought against Juno FS and, appearing as it does in the prayer to the APOC, what is being sought is a final injunction.

10 In his skeleton submissions, Mr. Azopardi sets out in some detail the historic factual matrix upon which, it is said, it was considered necessary to seek injunctive relief. Essentially, that on April 3rd, 2018, CM's lawyers wrote to Juno FS (as well as the other defendants) seeking undertakings to

the effect that it would not assist or allow Cell A dissipation activity. How despite what is said to be IR's conduct and actions, these undertakings were not forthcoming from Juno FS. That CM's lawyers requested a response the following day, due to what was said was an imminent risk of dissipation of DVP's assets. That no response was received until April 6th, 2018, when Juno FS stated that it required more time to establish the facts. And that CM's claim was then issued on April 6th, 2018 in order to seek to hold the ring. Those allegations of fact upon which CM seeks injunctive relief are not particularized in the APOC, although they are to be found in CM's response to Juno FS's request for further information. By virtue of CPR r.2.3, "statement of case" (formerly known as pleadings) includes further information given under CPR r.18.1. The final paragraph of the response condenses the basis upon which the injunctive relief is sought as follows:

> "As such, and given [Juno FS's] continued role as Fund Administrator to DVP and (where applicable) Administrator to [the bid vehicles] [CM] sought and continues to seek an injunction to restrain [Juno FS] from taking any steps which could allow or assist Cell A Dissipation Activity pending an Order of the Court (in light of the fact that [Juno FS] has never been willing to provide the undertaking of the sort sought on 3 April 2018)."

11 The difficulty with the claim for injunctive relief lies in the fact that it does not appear to be in dispute that Juno FS does not hold Cell A assets. Although in the original claim form and particulars of claim CM appeared to assert that Juno FS had Cell A assets in its "custody," that assertion was deleted in the APOC. Moreover, the cell administration order which was made on April 23rd, 2018 remains in place and therefore the directors are deprived of their powers and the Cell A assets are under Mr. Lavarello's control.

12 Mr. Eaton Turner cogently submits that if the cell administration order is discharged because either of the statutory purposes cannot be achieved (namely the survival of the cell as a going concern or the more advantageous realisation of its business assets than would be achieved on a liquidation), then Cell A would doubtless go into liquidation. And (in what at present would appear to be a very unlikely event) should Mr. Lavarello seek to discharge the order for any other reason, that would be flagged up with ample time for CM and any other investors or creditors to seek whatever protection they considered necessary.

13 Viewed from the perspective of the test for summary judgment, the claim for injunctive relief may be arguable but, in my judgment, the prospects of it succeeding are fanciful. There being no other compelling reason why this claim should be disposed of at trial, on this issue Juno FS is to have judgment against CM.

The default notice claim

14 One of CM's principal claims in the action is premised upon the assertion that she is the only shareholder of Cell A shares who met all capital calls made by DVP with respect to Cell A shares. That when account is taken of that, her Cell A equity rights entitle her to receive 62.7% of total distributions made by DVP to Cell A shareholders. For present purposes, it is unnecessary to set out the various provisions in the DVP articles of association ("the DVP articles") which may be engaged, save for art. 46.1, because it relates to the claim against Juno FS. It provides:

> "46. If a Participating Shareholder fails to meet a Call prior to or on the Call Date appointed for payment thereof:
>
> 46.1 the Administrator shall forthwith provide Notice of the default to the Participating Shareholder giving notice of the consequences thereof . . ."

15 CM's primary case is that arts. 46 and 47 of the DVP articles, which deal with the consequences that flow when the holder of Cell A shares defaults on a call for committed capital, take effect in respect of such shareholder irrespective of whether or not a notice pursuant to art. 46.1 ("a default notice") was issued. By her APOC at para. 85, the claim against Juno FS is advanced on the following terms:

> "85. In the event that it is established as a matter of fact that [Juno FS] failed to issue a Notice to any defaulted investor as stipulated under DVP Article 46.1 above, and is also found that, as a consequence of that failure, the Claimant's economic entitlements in DVP are reduced as compared to a scenario in which such Notice had been issued when due, the Claimant claims damages for breach of contract and/or in negligence against [Juno FS] in respect of any such failure. The factual existence of any such failure by [Juno FS] is not admitted by the Claimant."

Thereafter by her Part 18 response, CM conceded that she would "advance her Default Notice Breach case against [Juno FS] in tort only."

16 By an application notice issued some ten days before the hearing of this application, CM seeks to re-amend para. 85 of her APOC as follows:

> "85. Alternatively, the Claimant contends that it was the Second Defendant's duty/responsibility to issue a Notice to any defaulted investor as stipulated under DVP Article 46.1 and that in failing to issue such Notices the Second Defendant breached its duties towards the Claimant giving rise to loss being suffered by the Claimant as a result and the Claimant claims damages in negligence against the Second Defendant in this regard equivalent to such loss."

The reasons for the proposed amendment are explained at para. 36 of Mr. Azopardi's skeleton, as follows:

> "36. This alternative wording is suggested in order to clarify the wording of the Claimant's Default Notice case against the Second Defendant. No substantive change is proposed in this amendment, save for (i) the positive averment that no Default Notices were issued (that now being clear as a matter of fact) and (ii) the deletion of the reference to a claim made in contract (the Claimant having stated by way of Part 18 Response that her claim based on breach of the statutory contract formed by the DVP Articles to which the Second Defendant agreed to adhere would not be advanced)."

I note that in a witness statement of Adrian Hogg, filed in response to the application to amend, Mr. Hogg, who was a director of Juno FS between 2006 and 2020, states that Juno FS was instructed by DVP to issue certain default notices (which are identified in the witness statement) and that these were sent by email and post to the investors to which they related.

17 The default notice claim is predicated upon the principle established in *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.* (2) and developed in subsequent cases. In the context of the present application there is no material dispute as to the principles but rather as to their application. The three tests to be applied are succinctly set out in the judgment of Lord Bingham in *Customs & Excise Commrs.* v. *Barclays Bank plc* (1) ([2007] 1 A.C. 181, at para. 4):

> "The first is whether the defendant assumed responsibility for what he said and did vis-à-vis the claimant, or is to be treated by the law as having done so. The second is commonly known as the threefold test: whether loss to the claimant was a reasonably foreseeable consequence of what the defendant did or failed to do; whether the relationship between the parties was one of sufficient proximity; and whether in all the circumstances it is fair, just and reasonable to impose a duty of care on the defendant towards the claimant (what Kirby J in *Perre v Apand Pty Ltd* (1999) 198 CLR 180, para 259, succinctly labelled 'policy'). Third is the incremental test, based on the observation of Brennan J in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 481, approved by Lord Bridge of Harwich in *Caparo Industries plc v Dickman* [1990] 2 AC 605, 618, that:
>
> > 'It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed.'"

18 Essentially premised upon the application of those principles, Mr. Azopardi, at paras. 68 and 69 of his skeleton, seeks to correlate these with CM's claim as follows:

> "68. The failure to issue (any) Default Notices was an especially egregious breach of the Second Defendant's duties. Although the Claimant's primary case is that the failure does not affect her economic entitlements in DVP, the defaulted investors will resist the application of Article 46 at the trial of these matters, and can be expected to do so on the basis that Default Notices were not issued by the Second Defendant. The effect of the Second Defendant's failure to issue Default Notices and its liability for any economic consequences of those failures is a matter which can in the Claimant's submission only fairly be determined at trial.
>
> 69. Whilst the Claimant maintains her wider claims against the Second Defendant in relation to SPV Maladministration, the Default Notice claim in particular:
>
> (a) rests on a clear assumption of responsibility by the Second Defendant (in the form of agreeing to be bound by the Articles including Article 46.1 in connection with the protection conferred on non-defaulting investors);
>
> (b) involves a clearly foreseeable damage to non-defaulting investors in DVP (or at least the risk of one, depending on whether the issuance of Default Notices is held to be a necessary condition for the application of a redistribution of equity under Article 46);
>
> (c) is based on an intimately proximate relationship between a licensed fund administrator and the narrow known class of investor-shareholders in the fund, both of whom were enmeshed in and bound by the Articles including most especially the particular duty in issue;
>
> (d) is in the Claimant's submission, one which in which it is therefore fair, just and reasonable to impose a duty of care (which in any case, the Claimant submits is a matter which should only be determined at Trial).
>
> (e) does not require any large-scale non-incremental change in the law as applies to duties of care in tort, being a duty of care founded on the particular and peculiar duty assumed by the Second Defendant in accordance with Article 46.1 of the Company."

19 Evidently imposing a duty of care upon Juno FS towards CM is a core element that she would have to establish. Mr. Azopardi submits that the

fund administration agreement by which Juno FS also agreed to be bound by the DVP articles together with the administration agreements, entered into between each SPV and Juno FS, gives rise to a relationship between Juno FS and CM *qua* investor in DVP and the SPVs by which Juno FS owes CM a duty of care. In particular he relies upon cll. 2.2 and 4.1 of the administration agreement with DVP (at para. 4 above) as supporting the imposition of the duty of care. Additionally he submits that many of the duties to be found in "Schedule 1—List of Administration Duties" and the provisions in the DVP articles on which the default notice claim is premised, set out duties which Juno FS undertook in the interests of the shareholders of DVP rather than DVP itself. Reliance is also placed upon cll. 8.4, 14.1 and 14.2 of the fund administration agreement. It is submitted that these provisions do not seek to exclude the duty of care owed to investors and in fact envisage actions being brought by investors as a result of Juno FS's negligence or wilful default. It is submitted that the effect of Juno FS's obligations under the fund administration agreement and the various SPV administration agreements is to create a duty of care in tort towards non-contractual parties. Mr. Azopardi further contends, albeit without identifying any specific statutory provision, that fund administrator is a role which by statutory design is intended to protect the interest of investors.

20 Mr. Eaton Turner accurately submits that no authority has been identified which supports the proposition that a fund administrator owes a duty of care to an investor with whom it has no contractual relationship. He also highlights the failure to identify a specific statutory provision in support of the contention that fund administrator is a role which by statutory design is intended to protect the interests of investors. Mr. Eaton Turner also relies upon the administration agreement with DVP and in particular cl. 8.4. Whilst properly conceding that the provision forms part of an agreement made only between Juno FS and DVP, and therefore, I would add, not capable of excluding liability towards a third party, the point made is that it is relevant as to whether CM can properly claim that there was an assumption of a duty of care towards her, upon which she relied. That may of course depend on whether CM had actual or constructive notice of that provision.

21 In respect of the application of the "fair just and reasonable" test it is submitted that Juno FS did not agree (or purport) to act independently in relation to the issuing of default notices with these matters being entirely within the control of the directors of DVP. Reliance is placed upon s.9.4 of the DVP PPM which deals with the contractual position in relation to calls and defaults, and which is in the following terms:

> "Should any sums due under Payment II, Payment III, Payment IV or any Calls not be met by a Participating A Shareholder such Shareholder

must allow a third party, identified by the Directors, to make such payments on its behalf and become a joint shareholder and thus the maximum distribution that it would be entitled to receive would be the percentage of the distribution attaching to such A Shares beneficially held by it. For the sake of clarity such percentage shall be the aggregate of all amounts paid-up by the Investor as a proportion of the total amount paid up on the A Shares held by the Shareholder at the date of the distribution."

22 That provision is in apparent conflict with art. 46 and Mr. Eaton Turner does not ask that the court resolve that conflict, but rather relies upon it to illustrate that the grounds and procedure for the sending of default notices to defaulting creditors are complex and uncertain, and entirely under the control of the directors. He submits that it cannot fairly, justly and reasonably be suggested that merely by entering into the administration agreement, Juno FS assumed a free-standing and independently enforceable duty to serve default notices on any defaulting investor.

23 It is evident that the default notice claim is fraught with difficulties; it may even be improbable but it does not follow that it does not have a "real prospect of success." I am conscious that in the context of a *Hedley Byrne* pure economic loss claim there is scope for the incremental development of novel categories and respectfully adopting the language of Lord Bingham in *Customs & Excise Commrs.* v. *Barclays Bank plc* (1) ([2007] 1 A.C. 181, at para. 8) that there is a need to "concentrate attention on the detailed circumstances of the particular case and the particular relationship between the parties in the context of their legal and factual situation as a whole," in my judgment, in the present case that cannot properly be undertaken other than at trial.

24 In the circumstances the application for strike out/summary judgment in so far as it relates to the default notice claim is refused and the application for re-amendment is allowed.

The SPV maladministration claims

25 The SPV maladministration claim is set out at section L, paras. 113–118 of the APOC and in so far as it relates to Juno FS, reads:

"113. As the director of each of the SPVs, DML was obliged:

(a) to maintain books of account in accordance with Articles 176 to 181 of the SPV Articles to be held by [Juno FS] at the SPV's registered office.

(b) annually to prepare, have approved, and have circulated (i) annual accounts and (ii) Directors' annual reports on the affairs of each SPV, in accordance with Article 180 of the SPV Articles.

> 114. As the appointed Administrator for, and/or as Company Secretary of, each of the SPVs, [Juno FS] was obliged:
>
> (a) to hold at the registered office of each such SPV the books of account which the Directors were obliged to maintain in accordance with Articles 176 to 181 of the SPV Articles.
>
> (b) to ensure that the Director(s) of the SPV complied with its/their duties under Articles 180 of the SPV Articles annually to approve (i) annual accounts and (ii) Directors' annual reports on the affairs of each SPV.
>
> (c) to distribute Director's annual reports to the members of each SPV in accordance with Article 181 of the SPV Articles.
>
> 115. It is averred that in breach of these obligations:
>
> . . .
>
> (d) [Juno FS] allowed DML to breach its obligations to maintain books of account, to prepare annual accounts and to issue Directors' annual reports, for all SPVs in all their years of operation.
>
> 116. [CM] avers that [IR] caused DML to fail to comply with its obligations as set out in paragraphs 114 and 115 above, and that [Juno FS] knew that DML was in breach of such obligations, and that this was at the instigation of [IR].
>
> 117. These breaches of obligations, including the SPV Articles, by DML and [Juno FS] have denied the Claimant access to financial information and records to which she is or was entitled as a member of each SPV.
>
> 118. The Claimant seeks declarations in respect of her entitlement to this financial information and/or an Account of the affairs of each SPV and/or further/alternatively damages for breach of these obligations by DML and [Juno FS]."

26 The claim is then further developed in the response to the CPR r.18 request in a way which I found somewhat difficult to follow. Paragraph 7(c)(i)–(ii) states that Juno FS's duties under the administration agreement with DVP included duties set out in Schedule 1 of that agreement (which is not in dispute) and appears to conflate duties said to be owed under that agreement with duties owed by Juno FS's sister company Juno Fiduciary Services, and attributes to Juno FS knowledge of alleged breaches of duty by the sister company.

27 The claim finds its most clear expression in Mr. Azopardi's skeleton, albeit one which goes beyond the pleaded case. At paras. 38–40 he states:

> "38. The Claimant contends that the Second Defendant as appointed Administrator was obliged:
>
> (a) to hold at the registered office of each such SPV the books of account which the Directors were obliged to maintain in accordance with Articles 176 to 181 of the SPV Articles;
>
> (b) to ensure that the Director(s) of the SPV complied with its/their duties under Articles 180 of the SPV Articles annually to approve (i) annual accounts and (ii) Directors' annual reports on the affairs of each SPV; and
>
> (c) to distribute Director's annual reports to the members of each SPV in accordance with Article 181 of the SPV Articles.
>
> 39. It is averred that in breach of these obligations the Second Defendant allowed the Third Defendant to breach its obligations to maintain books of account, to prepare annual accounts and to issue Directors' annual reports, for all SPVs in all their years of operation. Further, it is averred that the Fourth Defendant caused the Third Defendant to fail to comply with its obligations as set out above, and that the Second Defendant knew that the Third Defendant was in breach of such obligations, and that this was at the instigation of the Fourth Defendant.
>
> 40. These breaches of obligations, including under the SPV Articles, have denied the Claimant access to financial information and records to which she is or was entitled as a member of each SPV. That information would have informed the Claimant's investment decisions in relation to DVP."

28 This claim is also predicated upon the principles in *Hedley Byrne* v. *Heller* (2) but it is unnecessary for me to consider their application in detail. The short answer is to be found in Mr. Eaton Turner's submissions, which I accept. Namely, that it is correctly acknowledged at para. 113 of the APOC that the obligations to maintain accounts and circulate reports lay on DML, as director of the SPVs, and that it would be unrealistic and unfair to impose upon Juno FS a separate duty of care to investors to police the actions of DML or enforce compliance by DML with its obligations as a director.

29 In my judgment the SPV maladministration claim is unwinnable and is one which therefore falls to be struck out.

30 Orders accordingly, and I shall hear the parties as to costs.

Ruling accordingly.