

**Court File No: 2015/343**

**IN THE ROYAL COURT OF JERSEY  
(Samedi Division)**

<b>BETWEEN</b>	<b>DOROTHY AUDREY BRAKSPEAR</b>	<b>First Plaintiff</b>
	<b>ALISON SHANE BOWLER</b>	<b>Second Plaintiff</b>
	<b>IAN DONALD BRAKSPEAR</b>	<b>Third Plaintiff</b>
<b>AND</b>	<b>NEDGROUP TRUST (JERSEY) LIMITED</b>	<b>Defendant</b>

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**AMENDED ORDER OF JUSTICE**

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**BACKGROUND AND PARTIES**

1. The Westley Trust deed dated 5 May 2004 (the “**Westley Trust**”) is a Declaration of Trust, governed by Jersey law and the Defendant was the trustee of the Westley Trust.
2. The First and Second Plaintiff are the named beneficiaries in the Westley Trust deed, but were never contacted by the Defendant in all the years of the trust existence to inform them that they were beneficiaries, or to explain their rights in the trust, and indeed of the trustee’s duties. The Defendant never sent any trust accounts to them until legal action was threatened.
3. The Third Plaintiff as settlor and as advised by the Defendant paid fees of £8810 to the Defendant on 31 March 2004 of which £8800 was for the purchase a BVI Company and for Declaration of Trust and £10 was used to settle on the trust. The Declaration of Trust as advised by the Defendant was to be the nominee shareholder of the BVI Company on behalf of Third Plaintiff.

4. The purpose of the structure for the BVI Company and Declaration of Trust was done under the advice and guidance of the Defendant to the Third Plaintiff to allow the Third Plaintiff to invest money he held offshore in a wine farm (the **"Farm"**) with two other partners in South Africa. The secondary purpose was to assist, if legally possible, the First and Second Plaintiff to obtain residency in South Africa. Third Plaintiff informed both beneficiaries of these facts in 2004 and kept them fully informed of all matters over the next 5 years.
5. The Defendant (the **"Jersey Trustee"**) is a company incorporated in Jersey with company number 58621 whose registered address is 31 Esplanade St Helier Jersey JE1 1FT. The Defendant is licensed by the Jersey Financial Services Commission to conduct trust company business. . Between 1 June 2001 and 14 December 2004 the Jersey Trustee was called Gerrard Trust (Jersey) Limited. Between 14 December 2004 and 25 October 2012 the Jersey Trustee was called Fairbairn Trust Limited.

#### **RELATED ENTITIES**

6. Nedbank Private Wealth Limited is licensed by the Jersey Financial Services Commission to conduct deposit-taking business (the **"Jersey Bank"**). The Defendant, the Jersey Trustee, is the wholly owned subsidiary of the Jersey Bank. The address of the Jersey Bank is 31 Esplanade, St Helier, Jersey, JE1 1FB. Until December 2004, the Jersey Bank was called Gerrard Private Bank (Jersey) Limited where upon it changes its name to Fairbairn Private Bank Limited. By means of a continuance dated 3 October 2012 Nedbank Private Wealth Limited now conducts the business formerly conducted by Fairbairn Private Bank Limited.
7. Fairbairn Trust Company Limited (**"the Guernsey Trustee"**) is a company incorporated in Guernsey with company number 23460 whose registered address is Fairbairn House, The Rohais, St Peter Port, Guernsey GY1 3LT. Since 18 October 2012 the Guernsey Trustee has been called Nedgroup Trust Limited. The Guernsey Trustee is a sister company to the Defendant. At all material times Fairbairn Trust Company Limited was and is the trustee of the JAM Brakspear Overseas Trust.
8. JAM Brakspear Overseas Trust (**"Brakspear Trust"**) is a discretionary trust governed by Isle of Man law. At all material times the trustee of Brakspear was **the Guernsey Trustee**. The beneficiaries of Brakspear Trust included, at all material times, the Plaintiffs. As of 31 December

2004 the assets of Brakspear Trust amounted to some £1.584 million.

9. Fairbairn Private Bank (IOM) Limited (**the "IOM Bank"**) was previously known as Gerrard Private Bank (IOM) Limited. IOM Bank was a company incorporated in the Isle of Man under company number 032816C and was the banker to the Guernsey Trustee. The IOM Bank was a distinct and separate legal entity to the Jersey Bank. IOM Bank was dissolved on 20 September 2012.
10. Westley Holdings BVI Limited ("**Westley Holdings**") is a company incorporated in the British Virgin Islands with company number 591405 whose registered address was Akara Building 24 De Castro Street Wickhams Cay 1 Road Town Tortola British Virgin Islands. The shares in Westley Holdings are purportedly fully owned by the Jersey Trustee in the assets of the Westley Trust. The Panama Papers however show Westley Holdings board resolution recording the owner to be Gerrard Nominees (Jersey) Limited – a fact that none of the Plaintiffs were ever made aware of.
11. Money Box Investments 0012 (Pty) Limited ("**Money Box**") is a company incorporated in the Republic of South Africa with company number 2004/002945/07. The shares in Money Box are wholly owned by Westley Holdings. The Third Plaintiff was the sole director of Money Box.
12. West Dune Properties 5 (Pty) Limited ("**West Dune**") was a company incorporated in the Republic of South Africa. At all material times, the shares in West Dune were 60% owned by Money Box. The Third Plaintiff was a director of West Dune.
13. Southern Palace Investments (Proprietary) Limited ("**Southern Palace**") was a company incorporated in the Republic of South Africa. At all material times, the shares in Southern Palace were 60% owned by Money Box. The Third Plaintiff was a director of Southern Palace
14. A company incorporated pursuant to the laws of South Africa, called Cross Atlantic (Proprietary) limited, ("**Cross Atlantic**"), owned the other 40% of the issued share capital of West Dunes and Southern Palace.
15. Later the interests of Cross Atlantic were acquired by Money Box, which then came to own 100% of West Dunes and Southern Palace. This was after third plaintiff uncovered a fraud committed by the directors of Cross Atlantic, involving the original purchase of the property and then

subsequently in the operations of the farm.

16. First Rand Bank (“**FRB**”) was the South African lender to West Dune that provided the balance of the purchase monies for the Farm, secured by a mortgage over the Farm (the “**FRB Mortgage**”).

#### **DEALINGS WITH TRUST PROPERTY**

17. During July 2004 the above entities were involved in West Dune’s purchase of the Farm. There are no resolutions from the Jersey trustee authorizing the investment into the Farm in alignment with the Defendant advice that the declaration of trust would only act as the nominee shareholder of the underlying companies on behalf the Third Plaintiff.
18. On or around 7 May 2004 the Jersey Bank agreed a lending facility of up to ZAR 4 million to the Jersey Trustee of the Westley Trust (the “**Jersey Bank Loan**”). The Jersey Bank Loan was for a term of two years and bore interest on the principal sum at a rate of LIBOR + 1%.
19. On 7 May 2004, the Guernsey Trustee resolved to
- a. provide security from Brakspear Trust to the IOM Bank as security for the Jersey Bank Loan; and
  - b. enter into a Deed of Charge with the IOM Bank in respect of liabilities to the IOM Bank.
20. The Guernsey trustee resolution was providing security in the course of administration of the Brakspear Trust which was supporting the activities of three of its designated beneficiaries and was not in any way part of a loan agreement to any entity
21. On 12 May 2004 tax advice from Price Waterhouse Coopers (PwC) explaining *Foreign Exchange Control Laws of South Africa* was supplied to the Jersey Trustee. The law stated that foreign loans required prior South African Reserve Bank approval before any loan can be made. PwC advised that the purchase of the share capital in the South African company was the preferred option to introduce capital into South Africa
22. On or around 26 May 2004 the Jersey Trustee agreed to enter a counter-indemnity between itself and the Jersey Bank. Westley trustees agreed to pay to the Jersey Bank promptly on demand all liabilities that might arise to the Jersey Bank (the “**Counter Indemnity**”).

23. In an undated and unsigned Guarantee and Indemnity, the Guernsey Trustee agreed to indemnify the Jersey Bank from the assets of the Brakspear trust for any loss that might arise to the Jersey Bank from the Jersey Trustee's default on the Jersey Bank Loan (the "**Brakspear Guarantee and Indemnity**").
24. In a signed and sealed but undated Deed of Charge over cash, Guernsey Trustees in its capacity as trustee of the Brakspear Trust entered into a deed of charge over cash with IOM Bank ("**the Charge**"). The Charge supported only obligations and liabilities that Guernsey trustee of Brakspear Trust owed to IOM Bank
25. By a letter dated 26 May 2004 from Westley Holdings to the Jersey Bank (contrasting with the board resolution below in paragraph 26 and 31 stating the loan was only received on 28 May 2008), Westley Holdings authorized the payment of ZAR 3,9million for the purchase of share capital in Money Box to the attorneys who were acting for both Cross Atlantic and Money Box in the purchase of the Farm.
26. On 28 May 2004 Westley Holdings received an interest free, unsecured loan with no set repayment date of ZAR 3,914,218 million from its "shareholder" (the "**Shareholder Loan**"), which it used to purchase the entire issued share capital in Money Box as per the PwC advice in Para 20 above.
27. On 7 June 2004 the IOM Bank gave a guarantee to First Rand Bank in respect of West Dune's obligations and liabilities to FRB under the FRB Mortgage. The value of the guarantee was up to £550,000. (the "**2004 IOM Guarantee**")
28. On 5 July 2004 West Dune purchased the Farm for ZAR 20,9 million through two transactions - the usufruct in a 9 year lease for ZAR12 million and the purchase of the bare dominium for ZAR 8,9 m.
29. Money Box loaned its share premium of ZAR 3,9 million to West Dune in order for West Dune to use as a deposit on the purchase of the Farm combined with another ZAR 3,9 million loan from Cross Atlantic for a total of ZAR7, 8 million.

30. The balance of the purchase price for the Farm of ZAR13, 1 million was provided by First Rand Bank Limited (“**FRB**”) in South Africa. The debt was secured by way of a mortgage over the Farm (the “**FRB Mortgage**”). The Third Plaintiff signed a personal surety for West Dune’s liabilities to FRB dated 18 May 2004 in alignment that he was the beneficial owner with his 2 South African partners.
31. Belatedly on 18 November 2004 Westley Holdings resolved to ratify the acceptance of the interest free Shareholder Loan referred to in paragraph 25 and to ratify the purchase of shares into Money Box as per paragraph 25 above and in alignment with the PwC advice in Para 20 above
32. On or around 4 October 2006, the Jersey Bank Loan was superseded and replaced by another lending facility agreed between the Jersey Bank and the Jersey Trustee (the “**Replacement Jersey Bank Loan**”). This Replacement Jersey Bank Loan was for a sum of £415,000. This sum was inclusive of the balance on the Jersey Bank Loan to date and of unpaid accrued interest. The Replacement Jersey Bank Loan was for a term of two years and bore interest on the principal sum at a rate of LIBOR + 2%.
33. On 9 October 2006 the 2004 IOM Guarantee was superseded and replaced by a further guarantee from the Jersey Bank to FRB in respect of West Dune’s obligations and liabilities to FRB under FRB Mortgage. The value of the guarantee was up to £500,000. (The “**2006 Jersey Guarantee**”)

#### **THE TRUSTEE’S NEGLIGENCE IN FAILING TO AMEND THE 2006 GUARANTEE**

34. On 16 March 2007 FRB requested that the wording of the 2006 Jersey Guarantee be altered as per FRB’s international requirements. FRB stated that despite request to the Jersey Trustee they had failed to amend the 2006 Jersey Guarantee and the failure to amend the 2006 Guarantee constituted a breach of the terms and conditions of the FRB Mortgage.
35. On 18 April 2007 FRB after negotiations between West Dunes lawyer and FRB, FRB agreed not to call on the 2006 Jersey Guarantee subject to a condition that the Jersey Bank, or its wholly owned subsidiary the Jersey Trustee, rectify the wording of the 2006 Guarantee within 30 days and that the Plaintiffs pay the monthly mortgage of ZAR166, 000.
36. The Plaintiffs paid the monthly mortgage of ZAR166, 000 as per the agreement with FRB

37. In breach of its duty of the Jersey Trustee's duty of care, skill and diligence, the Jersey Trustee failed to rectify the 2006 Jersey Guarantee within 30 days or at all.
38. On or around 4 July 2007, by reason of the Jersey Trustee's failure to amend the 2006 Guarantee, FRB called upon the 2006 Jersey Guarantee from the Guernsey Trustee.
39. On 5 July 2007 the Guernsey Trustee of Brakspear Trust paid £500,000 from Brakspear trust accounts with IOM Bank to FRB in satisfaction of the 2006 Jersey Guarantee. This payment was recorded as a distribution of £500,000 from Brakspear trust to the Third Plaintiff (the "**Distribution**") in the Brakspear trust accounts for the year ending 28 February 2008 and the Brakspear trust assets reduced accordingly.
40. But for the Jersey Trustee's failure to amend the 2006 Jersey Guarantee there would have been no requirement for the Brakspear family to pay the monthly mortgage of ZAR166, 000.
41. By reason of its failure to amend the 2006 Guarantee as requested by FRB, the Defendant breached its duty to act with care, skill and diligence enumerated in paragraph 76 and 77 below.
42. As a result of the matters set out in paragraphs 34-41 above the Plaintiffs have suffered loss and damage in the sum of £73,857 being the amount of the mortgage payments paid by the Brakspear family to FRB.
43. Suffered further losses for out of pocket expenses for improvements and operating costs of the Farm in the amount of £214,285.

#### **THE JERSEY TRUSTEE'S GROSS NEGLIGENCE – BREACH OF CONFIDENCE**

44. On or around 19 August 2007, West Dune received an offer to buy the Farm from a South African company for ZAR 37.75m (approximately £2.7m).
45. On 30 November 2007 the Jersey Trustee's managing director Mr. Justin Thomas sent an email to the purchaser and gave away commercially sensitive information about the Westley trust to the buyer.

46. In an follow up email also dated 30 November 2007, the Jersey trustee admitted its error in sending the email containing confidential trust information to the buyers attorney, apologized and that it would do anything to ameliorate the error and help fix things up.
47. It is to be inferred that by reason of the email, disclosing the confidential financial position of the Westley Trust, the purchaser perceived that it could acquire the Farm for a lesser sum and therefore withdrew their offer for the Farm. The purchaser did withdraw its offer to purchase 10 days later.
48. On or around 14 June 2008, the buyer who had put in offer of ZAR 37.75m (approximately £2.7m) in August 2007, purchased the Farm from West Dune at auction for ZAR 18m. West Dunes suffered a loss ZAR19, 75 million as a result of Mr. Thomas gross negligence.
49. In making the disclosure in paragraph 45 above to prospective purchaser on 30 November 2007, the Defendant breached its duty to act with care, skill and due diligence and duty of confidentially enumerated in paragraph 76 and 77 below.
50. As a result of the matters set out in paragraphs 44-48 above the third Plaintiff as director of West Dunes informed the Jersey trustee that the West Dunes had suffered loss and damage and intended to sue the Jersey trustee for same.

#### **RECALL AND REPAYMENT OF THE JERSEY REPLACEMENT BANK LOAN**

51. On or around 29 July 2008 the Jersey Bank recalled the Replacement Jersey Bank Loan from the Jersey Trustee.
52. On or around 30 July 2008, the Jersey Bank called on the Brakspear Guarantee and Indemnity and £446,649.29 was paid from Brakspear trust to the Jersey Bank.
53. The Jersey trustee accounted for this £446,649 as an addition to the capital of the Westley Trust in the Westley trust accounts dated 28 February 2009. By reason of this payment, the Replacement Jersey Bank Loan was settled and there were no outstanding liabilities by the Jersey Trustee/Westley Trust to the Jersey Bank.



## **DISHONEST BREACH OF FIDUCIARY DUTY AND CONSPIRACY TO INJURE**

54. Before transfer of the Farm could take place to the purchaser for ZAR18 million, Third Plaintiff received an improved offer on or around the end of November 2008, from well-known South African businessman Mr Johan Rupert's company Applemint, to purchase the company West Dunes for ZAR 500,000 and pay WDP creditors up to a value of ZAR 25,000,000 (£1,78 million).
55. Third Plaintiff notified the Jersey trustee of the terms of the improved offer and that he was going to accept it and requested the Jersey trustee as the nominee owner to sign off on the offer to purchase.
56. In an email dated 8 December 2008, West Dune's then lawyer in South Africa received an email from Defendant South African lawyer (which was marked "WITHOUT PREJUDICE" but cannot be privileged in the present or any proceedings) who stated that he was acting for.

*"Fairbairn Private Bank, Fairbairn Trust Company (FTC) of Guernsey, Fairbairn Trust Limited (FTL) of Jersey, Westley Holdings Limited, the Westley Trust, the JAM Brakspear Overseas Trust, the trustees of these two trusts as well as the individuals representing these entities in the various transactions that you and I have discussed"*

(Together those entities are referred to as the "Fairbairn Group").

57. The letter further stated that the Fairbairn Group and its shareholders would agree to the offer of ZAR 25,000,000 (£1,78 million), provided that (a) they received at least ZAR 1,000,000 (*approx. £71,000*) from the transaction and (b) that First and Third defendant:

*"...unequivocally waive and abandon any claims which they allege they are entitled to against any of my clients. This waiver and abandonment must also extend to the shareholders of FTC and FTL. In addition, both Mr Ian Brakspear and Mrs Dorothy Brakspear must confirm that they will not receive any further financial benefits from the two trusts referred to above."*

58. Additionally, the letter also stated that its author was

*"...in receipt of instructions to issue a letter of demand from to West Dune Properties on behalf of Fairbairn Private Bank to claim full repayment of the residue of the proceeds of the*

*current sale in order to reimburse Fairbairn Private Bank a portion of the monies drawn down on the guarantee which it issued in favour of Rand Merchant Bank for the liabilities of West Dune Properties in the sum of GBP500, 000, and which was drawn down in July 2007.”*

59. On 12 December First and Third Plaintiff instructed West Dunes attorney to inform defendant attorney that no debt of £500, 000 was owed to Fairbairn Private Bank, that both Plaintiff declined to waive and abandon any claims against the various legal entities, declined to confirm that that they will not receive any further benefits from the Westley trust and Brakspear trust and that West Dunes intended to sue Jersey Trustees for damages and losses for the breach of trust in releasing confidential information and causing the cancelation of the ZAR37,75 million sale.
60. Immediately after the First and Third defendant refused to accept the unlawful and extortionate demands from the defendant and related companies and that West Dunes intended to sue for the loss caused by the Jersey Trustee, the Jersey Trustee commenced legal proceedings on 23 December 2008 in South Africa (proceedings No 16790/2008) to place West Dune into a contrived liquidation for the non-payment of fictitious debts said to be owed to the Jersey Trustee.
61. It is averred that the contrived liquidation was done solely for the purpose of covering up the breaches of duty by the Jersey Trustee and to prevent West Dunes from suing the Jersey Trustee for ZAR 19,75 million in losses and damages as per Para 48 above.

#### **WEST DUNES CONTRIVED LIQUIDATION - DISHONEST BREACH OF TRUST AND DISHONEST BREACH OF FIDUCIARY DUTY**

62. On the 19 December 2008 Mr Justin Thomas as director of Jersey Trustee and Mr Greg Horton (who claimed he was director of Jersey Trustee), and who was the managing director of the Jersey Bank and the IOM Bank (a serious conflict of interest) and who was living in the Isle of Man, signed a trustee resolution authorising Nico Theo Botha to make an application for the liquidation of West Dunes “*to prove the Trust and/or the Company’s claims*”, none of which claims were specified in any amount in the resolution or supported by previous trustee resolutions or loan agreements.

#### **(A) Fictitious £500,000 loan**

63. In order to induce the South African Court to grant an order that West Dune be placed into liquidation, the Defendant, by an affidavit sworn by Mr. Nico Andrew Theo Botha dated 19 December 2008 and placed before the South African Court on 23 December 2008, represented that West Dune was unable to make payment of a loan of £500,000 made in June 2008 by the Jersey Trustee which was “*due and payable*”.

64. The Defendant represented the following under oath:

*“In and during 2004 JAMBOT advanced the sum of £400,000 to the Westley Trust. The Westley Trust owns the entire share capital of Westley Holdings Limited (“WHL”) a company incorporated in the British Virgin Islands.”*

...

*“In and during June 2008 the Westley Trust lent and advanced the sum of £500,000 to West Dune at the latter’s special insistence and request. This amount was due and payable by West Dune but West Dune was unable to repay it. The claim of Westley Trust is unsecured. The current value of the claim of the Westley Trust is in excess of R7,000,000.”*

65. Further, in order to induce the South African Court to recognize the Jersey Trustee as a creditor in the liquidation of West Dunes, the Defendant, by an affidavit sworn by Mr. Nico Andrew Theo Botha dated 11 March 2009 and placed before the South African Court, represented that:

*“Accordingly the creditor [the Jersey Trustee] borrowed the sum of £500,000 from FPB [the Jersey Bank] which it then advanced to the company [West Dunes]. I refer in this regard to NB3 and in particular to the balance sheet at page 3 thereof which refers to “Creditors and accruals” in the sum of £500,000. Note 5 to the financial statements (which appears at page 5 of annexure NB30 reflects the creditor to be FPB in the sum of £500,000.”*

66. Further, in order to induce the South African Court to recognize the Jersey Trustee as a creditor in the liquidation of West Dunes, the Defendant, by an affidavit sworn by Ms. Justine Hoppe of legal firm ENS (Defendant South African attorney) and dated 11 March 2009 and placed before the South African Court, represented that:

*Although the sum of £500,000 was paid directly by Fairbairn Private Bank to First Rand Bank, this payment was pursuant to an agreement between Westley Trust and the Fairbairn*

*Private Bank in terms whereof the Fairbairn Private Bank advanced the sum of £500,000 to the Westley Trust.*

(Together the “**Representations**”)

67. These were false Representations:

- a. In relation to the representation at paragraph 64 above, there was no advance of £400,000 in or during 2004 from Brakspear Trust to the Westley Trust.
- b. And to the representation at paragraph 64 there was no loan of £500,000 or any amount during 2008 (or at all) from the Westley Trust to West Dune
- c. In relation to the representation at paragraph 66 above, there was no legal debtor-creditor relationship in existence between the Jersey Bank and the Jersey Trustee or between the Jersey Trustee and West Dunes in respect of the £500,000.
- d. In relation to the representation at paragraph 66 above, there was no agreement between the Jersey Trustee and the Jersey Bank and the Jersey Bank did not transfer £500,000 to the Jersey Trustee during 2008 or at any time at all.
- e. No prior approval from the South African Reserve Bank was obtained as required under South Law for foreign loans (see paragraph 20 above re South African foreign exchange laws)
- f. The Jersey trustee has no records of trustee resolutions, no loan agreements, no receipt of £400,000 from Brakspear trust, no receipt of £500,000 from the Jersey Bank and no proof of payment of £500,000 to West Dunes account in South Africa.

68. The Defendant knew that these Representations were false when they were made for the reasons given above and because they conflicted with documents from Defendant related companies:

- a. Guernsey Trustee minute dated 7 May 2004 see paragraph 19 above shows that Guernsey trustee provided security in the course of administration of the Brakspear Trust and not in any way as part of a loan agreement
- b. In fact, a payment of £500,000 was made directly from Brakspear Trust account held in the IOM Bank to West Dunes account at FRB and is recorded in the accounts of Brakspear Trust as a distribution to the Third Plaintiff.
- c. The Brakspear trust accounts for the year ending 28 February 2008 and written up 8 months after the distribution by the Guernsey trustee record a cash transaction of £500,000 on 5 July 2007 as a distribution to the Third Plaintiff and not a loan to any third party.

- d. The Brakspear Trust financial statement issued on 28 February 2008 record the assets of the trust were reduced by £500,000 in line with a distribution as opposed to no change in assets if there were a loan to a third party.
  - e. Banking documents (SWIFT) from the Isle of Man Bank dated 5 July 2007 show the transferor of £500,000 to be Brakspear trust to the transferee, West Dunes In South Africa.
  - f. Banking documents (SWIFT) from FRB dated 10 July 2007 show the transferor of £500,000 to be Brakspear trust account in IOM Bank to the transferee West Dunes account at FRB.
  - g. There has never been a reversal of the £500,000 distribution in the Brakspear trust accounts, no communication to the Brakspear trust beneficiaries seeking their consent for a reversal or an application to seek the Guernsey Court directions for a mistake in a distribution or to unwind a any Guernsey Trustee decision.
69. Induced by and acting in reliance on the Defendant's false Representations as to a debtor-creditor relationship and the fabricated Westley Trust financial accounts provided by the Defendant as evidence, the South African Court placed West Dune into provisional liquidation on 23 December 2008 and into final liquidation on 5 February 2009.
70. Further, induced by and acting in reliance on the Defendant's false Representations and the fabricated Westley Trust financial accounts, the £500,000 debt was admitted as a creditor claim in West Dunes' liquidation.
71. On 13 February the liquidators sold the farm to the same person mentioned in paragraph 54 above Mr Johan Rupert of Applemint for ZAR25, 200,000 and which the various Nedbank entities stated they would only sign off on, if the first and third defendant waiver all their legal claims against the greater Fairbairn Group. The legal and liquidation fees pad to third parties exceeded ZAR 6,7 million and were paid directly from the proceeds of the sale of Westley Trust only asset the Farm.

**(A) Fictitious £340,000 loan**

72. Mr. Nico Andrew Theo Botha this time as the appointed agent of the directors of Westley Holdings Limited (whose directors are the same persons who are the Jersey trustees of Westley Trust) In an affidavit dated 23 April 2010 and placed before the South African Court, represented that:

*“The company (West Dunes), which has been placed in liquidation, was at the date of the provisional liquidation and still is, indebted to the creditor (Westley Holdings Limited BVI) in the sum of R3 914 218.37, being in respect of monies loaned and advanced by the creditor to the company at the latter special instant and request (“ the claim”). The claim was to be repaid by the company when it was in a position to do so.*

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*“As at the date of the provisional winding-up of the company (West Dunes), the company was indebted to the creditor in the amount of R 3 914 218.37, being the amount loaned and advanced by it to the company on 28 May 2004.*

73. These Representations were false and furthermore conflicted with following documents written up by the Defendant:

- a. Westley Holdings made no loan to West Dunes in 2004 or at any time
- b. Westley Holdings has no loan agreements or board resolutions for any transaction with West Dunes.
- c. The Westley Holdings board resolution as stated in paragraph 25 and 31 above ratifies the purchase of shares for ZAR 3,914,218.37 into Money Box.
- d. The Westley Holdings financial statements from 2004 to 2013 show an investment of ZAR 3,914,218.37 into the shares of Money Box.
- e. The same Westley Holdings accounts for the same 9-year period 2004 to 2013 do not record West Dunes to be a creditor for ZAR 3,914,218.37 at any point in time.
- f. Money Box Investment’s auditors (NOLAN’S in an information sheet for Money Box dated 11 June 2010 confirms: *Total premium (Stated Capital) R 3 899 900*; and that 0,25% stamp duty of ZAR 9750 was paid on the issue of those shares.

74. No prior approval from the South African Reserve Bank for any loan from Westley Holdings BVI to West Dunes was obtained in May 2004 or at any time as required for foreign loans (see paragraph 20 above) under South African foreign exchange law.

75. The false representations of fictitious loans by the Jersey trustee caused legal and liquidation fees to exceeded ZAR 6,7 million (approx.£480,000), all paid directly from the proceeds of the sale of Westley trust underlying asset – the Farm.

**THE DEFENDANT'S DUTIES AS TRUSTEES AND FUDICARIES**

76. The Jersey Trustee owed the following duties to the Plaintiffs in the execution of the Westley Trust:

- a. to act with integrity
- b. to act with due diligence as would a prudent person to the best of the Defendant's ability and skill;
- c. to keep accurate accounts and records of the trustee's trusteeship;
- d. to preserve the confidentiality of the affairs of the Westley Trust;
- e. to observe the utmost duty of good faith and to act in the beneficiaries' best interests; and
- f. to preserve and enhance the value of the trust property;

77. The Defendant owed the following further duties to the Plaintiffs, not to:

- a. directly or indirectly profit from its trusteeship;
- b. cannot, in any matter within the scope of his service, have a personal interest or an inconsistent engagement with a third party unless this is freely and informedly consented to by his beneficiary or is authorized by law
- c. cause or permit any third party to profit directly or indirectly from the Defendant's trusteeship, including the Jersey Bank; and
- d. on the trustee's own account, enter into any transaction relating to the trust property which may result in such profit arising to either the Defendant or any third party.

78. It is averred that the Jersey Trustee owed the above duties in relation to the transactions described at paragraphs 17 - 75 above and continued to owe those duties while it remained trustee of the Westley Trust.

**DISHONEST AND DECEITFUL BREACHES OF DUTY AS TRUSTEES ARISING FROM THE DEFENDANT'S FALSE REPRESENTATIONS TO THE SOUTH AFRICAN COURT IN A CONTRIVED LIQUIDATION**

79. In placing West Dunes into a contrived liquidation by making false representations of fictitious loans and submitting false trust accounts to the South African Court to prove itself to be a creditor

in West Dunes' liquidation for debts as outlined above in Para 62 -75, the Defendant:

- a. Did not act with integrity in any manner whatsoever – but did the opposite in acting dishonestly and deceitful in its duties.
- b. Dishonestly breached its duty to observe the utmost good faith in the administration of the Westley Trust and to act in the Plaintiffs' best interests; and
- c. Dishonestly breached its duty to keep accurate accounts and records of its trusteeship by representing that there were loans in place – when there are in fact no records of loan agreements.

80. Further, in placing West Dunes into a contrived liquidation the Defendant dishonestly breached its duty to preserve and enhance the value of the trust property by causing the assets of the Westley Trust to be liquidated for an amount that was less than the value they would likely achieved had there not been a liquidation.

81. The liquidation and legal fees paid out from the sale of the Westley trust asset exceeded ZAR6, 7 million (approx. £480,000) and the “out of pocket” expenses of ZAR5, 7 million (approx. £404,713) paid by the Plaintiffs personally to maintain and enhance the value of the of the Westley trust only asset the Farm, were lost as a direct result of the Jersey Trustee efforts to cover up its misfeasance's and dishonest breaches of trust.

82. Further, without the authorization of the Plaintiffs as required by the terms of the Westley Trust, in seeking to place West Dunes into liquidation and in making the dishonest Representation and by proving as a creditor in West Dunes' liquidation for fictitious debts to which it knew it was not entitled, the Defendant dishonestly breached its duties enumerated in paragraph 76 and 77 above by preferring its own interests and the interests of its parent company (a third party to the Westley Trust – namely the Jersey Bank) over the interests of the Plaintiffs in the recovery of fictitious loans from West Dune to which they were not legally entitled.

#### **THE JERSEY TRUSTEE'S FINANCIAL STATEMENT FRAUD IN WESTLEY TRUST ACCOUNTS**

83. In March 2009 the Defendant submitted accounts for Westley Trust for the period 1 May 2008 to 28 February 2009 to the South African courts. These accounts show:



- a. The Jersey Bank to be a creditor of the Westley Trust for £500,000 from 1 May 2006 onwards.
  - b. West Dunes to be a debtor of the Westley Trust for £500,000 from 1 May 2006 onwards.
  - c. An addition to capital of £446,649 resulting in the net assets increasing to £272,934 from the previous year negative capital of £177,633.
84. It is averred that the accounting records for paragraphs 83.a and 83.b above were false. It is averred that the Jersey Bank was never a creditor of the Westley Trust for the sum of £500,000. It is averred that £500,000 was paid directly to FRB on behalf of West Dunes by the Brakspear trust which itself accounted for the £500,000 as a distribution to the Third Plaintiff. It is averred that West Dunes was never a debtor of the Westley Trust.
85. It is averred that on the basis of these fabricated accounting statements, the South African Court was induced by the Defendant to place West Dune into liquidation, by virtue of which the Plaintiffs have suffered financial loss and damage.
86. Further, in September 2009 the Jersey Trustee sent copies of the Westley Trust accounts to the beneficiaries for the years ending April 2005, April 2006, for years 2006-2008 and for the year ending February 2009.
87. In December 2012 the Jersey Trustee send the Westley Trust accounts for the year ending April 2010. This is some 3 years after the Westley trust accounts submitted to the South African High Court and more noticeably after the 2012 Court Case in Jersey - has changed dramatically.
88. These financial statements show the £446,649 credit "added to capital" in the Westley Trust's accounts ending 29 February 2009 has been removed and £226,649 as been added as a debt payable.
89. These 2010 Westley Trust financial accounts also reflect in the Capital Account that there is a "*Gain on foreign exchange*" of **£209,682** for the "Jersey Bank Loan" of ZAR 4 million, an increase of **1832%** on the previous foreign exchange gain of **£10849** for the year ending 28 February 2009. The GBP/ZAR exchange rate on 28 February 2009 was £1 to ZAR14.17 and on the 30 April 2010 £1 to ZAR11.26, a 20.54% gain, proving absolutely that this is a **deliberate**

**dissemination of an untrue fact and a plain lie.**

90. In the 2010 Balance sheet “*Debtors and Prepayments*” has increased by **£134,010 to £634,000** from £500,000 for the year ending 28 February 2009. Both the **£500,000** and the newly added **£134,010** are **false debtors** unsubstantiated by any supporting trust records or vouchers. **This is another deliberate dissemination of an untrue fact and a plain lie.**
91. The 2010 Westley Trust financial accounts record a “*Post Balance Sheet Event*” in point 6, which occurred on 10 October 2012 some 2 years and 6 months after the 30 April 2010 financial accounts were supposed to be written up by Jersey Trustee. In order for the Jersey Trustee (as preparers of the Westley Trust 2010 annual financial statements) to have recorded a post balance sheet event dated 10 October 2012 this required that the 2010 financial statements could not have been approved before October 2012 some 30 months after the end of the financial year.
92. On 14 July 2015, the Jersey Trustee sent revised Westley Trust Accounts for the years 2005 and 2006. The 2005 accounts contained material alterations since they were first disclosed to the beneficiaries in September 2009.
93. The original 2005 Balance Sheet records:
- a. Current assets of £10 in cash
  - b. No debtors
  - c. The Jersey Bank is recorded as a creditor for the sum of £358,173
94. The revised 2005 Balance Sheet (revised in 2105) records:
- a. Current assets to be £550,010
  - b. West Dune is recorded as a debtor of the Westley Trust in the sum of £550,000
  - c. The Jersey Bank is recorded as a creditor of the Westley Trust in the sum of £550,950.
95. It is averred that if there were errors in these Westley Trust accounts then there are well defined formalities which involve recalling all copies of the defective accounts which are followed by the release of the revised accounts which themselves are recorded as ‘Revised’ that should have explained at length the change and on what basis it has been affected. These steps were never followed the Jersey Trustee. This is a breach of generally accepted accounting practices and also a dishonest breach of trust.

96. It is averred that the revised 2005 Balance Sheet (sent in 2015) was false. There was never any debtor/creditor relationship between the Jersey Bank and the Westley Trust in the sum of £550,950 in 2005
97. It is averred that £500,000 was paid directly to FRB on behalf of Third Plaintiff by the Brakspear Trust on 5 July 2007 which itself accounted for the £500,000 as a distribution to the Third Plaintiff.
98. It is averred that there was never any debtor/creditor relationship between the Westley Trust and West Dunes in the sum of £550,000.
99. By reason of the following
- a.* the presentation of false and misleading accounting records to the South African court in March 2009
  - b.* the submission of false and misleading accounting records to the beneficiaries in 2009
  - c.* the submission of false and misleading accounting records to the beneficiaries in 2012
  - d.* the submission of the final Westley Trust accounts to the beneficiaries on 2015 being false and misleading accounting records,
  - e.* the submission of the revised 2005 and 2006 Westley trust accounts given to the beneficiaries on 14 July 2015 being false and misleading accounting records
  - f.* that all the Westley Trust and Westley Holdings accounts are not authenticated, not signed and not dated by either the Jersey trustee or Westley Holdings directors.

- the Defendant has deceitfully and dishonestly breached its duty to act with integrity and to keep accurate accounts and records of the trustee's trusteeship as per paragraph 76 and 77 above.

100. As a result of the matters set out in paragraphs 83 - 99 above the Plaintiffs have suffered loss and damage.

#### **DISHONEST BREACH OF FIDUCIARY DUTY AND CONSPIRACY TO INJURE**

101. It is averred that the Guernsey Trustee and the Jersey Trustee owed the Plaintiff the duties enumerated at paragraph 76 and 77 above.

102. It is averred that in the course of proceedings before the Royal Court of Jersey bearing file number 2012/403 the Guernsey Trustee and the Jersey Trustee together, wrongfully and with intent to injure the Plaintiffs by unlawful and deceitful means, conspired and combined together to defraud the Plaintiffs.

103. Pursuant to and in furtherance of the conspiracy pleaded above, the Guernsey Trustee and the Jersey Trustee carried out the following unlawful acts and means by which the Plaintiffs were injured.

104. On about 14 September 2012 the Guernsey Trustee issued proceedings against the Jersey Trustee for payment of £946,649 claiming, by way of subrogation, the Jersey Bank's rights against the Jersey Trustee. The Guernsey Trustee claim for £946,649 was comprised of two parts: the first part being in respect of £500,000, the second part being in respect of £446,649.

105. In the proceedings, the Guernsey Trustee represented that in respect of the £500,000:

- i.* That on the 4 July 2007, the 2006 the Replacement Jersey Guarantee was called upon by FRB in the sum of £500,000
- ii.* That on the 5 July 2007 the Jersey Bank paid the sum of £500,000 to FRB pursuant to the Replacement Jersey Guarantee.
- iii.* That on the 5th July 2007, the Guernsey Trustee paid the Jersey Bank the sum of £500,000 pursuant to the guarantee in satisfaction of the Jersey Trustee's liability to the Jersey Bank for £500,000 that the Jersey Bank had paid to FRB in South Africa.

106. It is averred that the material statements contained in points in *(ii)* and *(iii)* above were false.

- a.* The Jersey Bank did not pay £500,000 to FRB in South Africa.
- b.* The Guernsey Trustee did not pay £500,000 to the Jersey Bank

107. The plaintiffs aver that the notice from FRB to pay the 2006 Guarantee was sent direct to the Guernsey Trustee.

108. It is averred that the true factual position was that Brakspear Trust had satisfied the FRB £500,000 claim directly to FRB and recorded it as a Distribution to the Third Plaintiff as the beneficial owner of the Farm and not as contingent liability or a loan to a third party.

109. It is further averred that the Jersey Trustee/Westley Trust was never indebted to the Brakspear Trust in the sum of £500,000 from July 2007 as alleged and which is also evidenced in writing by the Jersey trustee in a letter dated 27 May 2008 and addressed to the Guernsey trustee stating:

*“For the avoidance of doubt the trustee **do not** recognise any liability due to the JAM Brakspear Trust”* (bold typeface and underlining inserted by the Jersey trustee)

110. It was further averred and represented by the Guernsey Trustee in the proceedings that in respect of the £446,649 that on or about 30th July 2008 the Guernsey Trustee paid to the Jersey Bank the sum of £446,649.29 pursuant to the Brakspear Guarantee and Indemnity in satisfaction of the Jersey Trustee’s liability to the Jersey Bank under the Loan Facility.

111. It is the Plaintiff’s case that the sum of £446,649 was paid by the Brakspear trust to the Westley Trust on 30 July 2008.

112. That the Jersey trustee accounted for this £446,649 as an addition to the capital of the Westley Trust in the Westley trust accounts dated 28 February 2009 which was given as evidence to the South African Court in March 2009.

113. It is averred that the Guernsey trustee could not in law be subrogated for the Jersey Bank in the sum of £500,000, as

1. the Jersey Bank did not pay £500,000 to FRB in South Africa
2. the Jersey Trustee had no liability in the sum of £500,000 to the Jersey Bank
3. the Guernsey trustee made no payment of £500,000 to the Jersey Bank

114. It is averred that the Jersey Trustee knew that the representations given to the Royal Court about the transferor and the transferee of £500,000 were false and that the Jersey Trustee knew of the true factual position that the

115. In a dishonest breach of its fiduciary duties to the Plaintiffs, the Defendant did not dispute the false representations made to the Royal Court by the Guernsey Trustee when it knew they were false but remained silent to the truth. In submitting to judgment for the sum claimed by the Brakspear Trustee, the Jersey Trustee dishonestly breached its fiduciary duties to the Plaintiffs by:

- a. Failing to observe the utmost duty of good faith and to act in the beneficiaries' best interests
- b. Conferring a benefit upon a third party, the Brakspear Trustee, to which the Jersey Trustee knew the Brakspear Trustee, was not entitled.

116. In remaining silent to the false representations by the Guernsey Trustee the Defendant committed a dishonest breach of trust

- a. Failing to preserve and enhance the value of the trust property;

117. As a result of the matters pleaded in 101-116 above, the Royal Court was induced to order that the Jersey Trustee pay the Brakspear Trustee the sum of £946,649 plus accrued interest in the sum of £300,120.57.

118. By reason of the Royal Court's order the Plaintiffs have suffered loss and damage in the same sum.

## **SHAM TRUST**

119. It is averred that the Defendant has formed a sham trust in that Defendant represented to Third Plaintiff in various emails, meetings and phone calls

- a. that he was the client and settlor of a Declaration of Trust
- b. that a shelf company would be bought from a BVI agent on behalf the third Plaintiff
- c. that the nominee owner for the Third Plaintiff's BVI company would be the Defendant as trustee of the Declaration of Trust
- d. that the declaration of trust would be a bespoke 1 -2 page deed
- e. that the deed would include certain settlor powers and the requirement that the Defendant would always seek Third plaintiff written consent or authority.

120. On the above mentioned advice and upon receipt of an email from the Defendant dated 8 March 2004, Third plaintiff paid £8810 fees on 31 March 2004 for the following services

- a. £1250 for preparation of Declaration of a Trust

- b. £2000 upfront fees for the annual administration of the trust and preparation and delivery of annual accounts
- c. £1250 for establishing the offshore company and the provision of nominee shareholders under a declaration of trust.
- d. £3000 upfront fees for administration of the offshore company and providing the first year annual accounts
- e. £500 legal fees for the trust
- f. £800 legal fees for the offshore company
- g. £10 to be settled on the trust
- h. on receipt of funds (£8810) defendant would be able *“to have the trust and company structure up and running within five working days”*

121. From the settlement of the Westley Trust on 5 May 2004 until 2009, the Defendant subsequent actions were all in alignment with Para 118 (e) in that the Defendant sent the Third Plaintiff the trustee's fee notes, communications in relation to the administration of the Westley Trust and sought his written consent or authority concerning the activities of the Westley Trust.

122. In reliance on the Defendant representations and advice that the Third Plaintiff would at all material times be the beneficial owner, the Third plaintiff paid the mortgage costs, legal costs and operating costs for the farm for 4 years.

123. The Defendant at no point in time explained to Third Plaintiff that he was not the beneficial owner, that this was not a joint venture investment between him and the South African based partners or that he risked losing all money if he paid the day to day operating cost, legal fees and mortgage payment of the Farm.

124. On 5 June 2009 the Third Plaintiff as settlor and the First and Second Plaintiff as beneficiaries requested the immediate resignation of the Jersey Trustee. Defendant stated in a letter that it did not recognize the Third Plaintiff as the settlor of the Westley Trust and that it would not resign as only the Defendant had the power to appoint new trustees i.e. in laypersons terms only we can “fire” ourselves.

125. It is averred that the various fees of £8810 paid for services to be delivered to the Third Defendant (see Para's 119 and 120 above) were never delivered as promised in that:

- a. The trust and company structure was not set up within five working days of the receipt of funds
- b. There was no bespoke 1-2 declaration of trust deed as the nominee owner of a BVI company for Third Defendant. Instead a 34-page trust deed – containing exemption clauses and clauses which negate positive duties. The Third Plaintiff was never aware of their existence and their meaning. The terms of the Westley Trust do not represent the terms as represented that they would be by the Defendant to Third Plaintiff.
- c. The Declaration of Trust was not a nominee shareholder to hold Westley Holding shares on behalf of the Third Defendant
- d. There was no preparation of the first year annual trust accounts nor were any ever sent to First and Second Plaintiff despite been paid for upfront–this fraudulent mis-selling.
- e. There was no preparation of the first year annual BVI Company accounts nor were any sent to the beneficiaries despite been paid for upfront – this fraudulent mis-selling.
- f. It has never been explained what these legal fees for the trust and company were for
- g. The original £10 property settled on the trust was never returned to the Third defendant, notwithstanding that a trust cannot be undone once the trust property has been settled

126. On 30 April 2008 and 14 May 2008 the Guernsey Trustee stated in letters addressed to the Defendant that Guernsey Trustee is the settlor of the Westley Trust, this being the second purported settlor.

127. These statements were false in that Guernsey trustee has been unable to provide the Plaintiffs request for a copy of a minute from Guernsey trustee sitting in its capacity as trustee of the Brakspear trust resolving to settle assets with Jersey trustee pursuant to the terms of the Westley Trust and were later contradicted by the Guernsey Trustee itself in 2011 (see Para 130 below)

128. In the above mentioned letters at Para 126, the Guernsey trustee stated that there are 3 capital beneficiaries in the Westley trust; Second and Third Plaintiff and the grandchildren of the First Plaintiff and one interest beneficiary - the First Plaintiff.

129. These statement were false in that Westley Trust deed only records two capital beneficiaries being First and Second Plaintiff and no interest beneficiaries



130. On 29 November 2011 the Guernsey Trustee stated, in a letter from its lawyers that Guernsey Trustee had made a distribution of £10 to the Second Plaintiff for her to settle on the terms of the Westley Trust as the initial property, now contradicting the letters of 30 April 2008 and 14 May 2008 in Para 126 above. This being the third purported settlor claim by Nedgroup entities.

131. The party that requested the Guernsey trustee make a distribution to the Second Plaintiff was the Defendant in an email dated 7 May 2004 sent only to the Guernsey Trustee.

132. The Second Plaintiff avers that she had no intention to settle any property upon a Trust and denies ever issuing any instruction for any person to do so.

133. On 21 July 2016 the Defendant in response to a question of “*Who is the settlor of Westley trust*”, replied writing via their attorney that

*“Westley Trust is a declaration of trust and has such does not have settlor”*

134. This being now the fourth contrary version of settlor by Nedgroup - the four different versions of settlor being – Third Plaintiff, Guernsey Trustee, Second Plaintiff and finally no settlor

135. It is averred by the Third Plaintiff, that Jersey trustee knew that the BVI Company shares could not be held on trust, therefore the trust would never be the nominee owner of the BVI Company under a declaration of trust as it had advised the Third Plaintiff and for which they induced the Third Plaintiff to pay fees upfront. And furthermore the Defendant knew that ownership would vest in a distinct and separate Nedgroup legal entity to the Jersey trustees yet informed none of the Plaintiffs of this fact. Westley Holdings Articles of Association record that

*“Except as required by law, no person shall be recognised by the Company as holding any share upon any trust”*

136. This is further evidenced by emails and board resolution on 5 May 2004 in which Mossack Fonseca the subscriber of Westley Holdings in BVI and signs an instrument in writing appointing Justin Gregory Thomas and Christopher John Roscouet in their personal capacities as the first directors of Westley Holdings (BVI).

137. On 5 May 2004 the inaugural meeting of the Board of Westley Holdings is held, and the directors

being Thomas and Roscouet accept and confirm their appointment by Mossack Fonseca. They appoint Gerrard Corporate Services (Jersey) as Company Secretary and that one ordinary share of USD \$1 be paid and issued to Gerrard Nominee (Jersey) Limited directly, a separate and distinct legal entity to the Jersey trustee but in alignment with Westley Holdings Articles in Para 126 above

138. On 7 May 2004 the minutes of the inaugural meeting confirming the appointment of directors and the register of members for Westley Holdings are then faxed to Mossack Fonseca.

139. On the 10 November 2006 the Directors Thomas, Roscouet and Hawson (it is not known when or why this third director was appointed) resigned and Fairbairn Corporate Services Limited appointed as directors.

140. Furthermore it is averred that the Defendant has never been the legal owner of one issued share of Westley Holdings as recorded in the Westley trust accounts and as such has no legal title or property rights in Westley Holdings.

141. In addition the Plaintiffs aver that the BVI International Business Companies Act at Para.18 states

*“No share in a company incorporated under this Act may be issued until the consideration in respect of the share is fully paid”*

142. Westley Trust accounts have no record of paying for one issued share of Westley Holdings or of a corresponding reduction in the cash reflecting payment for the issue of one share.

143. Westley trust accounts show no costs and expenses for purchasing or forming a BVI company.

144. Westley Holdings was liquidated on the 31 October 2014 in the BVI by its shareholder Nedgroup Private Wealth Nominees Limited whereas Westley trust cease to exist on 15 March 2013 some 1 and ½ years before.

145. It is averred by the Plaintiffs that when it comes to setting up the trust the responsible advisers are fiduciaries who have a duty of care and loyalty to the settlor to make full disclosure of all

relevant facts known to him or her.

146. It is averred that the Defendant intentionally, deceitfully and dishonestly exploited the information asymmetry that existed between the Plaintiffs and the Defendant and **misrepresented the exact nature of the beneficial property rights, the risks of a Declaration of Trust and ownership of a BVI company** to the detriment of all the Plaintiffs and that no transaction resting in any degree on misrepresentation and mis-selling of financial products (*Declaration of Trust, BVI company and the non delivery of the first year accounts for both the Declaration of Trust and BVI company which were paid for upfront*) by person with a fiduciary duty can stand.

147. It is averred that the Westley Trust instrument is a sham. The Defendant has stated that there is “*no settlor*” thus the certainty of intention legally required for a trust to be effective is absent. If there is no settlor there can be no common intention between settlor and trustee. Only the unilateral intention of the Defendant who has a fiduciary duty, was the only party to sign the trust instrument and who gave the Plaintiffs, in particular the Third Plaintiff the impression of having created certain property rights and obligations between the Plaintiffs and the Jersey trustee but which in fact never existed at all.

#### **LOSS AND DAMAGE RESULTING FROM THE DEFENDANT’S DISHONEST BREACHES OF DUTY AS TRUSTEES**

148. By reason of the Defendant’s breach of its duty of confidence pleaded at paragraphs at 34 – 43 (failure to amend the guarantee) and 44-48 (unauthorized release of confidential information to a third party) above, and the Defendant’s dishonest breach of trust and dishonest breach of fiduciary duty pleaded at 62 – 82 (contrived liquidation of the Westley trust asset) the Plaintiffs have suffered loss and damage:

- a. In the sum of ZAR 127.59 million or the equivalent sum in Sterling, being the current value of the Farm had it not been sold as part of the contrived liquidation by the Defendant of West Dune’s or alternatively;
- b. In the sum of ZAR 24,75 million, or the equivalent sum in Sterling being profit West Dune would have made on the sale of the Farm at ZAR 37,75 million (less the repayment of the outstanding mortgage of ZAR13 million) had it not been for the cancelation of the

ZAR37,75 sale to the breach of trust by the Defendant or alternatively

- c. In the sum of ZAR 12.55 million being the difference in the offer price for the Farm of ZAR 37.75m received on or around 14 June 2008 and the price eventually achieved for the Farm by the liquidators (ZAR 25.2 million) on 22 February 2009; plus the sum of ZAR 6,7 million being the legal fees unreasonably incurred by the Jersey Trustee (and ultimately borne by the Westley Trust) in the course of the liquidation for a total of ZAR19.25 million and:
- d. In the sum of £73,857 for the mortgage payments for the Westley trust property by the Plaintiffs and:
- e. In the sum £214,285 for the operating cost and improvement for the Westley trust property paid by the Plaintiffs and:
- f. In the sum of £116,571 Legal fees involving the Farm which include legal fees for the original purchase price fraud, legal fees to evict the previous partner and farm manager in that fraud and a defense against a servitude dispute which was won with costs but never repaid due to the contrived liquidation.

149. By reason of the Defendant's breach of its duty of care, skill and diligence and breach of duty to keep accurate accounts and records of the trustee's trusteeship via the dishonest and unlawful falsification and manipulation of the financial information contained in Westley Trust accounts pleaded at paragraphs 83 - 100 Plaintiff have or has suffered loss and damage:

- a. In the sum of ZAR 127.59 million or the equivalent sum in Sterling, being the current value of the Farm had it not been sold as part of the contrived liquidation by the Defendant of West Dune's or alternatively:
- b. In the sum of ZAR 24,75 million, or the equivalent sum in Sterling being profit West Dune would have made on the sale of the Farm at ZAR 37,75 million (less the repayment of the outstanding mortgage of ZAR13 million) had it not been for the cancelation of the ZAR37,75 sale to the breach of trust by the Defendant or alternatively
- c. In the sum of ZAR 12.55 million being the difference in the offer price for the Farm of ZAR 37.75m received on or around 14 June 2008 and the price eventually achieved for the Farm by the liquidators (ZAR 25.2 million) on 22 February 2009; plus the sum of ZAR 6,7 million being the legal fees unreasonably incurred by the Jersey Trustee (and ultimately borne by the Westley Trust) in the course of the liquidation for a total of ZAR19.25 million and:

- d. In the sum of £73,857 for the mortgage payments for the Westley trust property by the Plaintiffs and:
- e. In the sum £214,285 for the operating cost and improvement for the Westley trust property paid by the Plaintiffs and:
- f. In the sum of £116,571 legal fees paid by the Plaintiffs involving the Farm, which include legal fees for the original purchase price fraud, legal fees to evict the previous partners and farm manager in that fraud and legal fees for defense against a servitude dispute which was won with costs but never repaid due to the contrived liquidation.

**LOSS AND DAMAGE RESULTING FROM THE DEFENDANT'S DISHONEST BREACHES OF FIDUCIARY DUTIES AND CONSPIRACY TO INJURE**

150. By reason of the conspiracy to injure the Plaintiffs and by reason of the unlawful means as pleaded in paragraphs 54 – 61 (the unlawful demand to waiver legal rights against the greater Nedgroup) and 101 - 114 (Jersey Trustee remaining silent to false representation by its sister company Guernsey Trustee to the Royal Court of Jersey to obtain a right of subrogation) above, the Plaintiff have or has suffered loss and damage:

- a. The Defendant is liable to pay compensation for its dishonest breaches of duty as trustee as particularized above;
- b. The Defendant is liable to account for the sums paid away by it pursuant to the judgment of the Royal Court.
- c. The Defendant is liable to pay damages for conspiracy.
- d. Further, the Plaintiffs claim and are entitled to interest, whether or not compounded, on all sums found to be due to it at such rates, as the Court shall deem just.

**PUNITIVE DAMAGES RESULTING FROM THE DEFENDANT'S CONDUCT**

151. Further or in the alternative, by reason of the Defendant's dishonest breach of fiduciary duties and breaches of trust combined with the complete disregard of the Plaintiffs' rights for 13 years, the Plaintiffs seek punitive damages in the sum of £2,000,000 each.

**WHEREBY** the Plaintiffs have suffered a wrong and pray the Royal Court may order:


- (1) That the Defendant is liable to pay to the Plaintiffs the sum of at least ZAR 24 million plus interest compounded once per annum at 15,5 % (South African rate) from 30 November 2007 until the date of payment, or the equivalent sum in Sterling.
- (2) Compounded interest on all sums found due to the Plaintiffs above at such rate as the court thinks fit.
- (3) AND that the Court shall make such ancillary or further orders as it sees fit.

**SAVING ALL JUST EXCEPTIONS**

This <sup>20</sup> ~~October~~ <sup>November</sup> 2017

Plaintiff's address for service

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