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Voisin Executors Ltd (as Executor of the moveable estate of John William Neal (Deceased)) v John Daniel Kelleher (former Curator of John William Neal (Deceased)

Jurisdiction:	Jersey
Judge:	Matthew John Thompson, Master Thompson
Judgment Date:	29 February 2016
Neutral Citation:	[2016] JRC 51
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Text

[2016] JRC 51

ROYAL COURT

(Samedi)

Before:

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

Between
Voisin Executors Limited (as Executor of the moveable estate of John William Neal (Deceased))
Plaintiff
and
John Daniel Kelleher (former Curator of John William Neal (Deceased)

Defendant

Advocate S. J. Young **for the Plaintiff.**

Advocate N. L. M. Langlois **for the Defendant.**

Authorities

Neal -v- Kelleher [2014] JRC 233.

Bagus Investments Limited v Kastening [2010] JLR 355.

Daisy Hill Real Estates Limited v Rent Control Tribunal [1995] JLR 176.

Crociani v Crociani [2015] JRC 177.

Campbell v Campbell [2015] JRC 249.

Representation of Anthony Investments (Esplanade) Limited and others [2015] JRC 056A.

Freeman v Ansbacher [2009] JLR 1.

Goode v Martin [2001] EWCA Civ 1899.

Vezier v Bellego [1994] JLR 75.

Human Rights (Jersey) Law, 2000.

Royal Court Rules 2004.

MacFirbhisigh (Ching) v CI Trustees and Executors [2015] JRC 014.

Curatorship — reasons in relation to application by the plaintiff to re-amend order of justice and application by the defendant to re-amend answer.

CONTENTS OF THE JUDGMENT

THE MASTER:

Introduction

1 This judgment represents my detailed reasons in respect of an application by the plaintiff to re-amend its order of justice and an application by the defendant to re-amend its answer. How these applications developed is complex and resulted in hearings on 14 th and 15 th October, 25 th November, 2015, and 27 th January, 2016. This judgment therefore represents my reasons in respect of the orders I made at the conclusion of each of those hearings.

Background

2 The background to the present proceedings was set out in my earlier judgment reported at *Neal -v- Kelleher* [2014] JRC 233 at paragraphs 3 to 16 which I adopt for the purposes of this judgment as follows:-

> ***"The proceedings arise out of the appointment of the defendant as curator of the plaintiff's late husband John Neal ("Mr Neal").*** The defendant was appointed curator because Mr Neal suffered a severe stroke in February 1999. After his stroke Mr Neal was incapacitated and needed extensive care for the rest of his life, until he passed away earlier this year.
>
> ***Prior to his stroke, Mr Neal was a businessman who had accumulated substantial wealth, principally through commercial property.*** The commercial property business was operated through a trust and company structure referred to in the draft amended order of justice as the J.C.N. Group. The first trust was established by a deed dated 5th April, 1979, which owned the

share capital of a Jersey company called Evreux Holdings Limited ("EHL"). EHL in turn owned 100% of J.C.N. Investments (Jersey) Limited ("JCN"). JCN had two wholly owned subsidiaries Anthony Investments (Esplanade) Limited ("AIEL") and J.C.N. Properties Limited ("JCNP"). EHL also owned a trading company known as J.C.N. Trading (Jersey) Limited ("JCNT"). I refer to these entities as the Companies.

At the date of the appointment of the defendant as curator, EHL was owned by the John Neal Family Trust which had been settled in 1997 (the 'Trust'). Royal Bank of Scotland Trust Company (Jersey) Limited ("RBST") was the trustee. Mr Neal was a director of EHL, JCN and AIEL.

The most significant property owned by the JCN Group through AIEL was a block of commercial buildings located at 44 The Esplanade/17–19 Seaton Place, St Helier, Jersey. At this point, I record that no party had any objection to me deciding in relation this matter, notwithstanding I was an equity partner in the Ogier Group which ultimately leased 44 The Esplanade once it was developed.

The Trust also owned other commercial property in Jersey at the time the defendant was appointed.

The plaintiff and Mr Neal had four sons, Mark, Simon, James and Stephen. Following Mr Neal's stroke, Simon played a more active role in relation to the Trust and Companies. On 31st January, 2000, the defendant, the plaintiff and Simon were appointed as new trustees in place of RBSI. Simon also became Managing Director of the JCN Group in 1999.

As at the date of the defendant's appointment, by reference to an inventory produced by the defendant in accordance with his obligations, Mr Neal's property was said to comprise the following as set out at paragraph 25 of the order of justice:-

> ***"Immovable Property***
>
> ***Chateau Vermont, Jersey (jointly owned with spouse) 10,000,000.00***
>
> ***La Corona, Spain (jointly owned with spouse) 2,000,000.00***
>
> ***Kilmorie, Torquay 50,000.00***
>
> ***Movable Property***
>
> ***Midland Bank Current Account with spouse 40,000.00***
>
> ***Beneficiary of the Trust***
>
> ***Contents of Chateau Vermont (Insured Value) 700,000.00***

Contents of La Corona (Insured Value) 150,000.00

Jewellery 50,000.00

Liabilities

Mortgage on Chateau Vermont 2,250,000.00

Mortgage no security with RBS 275,000.00

Mortgage no security with RBS 125,000.00"

Mr Neal was also a beneficiary of the Trust. It was accepted by the defendant in 2000 that the balance on the Midland Bank current account was a debit balance not a credit balance.

When the defendant resigned as curator, the assets of the Curatorship were La Corona, furniture and jewellery. Chateau Vermont had been sold in 2005 for £3.1 million. According to the defendant's answer, Mr Neal received £436,996 being half the share of the proceeds of sale of Chateau Vermont after deduction of the mortgage and estate agent and professional fees. In addition, as part of the basis upon which the Royal Court approved a sale of Chateau Vermont, JCN agreed within thirty-six months of the sale to transfer cash and/or Spanish property to the plaintiff and Mr Neal (acting through the defendant) to an aggregate value of £900,000 referred to as the Compensation Payment. This was to reflect that Chateau Vermont was being sold at a lower price than its estimated value. The Compensation Payment has never been paid, and JCN is now in liquidation.

In relation to the JCN Group, according to the plaintiff, the value of the commercial property portfolio held within the JCN Group in November 1998 was in excess of £17 million with a combined estimated annual rental value of over £1.8 million. In January 1999, according to Simon Neal, the indebtedness of the JCN Group was around £8.5 million. For the purposes of this application I am assuming, in the plaintiff's favour, that assets held by the JCN Group within the Trust were of this magnitude. It was not disputed by the defendant in its answer that the JCN Group held a significant asset in the form of its interest in 44 The Esplanade.

The plaintiff also alleges that on 26th November, 1980, Mr Neal entered into a series of agreements with EHL pursuant to which he transferred ownership of various companies, which became part of the JCN Group, in return for loans totalling £2,357,070 to be paid over a twenty year period in equal instalments. In this judgment I shall refer to these loans as the EHL loans.

In 1984, as EHL had not paid any of the instalments due under the EHL loans, the amounts due were instead agreed to remain as outstanding loans due from EHL to Mr Neal which loans were recorded in the accounts

of the JCN Group as having no set repayment date and therefore were repayable on demand.

In relation to AIEL, the plaintiff asserts that, by reference to accounts of AIEL for the years ended 31st December, 1997, and 1998, a further loan was shown as being due to Mr Neal. The accounts for the year ended 31st December, 1998, record this loan as being in the sum of £909,904.

In relation to the Trust, the defendant, the plaintiff and Simon all retired as trustees on 16th July, 2006.

In or around January 2007 the Dandara Group offered to purchase 44 The Esplanade from AIEL for £11 million on purchase and a further £3 million on completion of the build assuming planning permission for another floor was granted. This offer was not accepted but is said to have been known to the defendant."

3 In that judgment I also considered the applicable legal principles on an application to amend at paragraphs 31 to 39. For the purposes of the application before me the relevant paragraphs are 33 and 36 to 38 which provide as follows:-

"33. Insofar as a party seeks to introduce a new cause of action which is arguably time barred, the party seeking to introduce such a cause of action has to establish that a defendant has no reasonable prospect of success on the limitation argument. If the party seeking to introduce the amendment cannot establish that a defendant has no reasonable prospect of success then leave to amend should be refused (see *Bagus Investments Limited v Kastening* [2010] JLR 355).

36. In relation to applications to amend, I considered the relevant legal principles in *MacFirbhisigh & Anor v C.I. Trustees and Executors Limited* [2014] JRC 033 ***at paragraphs 28 to 29.***

37. At paragraphs 28 to 29 I considered the principles as to whether a new cause of action arose out of the same facts or substantially the same facts as an existing cause of action by reference to the judgment of Page, Commissioner in *Alhamrani v Alhamrani* [2007] JLR 44 ***(see paragraphs 28 to 29 of*** *MacFirbhisigh*).

38. Advocate Langlois also referred me to the judgment of the Royal Court in *Freeman v Ansbacher Trustees (Jersey) Limited* [2009] JLR 001. ***Paragraph 67 of the judgment provides as follows:-***

"In this connection Mr Journeaux refers me again to Paragon where the court held that an allegation of intentional wrongdoing did not arise out of the same facts or substantially the same facts as the claims in respect of unintentional wrongdoing such as negligence. He also referred me to the observations of Judge

Mackie QC sitting in the English High Court in the case of *Berezovsky v Abramovich* [2008] EWHC 1138 (Comm) ***where he said the following at paragraph 15:-***

"Miss Dohmann submits that even if the relevant primary limitation period has expired the claims for breach of trust and breach of fiduciary duty can still be added because they arise out of the 'same facts or substantially the same facts as a claim in respect of which [the Claimant] has already claimed a remedy in the proceedings'. She draws attention to several cases containing helpful observations from the Court of Appeal but I say at once that these seem to me to be 'trumped' by the recent guidance set out in *Society of Lloyds v Henderson* [2007] EWCA Civ 930 ***and*** *Giles v Rhind* [2008] EWCA Civ 118. ***These cases take the matter on from early authorities notably*** *Goode v Martin* [2002] 1 WLR 1828 ***and their effect was helpfully summarised in two paragraphs of Mr Popplewell's skeleton argument as follows:***

(a) A new claim does not arise 'out of the same facts' as those on which the old claim was based 'if, in order to prove it, new facts have to be added.' The basic test therefore is 'whether the plea introduces new facts.' It is not sufficient merely to demonstrate that some or a substantial part of the facts relied on to promote the new claim were relied on to promote the old claim. Moreover it is not sufficient that certain facts are indirectly relevant, for ***example by way of background, to the old claim.*** Rather they have to be facts 'in respect of which' a remedy was originally claimed.

(b) The additional possibility that the new facts are substantially the same as those already relied on is limited to

'….. something going no further than minor differences likely to be the subject of enquiry but not involving any major investigation and/or differences merely collateral to the main substance of the new claim, proof of which would not necessarily be essential to its success.' (taken from Colman J in *P&O Nedlloyd v Arab Metals* [2005] 1 WLR 3733 ***at 3745)."***

4 At the conclusion of my judgment I held at paragraph 91 as follows:-

"91. In summary my decision for the reasons set out in this judgment is as follows:-

None of the causes of action raised in the original order of justice are prescribed.

The relevant period of limitation is three years from the date the defendant ceased to be a curator because up to that point in time Mr Neal was under an empêchement de droit.

The doctrine of empêchement de fait does not apply.

The allegation in the draft amended order of justice that the defendant acted in breach of fiduciary duty is a new allegation which is not

supported by any material facts and is struck out.

The allegation that the defendant failed to exercise his powers as curator to protect the interests of Mr Neal in relation to the Trusts is limited to the offer made by Dandara in 2007.

The complaint that the defendant was negligent in failing to call in certain loans is a matter for trial.

The complaint that the defendant acted in breach of duty by failing to sell Chateau Vermont or La Corona in 2000 is a matter for trial.

The claim that inventories produced by the defendant were defective is part of the factual matrix relevant to the plaintiff's complaint against the defendant and is a matter for trial.

The allegation in the order of justice challenging the sale of Chateau Vermont in 2005 is now abandoned. If it had been maintained, the allegation is not a collateral attack on a previous decision of the Royal Court.

The allegation that the defendant failed to exercise his powers to protect the value of trust assets is too vague an allegation for the defendant to respond to without significant new material facts being pleaded in support of a cause of action. It is now too late to do so with the result that any such claim is time barred."

5 It is also right to refer to paragraph 84 of my decision as this paragraph became relevant to issues that emerged in the course of argument. Paragraph 84 states as follows:-

"84. In relation to the allegation that the defendant failed to take action in relation to the Trust or Companies in the JCN Group, the only particularised complaint made in the original order of justice which might lead to a recoverable loss relates to a failure to take steps to procure the sale of 44 The Esplanade to Dandara (see paragraph 37 of the order of justice). I consider this is an arguable claim. However, this assertion is the only assertion in the order of justice advanced by the plaintiff where it is said that the defendant failed to act in relation to the Trust or the Companies and caused a potential loss. The other allegations of breach of duty made in the order of justice are much more general in nature and criticise the defendant for failing to appoint an independent director or control Simon's actions in relation to the JCN Group. However the pleading does not define what steps or actions may have been prevented or what loss might have been avoided if such steps or actions had not occurred. In my judgment to add such facts now falls foul of the test in *Freeman* ***as it requires too many new matters to be raised in order to formulate a claim for the defendant to answer. This is different from defining a date by which a property should have been sold and for how much. To allow the plaintiff to add such new facts now would permit her to***

review the entire period of the trusteeship and potentially complain about a whole series of events between 1999 and 2010. For much of this time as with the claim for breach of fiduciary duty the plaintiff was co-trustee and therefore had the wherewithal to formulate a claim. It is now too late to do so and so any such claims are time barred as any facts that might be relied on occurred more than three years ago. The only relevance of a failure to act in respect of the Trust or Companies is the defendant's failure to recover the loans or payment for the mortgage on Chateau Vermont. The position of the Trust or the Companies may be part of the factual matrix relevant to these parts of the claim. This does not however justify new and wholly different claims."

Subsequent procedural history up to 14th/15th October, 2015

6 The earlier judgment was handed down on 27 th November, 2014. The plaintiff was therefore ordered on 27 th November to send a final version of the proposed re-amended order of justice to the defendant for agreement by 12 th December, 2014, with liberty to apply in the event that the final version of the re-amended order of justice could not be agreed. Directions were also given for the filing of an amended answer and a reply.

7 The obligation to send the final version of the proposed re-amended order of justice was extended to 22 nd December, 2014, and then to 16 th January, 2015, by acts of court dated 8 th and 18 th December, 2014. Corresponding extensions of time were also granted in relation to the filing of an amended answer and a reply.

8 By a consent order dated 9 th March, 2015, further directions were given relating to amendments to the order of justice which were to be agreed by a specified date. In the event that amendments could not be agreed the parties were directed to attend before me by Friday, 20 th March, 2015, to fix a date for summons to resolve any issues in relation to the amendments the plaintiff wished to bring.

9 Ultimately, the areas of dispute were resolved by consent and an amended order of justice was filed on 14 th April, 2015.

10 The breaches of duty pleaded in the amended order of justice were set out in part G of the amended order of justice. Paragraph 119 set out certain breaches of duty relevant to the issues before me in the present application. Given the length of this judgment, I have only set out the pertinent paragraphs as follows:-

"119. In the premises, in order to comply with his obligations pleaded in paragraph 28.2 above, Dr Kelleher ought to have managed the assets of Mr Neal to provide a

regular and secure source of income for the long-term maintenance of Mr Neal and his family. In fact Dr Kelleher failed to do so and acted in breach of duty in that he:

119.1. failed at the date of his appointment as curator or at any time thereafter to carry out any or any sufficient assessment of the needs of Mr Neal, including the costs as pleaded at paragraphs 117 and 118 above. Such assessment should have taken into account the age of Mrs Neal and the fact that Chrystal might or would not be able to look after Mr Neal, that in any event it would be proper to have Mr Neal medically and para-medically assessed at regular intervals to ensure that he was receiving appropriate care and considering the risk of further deterioration of Mr Neal's health and the likely need for private health care either at home or in a nursing home. This assessment should have included an independent assessment (by a health care professional) of his housing needs and the cost or adaptation of his property(ies). Any such analysis should have made clear that extensive modifications of Chateau Vermont and La Corona would be required, if either property was to become the main residence of Mr and Mrs Neal and that there would have been a considerable saving of capital required for the adaptation of those properties and the running and maintenance costs of those properties had Mr and Mrs Neal moved to a smaller property;

119.2. failed timeously or at all to make any or any proper plan as to how to manage, control or invest Mr Neal's assets;

119.3. failed to read, properly or at all, the materials provided to him at Trustee meetings or otherwise as generally pleaded at paragraphs 49., 50., 53., 55., 58., 60., and 68. above and/or to assimilate the information provided therein which materials included the HYRs, the FYRs and other materials which showed that the Loans and the Citibank Facility could have been repaid by the JCN Group, in whole or by way of instalments attracting interest and secured against immoveable property at any time after his appointment and at least up to about the time of the circumstances reported in FYR 6/2004 which recorded that £5.25 million worth of JCN Group property had been sold through Dr Kelleher's firm in the prior year;

119.4. failed to heed during the course of his appointment that investments being made by the Trustees were becoming more speculative and that the portfolio of commercial property which comprised the JCN Property Portfolio was being sold off and the proceeds of sale were being used to invest in speculative investments which did not provide a regular source of income, as reported to Dr Kelleher during the Trustee meetings at which he was supposed to review the HYR's and FYRs and to act on such information to establish for Mr Neal an Independent Fund as hereafter pleaded;

119.5. failed to establish an Independent Fund for Mr Neal as hereafter pleaded notwithstanding the events pleaded at paragraphs 62., 63., and 70. above and Simon and Mark Neal continuing to manage and deal with the assets belonging to the Companies. Such behaviour as pleaded ought to have put Dr Kelleher on high alert as to Simon Neal's bona fides, honesty and ability to manage the Trusts and/or the JCN Group. Dr Kelleher knew that neither Simon nor Mark were professional asset

managers. Dr Kelleher further knew or ought to have known that no market research or due diligence had been completed prior to embarking on any of the high-risk investment strategies adopted by the JCN Group which facts ought to have caused Dr Kelleher to establish an Independent Fund as aforesaid;

119.6. failed in time or at all to take advice from a suitably qualified professional in relation to the management control and investment of Mr Neal's assets which advice would have recommended the carrying out of a proper due diligence exercise in relation to the Companies and Trusts in circumstances where Mr Neal was the Settlor of those Trusts and the creator of the wealth therein and the sale of at least Chateau Vermont, La Corona and the repayment of the Loans and the investing of those monies in a fund independent of the JCN Group, together with adequate security from the JCN Group to ensure repayment of the Citibank Facility;

119.12. failed to create an independent Investment fund for Mr Neal (and Mrs Neal) which, properly and prudently invested, would have provided or substantially provided a secure and sufficient income for the care of Mr Neal and his family for the rest of their lives independent of and not reliant upon the fortunes of the JCN Group;

119.13. allowed Mr Neal's financial fortunes to be completely dependent upon and intermingled with the fortunes of the JCN Group, as apparent from the facts variously pleaded at paragraphs 48. to 68. above;

119.14. failed timeously or at all to prepare or to undertake any or any satisfactory analysis of any of the annual curatorship accounts and failed to take any steps to secure Mr Neal's financial future thereafter;

119.19. failed to procure the obtaining of an independent valuation of 44 Esplanade prior to its development by Simon Neal in order to properly to be able to consider a sale of the Site to Dandara at £11m (with a further £3m in the event of planning permission being granted for a further floor) in knowledge of Mr Neal's parlous financial state and the Curatorship Accounts. In 2011 CBRE provided a retrospective valuation of 44 Esplanade at £11 million. In or about September 2006 Simon Neal stated the value of the Site to be £9 million. It would have been clear to any reasonably competent curator that any redevelopment of 44 Esplanade would utilise any available cash and leave the JCN Group without any rental income for a 5 year period. On any view the JCN Group could not afford to lose the rental income without an alternative source of income, of which it had none, and Dr Kelleher knew that by reason of his own failure to manage control or invest Mr Neal's assets since his appointment Mr Neal was wholly reliant upon that income or distributions from the 1997 Trust which Trust had no assets other than the shares in the Companies;

119.20. failed, notwithstanding the above, to attend the meeting of 29 March 2007 following receipt of the e-mail from James Neal on 28 March 2007 as pleaded at paragraph 97. above in order to make the case with Nautilus that the sale of the Site would be the proper and appropriate action to take, which conduct would lower the potential risk if something went wrong with the development of 44 Esplanade and would provide to the Trustees (and therefore benefit Mr Neal) significant capital and

no risk;

119.21. failed to consider properly or at all an application on behalf of Mr Neal to the Royal Court under Art 51 (3) Trusts (Jersey) Law 1984 to seek the Court's direction as to how the development of 44 Esplanade should be evaluated and in particular failed to seek a direction that Nautilus should obtain a valuation as pleaded at paragraph 119.19 above and that it should revert to the Court before making any decision having regard to the pressing financial needs of Mr Neal;

119.26. failed to consider appropriating the whole of the Trust as Mr Neal's property pursuant to the averment made by Dr Kelleher as pleaded at paragraph 41. above and failing to seek the Court's direction to enable such steps to be taken as necessary to achieve this…

122. Dr Kelleher knew or ought to have known that it was the obligation of the JCN Group to service and to repay the Citibank Facility as pleaded at paragraphs 49., 50. and 53. above. In accordance with his duties pleaded in paragraph 28.2 above Dr Kelleher ought to have ensured that the same was serviced and repaid by the JCN Group. In breach of duty Dr Kelleher:

122.1 failed to ensure that any and all interest payments due with respect to the Citibank Facility were paid by the JCN Group;

122.2. allowed Mr Neal to service the Citibank Facility in the sum of at least £555,019.75 as pleaded at paragraphs 44. and 83. to 86. above; and failed to ensure that the Mortgage or Citibank Facility was repaid by the JCN Group at the time of its redemption or earlier and allowed the same to be settled out of the proceeds of sale of Chateau Vermont;

122.3 failed to ensure from the outset of his appointment or at all that the Citibank Facility was secured against the JCN Property Portfolio so that Chateau Vermont would be unencumbered and thereby avoid any need or any pressing need for a forced or rushed sale of Chateau Vermont or that that property was linked in any way with the fortunes or needs of the JCN Group;

122.4 failed to ensure that the Citibank Facility which was secured by way of the Mortgage on Chateau Vermont was redeemed promptly or at all by the JCN Group following the appointment of Dr Kelleher thereby avoiding the necessity of necessitating a sale of Chateau Vermont in 2004/2005 at a time when the property market in Jersey was particularly depressed (particulars of which will be given by way of expert valuation evidence but reliance will be placed on the offer for purchase of £12.5m pleaded at paragraph 19. above, the valuation of the Property in 1998 by Hamptons at £8.5m and the sale price of only £3.1m);

122.5 failed to provide to the Royal Court in the Representation of 17 February 2005, as pleaded at paragraph 76. hereof or the Affidavit in support thereof a full and frank explanation of the reasons for the decline in Mr Neal's wealth or as to how his wealth was being managed or the issue of the Loans and the true liability for the Citibank Facility. Had Dr Kelleher provided such explanation it is highly unlikely that the Royal

Court would have allowed the Mortgage to have been repaid from the proceeds of sale of Chateau Vermont;

122.6 failed to provide to the Royal Court in the Representation of 24 April 2008, as pleaded at paragraph 101. hereof or the Affidavit in support thereof that: the Compensation had not been paid and the updated circumstances in relation thereto; the Trusts had no income and would not be expected to have any income until August 2011; or the fact that there had been an offer to purchase 44 Esplanade for £11 million. It further made no mention of the fact that the mortgage was made available on the basis of a Loan to Value covenant of a maximum of 75%, was interest only, was payable on demand and that Mr Neal did not in fact have any secure source of income and literally all of his and Mrs Neal's liquidity was being utilised in the purchase of the Apartment.

123. For the reasons explained above, it is the Plaintiff's case that Dr Kelleher had repeated and on-going opportunities to set up an Investment Fund on behalf of Mr Neal but failed to do so. Instead, in breach of his duties pleaded in paragraph 28.2 above, he oversaw the almost complete diminution of Mr Neal's assets and sources of reliable income during his office as Mr Neal's Curator.

124. In breach of his statutory and/or implied duties pursuant to the 1969 Law as pleaded at paragraph 28. above Dr Kelleher accordingly failed to act with reasonable care at the outset or at any time throughout his appointment as curator to Mr Neal in properly managing and controlling the affairs of Mr Neal or in conserving and increasing the assets of Mr Neal.

125. In the premises Dr Kelleher failed in all the circumstances to carry out his duties and exercise his powers to manage control and invest the property of Mr Neal with reasonable care and skill."

H CAUSATION AND LOSS

126. By reason of Dr Kelleher's breaches of duty Mr Neal has suffered loss and damage."

11 The amended answer was filed on 8 th May, 2015.

12 Subsequent to the filing of an amended answer no reply was filed and to date no reply has been filed. Instead, correspondence took place where the plaintiff initially indicated it wished to re-amend its order of justice to deal with the effect of the liquidation of the JCN Group of companies. There were also disagreements about whether documents referred to in pleadings should be provided. The correspondence between the parties on both sides was somewhat acrimonious. This is unfortunate in the context of a dispute which appears to be underpinned by a significant breakdown in relations between different members of the Neal Family.

13 Ultimately, a draft re-amended order of justice was provided to the defendant on 21 st August, 2015. While I appreciate this is a complex dispute covering a number of years, over three and a half months elapsed between the provision of the amended answer and the plaintiff providing a re-amended order of justice. Even complex disputes should progress more quickly than this.

14 As the amendments were not agreed I directed that a summons was to be heard in the week commencing 14 th September, 2015. Ultimately, the summons only came before me on 14 th and 15 th October, 2015.

The re-amendments sought by the plaintiffs on 14th/15th October, 2015

15 While further different versions of the proposed re-amended order of justice were produced prior to the hearing in October, for the purposes of this judgment, I have considered the re-amended order of justice provided in the bundle to me for the hearing on 14 th and 15 th October, 2015.

16 The first category of amendments related to the liquidations of the JCN companies. The defendant pleaded the effect of these liquidations at paragraphs 6.1.4 and 6.1.5 in summary, 6.4.4 and 114.6 to 114.10 of the amended answer. The plaintiffs' proposal was that they should re-amend their order of justice to set out their case in relation to distributions received by Mrs Neal out of the liquidation of the JCN Group. These amendments were found at paragraphs 16A to C and 112 and 127A of the draft re-amended order of justice.

17 The second principal amendment related to a new claim that Mr Neal's personal assets included the assets of the 1997 Trusts/JCN Group. The material allegation concerned an assertion that the defendant, in his amended answer, had admitted that the defendant knew that Mr Neal's assets comprised those held in both his personal name and those of the 1997 Trust/JCN Group and no distinction was drawn between the two. Paragraph 8A of the draft re-amended order of justice provided as follows:-

> *" 8A. By his admissions in the Amended Answer, in particular at paragraphs 6.1.2, 11.6, 11.7, 11.8, 45.8, 65.6, 76.6, 114.4, and 121.23.3, Dr Kelleher admits that prior to and following his being appointed curator he knew that Mr Neal's assets comprised those held both in his personal name and those of the 1997Trust/JCN Group and that no distinction was drawn between those assets. Notwithstanding Dr Kelleher's state of mind in this respect, as pleaded by him at paragraph 117 of the Amended Answer, he failed at any time prior to his making those admissions on 8 May 2015 to inform the Plaintiff or anyone that he considered that the entirety of the 1997 Trust/JCN Group assets belonged to or were available to Mr Neal and that Mr Neal could treat them as his own. As pleaded hereafter, Dr Kelleher failed to conserve and enhance those assets*

during his appointment as curator."

18 Paragraph 8A lead to the proposed amendments at paragraphs 113A, 113B and 113C which provided as follows:-

" 113A. In breach of duty, and following the admissions of Dr Kelleher in the Amended Answer, Dr Kelleher failed to conserve and enhance the assets of Mr Neal held by the JCN Group. In particular, Dr Kelleher failed to take control of and/or realise such assets and to deal with such assets as pleaded in paragraph 119 below including by placing such assets or realisations in an Investment Fund having regard to Mr Neal's and his dependents' needs.

113B. As to the taking control of and/or realisation of such assets:

113B.1. Dr Kelleher failed to make any demand of the trustees of the 1997 Trust or the directors of the JCN Group companies to transfer ownership and control of the JCN Group or the assets thereof to Mr Neal either in their entirety or sufficient properly to establish the Independent Fund having regard to Mr Neal's and his dependents' needs; alternatively

113B.2. Dr Kelleher failed to call in the Loans. As admitted by Dr Kelleher in paragraph 45.7.2 of the Amended Answer this would have "triggered a winding up of the Group" resulting in the distribution of the JCN Group's assets in specie or the realisations thereof to the trustees of the 1997 Trust and enabling Dr Kelleher thereafter to demand of the trustees that such assets or realisations be transferred to Dr Kelleher either in their entirety or sufficient properly to establish the Independent Fund having regard to Mr Neal's and his dependents' needs; alternatively

113B.3. failed to make any demand of the trustees of the 1997 Trust to make an appointment out of the 1997 Trust of so much of the JCN Group or the assets thereof to Mr Neal sufficient properly to establish the Independent Fund having regard to the needs of Mr Neal and those of his dependents, and/or sought directions from the Royal Court to such effect to the extent necessary.

113C. It is averred that if Dr Kelleher had taken any of the steps pleaded in paragraph 113B this would have resulted in ownership and control of the assets of Mr Neal held in the name of the JCN Group, or sufficient thereof properly to establish the Independent Fund, being transferred to Dr Kelleher."

19 The relief claimed was found at paragraph 126A as follows:-

"126A.1. If Dr Kelleher had taken any of the steps identified at paragraph 113A-B he would have:

126A.1.1 secured the ownership of the Jersey Property valued at approximately £18.25 million in April 1999 together with the annual rental income therefrom in

the sum of approximately £1,434,800 or (b) the realised values of that property. The Plaintiff will rely on expert evidence as to (a) the value of such property as to the present day including the lost income as was not required for the maintenance of Mr Neal and his dependants and the lost investment return on such income and (b) the value of such realisations as to the present day if they had been placed in an Investment Fund as pleaded above; alternatively

126A.1.2 secured sufficient of the assets of the JCN Group to have repaid the Loans which would have likely have caused the sale of Nelson House, Charles Court and 24 Hill Street to pay off the JCN Group debt and securing 44 Esplanade and 17–19 Seaton Place for Mr Neal, alternatively

126A.1.3 secured by way of ownership management and control of sufficient of the Jersey Property to have run and maintained Chateau Vermont and La Corona, met all of the needs of Mr Neal and his dependants and to have serviced the Mortgage and any other borrowings in Mr and/or Mrs Neal's names."

20 The material parts of the amended answer relied upon by the plaintiff in support of the re-amendments sought to the order of justice are as follows:-

"6.1.2. Mr Neal did not draw any distinction between assets held in his own name and assets held in the name of the JCN Group. The Loans were not genuine arms' length transactions because Mr Neal was, to all intents and purposes, both creditor and debtor. In practice therefore, it made no difference to his overall financial position whether the Loans were called in or not.

11.6 It is further averred that, during the period in which Mr Neal operated the business of the JCN Group he drew no distinction between trust/company assets and his own personal assets. Accordingly, the trust and company structures were, in effect, disregarded and Mr Neal treated the assets of the JCN Group as a resource upon which he and Mrs Neal could draw as and when they needed to do so.

11.7 Mr Neal also ensured that all distributions of funds from the JCN Group were structured in a tax efficient way. Accordingly, Mr Neal only withdrew director's remuneration in amounts equal to his allowable taxable expenditure (which *principally comprised interest payments on the loan secured on Chateau Vermont).* This ensured that his tax liability was negligible. When (as was frequently the case) Mr Neal needed to supplement his income from the JCN Group, he did so either by procuring payment to himself of a tax free bonus or by receiving payments which were accounted for through the Loan Accounts;

11.8 Simon Neal continued the same modus operandi after Mr Neal's stroke. Thus, to all intents and purposes, throughout the period of Advocate Kelleher's Curatorship the entirety of the assets of the JCN Group continued to be treated as a resource available to Mr and Mrs Neal. As before, payments were made either in the form of director's remuneration (albeit now to Mrs Neal) or by means

of withdrawals from the Loan Accounts.

45.8 Further, in circumstances where (as pleaded at paragraphs 11.6 to 11.8 above) no practical distinction was drawn between Mr Neal's personal assets and the assets of the JCN Group, it made no difference to Mr Neal whether the Loans were called in or not. He was, in effect, both creditor and debtor;

76.6 The allegation that Mr Neal could not afford the expenditure is denied. Advocate Kelleher was entitled to, and did, take into account the fact that Mr Neal was able to draw on the assets of the JCN Group whenever he needed to do so. It is specifically denied that the expenditure on Chateau Vermont and La Corona led to there being insufficient assets in the JCN Group to meet Mr Neal's reasonable needs.

114.4 It is denied, if alleged, that Mr Neal's financial resources were limited to assets held in his personal name. As pleaded at paragraph 11.6 above, it is averred that the entirety of the assets of the JCN Group were a resource available to Mr Neal to meet his financial needs. It is specifically averred that on any reasonable measure the financial position of the JCN Group in February 2010 was significantly healthier than it had been in 1999;

117 As to paragraph 115, Advocate Kelleher knew that Mr Neal had structured his affairs so as to settle the bulk of his wealth on the 1997 Trust and that he had retained limited assets in his own name. Advocate Kelleher was also aware that, in practice, no distinction was drawn between Mr Neal's personal assets and the assets of the JCN Group. Mr Neal's personal financial position, and the position of the JCN Group, were therefore one and the same. Accordingly, it is denied that Mr Neal was, in fact "asset rich and cash poor with significant liabilities";

121.23.3 In any event, it is denied that Mr Neal's assets were, in fact, limited to those assets which were held in his personal name. As pleaded at paragraph 45.7 above, it is averred that no distinction was drawn between assets held in Mr Neal's name and the assets of the JCN Group. Accordingly, in comparing the value of the resources available to Mr Neal in 1999 and 2010 it is necessary also to take account of the value of the JCN Group. As pleaded at paragraph 114.4 above, it is averred that the financial position and future prospects of the JCN Group was significantly more healthy in 2010 than it had been in 2009."

21 In her skeleton argument filed on behalf of the defendant Advocate Langlois contended that:-

(i) The material paragraphs of the amended answer relied upon were not admissions and therefore could not be relied upon by the plaintiff to amend its case.

(ii) The proposed amendments failed to comply with the basic requirements of a pleading namely that the proposed amendments did not state material facts upon

which the plaintiff relied.

(iii) Most significantly it was not the defendant's case that the assets of 1997 Trust/JCN Group belonged beneficially to Mr Neal. Rather the defendant's case was that assets in the Trust or the JCN Group were a resource available to Mr Neal but did not belong to him.

(iv) Advocate Kelleher's duties only extended to Mr Neal's personal assets and not to assets held in the Trust or the JCN companies. Paragraph 25/5 of her skeleton therefore stated as follows:-

"It is also Advocate Kelleher's case that, in exercising his duties as Curator, it was perfectly proper for him to have regard to whether any steps taken in that capacity might impact adversely on the value of the 1997 Trust and its underlying companies and thus diminish the resources which would otherwise be available to Mr Neal through those structures."

(v) Finally, by reference to paragraph 25/6 of her skeleton Advocate Langlois contended that:-

"Advocate Kelleher also contends that his performance as Curator cannot be measured only by reference to the value of Mr Neal's personal assets at any particular time, and to the extent that the Plaintiff has sought to do exactly that since these proceedings were first issued the picture that has been presented is as distorted as it is selective. In order for there to be a fair and balanced assessment of Advocate Kelleher's performance the Court will need to take into account the significant increases in the value of the 1997 Trust and its underlying companies which took place over the period of his Curatorship, an increase which would never have been possible had Advocate Kelleher taken the steps which VEL now alleges he should have taken."

22 Advocate Young in response contended that all claims he wished to bring should be pleaded in the order of justice and not by way of reply and this was why the amendments in relation to the effect of the liquidation had been included in the draft re-amended order of justice. His main argument however focussed on what was pleaded in the amended answer which he contended were admissions which his client was entitled to rely on. He did not have to plead material facts when relying on admissions. What was pleaded in the draft re-amended order of justice was therefore not a new cause of action as the cause of action to take reasonable care and conserve and manage Mr Neal's assets was already pleaded. Alternatively, even if it was a new cause of action it arose out of the same set of facts. Finally, there was a clear *empechement* because it was only on receipt of the amended answer that Mrs Neal, the then plaintiff became aware of how the defendant regarded the assets of Mr Neal and the JCN Group as being *"one and the same".*

Decision on 14th and 15th October 2015

23 In the course of argument with Advocate Langlois, I explored with her whether the relevant paragraphs of the amended answer set out at paragraph 20 above (and other minor references which I have not set out) were consistent with her submissions about the defendant's case. In particular, I explored whether they were consistent with the contention that the assets of the Trust/JCN Group had not belonged beneficially to Mr Neal. I referred in particular to paragraph 6.1.2 to Mr Neal not drawing a distinction between any assets held in his own name and assets in the name of the JCN Group, to paragraph 76.6 which indicated that Advocate Kelleher did take into account the fact that Mr Neal was able to draw on the assets of the JCN Group whenever he needed to do so, to paragraph 117 which stated that the position of Mr Neal and the JCN Group were *"one and the same"* and to paragraph 112.23.3 which pleaded that that *"no distinction was drawn between assets held in Mr Neal's name and the JCN Group".*

24 Without conceding the point that the amended answer did contain admissions and/or stated that assets of the Trust/JCN Group belonged to Mr Neal, Advocate Langlois accepted it was appropriate for the amended answer to be revised. This was to remove any perceived ambiguity in her client's case or alleged inconsistency with her submissions. Both counsel also accepted that clarification of the defendants' case was necessary before I could adjudicate on that part of the plaintiff's application to re-amend its order of justice to plead reliance on the admissions said to be found in the amended answer. Clarification of the defendants' case was necessary because, as is well known, amendments take effect from the date a party's original pleading. In other words they are deemed to form part of a party's case from the outset. This also means that what was contained in a pleading prior to amendment which is no longer part of a party's case, no longer defines the issues to be tried and is not therefore a matter for the Court to determine. Authority for this principle is found at paragraph 20/8/2 of the 1999 White Book. The effect of an amendment relating back to the date of the original order of justice was also noted by the Royal Court in *Bagus Investments Limited v Kastening* [2010] JLR 355 at paragraph 16. If therefore the amended answer was re-amended to remove the relevant parts of the paragraphs relied upon by the plaintiff in its application to re-amend its order of justice then the plaintiff would have to consider whether it wished to maintain this application to amend on the basis of a pleading that had since changed. For this reason I allowed the defendant's application to re-amend its answer and accordingly adjourned the plaintiff's application to re-amend its order of justice.

25 While I permitted the defendant to apply to re-amend its answer, I informed the parties of my conclusion that what was contained in the amended answer were not admissions but averments. An admission is that part of a pleading which responds to the other party's pleading, in this case the order of justice. An admission is therefore that part of the pleading by which a party accepts what the other party has said in respect of a claim e.g. an admission of liability, acceptance of a particular fact, a series of facts or agreement on a legal issue.

26 I therefore indicated that the paragraphs relied upon by the plaintiff in its application to re-amend in my judgment were not admissions. Rather they were averments. In other words

they were a set of facts alleged by the defendant to represent a particular position. However, an averment in a pleading does not prevent any party, where the other party has pleaded certain facts, in principle from responding to those facts by contending, if such facts are established, that such facts give rise to a claim against the first party or lead to a particular conclusion that the Court should draw. I do not therefore have any difficulty in principle with a plaintiff from pleading reliance on averments set out by a defendant and to make certain claims as a consequence. In this case what was key was to have clarity as to what averments the defendant was advancing to consider any amendments sought by the plaintiff as a consequence.

27 The one qualification to the approach set out in the preceding paragraph concerns whether or not any matters introduced by an amendment represent a new claim that is arguably time barred. If the pleading gives rise to a new cause of action that is time barred or is arguably so and it does not arise out of the same set of facts then such an amendment should not be allowed (see *Bagus v Kastening*). Whether this principle, which was not disputed by counsel, extends to matters said to be only known to the defendant and only arising out of the defendant's amended answer is a matter that was argued at the hearing on 27 th January, 2016. It was also an issue that was in part considered in my earlier judgment in this matter (see paragraphs 3 and 5 above). I address this issue later in this judgment.

28 Apart from permitting the defendant to apply to re-amend its answer on 14 th and 15 th October, 2015, the other decision I reached was that the matters the plaintiff wished to plead in its amended order of justice at paragraph 16A to C were matters for reply. This was because the defendant had pleaded the effect of the liquidations in its answer. All that paragraphs 16A-C did was to record the outcome of the liquidations and what monies were or were not recovered. Therefore these amendments in part qualified the plaintiff's' claims in respect of a failure by the defendant to call in loans said to be due to Mr Neal. I did not consider it necessary for these qualifications to be contained in a re-amended order of justice. The claims have been made. All the amendments do is partially limit those claims, which is an appropriate matter for a reply. I accept that such matters could be pleaded in a re-amended order of justice. However in this case I consider that would cause undue complications because it would then require or then lead to the defendant having to amend his answer further. It would also delay the filing of a reply which is long overdue. Pleading matters in a reply was therefore the most efficient way of dealing with the effect of the liquidations of the JCN Group of companies.

29 The final decision made on 14 th and 15 th October, 2015, was the approval of the appointment of Voisin Executors Limited (“Voisins”) as plaintiff in substitution for Mrs Neal. This was not opposed, albeit the defendant reserved the right to bring a security for costs application against Voisins.

Events subsequent to the hearing on 14th and 15th October, 2015.

30 As a result of the decisions I made on 14 th and 15 th October, 2015, I directed the defendant to provide its draft re-amendments to the plaintiff by 23 rd October, 2015, together with a letter from Advocate Kelleher explaining without waiving privilege why the defendant's amended answer did not contain the alleged admissions the plaintiff sought to rely on. I required this letter because I considered it appropriate for the defendant to explain why he wished to re-amend rather than simply having his case set out by Advocate Langlois (notwithstanding the clear way in which Advocate Langlois made her submissions).

31 I further directed the plaintiff to indicate by 6 th November, 2015, whether it consented to or opposed the amendments sought.

32 By the same date I also directed the plaintiff to indicate whether it wished to maintain the remainder of its application to amend its re-amended order of justice and to provide a copy of any further amendments sought, either in addition to or in substitution for the amendments sought by its summons dated 24 th September, 2015.

33 The defendant was to agree by 5pm 30 th November, 2015, whether or not agreed to any re-amendments to the order of justice sought by the plaintiff.

34 I further directed the matter to return for argument on 25 th November, 2015.

35 However, the plaintiff did not comply with the directions I gave. This was because the plaintiff took objection to the re-amended answer on the basis that the proposed amendments lacked particulars. This was set out in a letter from Advocate Young to Advocate Kistler dated 30 th October, 2015. In respect of the particulars sought by Advocate Young, these were as follows:-

Of paragraph	*Particulars required*
6.1.2	*State all facts and matters relied upon in relation to the allegations that:* *1) Mr Neal did not draw any distinction between assets held in his own name and assets held in the name of the JCN Group and please explain precisely what is meant by "did not draw any distinction" in this context;* *2) the Loans were not genuine arms' length transactions; and* *3) it made no difference to the extent of the resources available to Mr Neal whether the Loans were called in or not.* *State all facts and matters relied upon to show that Mr Neal drew no distinction*

11.6	*in practice between trust/company assets and assets in his name during the period in which he operated the business of the JCN Group.* Again, please explain precisely what is meant by “did not draw any distinction” in this context
11.8	*State all facts and matters relied upon in relation to the allegation that the directors of the JCN Group continued to treat the entirety of the assets of the JCN Group as a resource available to Mr Neal and how the directors accounted for the use of that resource.* Please explain precisely what is meant by the directors “treating” the assets of the JCN Group as a resource available to Mr Neal and please explain in exactly what respects they did so.
26.2	*State all facts and matters relied upon in relation to the allegation that the financial resources in practice available to Mr Neal were not limited to the value of the assets in his own name but extended to the entirety of the assets of the JCN Group, identifying what assets Advocate Kelleher was entitled to have regard to and the value of them.* Please explain exactly what is meant by the resources “in practice available” to Mr Neal.
45.8	*State all facts and matters relied upon in relation to the allegation that the directors of the JCN Group companies drew no distinction in practice between Mr Neal's personal assets and those of the JCN Group.* Please explain precisely what is meant by “drew no distinction in practice” in this context
65.6, 121.1	*State all facts and matters relied upon in relation to the allegation that Mr Neal's financial fortunes and those of the JCN Group were inextricably linked.*
	State all facts and matters relied upon to show:
	1) why Advocate Kelleher, as Curator of Mr Neal, was entitled to take into account the fact that Mr Neal was in practice able to draw on the assets of the JCN Group as a financial resource available to Mr Neal whenever he needed to do so, providing particulars of how when and in respect of what circumstances Advocate Kelleher did take into account the above;
76.6	*2) when and in relation to what circumstances Advocate Kelleher did take into account that Mr Neal was in practice able to draw on the assets of the JCN Group as a financial resource available to him whenever he needed to do so, providing particulars of how Advocate Kelleher did take such into account the above and the result thereof;*
	3) what assets were available in the JCN Group to meet Mr Neal's reasonable needs, whether profits property or otherwise and what to include details of all and each of the assets and/or resources of the JCN Group utilised by Advocate Kelleher for Mr Neal's benefit during the period of Advocate Kelleher's curatorship of Mr Neal.
	State all facts and matters relied upon in relation to the allegation that:

1) in practice the directors of the JCN Group treated the entirety of the assets of the JCN Group as a resource available to Mr Neal to meet his financial needs during the course of Advocate Kelleher being his Curator, providing details of each occasion that such treatment occurred; and

114.4

2) the financial needs of Mr Neal as determined by Advocate Kelleher, or anyone on his behalf and who, such that the Plaintiff is able to understand what assets/resources were required to meet those needs.

Again, please explain precisely what is meant that the directors "treating" the assets of the JCN Group as a resource "available" to Mr Neal and please explain in exactly what respects they did so.

117

Provide particulars of the true extent of the financial resources available to Mr Neal during the course of Advocate Kelleher being his Curator.

121.1

Provide particulars as to how Advocate Kelleher managed the personal assets of Mr Neal to provide a regular and secure source of income for his long term maintenance and that of his family, providing particulars of the amount of such income, its regularity how it was secure from where the income was sourced and what income source Mr Neal was left with at the date of Advocate Kelleher's resignation as his Curator.

121.3.1

Provide particulars of why Advocate Kelleher had only very limited scope for managing Mr Neal's personal assets but was able to provide a regular and secure source of income for his long term maintenance and that of his family as alleged at paragraph 121.1

Provide complete particulars of what other assets, and all of them, that comprised the financial resources available to Mr Neal, other than those in his own name, and the value of them and how they were available to Mr Neal, for example by his making a demand a request or otherwise and of whom and whether Advocate Kelleher contemplated that such demand or request could or would ever be refused and in what circumstances.

Please explain how, in practice, the directors of the JCN Group companies drew no distinction between assets held in Mr Neal's name and the assets of the JCN Group.

121.23.3

Provide all particulars of what resources were available to Mr Neal at the date of Advocate Kelleher's appointment as his Curator including their identity and value and how they were available to Mr Neal, for example by his making a demand a request or otherwise and of whom and whether Advocate Kelleher contemplated that such demand or request could or would ever be refused and in what circumstances.

Provide all particulars of what resources were available to Mr Neal at the date of Advocate Kelleher's resignation as his Curator including their identity and

value and how they were available to Mr Neal, for example by his making a demand a request or otherwise and of whom and whether Advocate Kelleher contemplated that such demand or request could or would ever be refused and in what circumstances.

The hearing on 25 th November 2015

36 The first issue necessary for me to consider on 25 th November, 2015, was whether not to grant leave to the defendant to re-amend its answer. This issue depended on whether or not the particulars requested by the plaintiff were required for the defendant to plead its case in accordance with the requirements for a pleading. There was no disagreement as to the applicable legal principles when further and better particulars should be provided, which was set out in *Daisy Hill Real Estates Limited v Rent Control Tribunal* [1995] JLR 176, the relevant part of which was considered in *Crociani v Crociani* [2015] JRC 177 at paragraph 9.

37 I was also referred by Advocate Langlois to paragraph 16 of the *Crociani* judgment which states as follows:-

> ***"Again in my judgment, the issues between the parties by reference to the pleadings and the further and better particulars generally are clear.*** I therefore agree with the plaintiffs that the circumstances in which payments made to the first plaintiff were transferred to the first defendant is a matter for discovery and witness evidence. I should also add that the request asks for information which is within the knowledge of the first, second and third defendants. They were the trustees who made the distributions and are therefore able to provide both discovery and witness statements in relation to such distributions. They can also give evidence as to the extent of their knowledge."

38 I also expressed the view in the *Crociani* case that such particulars requested were not proportionate.

39 Subsequent to the hearing on 25 th November, 2015, in *Campbell v Campbell* [2015] JRC 249 I also considered a request for further and better particulars at paragraphs 31 to 36. I have referred to these decisions because in all of them there is a common theme namely requests for further and better particulars are sought which are in fact requests for evidence to be provided by way of discovery or witness statements or are matters for cross-examination to be explored at trial. What is sometimes lost in formulating requests is that, as recorded at paragraph 68 of the earlier decision in this matter referred to above, "the selection of the material facts to define ***the cause of action must be made at the highest level of abstraction".*** When parties are formulating requests for further and better particulars in future, they should bear this principle in mind.

40 Advocate Langlois started by reminding me that the paragraphs of the draft re-amended answer with which the plaintiffs were concerned were only a small part of the defences advanced. The whole of the defences relied on were summarised at paragraphs 6.1. to 6.6. Secondly how the Trust and JCN Group companies were operated and how monies were made available for the benefit of Mr Neal and Mrs Neal out of the Trust or the JCN companies was well known to Mrs Neal, both given her position as trustee and her dealings with the plaintiff and the affairs of the family. Thirdly by reference to the recent judgment in the matter of *Representation of Anthony Investments (Esplanade) Limited and others* [2015] JRC 056A, Mrs Neal was extremely familiar with the fact that at least £3.8 million worth of loans had been made out of the Trust and companies which was not disputed.

41 In respect of the detail of the requests, these were in fact requests for particulars of the amended answer not the draft re-amended answer. Advocate Langlois then commented on each of the requests as follows:-

(i) Paragraph 6.1.2 was only a summary. The detail of why the said loans were not genuine arm's length transactions was found at paragraphs 45.3 to 45.5 of the amended answer.

(ii) In respect of paragraphs 11.6 to 11.8 the case was clear. What was being asked for was evidence and for the defendant to identify on each and every occasion when Mr Neal or the directors of the JCN Group or did not draw any distinction between trust or company assets and Mr Neal's own assets. This was not a necessary requirement for the defendant's case to be properly pleaded.

(iii) The same criticisms were made of paragraphs 26.2, 45.8, 65.6, 114, 117 and 121.1. Paragraph 121.1 was also a matter for cross—examination as was the request in respect of paragraphs 121.3.1 and 121.23.3.

(iv) Paragraph 76.6 was also properly pleaded. In its proper context this paragraph was a response to an allegation that Mr Neal could not afford the running costs for Chateau Vermont. The request was therefore answered in the pleading.

42 Advocate Young in response was content to rely on his letter and his written submissions. These emphasised that his client was entitled to know the case it had to meet which required material facts to be pleaded. Vague and ambiguous allegations could not be allowed to stand.

43 Ultimately, having considered the proposed re-amended answer and the amendments sought and the concerns of Advocate Young in his letter of 30 th October, 2015, subject to one point, I was of the view that the amended answer was clear in that the plaintiff knew the case it had to meet and it did not require particulars which were either requests for evidence or were matters for cross-examination or represented matters known to Mrs Neal as submitted by Advocate Langlois. In particular, I concluded that it was not necessary for

the defendant to identify on each and every occasion when Mr Neal or the directors of the JCN Group did not draw any distinction between trust or company assets and Mr Neal's own assets. It was clear from the re-amended answer that it is the defendant's case that throughout his curatorship, assets of the Trust or the JCN group of companies were a resource available to Mr Neal to meet Mr Neal's needs. The Plaintiff is able to prepare its case accordingly.

44 The one qualification to my decision was in respect of paragraphs 6.1.2. I did not agree that paragraph 6.1.2 reflected a summary of the case pleaded at paragraphs 45.3 to 45.5. Those paragraphs did not contain a pleading that the loans were not genuine arm's length transactions. Accordingly, I required the defendant to make it clear as to why it was its case that the loans were not genuine arm's length transactions. I left it to Advocate Langlois and the defendant to decide whether this would be provided by amendment to the draft re-amended answer before me (which would form part of the final version of the re-amended answer), or whether a separate statement of case would be provided. I therefore gave the defendant until close of business Monday, 30 th November, 2015, to provide the final draft of the re-amended answer together with any statement of case in respect of paragraph 6.1.2 to the plaintiff and file a copy with the Court.

45 As a result of this decision Advocate Young indicated that he wanted to consider further his draft re-amended order of justice in light of my decision in respect of the requests that the amended answer did not require further particulars. Whilst I had intended following the hearing on 14 th and 15 th October, 2015, for such consideration to have occurred before 25 th November, 2015, this has not taken place which is regrettable and which has delayed progress of this action. The plaintiff should have considered its position by the time of the hearing on 25 th November, 2015, and should have been ready to set out what amendments it was seeking if I was not willing to order the particulars sought.

46 Despite the failure of the plaintiff to prepare proposed amendments consequent upon the re-amendments sought by the defendant, I reached the view that it would be unjust to prevent the plaintiff at this stage from bringing such amendments. This is not a late amendment in the sense that such an application is understood by the relevant authorities. To refuse to allow the plaintiff time to consider the re—amended answer I have allowed the defendant to file would be unfair when the case is far from being ready for trial. The concerns I have expressed in this judgment are therefore matters to be dealt with in respect of the costs of the applications before me once the parties have received the benefit of this judgment and when I have heard their submissions on what costs orders I should make. I observe in this context that in respect of each party's application to amend the other party has criticised the party seeking to amend on the basis that its pleading lacked particulars but resisted any request for particulars of its own pleading. In my judgment in reviewing the other party's pleading both parties failed to have regard to the principles set out in *Daisy Hill*, *Crociani* and *Campbell* to which I have referred to at paragraphs 36 —34 above and have confused requests for evidence with the proper function of pleadings.

47 Accordingly, I granted permission to the plaintiff to bring back an application to re-amend its order of justice on 27 th January, 2016, which was the first available date having regard to absences over the Christmas period including the absence of leading counsel assisting the plaintiff and the plaintiff's advocate. Nevertheless I required the draft the plaintiff wished to advance to be filed with the defendant by 7 th December, 2015.

48 At the conclusion of the hearing on 25 th November, 2015, the issue between the parties in respect of any application to re-amend the order of justice depended on firstly whether particulars were required of any re-amendment, secondly whether any re-amendment was a matter for a reply, other than those that had already been ruled upon and thirdly whether the proposed re-amendments were a new cause of action. If they were a new cause of action, I had to consider whether they arose out of the same set of facts and, if not whether the new cause of action was arguably time barred. Leave to introduce arguably time barred amendments should not be allowed (see *Bagus v Kastening* [2010] JLR 355). This issue focussed in particular on paragraph 121.23.3 of the re-amended answer set out at paragraph 20 above and paragraph 25.6 of the defendant's original skeleton set out at paragraph 21(v) above. The plaintiff, if the defendant was seeking credit for the increase in value of the Trust, wanted to contend that the defendant was in breach of duty or should not be excused by reference to any increase of the value of the Trust fund during the defendant's period of curatorship because there were certain matters where the defendant failed to act to discharge his duties. The defendant was concerned that the plaintiff was claiming losses over and above those already claimed in the amended order of justice and that these amounted to a new cause of action. The defendant's view was that such a claim cannot be said to come out of the same facts and matters as had been pleaded in the original order of justice.

Events subsequent to the hearing on 25 th November, 2015

49 On 30 th November, 2015, the defendant filed a re-amended answer pursuant to paragraph 2 of the act of court of 25 th November, 2015. On the same day the defendant provided a further and better statement of case in respect of paragraphs 6.1.2 of its amended answer to address the matters referred to at paragraph 44 of above. At the resumed hearing no issue was taken in respect of the contents of the further and better statement of case. A draft re-amended order of justice was provided to the defendant on 8 th December. I refer to this as the new draft. Although some of the amendments sought overlapped with the draft presented for the hearing on 14 th and 15 th October, the new draft was narrower in scope; despite this the real point of contention remained whether the plaintiff could rely on matters pleaded by the defendant. Otherwise most of the amendments sought by the new draft were agreed.

50 The new draft still contained the amendments at paragraph 16(A) to (C) which I had ordered on 14th and 15 th November, 2015, were all matters for reply. Accordingly, I did not allow these paragraphs to stand as re-amendments. Leave to make the consequential

amendments at paragraphs 112 and 127A was therefore also refused.

51 The amendments in dispute were those found at paragraphs 8A, 94, 123A and 129.6. As these amendments were different from those sought on 14 th/15 th October, 2015, I therefore set them out in full as follows:-

> *"8A. By his admissions and/or averments made in the Re-Amended Answer (in paragraphs 6.1.2, 11.6, 11.7, 11.8, 45.8, 65.6, 76.6, 114.4 and 121.23.3 thereof), Dr Kelleher admits/avers that:-*
>
> *8A.1 Mr Neal did not draw any distinction between assets held in his own name and assets held in the name of the JCN Group (or assets of the 1979 Trust or the 1997 Trust);*
>
> *8A.2 prior to his stroke, when Mr Neal needed to supplement his income from the JCN Group (as was frequently the case), he drew freely on the assets of the JCN Group without objection from any interested party;*
>
> *8A.3 after Mr Neal's stroke (and throughout Dr Kelleher's curatorship), the same practice continued, and the directors of the companies comprising the JCN Group treated the entirety of the assets of such companies as being available to Mr Neal on demand, notwithstanding that Mr Neal did not hold legal title to such assets;*
>
> *8A.4 Mr Neal's financial fortunes and those of the JCN Group were inextricably linked; and*
>
> *8A.5 at all material times, Dr Kelleher had knowledge of the matters pleaded in sub-paragraphs 8A.1 to 8A.4 above.*
>
> ……..
>
> *94. On 30 November 2006 a statement of affairs of the 1997 Trust was produced by Nautilus which showed assets valued at £20.21 million comprising 44 Esplanade, Century Buildings and the Spanish Project with debt of only £2.75 million. By an email on 22 December 2006, Jane Gallagher of Nautilus wrote to Simon Neal stating that there was an additional £3.2 million owed from the Spanish Projects to the JCN Group (£5.95 million of debt in total) and net assets were therefore worth approximately £14 million. On the basis of Dr Kelleher's admissions in the Re-Amended Answer and the email of 22 December 2006 above Dr Kelleher had by that time sold in excess of £5 million worth of Jersey Property of which in excess of £3.2 million was invested in the Spanish projects and never recovered with further monies lost on other speculative investments. The Plaintiff will rely on expert evidence to determine the level of losses and loss of investment return on such monies.*
>
> ……..

123A. Further or alternatively:

123A.1. Dr Kelleher knew that Mr Neal was, in practice, able to draw on the assets of the JCN Group as a financial resource available to him whenever he needed to do so. As pleaded in paragraph 8A above, Dr Kelleher has admitted that he had such knowledge in his Re-Amended Answer.

123A.2. In the premises, Dr Kelleher should have caused Mr Neal to draw on the assets of the JCN Group to discharge all principal and interest payments on the Citibank Facility, and to discharge any other secured or unsecured indebtedness for which Mr Neal was (or was alleged to be) an obligor, as soon as possible after his appointment as curator (and, in any event, prior to the sale of Chateau Vermont).

123A.3. Contrary to his duties as pleaded above, Dr Kelleher failed to cause Mr Neal to draw on the assets of the JCN Group to discharge any principal or interest due under the Citibank Facility, or to discharge any other indebtedness for which Mr Neal was alleged to be an obligor, at any time during his tenure as curator."

129.6 Further or alternatively:

129.6.1. As pleaded above, Dr Kelleher should have caused Mr Neal to draw on the assets of the JCN Group to discharge all principal and interest payments on the Citibank Facility, and to discharge any other secured or unsecured indebtedness for which Mr Neal was (or was alleged to be) an obligor, as soon as possible after his appointment as curator (and, in any event, prior to the sale of Chateau Vermont).

129.6.2. Dr Kelleher is liable to restore, by way of damages, to the Plaintiff the entire amount of the assets which should have been drawn down from the assets of the JCN Group."

The parties' contentions

52 Advocate Young, in seeking the disputed amendments of the new draft contended as follows:-

(i) Firstly, the cause of action against the defendant had not changed, in that the defendant was in breach of duty by failing to conserve assets.

(ii) The amendments were not seeking to claim losses suffered by the Trust or to claim any additional losses over and above those already claimed by the amended order of justice.

(iii) The purpose of the amendment to paragraph 94 was to set out fully the basis as to why an independent fund should have been established.

(iv) The amendments set out in paragraph 8A are the plaintiff's summary of the defendants re-amended answer which the plaintiff then relies on in support of the matters pleaded at paragraphs 123A and 129.6 as an alternative case.

(v) In reviewing the amendments the Court was not required to produce a paradigm set of pleadings; the claim made simply had to be clear. The essence of the plaintiff's new draft was that in light of the defendant's pleading, the plaintiff was entitled to contend that the defendant should have drawn on assets available to him. By not drawing on these assets the defendant failed to ensure that the Citibank facility should have been repaid. This is the loss the disputed amendments go to which was already a loss claimed by the plaintiff. The amendments therefore put the plaintiff's case on an additional basis in reliance on the defendant's own pleading and facts already pleaded.

(vi) The plaintiff's claim was not a new cause of action. What is meant by a cause of action was considered by the Royal Court in *Freeman v Ansbacher* [2009] JLR 1 at paragraphs 58 to 65 including citing with approval the following remarks:-

"A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person."

….. However it is formulated, only those facts which are material to be proved are to be taken into account. The pleading of unnecessary allegations or addition of further instances or better particulars do not amount to a distinct cause of action. The selection of the material facts to define the cause of action must be made at the highest level of abstraction." [Emphasis supplied.]

(vii) Advocate Young referred paragraph 59 of *Freeman* and the observations of Brett J. that a cause of action was ***"the set of facts which entitles the claimant to relief".*** He also reminded me was that it was important to draw a distinction between legal labels that might be attached to a claim from the set of facts which entitled a plaintiff to relief. Legal labels were not material facts and did not have to be pleaded.

(viii) He also relied on *Goode v Martin* [2001] EWCA Civ 1899 in support of the contention that where a defendant puts forward a particular version of events whether before or after the expiry of a limitation period, this ought not to make any difference to a plaintiff's ability to adopt the defendant's version of events as part a plaintiff's case and to make an allegation of breach of duty by way of response.

(ix) What particularly appeared to have influenced the Court in *Goode v Martin* was the impact of the introduction of the Human Rights Act 1998 in England and Wales which led to Brooke LJ to state:-

"The 1998 Act, however, does in my judgment alter the position. I can detect no sound policy reason why the claimant should not add to her claim in the present action the alternative plea which she now proposes. No new facts are being introduced: she merely wants to say that if the defendant succeeds in establishing his version of the facts, she will still win because those facts, too,

show that he was negligent and should pay her compensation."

(x) Advocate Young contended that he was taking exactly the same approach by reference to the matters pleaded at Article 8A and that *Goode v Martin* should be followed in Jersey.

(xi) He rejected the argument that additional facts had to be pleaded in order to make the amendments he sought.

53 Advocate Langlois in response contended as follows:-

(i) The amendments to which she took objection did introduce a new cause of action.

(ii) It was simply too broad brush an approach to say that the claim was one of a failure to conserve Mr Neal's assets without setting out what the breaches were and what loss followed.

(iii) By relying on what was pleaded in the re-amended answer the plaintiff was pleading new facts when the relevant limitation period had expired, and so by reference to *Bagus* the amendments should be refused.

(iv) She contended *Goode v Martin* was not part of the law of Jersey, was inconsistent with *Freeman v Ansbacher* (and remarks to like effect in *Vezier v Bellego* [1994] JLR 75) and accordingly the plaintiff was not entitled to rely on facts pleaded in the answer to support his amendment.

(v) The law of Jersey could remedy the injustice that arose in *Goode v Martin* by the use of the doctrine of *empechement*.

(vi) To follow *Goode v Martin* would cause prejudice to the defendant.

(vii) The proposed amendments, in particular paragraph 123A, failed to plead the basis on which it was alleged that a reasonable and prudent curator would have caused the JCN Group to discharge the Citibank facility or Mr Neal's share of it, what loss followed from this, why any loss was caused by Advocate Kelleher not taking steps to procure the discharge of the obligations by the JCN Group, and why such loss should have been foreseeable. These were all essential elements to plead a claim. These elements were lacking.

(viii) She was also critical of the references in paragraph 123A to the defendant being required to "discharge any other indebtedness for which Mr Neal was (or was alleged to be) an obligor" and/or what this part of the amendment was intended to cover.

(ix) The reality of what the plaintiff was pleading was that the defendant had control over assets within the Trust. Being in control was pleading new facts. The pleading of the matters in the answer was trying to avoid having to plead facts alleging that the defendant controlled the assets of the Trusts and/or the JCN Group.

(x) There was a danger, if the amendments were allowed, of the trial judge having to construe pleadings during the course of a trial.

(xi) Nothing was pleaded to show that Mr Neal had any need to draw on assets and therefore that assets would have been transferred to him. Unless need could be established then there was no basis for the defendant to seek a transfer of assets to him and any request would have been refused by the directors. The new draft was therefore defective as material averments were missing.

54 In reply Advocate Young referred me to all the re-amendments made by the defendant in the re-amended answer identified in paragraph 8A which his client relied upon. He contended that these paragraphs justified pleading that entirety of the assets of the JCN Group were available to Mr Neal *"on demand".*

55 It was not necessary for the plaintiff to plead control and control was not relied upon. What was relied upon was contained in the re-amended answer only.

Decision

56 In deciding whether or not to allow the amendments, I start by considering the nature of the amendments sought in the new draft at paragraph 8A and the consequential amendments at paragraphs 123A and 129.6 to consider if these amendments amount to a cause of action when coupled with facts already pleaded or whether there are additional facts that need to be pleaded for there to be a cause of action.

57 In reviewing paragraph 8A of the new draft, in my judgment the draft amendments as put before me amount to the plaintiff's interpretation of the defendant's case, rather than a summary of the relevant paragraphs of the defendant's case and therefore in parts went too far.

58 Firstly, for the reasons set out at paragraph 26 above, what is relied upon can only be averments not admissions.

59 Secondly, in paragraph 8A.2, the words *"without objection of any interested party",* represent a comment by the plaintiff rather than something that is found in paragraphs of the re-amended answer on which the plaintiff rellies. This is therefore pleading an additional fact which is arguably out of time and so by reference to *Bagus*, these words cannot be allowed to be inserted by way of amendment.

60 Thirdly in paragraph 8A.3 the words *"on demand"* do not appear in any of the paragraphs of the re-amended answer relied upon. There is no such averment in the re-amended answer. The plaintiff cannot therefore invoke reliance on something that is not pleaded. These

words therefore introduce a new fact which for the same reasons as in respect of paragraph 8A2 is disallowed. What does appear in the amended answer, as Advocate Langlois contended, is that the assets were *"a resource upon which Mr Neal could draw on as and when he needed to do so"*. I allowed the amendment to this extent. This is because the plaintiff is only entitled to rely on a summary and paragraph 8A.3, as drafted, was not an accurate summary of the relevant paragraphs of the re-amended answer. In reaching this view I was conscious of the dangers of a court drafting a pleading for a party. However, when it was made clear in submission that the plaintiff was simply relying on what was found in the defendant's re-amended answer, I consider I am entitled to disallow amendments that go beyond the re-amendments. The issue for me was then to consider if what remained was a cause of action.

61 The reference in paragraph 123A to the defendant having to "discharge any other indebtedness for which Mr Neal was (or was alleged to be) an obligor" also appeared to be claiming additional heads of loss albeit unspecified. I was not willing to approve amendments that led to additional losses claimed as to claim an additional loss requires new facts i.e. the amount of the loss to be pleaded. During submission, Advocate Young made it clear that he was not seeking any additional loss by virtue of this amendment. This led to him accepting over the lunchtime adjournment that paragraph 123A should be limited to the Citibank facility and the reference to any other secured obligations for which Mr Neal was alleged to be *obligor* should be removed from the new draft.

62 The conclusion I reached was that the following wording when taken with matters already pleaded was a cause of action based solely on matters pleaded in the re-amended answer and facts already pleaded in the amended order of justice. The wording I indicated that did not go beyond the re-amended answer was as follows:-

> *"In the Re-Amended Answer (in paragraphs 6.1.2, 11.6, 11.7, 11.8, 45.8, 65.6, 76.6, 114.4 117 and 121.23.3 thereof), Dr Kelleher avers that:-*
>
> *8A.1 Mr Neal did not draw any distinction between assets held in his own name and assets held in the name of the JCN Group (or assets of the 1979 Trust or the 1997 Trust);*
>
> *8A.2 prior to his stroke, when Mr Neal needed to, he drew freely on the assets of the JCN Group;*
>
> *8A.3 after Mr Neal's stroke (and throughout Dr Kelleher's curatorship), the same practice continued, and the directors of the companies comprising the JCN Group treated the entirety of the assets of such companies as being available to Mr Neal as a resource which he could draw on as and when he needed to do so, notwithstanding that Mr Neal did not hold legal title to such assets;*
>
> *8A.4 Mr Neal's financial fortunes and those of the JCN Group were inextricably linked; and*
>
> *8A.5 at all material times, Dr Kelleher had knowledge of the matters pleaded in*

sub-paragraphs 8A.1 to 8A.4 above.

…….

123A. Further or alternatively:

23A.1. Dr Kelleher knew that Mr Neal was, in practice, able to draw on the assets of the JCN Group as a financial resource available to him whenever he needed to do so. As pleaded in paragraph 8A above, Dr Kelleher has averred that he had such knowledge in his Re-Amended Answer.

123A.2. In the premises, Dr Kelleher should have caused Mr Neal to draw on the assets of the JCN Group to discharge all principal and interest payments on the Citibank Facility,

123A.3. Contrary to his duties as pleaded above, Dr Kelleher failed to cause Mr Neal to draw on the assets of the JCN Group to discharge any principal or interest due under the Citibank Facility, in breach of his statutory and/or implied duties pursuant to the 1969 Law as pleaded at paragraph 28. above Dr Kelleher accordingly failed to act with reasonable care at the outset or at any time throughout his appointment as curator to Mr Neal in properly managing and controlling the affairs of Mr Neal or in conserving and increasing the assets of Mr Neal.

129.6 Further or alternatively:

129.6.1. As pleaded above, Dr Kelleher should have caused Mr Neal to draw on the assets of the JCN Group to discharge all principal and interest payments on the Citibank Facility as soon as possible after his appointment as curator (and, in any event, prior to the sale of Chateau Vermont).

129.6.2. Dr Kelleher is liable to restore, by way of damages, to the Plaintiff the Citibank Facility."

63 I reached this view because the effect of the case the plaintiff wished to advance by reference to the matters pleaded by the defendant in the paragraphs identified was to claim the same relief already sought, but on an alternative basis. In my judgment prior to the application to re-amend the order of justice as before me on 27 th January, 2016, the plaintiff was already complaining that the defendant had failed to procure that the JCN Group redeemed the Citibank facility. The amendment in the new draft by reference to matters pleaded by the defendant alleges that the defendant himself should have transferred assets from the JCN Group to repay the Citibank facility. The effect of the amendment is to claim the same loss namely that the late Mr Neal had to repay the Citibank facility out of the proceeds of sale of Château Vermont rather than it being borne by the JCN Group in one way or another.

64 For the above reasons I reached the view that the proposed re-amendments set out

sufficient material facts to plead an alternative case against the defendant based on a combination of the paragraphs of the amended answer identified in paragraph 8A of the new draft and matters already pleaded in the amended order of justice. The case is clear in that the plaintiff claims that the defendant by virtue of specific averments in his answer had the power to call on assets in the name of the JCN group, and that he should have exercised that power to repay the Citibank facility. I saw no material distinction between the way in which the case was pleaded at paragraph 129. 6 that the defendant should have drawn on the assets to repay the Citibank facility as being in substance different from the existing case, at paragraph 129.1 that Advocate Kelleher "should have ensured by open negotiations or action if necessary" that the JCN group repaid the Citibank Facility. The new case does not require any new major investigation per *Freeman*. The key issue will be whether assets of the JCN group could and should have been used to repay the Citibank facility either by the JCN group directly or by such assets being transferred to the defendant.

65 Advocate Langlois' criticisms of the new draft are matters to be reviewed by way of answer, and do not need to be addressed in an order of justice. The case as pleaded in the new draft does not require the plaintiff to plead what the hypothetical curator would have done. The plaintiff has pleaded what the duty was, what it is alleged the defendant failed to do in breach of duty and what loss followed. The allegation is clear namely that the defendant acted in breach of duty by not calling on assets when he could have done, resulting in the late Mr Neal having to repay the Citibank facility. The issue of why the defendant did not draw on the assets and why this was not a breach of duty, including the effect of taking such a step and whether such a step would have been accepted by the JCN Group because of the possible effect on the 44 The Esplanade development are all matters that can be raised in an answer and can be explored at trial. Issues of whether assets could only be drawn upon when there was a need are also matters to be determined by evidence. Likewise challenges to the quantum of any loss based on the Citibank facility being a joint borrowing with Mrs Neal are also a matter for trial. Similarly the defendant may contend that the loss claimed by virtue of this amendment, was not foreseeable. This is however a legal argument and just the a sort of legal label referred to in *Freeman*, as distinct from pleading the material fact of the loss claimed, which is clear.

66 In view of my conclusion that the new draft does plead an alternative claim in reliance on the re-amended answer and matters already pleaded by the plaintiff, I then considered whether I should allow the amendments sought because the application is made outside any applicable limitation period, where such amendments relied on a combination of matters pleaded in the defendant's re-amended answer and matters otherwise already pleaded by the plaintiff. The argument on this issue focused on the English Court of Appeal decision of *Goode v Martin*. However, I start by reference to the current position under Jersey law in relation to applications to amend that are arguably out of time. This was considered at paragraph 16 of *Bagus*. *Bagus* is a case concerning an application for leave to re-amend its order of justice. At paragraph 16 Sir Michael Birt stated as follows:-

"The parties are agreed on the relevant test, namely that the court will not permit amendments to introduce a new cause of action which is arguably

prescribed at the date of amendment, unless the claim arises from the same or substantially the same facts as the claim already pleaded (see Goode v. Martin (6)).”

67 On the facts Sir Michael held that the claim in knowing receipt was arguably time barred based on prescription. What *Bagus* does not address however is the situation before me namely, whether a plaintiff is entitled to amend its case out of time in response to an answer filed outside the limitation period, where a plaintiff contends that if certain matters set out in that answer are established, then the defendant is liable by reference to those facts and/or any facts already pleaded by the plaintiff. This issue was not considered in *Bagus* or in *Freeman*. It does not therefore appear to be a point that the Royal Court has considered previously.

68 The power to allow amendments is set out in Rule 6/12(1) Royal Court Rules 2004, as amended which states as follows:-

“6/12 Amendment of claim or pleading

(1) The Court may at any stage of the proceedings allow a plaintiff to amend his or her claim, or any party to amend his or her pleading, on such terms as to costs or otherwise as may be just.”

69 I have referred to the Rule which appears to be very broad in its language because in Goode v Martin the English Court of Appeal was considering Rule 17.4(2) of the Civil Procedure Rules. The language of CPR 17.4.(2) is not the same as Rule 6/12 and the provisions of the CPR do not necessarily have the same persuasive effect as the former Rules of the Supreme Court on which the Royal Court Rules are based. CPR rule 17.4(2) states:-

“The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings.”

70 While Rule 17.4(2) uses different language from Rule 6/12, it is however effectively identical to the relevant test applicable in Jersey as summarised in *Bagus* set out above.

71 The conclusion of the Court of Appeal in Goode v Martin is found in the following extracts:-

“42 …I can detect no sound policy reason why the claimant should not add to her claim in the present action, the alternative plea which she now proposes. No new facts are being introduced; she merely wants to say that if the defendant succeeds in establishing his version of the facts, she will still win because

those facts show that he was negligent and should pay her compensation."

"43. …. In these circumstances it seems to me that to prevent her from putting this case before the court in this action would impose an impediment on her access to the court, which should require justification. If it cannot be justified the defendant cannot then be heard to say that she should could bring another action….."

72 The judgment then went on at paragraph 44:-

"I do not consider that the rule was interpreted correctly by the Master and the judge has only legitimate aim, when applied to the facts of the present case. Whether the defendant put forward his version of events (which the claimant now wishes to adopt) before or after expiry of the primary limitation period ought to make no difference to her ability to adopt it as part of her case and to say if that was indeed what had happened, he had nevertheless been negligent."

73 The Court of Appeal also considered that Rule 17.4(2) should be interpreted to permit a court to allow an amendment whose effect would be to add a new claim, but only if the new claim arose out of the same facts or substantially the same facts as were already in issue on a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings. In other words Rule 17.4(2) was to construe the facts as extending to facts raised in a defence as well as by a plaintiff's own pleading.

74 Advocate Langlois contended it was not necessary to adopt *Goode v Martin* because the problem that Mrs Goode faced would have been addressed if the matter had taken place in Jersey by application of the doctrine of *empechement*. I am not able to reach that conclusion. The doctrine of *empechement* permits a party to bring a claim that is otherwise out of time, where that party is under a practical impossibility from doing so. Once a party has brought a claim however, *Bagus* states that if a claim is arguably prescribed at the date of the amendment as distinct from when the claim was originally brought, then the amendment would not be permitted. In other words *empechement* would not save an application to amend out of time, because an argument about whether or not the doctrine applied would be an argument between the parties that the case was arguably prescribed. A plaintiff would be saying it was not because *empechement* applied whereas a defendant would be saying that the doctrine did not apply. While this result may appear harsh at first, the principle of *empechement* is to allow a party to bring claims, which would otherwise be out of time. Once that party is no longer under a practical impossibility from bringing a claim, the doctrine does not save them in respect of additional causes of action. At that stage the approach required by *Bagus* is for that party to issue a fresh claim and to seek consolidation if appropriate of the two actions.

75 The view I have reached however is that the precise scenario that existed in *Goode v Martin* was not considered or explored by the Royal Court in *Bagus* and has not

otherwise been considered by any other court in Jersey. I have therefore concluded that it is open to me to apply *Goode v Martin*, which was itself cited in *Bagus*, as an exception to the general principle set out in *Bagus*.

76 I further reached the view that I should follow *Goode v Martin* firstly, because Rule 6/12 of the Royal Court Rules 2004, as amended is broad in its terms. Subject to the limitations contained in *Bagus* I possess a broad discretion to allow amendments on such terms as to costs or otherwise as may be just. Secondly, the applicable test in Jersey and the provisions of CPR Rule 17/4(2) are in essence the same. It would be strange to apply a different approach in Jersey to that adopted by the Court of Appeal in England to the same rule. Thirdly, in my view, and most importantly, there is significant force to the English Court of Appeal reaching its conclusion because of the effect of the Human Rights Act 1998 which enabled the English Court of Appeal to interpret Rule 17 to produce a just result. The Jersey equivalent, the Human Rights (Jersey) Law, 2000 has been in force since 2006. The observations of the English Court of Appeal and to their construction of Rule 17/4(2) and the problem they faced in my judgment therefore carry real weight; as in England it does not appear sensible to me to require a plaintiff to issue fresh proceedings with the procedural complexities that would engage if a defence of prescription and an argument about *empêchement* was then raised. Such an approach would simply lead to further pleadings and the likelihood that any such proceedings would be consolidated with the present action. I am also of the view, that it would be likely that any arguable *empechement* defence raised would be a matter for trial (see *MacFirbhisigh (Ching) v CI Trustees and Executors* [2015] JRC 014 in particular paragraphs 37 to 38) which would also point to any later action being consolidated to enable prescription disputes and related evidence to be addressed at trial.

77 The view I have reached in that I should follow *Goode v Martin* is however subject to one modification. This is because of the power vested in in Rule 6/12 that I may allow amendments on such terms as might be just. Based on my conclusions the plaintiff is entitled to rely on the version of events put forward by the defendant as set out in the new draft to plead why the defendant is liable to the plaintiff. However, it may be that the matters in the defendant's answer relied upon by the plaintiff were matters already known to the plaintiff or the plaintiff's predecessor in title. I therefore ordered in addition that, notwithstanding permission being granted to the plaintiff to re-amend their order of justice, the defendant is entitled to plead that the matters relied on by the plaintiff by reference to the defendant's re-amended answer were matters known to the plaintiff or its predecessors in title prior to receipt of the re-amended answer and therefore if so advised to plead prescription in respect of the permitted re-amendments. While it would not be just to prevent the plaintiff from relying on matters it says it was only aware of by reference to the defendant's re-amended answer, for the reasons set out in *Goode v Martin*, it would not be fair to prevent the defendant from saying that the matters he had pleaded were matters in fact already known to the plaintiff or the plaintiff's predecessor in title at an earlier point in time and therefore to raise a prescription or limitation defence to be determined at trial. While a defendant cannot complain about a plaintiff relying on averments in an answer filed after expiry of a limitation period, a defendant should still be able to argue that the pleaded matters relied upon were in fact known to the plaintiff much earlier and so were already

prescribed.

78 Finally, I deal briefly with paragraph 94 of the new draft. The amendments sought also referred to paragraph 8A. However this reference did not make any sense in the context of the other amendments sought in paragraph 94 of the new draft. Paragraph 94 simply records a factual position in relation to a statement of affairs as at 30 th November, 2006. I therefore refused to permit the insertion of a reference to paragraph 8A. In addition, as no additional losses were claimed by the other amendments sought I also refused to allow leave in respect of the final sentence of the new draft because it implied that additional losses were being sought by reference to the amendments to paragraph 94. Advocate Young made it clear this was not the case. In particular, Advocate Young made it clear that he was not claiming losses suffered by investment in Spanish property. Rather this paragraph was background to his claim that an independent investment fund should have been established. Advocate Young was right to make this concession because otherwise he would have been looking to raise matters that related to an allegation against the defendant that he had failed to supervise the Trusts and the JCN Group of companies properly which allegation I had limited to one head of loss by reference to paragraph 84 of my earlier judgment set out above. The amended paragraph 94 I approved therefore read as follows:-

> *"94. On 30 November 2006 a statement of affairs of the 1997 Trust was produced by Nautilus which showed assets valued at £20.21 million comprising 44 Esplanade, Century Buildings and the Spanish Project with debt of only £2.75 million. Simon Neal responded by an email on 22 December 2006, Jane Gallagher of Nautilus wrote to Simon Neal stating that there was an additional £3.2 million owed from the Spanish Projects to the JCN Group to the Spanish Banks (£5.95 million of debt in total) and net assets were therefore worth approximately £14 million. On the basis of the email of 22 December 2006 above the JCN group through Dr Kelleher's firm had by that time sold in excess of £5 million worth of Jersey Property of which in excess of £3.2 million was invested in the Spanish projects and never recovered with further monies lost on other speculative investments."*

Conclusion

79 In conclusion I allowed the re-amendments sought insofar as the re-amendments sought only to rely on particular paragraphs of the re-amended answer and no more. I refused to allow any amendments which arguably sought to claim losses over and above those already claimed which Advocate Young emphasised was not the intention behind the amendments. I also refused to allow amendments which were matters to be pleaded by way of reply. Costs will be dealt with when this judgment is handed down.