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Cristiana Crociani and A (by her Guardian ad Litem, Nicholas Delrieu) and B (by her Guardian ad Litem, Nicholas Delrieu) v Edoardo Crociani; Paul Foortse; BNP Paribas Jersey Trust Corporation Ltd; Appleby Trust (Mauritius) Ltd; Camilla de Bourbon des Deux Siciles; Camillo Crociani Foundation IBC (Bahamas) Ltd; BNP Paribas Jersey Nominee Company Ltd

Jurisdiction:	Jersey
Judge:	Matthew John Thompson
Judgment Date:	11 November 2015
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Text

[2015] JRC 227

ROYAL COURT

(Samedi)

Before:

Advocate Matthew John Thompson, **Master of the Royal Court**

Between
Cristiana Crociani
First Plaintiff

and

A (by her Guardian ad Litem, Nicholas Delrieu)
Second Plaintiff

and

B (by her Guardian ad Litem, Nicholas Delrieu)
Third Plaintiff

and

Edoardo Crociani
First Defendant

Paul Foortse

Second Defendant

BNP Paribas Jersey Trust Corporation Limited
Third Defendant

Appleby Trust (Mauritius) Limited
Fourth Defendant

Camilla de Bourbon des Deux Siciles
Fifth Defendant

Camillo Crociani Foundation IBC (Bahamas) Limited
Sixth Defendant

BNP Paribas Jersey Nominee Company Limited
Seventh Defendant

Advocate J. D. Kelleher for the First Defendant.

Advocate W. A. F. Redgrave for the Third Defendant.

Authorities

Cummins v Howland (Furniture) Limited [2014] JRC 242

Rule Court Rules 2004.

Blenheim Trust v Morgan 1999/51

1999 Edition of the White Book

In Re Esteem Settlement 2000/150.

MacFirbhisigh v CI Trustees and Executors Limited [2014] JRC 033

Trust — reasons in relation to application by the third defendant to issue third party claim against the first defendant.

CONTENTS OF THE JUDGMENT

	Paras
1. Introduction	1
2. The general background to the claim	2–11
3. The Law	12–15
4. The Proposed Amendment	16–20
5. The 2010 third party claim	21–32
6. The 2011 third party claim	33–41
7. Conclusions	42

THE MASTER:

Introduction

- 1 This judgment represents my detailed written reasons in relation to an application by BNP Paribas Jersey Trust Corporation Limited (“the third defendant”) to issue a third party claim against Edoarda Crociani (“the first defendant”) as part of an application to amend an answer brought by the third and seventh defendants. The application did not concern the other defendants or the plaintiffs, who did not take part in the hearing. The third and seventh defendants' application to amend their answer was not challenged or objected to by any party to the proceedings, including by the first defendant, other than in respect of the first defendant's objection to the issue of a third party claim.

The general background to the claim

- 2 The plaintiffs' claims relate to a trust established in 1987 by deed referred to in the order of justice as the “Grand Trust”
- 3 Between 2007 and 2012, the trustees of the Grand Trust were the first, second and third defendants.
- 4 On 9th February, 2010, the then trustees of the Grand Trust executed a deed (“the 2010

Deed”) appointing all the assets of the Grand Trust (except a promissory note) to another trust, known as the Fortunate Trust. The first, second and third defendants were both trustees of the Fortunate Trust, and the first defendant was a beneficiary (together with the first plaintiff and the fifth defendant).

- 5 On 30th June, 2011, by an “*instrument of revocation and termination*” (“the 2011 Revocation”), the Fortunate Trust was revoked by the first defendant and the whole of the property in the trust fund (“the Revoked Assets”) was revested in the first defendant.
- 6 On 10th February, 2012, the first, second and third defendants, as trustees of the Grand Trust, executed a deed under which they resigned as trustees and appointed the fourth defendant as sole trustee of the Grand Trust.
- 7 On 2nd August, 2012, the first, second, third and fourth defendants, as former and present trustees of the Grand Trust, executed a deed appointing the assets that were the subject of the 2010 Deed, together with any rights and interests in or over those assets, to the Agate Trust.
- 8 In 2013 the plaintiffs issued the present proceedings. While their order of justice has since been amended, the essence of the allegations made remains the same, namely that:—
 - (i) Certain payments out of the Grand Trust made by the first, second and third defendants said to be for the first plaintiff were wrongly directed to the first defendant and these monies should be reimbursed to the Grand Trust;
 - (ii) The 2010 Deed was executed in breach of trust by the then trustees of the Grand Trust (i.e. the first, second and third defendants) and should be reversed; and
 - (iii) The deeds executed in 2012 should also be set aside.
- 9 There have also been various procedural issues between the plaintiffs on the one hand and principally the first defendant on the other in respect of this dispute, which it is not necessary for me to recite. What is relevant is that by an act of court of 2nd July, 2015, I ordered the third and seventh defendants to provide a draft amended answer to all other parties for approval by 31st July, 2015, and that if the amendments sought were not agreed I required an application to be made by the third and seventh defendants to amend their answer.
- 10 What led to this order was that, until May 2015, the first, second, third, fourth and seventh defendants were all represented by Messrs Carey Olsen and a composite answer had been filed by Carey Olsen on behalf of the first to fourth defendants, followed later by an answer on behalf of the seventh defendant. The third and seventh defendants subsequently

chose to be separately represented and wished to amend their answers, rather than rely on the answers filed previously.

- 11 It is as part of this application that the third defendant now seeks permission to issue a third party claim against the first defendant.

The Law

- 12 There was no real dispute on the applicable legal principles as to when a third party claim may be brought, which were considered in *Cummins v Howland (Furniture) Limited* [2014] JRC 242. The power to convene an existing defendant as a third party is found in Rule 6/10(8) of the Royal Court Rules 2004, as amended (“the Rules”). It was also not in dispute that, as long as such a third party claim was properly pleaded, the first defendant could be joined as a third party by the third defendant on one or more of the grounds set out in Rule 6/10(8) of the Rules. The relief sought by the third defendant against the first defendant is for an indemnity and therefore falls within Rule 6/10(8)(a), as long as the claim is one that can properly be brought.
- 13 In *Cummings v Howland* (paragraph 13) I accepted that ordinarily when a *prima facie* case was shown on a pleading then leave to issue a third party claim should be granted. This followed on from consideration of *Blenheim Trust v Morgan* 1999/51, and extracts from the 1999 Edition of the White Book set out at paragraphs 10 and 11 of *Cummins v Howland*, which I adopt for the purposes of this decision.
- 14 In relation to analysing a pleading, I was also reminded by Advocate Redgrave of the words of Southwell J.A. in *Esteem Settlement* 2001/50 which were recently followed at paragraph 30 of *MacFirbhisigh v CI Trustees and Executors Limited* [2014] JRC 033 and which are as follows:–

“Finally, I was referred to an unreported decision of the Court of Appeal dated 27th July, 2000, in the *Re Esteem Settlement* (2000/150) litigation. In relation to amendment and striking out of pleadings Southwell JA stated at page 6 of the judgement as follows:–

“(3) From now on it has to be appreciated by all who are involved in civil proceedings in the Royal Court that their objective has to be to progress those proceedings to trial in accordance with an agreed or ordered timetable, at a reasonable level of cost, and within a reasonably short time.

(4) Consistent with that objective, the correct function of pleadings needs to be kept in mind. The function of pleadings is to set out the material facts on which the parties will rely at trial to establish their causes of action or defences, and which the parties will seek at trial to establish by relevant and admissible evidence. It is no part of the function of advocates to seek to persuade the Royal

Court to strike out the whole or part of a pleading which contains plainly arguable causes of action, or to edit a pleading whether so as to improve it or to make it less effective. It is no part of the function of the Royal Court to lend itself to any such endeavours on the part of advocates. Formal pleading is an art, not a science, and to seek to achieve some abstract level of perfection in pleadings is not consistent with the objective I have stated, or of value in terms of time, effort or expense.””

15 I applied the above principles in reaching my decision.

The Proposed Amendments

16 In summary two bases were advanced by the third defendant to issue a third party claim seeking an indemnity against the first defendant.

17 The first claim arose out of clause 6 of the 2010 Deed which provides as follows:–

“(6) The Settlor hereby indemnifies the Grand Trustee for good and valuable consideration the receipt and sufficiency of which are hereby acknowledged against any and all losses liabilities obligations costs expenses damages or judgments of any kind or nature (including reasonable lawyers' accountants' and experts' fees disbursements of counsel and other costs and expenses incurred pursuing indemnification hereunder) arising out of or resulting from or in connection with any past present or future omissions or directions or instructions or purported directions or purported instructions or decisions or requests of the Settlor or Beneficiaries in whatever capacity regarding the management and administration of the Grand Trust and its investments unless the same shall have been caused by the fraud wilful default or gross negligence of the New Trustee.”

I refer to this as the 2010 third party claim.

18 The second claim relates to the 2011 Revocation and I refer to it as the 2011 third party claim. The relevant terms of the 2011 Revocation are as follows:–

(i) In the 2011 Revocation the Fortunate Trust is described as the “*Settlement*”.

(ii) Recitals (C) and (E) of the 2011 Revocation state:–

“(C) By article 2A of the Settlement the Grantor may by a written instrument delivered to the Trustees withdraw any or all property from the trust fund or revoke any trust created under the Settlement (the “Power of Revocation”).

(E) The whole of the property of the trust fund is hereinafter referred to as

the “Revoked Assets”.”

(iii) Clauses 2 and 3 of the 2011 Revocation state:—

“2. In exercise of the Power of Revocation conferred upon her by article 2A of the Settlement and of every other power enabling her to do so the Grantor with effect from the date hereof HEREBY WITHDRAWS all of the Revoked Assets, REVOKES the Settlement in respect of the Revoked Assets and HEREBY REVESTS in herself title to all of the Revoked Assets freed and discharged from all trusts powers and provisions in the Settlement and upon such withdrawal, revocation and revesting the Revoked Assets shall be held by the Trustees upon trust absolutely for and to the order of the Grantor (the “Revocation”).

3. In pursuance of the Revocation and revesting the Grantor HEREBY ASSUMES liability for any and all liability arising directly or indirectly in respect of the Settlement arising from or in connection with the Revoked Assets and for herself and her heirs assigns personal representatives and estate hereby releases and covenants to indemnify keep indemnified and hold harmless the Trustees (other than herself) their respective successors and assigns and their respective officers and employees and their respective heirs assigns personal representatives and estates to the value of the Revoked Assets (as at the date hereof) against all actions claims costs demands loss or damage of any kind whatsoever and wheresoever arising directly or indirectly out of or in connection with the administration of the Settlement the Trust Fund and the Trustees' trusteeship thereof of the Revoked Assets or this Instrument whether the same shall be enforceable in law or not and in particular (but without prejudice to the generality of the foregoing) all taxes duties and fiscal impositions (including all interest costs charges and expenses or other sums incurred in connection therewith) by the revenue authorities of any government in any part of the world EXCEPTING ONLY such actions claims costs demands loss or damage arising from any fraud, wilful default, gross negligence or wilful misconduct on the part of the Trustees (other than by herself).”

(iv) Clause 4 is as follows:—

“4. In consideration for the indemnity provided by the Grantor the Trustees HEREBY ACKNOWLEDGE the said Revocation and declare and confirm that they are holding the Revoked Assets absolutely for and to the order of the Grantor freed and discharged from the trusts and provisions of the Settlement.”

19 The second basis for issue of a third party claim by the third defendant against the first defendant is therefore clause 3 of the 2011 Revocation.

20 I consider it appropriate to deal with the two different third party claims separately.

The 2010 third party claim

- 21 In respect of the 2010 third party claim, Advocate Kelleher's fundamental objection to the pleading was that the claim for an indemnity was not clear on the face of the relevant part of the pleading. His primary submission in relation to this claim was that he did not know what case the first defendant had to meet, if the third party claim in respect of the 2010 Deed was approved as drafted.
- 22 This was because the terms of clause 6 covered all losses, liabilities, obligations, costs and expenses "arising out of or resulting from or in connection with any past present or future omissions or directions or instructions or purported directions or purported instructions or decisions or requests of the Settlor or Beneficiaries in whatever capacity regarding the management and administration of the Grand Trust and its investments ..."
- 23 He contended that the 2010 third party claim did not set out which requests or directions the third defendant was relying on to invoke clause 6. It was necessary for the first defendant to know which requests or directions were complained of, so that a proper answer could be filed, and so that the first defendant's witness statement could set out the first defendant's evidence in relation to any such assertion. This was a trust that had run for a number years and where, on the basis of the allegations set out in the order of justice, consideration of some form of appointment out of the Grand Trust had taken place from 2002. The draft third party claim, unless properly particularised, required the first defendant to review her conduct over a number of years and to try and work out which request or direction the third defendant was relying on.
- 24 To evaluate this submission, it is necessary to set out the terms of the proposed pleaded case in the draft 2010 third party claim which are as follows:—

"109. In the circumstances particularised in the Amended Answer of the Third and Seventh Defendants above (the contents of which are incorporated into this Third Party Claim), it is averred that it was the practice of BNP Jersey not to make significant decisions or take significant actions regarding the management and administration of the Grand Trust and its investments without prior consultation with Mme Crociani in her capacity as settlor of the Grand Trust alternatively in her capacity as an object of the power contained at Clause 11 alternatively in her capacity as one of the Former Trustees and that BNP Jersey did not do so.

110. it is averred that each of the distributions particularised at paragraphs 35.1 to 35.3 above were decisions regarding the management and administration of the Grand Trust and its investments and were made as a result of requests made by Cristiana and/or Camilla (each of whom are included in the definition

of “Beneficiaries” referred to at the said clause (6) of the 2010 Appointment pursuant to recital (C) of the 2010 Appointment). If which is denied the distributions particularised at paragraphs 35.1 to 35.3 above were not made as a result of requests made by Cristiana and/or Camilla then it is averred that they were made as a result of requests made by Mme Crociani in her capacity as settlor of the Grand Trust alternatively as one of the Former Trustees. In any event it is averred that each of the distributions particularised at paragraphs 35.1 to 35.3 above were effected by a decision of Mme Crociani as one of the Former Trustees.

111. Further, and in the circumstances pleaded at paragraph 109 above it is averred that each of the actions and decisions taken by the Former Trustees which the Plaintiffs allege give rise to liability against BNP Jersey as one of the Former Trustees were actions and decisions regarding the management and administration of the Grand Trust and its investments and were taken pursuant to requests made by Mme Crociani in her capacity as settlor of the Grand Trust alternatively as an object of the power contained at Clause 11 alternatively as one of the Former Trustees and in any event were effected by a decision of Mme Crociani as one of the Former Trustees.

112. Without prejudice to the generality of the averment contained at paragraph 111 above, it is in particular averred that in the circumstances pleaded in the Amended Answer and in particular at paragraph 54 above that the 2010 Appointment arose out of a request of Mme Crociani in her capacity as settlor of the Grand Trust alternatively as an object of the power contained at Clause 11 alternatively as one of the Former Trustees and in any event was effected by a decision of Mme Crociani as one of the Former Trustees.

113. In the circumstances particularised at paragraphs 111 and 112 above it is averred that BNP Jersey's legal costs, expenses and disbursements of and occasioned by these proceedings arise as a result of actions and decisions regarding the management and administration of the Grand Trust and its investments which were taken pursuant to requests from one or more of Cristiana, Camilla and Mme Crociani and in any event which were effected by decisions of Mme Crociani in her capacity as one of the Former Trustees.

114. In light of the foregoing BNP Jersey is entitled pursuant to clause (6) of the 2010 Appointment to be indemnified and claims to be indemnified by Mme Crociani in respect of any liability which BNP Jersey is found to owe to the Plaintiffs or any one or more of them and in respect of the legal costs, expenses and disbursements which BNP Jersey has incurred and will incur in relation to these proceedings.”

- 25 Advocate Kelleher's main complaint was in respect of paragraph 111, which referred to each of the actions and decisions taken by the trustees. He wanted to know what those actions and decisions were. He also emphasised that the fact that paragraph 112 referred to “a request” of the first defendant and he wanted to know what that request was and when

it was made. Advocate Kelleher also criticised paragraph 110 for pleading a third party case, which was inconsistent with the primary defence advanced by the third defendant in its answer.

- 26 Advocate Redgrave contended in response that his pleading was clear. At paragraph 111, what was averred was that each of the decisions taken, which the plaintiffs alleged gave rise to liability on the part of the third defendant, fell within the terms of clause 6. The decisions challenged in the order of justice, even if the first of them had been under consideration for a number of years, were the appointment made by the 2010 Deed and the appointments in 2012.
- 27 Paragraph 109, which was referred to in paragraph 111, set out the practice of the third defendant of prior consultation with the first defendant and was also clear. The first defendant, in any pleading in response and in her evidence, was able to say whether or not the statements in paragraph 109 were the practice of the second and third defendants, as alleged, and whether or not the three decisions complained of by the plaintiffs in the order of justice were made at her request or with her direction or on her instructions.
- 28 The view I reached was that the pleading drafted by Advocate Redgrave in respect of the 2010 third party claim was sufficiently clear and did not require each request or decision to be set out. While the present litigation is of high value, there are only three individual acts of the plaintiffs that are complained about, apart from receipt of distributions. There has also been an extensive discovery exercise in this case and witness statements have been ordered. The first defendant in my judgment can plead to the case without any request having to be specified above and beyond what is already set out in the third party claim as drafted, and will be able to address in her witness statement what her practice was in relation to the decisions challenged by the plaintiffs and how far she accepts or disputes paragraphs 109 and 111. To the extent that any witness statement of the third defendant on this issue refers to requests or decisions that the first defendant has not dealt with in her witness statement, any such request or decision can either be explored in cross-examination or possibly by way of a supplemental witness statement. I do not consider however that the present pleading comes anywhere near not showing a *prima facie* case to justify refusing leave.
- 29 The fact that the pleading at paragraph 110 in respect of distributions challenged by the plaintiff is put in the alternative also does not in my view matter. There is nothing in principle which prevents a party putting an alternative case which only arises if a primary case fails. The fact that paragraph 110 is an alternative case only does not justify refusal of this part of the third party notice. All the third defendant is saying is that, if any requests for distributions are found by the Royal Court at trial not to have been made by the first plaintiff, then any such requests were made by the first defendant and, accordingly, the indemnity in the 2010 Deed is then invoked. There is nothing illogical or flawed in such an approach to justify refusing leave.

- 30 In respect of paragraph 110 it is right to record that the third defendant is not seeking an indemnity, if requests for distributions the subject matter of the present dispute were found to be made by the first plaintiff. It was also accepted by Advocate Redgrave that, at present, there is no issue on the pleadings challenging any distributions to the fifth defendant so an indemnity is not sought in respect of such distributions.
- 31 In the course of argument, I suggested that in paragraph 113 the circumstances referred to should extend to paragraph 110 and that in paragraph 114 the reference to "*the foregoing*" should be a reference to paragraphs 109 to 113 as a whole. I record these observations, conscious of the passage in *Re Esteem* which I have referred to above, that it is no part of the function of advocates to seek to persuade the Royal Court to strike out the whole or part of a pleading which contains plainly arguable causes of action or to edit a pleading to improve or make it less effective and the Royal Court should not lend itself to any such endeavours on the part of advocates. While Advocate Redgrave accepted these minor changes in the course of argument, it would be wrong to go any further.
- 32 Ultimately what Advocate Kelleher was attempting to do was to require the third defendant to particularise a claim where it was not necessary to do so. In my judgment this part of the third party claim is clear and does not require to be particularised further. I therefore gave leave in respect of this part of the third party notice.

The 2011 third party claim

- 33 In relation to the second third party claim advanced, this was set out at paragraphs 115 onwards of the draft pleading and arose out of clause 3 of the 2011 Revocation which I have set out above.
- 34 Advocate Redgrave emphasised that he relied upon the entirety of clause 3 as containing the terms of the indemnity, including the first three lines in which the first defendant assumed "liability for any and all liability arising directly or indirectly in respect of the Settlement arising from or in connection with the Revoked Assets".
- 35 His argument was that the claims brought by the plaintiffs seeking to hold the third defendant liable for its actions were in relation to the "*Revoked Assets*". This was because, while these assets were assets that had been in the Grand Trust, because they were appointed to the Fortunate Trust, although the appointment was later revoked, clause 3 of the 2011 Revocation covered any liability in respect of these assets and was an assumption of such liability by the first defendant whenever arising. Advocate Redgrave further contended that the word "*costs*" entitled the third defendant to be indemnified in respect of its legal costs of defending the proceedings whether or not the third defendant was successful or not in its defence. He also contended that the relief sought by the plaintiffs necessarily involved impugning the actions of the trustees of the Fortunate Trust including the third defendant.

- 36 Advocate Kelleher objected to this claim on the ground that there was no claim for breach of trust brought against any of the first, second and third defendants as trustees of the Fortunate Trust. The 2011 Revocation was no more than a step in the story. What was complained about was the appointment of assets out of the Grand Trust, which was a claim for breach of trust against the trustees of the Grand Trust and events subsequent to the revocation, which were also complaints made against the trustees of the Grand Trust. There is no claim against any defendant as trustee of the Fortunate Trust and so clause 3 cannot be invoked.
- 37 In respect of this argument I agreed with Advocate Kelleher. The first three lines upon which Advocate Redgrave relied relate to any liability arising *“directly or indirectly in respect of the settlement”* i.e. the Fortunate Trust. There is no claim for breach of trust in respect of the Fortunate Trust or for the period of time assets were held by the trustees of the Fortunate Trust. There is no claim against the first defendant or the third defendant for executing the 2011 Revocation. The relief sought by the plaintiffs relates to matters that either pre-date the appointment to the Fortunate Trust or post-date its revocation. I also do not accept the submission by Advocate Redgrave that the relief sought necessarily involves impugning the actions of the Fortunate Trustee. As I have indicated in the preceding paragraph, the actions of the trustees of the Fortunate Trust are no more than a step in the story. The claim for breach of trust is only against the third defendant in its capacity as former trustee of the Grand Trust.
- 38 I do not accept that the words *“arising from or in connection with the Revoked Assets”* can give rise to an indemnity or an assumption of liability by the first defendant when those assets were not held within the Fortunate Trust. That would mean the third defendant could be held liable for what had happened to assets which had been part of the Fortunate Trust in respect of liabilities relating to those assets when they were not part of the Fortunate Trust, i.e. earlier or later. I do not consider that it is possible to construe the 2011 Revocation in that way. Any liability has to arise directly in respect of the Settlement i.e. it has to arise in respect of the Fortunate Trust. To hold otherwise would ignore the basic principle that the duties and responsibilities of trustees of Trust A are separate and distinct from the duties and responsibilities owed by the trustees of Trust B even if those trustees are the same, and at different times the trustees held the same assets for the same beneficiaries. Accordingly, I refused to allow the third party claim in respect of the 2011 Revocation because I was not satisfied there was a *prima facie* case by reference to the terms of clause 3 of the 2011 Revocation itself.
- 39 For the same reason I do not accept that clause 3 provides the third defendant with an indemnity in respect of its costs for defending claims brought against it as trustee of the Grand Trust. I do not consider there is a *prima facie* case for clause 3 to be construed as indemnifying the third defendant for its legal costs in respect of its actions as trustee of the Grand Trust. The indemnity in respect of costs has to arise direct or indirectly out of or in connection with the administration of the “Settlement, the Trust Fund and the Trustees trusteeship thereof”. The costs incurred in defending the proceedings brought by the

plaintiffs arise out of the third defendant's trusteeship of the Grand Trust not the Fortunate Trust. The appointment of assets by the 2010 Deed to the Fortunate Trust cannot be said to arise out of actions by the trustees of the Fortunate Trust even indirectly. Likewise the 2012 appointments post-dated the termination of the Fortunate Trust. Again therefore these cannot be said to arise directly or indirectly out of the actions of the trustees of the Fortunate Trust. They are separate steps taken by the third defendant as former trustee of the Grand Trust.

- 40 Finally, I should record the fact that if circumstances were to change and that the plaintiffs did seek to pursue the third defendant for breach of trust in respect of the Fortunate Trust then this decision does not precluding the third defendant at that stage from seeking to invoke clause 3 should it wish to do so. The merits of any such application would of course be determined in light of prevailing circumstances at the time any such application was made.
- 41 Advocate Kelleher also indicated that there was no cause for the 2011 Revocation. While I found in his favour in respect of the primary argument before me, I did not accept this alternative argument. I have set out clause 4 of the 2011 deed above. The effect of clause 4 is that the trustees including the third defendant accepted the 2011 Revocation. In other words they were not challenging it and were accepting that it had legal effect. In my judgment that is sufficiently arguable cause in return for the promise of an indemnity from the first defendant. I did not therefore accept this argument as a basis to refuse leave in respect of the 2011 Revocation. However, such leave was refused for the reasons I have already given.

Conclusion

- 42 In conclusion, for the reasons set out in this judgment, I granted permission for the 2010 third party claim to be brought but refused permission for the 2011 third party claim. Consequential directions were given for service and for the filing of an answer and reply. The question of costs was left over until delivery of these written reasons and the time for any appeal was also suspended.