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

Jurisdiction:	Jersey
Judge:	Advocate Matthew John Thompson
Judgment Date:	27 August 2015
Neutral Citation:	[2015] JRC 177
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Court:	Royal Court
Date:	27 August 2015

Text

[2015] JRC 177

ROYAL COURT

(Samedi)

Before:

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

Between
Cristiana Crociani
First Plaintiff
A (by her Guardian ad Litem, Nicholas Delrieu)
Second Plaintiff
B (by her Guardian ad Litem, Nicholas Delrieu)
Third Plaintiff
and
Edoardo Crociani
First Defendant
Paul Foortse
Second Defendant
BNP Paribas Jersey Trust Corporation Limited
Third Defendant
Appleby Trust (Mauritius) Limited
Fourth Defendant
Camilla de Bourbon des Deux Siciles
Fifth Defendant
Camillo Crociani Foundation IBC (Bahamas) Limited
Sixth Defendant
BNP Paribas Jersey Nominee Company Limited
Seventh Defendant

Advocate A. D. Robinson **for the Plaintiffs**.

Advocate J. D. Kelleher **for the First, Second and Fourth Defendants**.

Authorities

Taylor & Ors t/a Stancliffe Todd & Hodgson v Kitchin & Anor t/a Charltons 1985/86 JLR Note 4a .

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

Re Esteem [2000] JLR Note 41a .

Brown v Barclay's Bank [2002] JLR Note 1 .

Cunningham v Cunningham [2009] JLR 227 .

Neal v Kelleher [2014] JRC 233 .

Trusts (Jersey) Law 1984

Trust — reasons in respect of various applications.

CONTENTS OF THE JUDGMENT

THE MASTER:

Introduction

1 This judgment represents my detailed written reasons in respect of the following applications:–

(i) The plaintiffs' application to re-amend its order of justice;

(ii) The first, second and fourth defendants' requests for further and better particulars of the order of justice which remain unanswered; and

(iii) The first, second and fourth defendants' application to amend their answer.

2 I will deal with each application in turn. For ease of reference, where I refer to the defendants, this is to the first, second and fourth defendants unless I indicate otherwise.

The plaintiffs' application to re-amend their order of justice

3 In respect of the plaintiffs' application to re-amend their order of justice, there was no dispute on the principles applicable to an application to amend which is not late; generally the approach is that the Court will allow such amendments which are necessary to enable the Court to determine the real issues in dispute, provided that no party to the action would thereby be unavoidably prejudiced and as long as the amendments show an arguable claim, i.e. one that is not capable of being struck out. (See *Taylor & Ors t/a Stancliffe Todd & Hodgson v Kitchin & Anor t/a Charltons* 1985/86 JLR Note 4.

4 Where a late application to amend is brought, the position is different and was considered by me at paragraphs 33 to 39 of *Neal v Kelleher* [2014] JRC 233. This decision in particular covered the approach to be taken where a new cause of action is arguably time barred and whether or not the new cause of action arises out of the same facts or substantially the same facts.

5 The real issue at the heart of the defendants' objection concerns the fact that the defendants dispute that the second and third plaintiffs are entitled to bring the claims set out in the re-amended order of justice because they contend that the second and third plaintiffs are illegitimate,. However, that is a matter for trial. Either the second and third plaintiffs are entitled to bring claims because they have sufficient *locus* to do so, or they do not. If they are entitled to bring such claims, then no question of limitation arises. This is because the second and third plaintiffs in this matter are minors. The limitation period for claims for breach of trust does not start to run against minors until they reach the age of majority (Article 57(3) of the Trusts (Jersey) Law 1984 (as amended)).

6 The defendants' concern was that, if they were to prevail in their arguments that the second and third plaintiffs are not entitled to bring claims, then the re-amended claim may be time barred as far as the first plaintiff is concerned in whole or in part. The defendants do not state by which date the proposed re-amended claims became time barred. When this might be depends on when the first plaintiff either received accounts or when she first had knowledge of the failure to collect interest from 2003 whichever is earlier (see Article 57(2) of the Trusts (Jersey) Law 1984 (as amended)).

7 The manner in which this concern can be dealt with is to provide that as far as the plaintiffs are concerned, the re-amendments do not relate back to the date the order of justice was issued but only apply from the date of the re-amendment. It is the date of the re-amendment that will therefore be the relevant date for any limitation argument the defendants raise in respect of the re-amendment. This approach was sufficient to address the concerns of the defendants.

The request for further and better particulars of the order of justice

8 The approach to be taken when dealing with further and better particulars, and whether or not they should be ordered, was considered by Hamon, Deputy Bailiff in *Daisy Hill Real Estate Limited v Rent Control Tribunal* [1995] JLR 176.

9 The relevant part of the judgment starts at page 180 line 6 to page 181 line 43 as follows:–

> ***"At the commencement of his judgment, the Judicial Greffier had regard to the principles that guide the English courts in relation to further and better particulars set out in The Supreme Court Practice 1995, para. 18/12/1, at 306–307.*** He did not set them out. He might well have done so. They read

(ibid.):

> ***"The function of particulars is accordingly:***
>
> > ***1) to inform the other side of the nature of the case that they have to meet as distinguished from the mode in which that case is to be proved…***
> >
> > ***2) to prevent the other side from being taken by surprise at trial…***
> >
> > ***3) to enable the other side to know with what evidence they ought to be prepared and to prepare for trial…***
> >
> > ***4) to limit the generality of the pleadings…***
> >
> > ***5) to limit and define the issues to be tried, and as to which discovery is required…***
> >
> > ***6) to tie the hands of the party so that he cannot without leave go into any matters not included…But if the opponent omits to ask for particulars, evidence may be given which supports any material allegation in the pleadings."***

We must recall that an application for particulars is a method of attacking pleadings that have been filed and "the object of particulars is to enable the party asking for them to know what case he has to meet at the trial, and so to save unnecessary expense and avoid allowing parties to be taken by surprise" ((*Spedding v Fitzpatrick (9)* 38 Ch. D.***at 413, per Cotton, L.J.***))

Particulars will normally narrow the issues between the parties and limit the parties to matters which are fairly contained within them. There is, in our view, a distinction to be drawn at this stage. A party is entitled to know the outline of his opponent's case; and the Greffier will always order a party to give particulars if he is satisfied that if he does not the applicant will be uncertain of what is going to be proved against him at trial. What the Greffier will not do is to order particulars of how the other party will prove his case. That, to us, is a matter of evidence and if the only purpose of particulars is to obtain details of such evidence, that would properly be regarded as an improper application.

But in the case where the only object is to obtain particulars, if the information asked for is necessary, we would say clearly necessary, then the application is a proper one and must be given even though it will disclose some evidence upon which the other party will rely at trial (see (*Marriot v Chamberlain (6)* 17 Q.B.D.***at 161)).*** This would apply, in our view, even in cases where the party from whom the particulars is sought was privileged from producing documents which would disclose the evidence (*Milbank v Milbank (7)* [1900 1 Ch.***At 383***]).

There is one other matter that we need to deal with at this stage. At one stage of his argument, Mr Bailhache said that the learned Greffier was taking a somewhat pedantic stance in driving a wedge between further and better particulars of a defence and a statement of the nature of the case. The wording occurs in r.6/14(1) of the Royal Court Rules 1992:

> ***"In any proceedings, the Court may order a party to serve on any other party particulars of any claim, defence or other matter stated in his pleading, or a statement of the nature of the case on which he relies, and the order may be made on such terms as the Court thinks just."***

We feel that the learned Greffier was aware of the distinction and adequately balanced the distinction as is shown in his judgment:

> ***"The requests contained in paras. 1(a) and (b) are not strictly for further and better particulars but are for a better statement of the respondent's case.*** The requests seek to ask questions about the attitude of the respondent to certain evidence and the facts and matters which the respondent took into account when reaching a certain decision. This is not a request for further and better particulars and it is not a proper request for a better statement of case as the respondent has adequately pleaded its answer to the relevant paragraph of the representation."

We do not feel necessarily that in the judgment the words "in this way" have the meaning urged upon it by Advocate Bailhache, namely, "because it is a statement of case.". In our view, though the matter is inelegantly worded, the reluctance of the Greffier is more concerned with the fundamental objection that prevails throughout the judgment. He said:

> ***"There are two of the requests which are of a similar nature and these are 2 and 13.*** In both of these, the representor has seized upon a reference in the respondent's answer to "a fair rent" and seeks information as to how the respondent set a fair rent. This application is clearly not an application for further and better particulars. It appears to me that it is an attempt to get the respondent to state how it sets a fair rent and that it is not appropriate that this information be sought in this way."

We must also recall that re. 6/8(1) of the Royal Court Rules 1992 states:

> ***"[E]very pleading must contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement must be as brief as the nature of the claim admits.***""

10 In respect of requests 1 and 2, these arise out of paragraph 6 of the amended order of justice which pleads that Camillo Crociani, the late husband of the first defendant *"was an immensely wealthy industrialist"*. What was sought were details of assets worth more than $100,000 and every debt and liability of $100,000 or more as at the date of Camillo Crociani's death. It is said this is of relevance because the defendants deny that the wealth in the Grand Trust came from Camillo Crociani; rather the lifestyle enjoyed by the first plaintiff was due to the work and efforts of the first defendant and no funds derived from the estate of Camillo Crociani were settled on the Grand Trust (see paragraphs 62 and 64 of the answer).

11 The fundamental issues at the heart of the plaintiffs' claim are to recover certain distributions paid to the first defendant (see paragraph 40 of the amended order of justice), the setting aside of an appointment made from the Grand Trust to the Fortunate Trust on 9 th February, 2010, that the retirement of the first, second and third defendants' as trustees of the Grand Trust on 10 th February, 2012, was of no effect, and that an appointment by the trustees of the Grand Trust to the second and fourth defendants as trustees of the Agate Trust dated 2 nd August, 2012, was also void and of no effect.

12 The issue as to whether or not assets settled on the Grand Trust came from the estate of Camillo Crociani or the first defendant is clear on the pleadings. The issue is, however, marginal to the substantive relief sought by the plaintiffs, which arises out of their criticisms of the steps taken by the combination of the first to fourth defendants and do not relate to the origin of monies settled on trust. The issue raised by paragraph 6 of the amended order of justice and paragraph 64 of the answer is therefore background only. In these circumstances, I do not consider it appropriate to require particulars of events that occurred 35 years ago. The real issues between the parties are clear. The dispute as to where funds settled on a trust came from is also clear. Furthermore the first defendant is able to give evidence and provide discovery of what assets were settled into the Grand Trust and the source of those assets. Requiring the plaintiffs to go back and search for information which is of marginal relevance is not an appropriate use of particulars.

13 In respect of request 15, this allegation arises out of paragraph 37 of the amended order of justice and is an allegation that the first, second and third defendants made distributions to the first plaintiff which would be redirected to the first defendant. The distributions are set out at paragraph 39 of the amended order of justice. The fact that these sums were distributed is not in dispute and that some of the sums were transferred to the first defendant's account is also not disputed (see paragraph 67 of the first, second and fourth defendants' answer). The plaintiffs' allegation by further and better particulars already provided has now been refined to mean that sums were first transferred to the first plaintiff and then to the first defendant.

14 At paragraph 19 of the answer it is averred that such sums were transferred because the first defendant was responsible for paying the common household accommodation and other expenses for the first plaintiff and the fifth defendant. The particulars sought relate to

an allegation that the first, second and third defendants knew that the distributions would be redirected to the first defendant as that allegation has now been clarified.

15 The answer of the plaintiffs to request 15 is that they cannot provide any such particulars until discovery and exchange of affidavits. However, the answer does say that requests for distributions were either made by the first defendant or made by the first plaintiff at the first defendant's request, with the purpose and intention on the first defendant's behalf that all or part of such distributions would be redirected to the first defendant.

16 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.

17 However, the allegation in paragraph 37 is that each of the first, second and third defendants knew and intended that the bulk of those distributions would be redirected to the first defendant. It is not clear whether the plaintiffs' allegation is that the second and third defendants actually knew and intended this was the case or whether it is the plaintiffs case that such knowledge and intention arises as a matter of inference. I therefore ordered the plaintiffs to clarify this one point, because I considered it important for the second and third defendants to know the case against them and whether it is an allegation of actual knowledge and intention or one based on inference only. I made this order because the answers provided by the plaintiffs' further particulars provided voluntarily on 27 th February, 2015, did not make the plaintiffs' position clear in respect of the knowledge of the second and third defendants.

18 The next series of requests for further and better particulars related to paragraph 63 of the amended order of justice which pleads that on or around 25 th April, 2011, the first plaintiff arrived in Monaco for an alleged surprise visit. In relation to this the first plaintiff is to put to strict proof that she visited Monaco on or around 25 th April, 2011, and it is denied that she visited the Monaco apartment on that day. The particulars sought in respect of this paragraph were:–

> “31. Please explain the purpose of the alleged surprise visit;
>
> 32. Please state how long and where Cristiana had been intended to stay during her “surprise visit”;
>
> 33. Please identify when Cristiana arrived in Europe for this visit and the airport where she landed.”

19 These requests do not go to any issue raised on the pleadings. They are quite clearly requests for evidence or are matters to be put in cross-examination. Such matters are entirely inappropriate as the subject matter of requests for further and better particulars. They do not narrow any issues between the parties. These requests are illustrative of an inappropriate approach to identifying the real issues between the parties, which is the function of further and better particulars, and are trying to obtain evidence.

20 Particulars were sought in relation to paragraph 64 of the amended order of justice which states:–

> *"When Cristiana arrived at the family home in Monaco neither Madam Crociani nor Camilla were home.* In their absence Cristiana discovered from papers that Madam Crociani was secretly arranging for the restructuring of the family wealth."

21 The requests sought in respect of this paragraph as follows:–

> *"34. Please confirm it is alleged that Cristiana arrived at the family home in Monaco on 25th April, 2011;*
>
> *35. Please explain how it is alleged that Cristiana travelled from the airport to the family home on 25th April, 2011;*
>
> *36. Please state the time which is alleged that Cristiana arrived at the family home on 25th April, 2011;*
>
> *37. Please explain how long it is alleged that Cristiana remained at the family home on 25th April, 2011;*
>
> *38. Please identify each and every document from which it is alleged that Cristiana made this alleged discovery;*
>
> *39. In respect of each document please state:–*
>
> > *i. Where in the family home it is alleged that Cristiana found the document;*
> >
> > *ii. How Cristiana came to find it;*
> >
> > *iii. Whether it is alleged that Cristiana took the original of it with her;*
> >
> > *iv. Whether it is alleged that Cristiana took a copy of it (also please explain how she took such a copy);*
>
> *40. Please explain how long it is alleged that Cristiana remained at the family home on 25th April, 2011;*
>
> *41. Please explain how long it is alleged that Cristiana remained in Monaco for her surprise visit."*

22 In respect of each of these requests, my decision is as follows, adopting the numbers of each request:–

> 34. When Cristiana arrived at the family home is a matter of evidence. The issue as to whether or not she visited the family home is clearly in issue. The defendants will be able to adduce evidence from the management of the building that Cristiana did not enter the building as they allege together with any other evidence relevant to whether or not she could have visited the family home on 25th April, 2011.
>
> 35. How Cristiana travelled from the airport is entirely irrelevant. It is not an issue referred to in the pleadings and is quite clearly a request for evidence. This request was entirely inappropriate.
>
> 36. The precise time at which Cristiana arrived at the family home is also a request for evidence. The plaintiff is on notice that these issues will be raised and can deal with them in any witness statement or in cross-examination. As I have noted above the defendants can also adduce their evidence in support of their case that Cristiana did not visit the Monaco apartment on the day in question.
>
> 37. The same analysis applies in relation to the request as to how long Cristiana remained at the Monaco apartment.
>
> 38/39. In respect of what documents Cristiana saw, again she will have to explain this in her witness statement. She is now on notice of the likely questions to be put to her, it will be for the Jurats to assess any answers given at trial. However, it is not appropriate to use further and better particulars as a precursor to such questions which are evidential issues.
>
> 40. The same analysis applies to requests 40 and 41 as for requests 36 and 37."

23 In relation to this part of my judgment I cannot but repeat the observations I made in respect of my last judgment reported 1 st July, 2015, in this matter in relation to the parties taking a proportionate approach to litigation. The particulars I have been asked to consider do not reflect such an approach.

The defendants' application to amend their answer

24 The nature of the proposed amendment sought is to plead a counterclaim as set out in my judgment dated 1 st July, 2015, at paragraph 2, namely that the first defendant seeks to contend, firstly, that she was permitted to benefit from the Grand Trust by reason of her interest in the sixth defendant and, secondly, if she is not entitled to benefit from the Grand Trust, then the Grand Trust was set up by mistake and all dispositions, pursuant to which

the first defendant settled assets on the Grand Trust, were made by mistake, such that the Grand Trust should be set aside.

25 This judgment therefore follows on from my judgment of 1 st July, 2015. That judgment was issued in relation to an application by the plaintiffs seeking discovery of legal advice said to have been referred to in the third affidavit of the first defendant and two letters from Carey Olsen dated 3 rd June, 2015, and 9 th June 2015. In my earlier judgment at paragraphs 35 to 39 I concluded that the third affidavit of the first defendant and the letter of Carey Olsen of 3 rd June, 2015, did refer to the gist of the advice. I then concluded at paragraphs 47, 48 and 49 as follows:–

> ***"47. In reaching my decision, although the gist of the advice had been referred to, I concluded that the third affidavit of the first defendant was not deployed in evidence. The broader context of the third affidavit was to resist the pre-emptive costs application, which was an application that was withdrawn before it was even argued. Furthermore, it was withdrawn without the first to fourth defendants relying on the third affidavit including paragraph 15 in any court hearing. Although the third affidavit was before Commissioner Clyde-Smith on 29th May, 2015, that hearing was a directions hearing and it appears not to be in dispute between the parties that no reference was made specifically to paragraph 15 of the third affidavit on 29th May.***
>
> ***48. The specific context of paragraph 15 is that it appears in a section headed "the setting up of the Grand Trust and the role of the promissory note". The relevance of paragraph 15 to the pre-emptive costs application was therefore to draw to the court's attention that one factor against making a pre-emptive costs order was that an application to amend had been brought to seek to set aside the Grand Trust on the basis of mistake. If the Grand Trust was set aside, or it was going to be set aside these possibilities were factors against ordering a pre-emptive payment of costs out of the assets of the Grand Trust. Advocate Kelleher was therefore correct in his submission that the Royal Court was not going to determine the application to amend; the relevance of paragraph 15 was to draw to the court's attention the fact that such a counterclaim was being made. The matters referred to in the final sentence of paragraph 15, which is the part relied on by the plaintiffs, were not being used to advance a case as to why a pre-emptive costs order should not be made. If anything, those observations appear to me to have been designed to head off a possible question that the Royal Court might have asked as to why the counterclaim was not pleaded earlier, in particular bearing in mind the order made in April 2013, requiring a full answer. However, the answer to any such question at best might have been relevant to any exercise of discretion. This should be kept in context. From the third affidavit alone, there were clearly many other factors that the Royal Court would have had to consider in exercising any such discretion, assuming it had the power***

to make such an order in principle, relating to the merits of whether or not a pre-emptive costs order should be made.

49. For all these reasons I therefore concluded that the third affidavit and, in particular paragraph 15 and the gist of the advice referred to, had not been deployed in evidence. I was also conscious that privilege is not easily lost as noted in Vilsmeier and Brennan. In view of this principle and the context in which the gist of the advice had been referred to and the affidavit deployed, I also concluded that fairness did not require disclosure of the advice."

26 In my earlier judgment I also considered the assertion by the first, second and fourth defendants in Carey Olsen's' letters dated 3 rd and 9 th June, 2015, that the first to fourth defendants only considered the possibility of filing a counterclaim once the plaintiffs filed their reply in May 2015. My conclusions in response to this assertion at paragraphs 40 to 46 were as follows:–

"40. This assertion contrasts with the following references in the order of justice:–

a) The foundation was incorporated for charitable purposes — paragraph 19;

b) The Grand Trust was not created with the purpose or intention of providing any benefit to Madam Crociani. Under its terms Madam Crociani was not able to benefit otherwise than as a default beneficiary — see paragraph 27;

c) The Trustee's justification for the Agate Appointment was to be influenced by the false assertion that Madam Crociani is and always has been intended to benefit from the Grand Trust via the foundation — see paragraph 100;

d) The foundation was at the time of the creation of the Grand Trust a wholly charitable foundation from which Madam Crociani could not benefit — see paragraph 100.2;

41. All of these allegations were denied in the answer filed by the first to fourth defendants. At paragraph 4 the answer also pleaded that the first defendant "was advised before entering into the Grand Trust agreement, that it had been drafted in such a way as to allow [her to benefit]. It was on this basis that she contributed to the Grand Trust substantial assets. If Madam Crociani had not been able to benefit from those assets then she would never have settled the Grand Trust or contributed to its substantial assets" .

42. Paragraph 15 of the answer also states "it was never intended that Madam Crociani should not benefit, or should be excluded, from the

Grand Trust".

43. The allegation that the first defendant could not benefit from Grand Trust was therefore raised in the order of justice as set out above and denied by the answer.

44. I also refer to the note of the consultation with Brian Green Q.C. the relevant part of which is set out at paragraph 5 above where it was expressly noted that a "counterclaim for rectification could be made in any hostile proceedings brought by Christiana" as early as July 2012. This extract means that the basis to plead a counterclaim of the kind now contemplated was known to the defendants in July 2012.

45. Taking this note and the pleadings as originally filed leads me to conclude, based on what has been provided to me so far, that pleading a mistake claim was known about even before proceedings had been commenced and the issue of whether or not the first defendant could benefit was already part of the matters in dispute between the plaintiffs and first to fourth defendants by June 2013. I address the significance of this conclusion later in these detailed reasons.

46. I also reached the view that the combined effect of the order of 19th April 2013, the detailed written reasons given the same day by Commissioner Clyde-Smith, and the undertaking given by the plaintiffs in May 2013, would have allowed the first to fourth defendants to either plead the counterclaim at the time they filed their answer, or to have made an application to amend long before they did. Although Carey Olsen's letter of 9th June, 2015 suggests that a counterclaim was not covered by the undertaking given, I disagree. The language of the undertaking could not have been clearer. It extended to any step in the proceedings and I construe the filing of a counterclaim or an application to amend to plead a counterclaim as such a step. Again I return to the effect of this later."

27 While I did not order disclosure of the legal advice for the reasons set out above, by an act of court dated 18 th June, 2015, I ordered at paragraphs 2 and 3 as follows:–

"2. the First, Second and Fourth Defendants shall file an affidavit by 5pm Friday, 26 th June, 2015, setting out when the First Defendant was advised not to pursue the Mistake Claim as set out at paragraph 15 of the First Defendant's third affidavit and when the First Defendant, if the date is different, decided not to pursue the Mistake Claim until resolution of the forum challenge;

3. the First Second and Fourth Defendants are permitted to file affidavit evidence, in addition to the affidavit evidence required by paragraph 2 of this order to set out the reasons why the First, Second and Fourth defendants did not seek to pursue the Mistake Claim until conclusion of

the forum challenge, together with any other circumstances, the First Second and Fourth Defendants wish to rely on."

28 My reasons for doing so were recorded at paragraphs 50 to 54 of my judgment of 1st July, 2015, as follows:–

"50. However, that was not the end of the matter. Although the affidavit had not been deployed, it had been filed with the court and served on the other parties. It was part of the Court record. The plaintiffs, as they had done in making the present application, were entitled to refer to the third affidavit and to rely on any parts of it in any subsequent court application, whether interlocutory or at trial. Even though I have found that the third affidavit had not been deployed by the first to fourth defendants, it is an affidavit that the plaintiffs may and do refer to me in the context of the first, second and fourth defendants' application to amend. In that sense it is the plaintiffs who have deployed the first defendant's third affidavit to resist the first, second and fourth defendants' application to amend. The reliance on the affidavit is in the context that the plaintiffs contend that the issue of when and why advice was given, is material to the application to amend. I agree as matters presently stand, with the plaintiffs' contention. I also consider that, if the application to amend is allowed, when and why advice was given may be relevant to any terms upon which such an amendment are permitted.

51. I therefore firstly required the first, second and fourth defendants to disclose when the advice referred to in paragraph 15 of the affidavit of the first defendant and the letter of 3rd June, 2015 of Carey Olsen was given. In view of the fact that the gist of advice had been referred to, I did not consider, on the facts of this case, that referring to when advice was given, amounted to a waiver of privilege. Although the fact of taking advice can be privileged, (see *Rokos v Brevan-Howard* [2014] JRC 232A ***at paragraphs 39 and 40), in this case the fact of advice having been taken was expressly referred to in paragraph 15. The first second and fourth defendant, having referred to advice being taken are no longer entitled to refuse to say when that advice was taken. As the question of when that advice was taken and the date, if different, of any decision to act on it is relevant to the application to amend, I concluded that I was not requiring privileged advice to be disclosed when the fact of taking advice had already been revealed.***

52. Secondly I gave the first to fourth defendants permission to file affidavit evidence setting out the reasons why the counterclaim had not been filed earlier, in support of the contentions set out in the letter of 9th June, 2015 from Carey Olsen referred to above. I indicated that any such explanations should be supported by evidence. In the absence of such an affidavit, based on the material already before me, I indicated I would proceed on the assumption that the counterclaim could have been

pleaded at the time the answer was filed in June 2013. My reasons for being able to proceed on such an assumption following on from paragraphs 40–46 above are as follows:–

> ***a) The fact that the concept of seeking rectification by counterclaim based on mistake was known to the defendants and their advisers prior to the commencement of the proceedings following the consultation with Brian Green Q.C..***
>
> ***b) The obligation to file a full answer required by Commissioner Clyde-Smith and confirmed by a single judge of the Court of Appeal.***
>
> ***c) The clear effect of the undertaking given by the plaintiffs in May 2013, covering any step in the proceedings.***
>
> ***d)The fact that the order of justice and the answer already placed in issue whether or not the first defendant was entitled to benefit from the Grand Trust.***

53. I granted the first, second and fourth defendants an opportunity to file an affidavit explaining why the application was not made earlier, to permit them to adduce evidence that what has occurred was as contended for in Carey Olsen's letter of 9th June, 2015. The fact that such an affidavit may lead to the first, second and fourth defendants choosing to disclose legal advice, the privilege of which has to date not been waived, does not matter. Any such disclosure is a consequence of what has already taken place in this case which, in the absence of any further evidence permits me to proceed on the assumption I have referred to in the preceding paragraph.

54. It is therefore for the first, second and fourth defendants to choose whether they wish to maintain privilege and proceed on the assumptions that I have set out in this judgment or whether they wish to explain why the application was not made sooner. When I gave my decision I made it clear that if I proceed either on the assumption set out in this judgment or I reached the view that the application was not made earlier, as a result of a deliberate, in the sense of a conscious, decision not to run the risk of prejudicing the forum challenge, what the consequences of such a position might be is a matter for the application to amend currently returnable on 2nd July, 2015. I also observe in passing that, at present, there is an issue between the plaintiffs and the first, second and fourth defendants as to whether or not I possess such a power to refuse to allow an arguable amendment, which is a matter to resolve on 2nd July, 2015."

29 Matters then took a surprising turn because in a fourth affidavit filed by the first defendant for this application, the first defendant indicated that paragraph 15 of her third affidavit, which had led to my judgment of 1 st July, 2015, did not *"in fact reflect the position".* This led

to the submission recorded at paragraph 21 of the first, second and fourth defendants' skeleton argument, that by reference to the first defendant's fourth affidavit and despite any previous indication given to the contrary, which can only be a reference to the first defendant's third affidavit, there was no deliberate or informed decision taken by the defendants (including the third defendant) when the answer was filed on 14 th June, 2013, not to pursue the mistake claim.

30 The issue at the heart of the plaintiffs resisting the application to amend therefore arises out of paragraph 15 of the first defendants' third affidavit. While paragraph 15 was set out in my judgment of 1 st July, 2015, the final sentence bears repetition and provides as follows:–

> *"The only reason why I have not sought to pursue this counterclaim sooner is that I was advised (without in any way waiving privilege) that to do so might jeopardise or otherwise adversely affect the challenge to forum that was pursued by me and the other defendants ("the Forum Challenge")."*

31 The plaintiffs' submissions in relation to this paragraph were that the counterclaim could have been pleaded much earlier and what has occurred is an abuse of process. Paragraph 3 of the plaintiffs' skeleton puts it plainly as follows:–

> *"Where a party has made a deliberate decision not to advance the case to which they seek to amend at the correct time that is a powerful factor against permission being given to amend."*

32 As a result I should not allow the application to amend. Rather the consequences of the decision not to plead the counterclaim earlier should fall on the first, second and fourth defendants or their advisers as the case may be.

33 The plaintiffs further contended that the counterclaim was highly relevant to the issues in the forum challenge and the Royal Court, Court of Appeal and the Privy Council were permitted to deal with the forum challenge on a false basis.

34 In addition to the general submissions of the plaintiffs on the application to amend recorded at paragraphs 1 to 4 of my judgment of 1 st July, 2015, Advocate Robinson made the following points:–

> ***i) There is no explanation from any of the legal advisers regarding the change of position between the third affidavit and fourth affidavit of the first defendant despite the first, second and fourth defendants having been given the opportunity to do so, by reference to paragraph 3 of my Order dated 18 th June, 2015.***
>
> ***ii) As the first, second and fourth defendants have chosen not to waive***

privilege, the court should proceed on the assumption set out at paragraph 52 of my judgment of 1 st July, 2015.

iii) The fourth affidavit is no clearer than the third affidavit. It does not explain whether the first defendant was represented in discussions rather than taking part herself.

iv) The rhetorical question was also posed as to why it was necessary for the lawyers to check their files as recorded at paragraph 11 of the fourth affidavit if in fact advice had never been given not to delay pleading the counterclaim.

v) The first, second, third and fourth defendants were still protected by the paragraph 18 of Commissioner Clyde-Smith's judgment [2013] JRC 080 ***of 19 th April, 2013, and the undertakings given by the plaintiff.***

vi) The reference in the first defendant's affidavit to the first, second, third and fourth defendants and their advisers considering counterclaims generally did not stand up to scrutiny. No other possible counterclaim had ever been identified.

vii) Pleading of the counterclaim did not require significant work. The material facts had already been pleaded. All that was pleaded in the counterclaim was a remedy.

viii) It continued not to be credible that the lawyers involved could have forgotten the mistake claim given their calibre. The mistake claim had also been referred to clearly in an opinion from Mr Le Poidevin Q.C. dated July 2012 at paragraphs 48 to 50. I was also referred in passing to paragraph 63 of Mr Le Poidevin's opinion which set out why proceedings could be brought in Jersey. The submission that the reference to the mistake claim was therefore a passing reference only again did not stand up to analysis.

ix) It also lacked credibility to contend that the legal advisers to the first, second and fourth defendants would have not looked at the reply which was not a complex document until after the Privy Council appeal.

x) The effect of allowing the amendment was significant because it would allow evidence of subjective intent to be adduced and the case would no longer be a simple question of construction.

35 The plaintiffs therefore concluded that it was clear that the counterclaim could have been pleaded earlier, that it was a deliberate decision not to do so and therefore the conclusion at paragraph 45 of the judgment of 1 st July, 2015, still stood.

36 The defendants in response, by reference to the fourth affidavit filed by the first defendant, no longer rely on what was said by the first defendant in the final sentence of paragraph 15 of her third affidavit. Paragraph 11 of the fourth affidavit is at the heart of this change of position and states as follows:–

> *"11. I can answer these points directly. I have never been advised not to plead the Mistake Claim. Before the resolution of the forum challenge, I never took a decision to delay the pleading of the Mistake Claim and advanced it at the first opportunity I could. I appreciate that in an earlier affidavit which I have never deployed I may have given a different impression. The paragraph in question was drafted by my lawyers and provided to me for my approval under a very tight and pressured deadline. Unfortunately, it does not in fact reflect the position and it is incumbent on me to correct the position. My lawyers have subsequently reviewed their files and can in fact find no record that I was given this advice or indeed any advice on when to bring the Mistake claim, prior to the Privy Council determination. As was explained in the application for a stay to the Privy Council dated 2 June 2014 (as also recorded in other formal documents), they were concerned that it might prejudice the forum challenge if they were to pursue a claim in the Jersey proceedings at the same time as arguing that those proceedings should not take place in Jersey. However it was never contemplated that the nature of any counterclaim would have made a difference to the forum challenge. In any event even if these concerns had not been present it would still not have been possible to plead the counterclaim prior to the Privy Council hearing, for as I explain below at no point was I ever in a position to plead a Mistake Claim."*

37 Paragraph 47 of the affidavit states "as I say above, I have never been advised not to pursue the mistake claim and have never taken a conscious decision not to pursue it until resolution of the Forum Challenge. Even if I had had it in mind not to pursue the Mistake Claim at the time the answer was filed, I could not have done so."

38 In paragraph 60 of her affidavit the first defendant's evidence was that during the course of the defendants' appeal to the Court of Appeal "the first to fourth defendants did have a little more time to reflect on the plaintiffs' claims, and the wider ramifications. We were also able — albeit only to a modest degree — to investigate, obtain and reflect on some potential evidence relevant to those claims and their wider ramifications (which we had simply not had time to do before the Royal Court heard the Forum Challenge). This came nowhere close to a complete review of an analysis of the position such as would have been necessary to enable any pleading."

39 At paragraph 61, she continued, "I certainly did not devote much thought to any possible counterclaim during this period or as to when the appropriate time might be to seek to advance a counterclaim if I had one. Beyond this, for the reasons explained above, I was simply not in a position to plead any counterclaim anyway and, in any event, the proceedings in Jersey were not advancing substantively."

40 At paragraph 77 of her affidavit the first defendant deposed, "I did not begin to think about counterclaims based on these issues until I after I had seen the plaintiffs' reply. I certainly did not begin to formulate in my mind what those counterclaims might be, and whether I

wanted to pursue them, until after I had been able to properly to consider the Reply, and its possible consequences for these proceedings."

41 In paragraph 78 the first defendant stated, "insofar as I gave any thought or was able to give any thought to any possible counterclaim during this period, I continued to hold the view that it would have looked odd to be pursuing a counterclaim in proceedings in Jersey at the same time as seeking a stay of those proceedings and arguing that those proceedings should not take place in Jersey. I also took the view that the way this might have looked could have prejudiced the forum challenge even if its impact on the court might only have been subconscious. I should emphasise again however that this had nothing to do with the substantive nature of any such counterclaim."

42 The defendants further contended that following the application for leave to appeal before Pleming J.A. on 24 th May, 2013, the parties operated under a *de facto* stay which meant that there was no onus on the defendants to apply to amend.

43 Similarly once an application was made to the Privy Council for a stay in June 2015, and the Privy Council ordered an early determination of the first to fourth defendants' appeal, again a *de facto* stay was in place.

44 In response to Advocate Robinson's criticisms of the fourth affidavit it was contended as follows:–

(i) The counterclaim was only an alternative claim. An alternative counterclaim was not relevant to where the plaintiffs' claims should be determined. The application to amend was therefore a normal one and should be granted on the usual terms.

(ii) This application would not cause any delay to the action now. There were many issues to be resolved.

(iii) The reply was the catalyst to the counterclaim which was only considered once the Privy Council hearing was resolved.

(iv) There was no deliberate election not to plead the counterclaim earlier.

(v) Mistake was not centre stage to the Brian Green opinion.

(vi) There was no intention to plead mistake in 2012 (see paragraph 23 of the fourth affidavit of the first defendant).

(vii) The amendment was not a *volte face* but was an alternative claim.

(viii) The forum challenge would have been determined by the Privy Council in any event.

(ix) The requirement to file a full answer coupled with other steps being taken, took place at an extremely busy time.

(x) What was being considered when the matter was before the Court of Appeal and the Privy Council was any possible counterclaim not the specific counterclaim now advanced.

(xi) The mistake claim was not straightforward and required detailed work to be carried out before it could be pleaded.

Decision

45 The principles upon which an application to amend which is not late are set out at paragraphs 3 and 4 above. I observe in particular that the general rule is that on an application to amend the Court will allow such amendments, provided no party to the action would thereby be unavoidably prejudiced.

46 This is not a late application to amend as compared with the position in *Brown v Barclay's Bank* [2002] JLR Note 1 and *Cunningham v Cunningham* [2009] JLR 227 as considered by me in *Neal v Kelleher* [2014] JRC 233.

47 However, the fact that this is not a late application to amend does not mean that I am not entitled to ascertain why an application was not made earlier or that I cannot refuse such an application. Although generally amendments not made late will be allowed, I construe the words in *Stancliffe v Charlton* referred to above as still vesting a discretion in me. This means that I possess the power to refuse to exercise my discretion to allow an amendment even if it is not made late.

48 However, to refuse to allow an amendment would also require me to be satisfied that the party opposing the amendment to an action would be unavoidably prejudiced if the amendment were granted, or that some special or unusual circumstances existed which entitled me to refuse an amendment that otherwise reflected a real issue in dispute. I also consider that, if I were minded to allow an amendment but that a plaintiff would suffer prejudice, I should evaluate whether any prejudice that a party facing the amendment might suffer or any other special or unusual circumstances could be addressed by imposing conditions or varying the usual order as to costs, when an amendment is granted. Any such prejudice must be balanced against the prejudice that a party seeking an amendment will suffer if the amendment is refused. I consider later in this judgment how I propose to exercise this discretion.

49 In considering the alternative contentions both of which were forcefully advanced, I start by reference to the material events.

50 As previously noted, on 19 th April, 2013, the first to fourth defendants were required to file

a full answer, for the reasons given in Commissioner Clyde-Smith's judgment reported at [2013] JRC 80.

51 That appeal came before Pleming J. A., sitting as a single judge of the Court of Appeal. Paragraphs 10 and 11 of his judgment reported at [2013] JCA 100 stated as follows:–

> ***"10. Although, as already stated, I am not prepared to grant leave to appeal from the April Act of Court, I can here address the timetabling issues that arise. The forum hearing, originally due to be heard on 29th May, has now been fixed for 28th–30th August, and Directions have recently been set by the Commissioner for the filing of documents/evidence and skeleton arguments. Advocate Robinson informed me that, in light of that timetable, there will be no time for the taking of other procedural steps in the substantive proceedings — such as Reply, Request for Further and Better Particulars etc. Advocate MacRae, in response, points out the automatic need for an application by the Respondents for directions which will (or at least might) arise before August. I am concerned that there should not be steps in the proceedings, other than the filing of the Answer, before the forum hearing/decision in August. Proceeding on the assumption that I have the necessary jurisdiction (which was accepted by the parties) I amend the date for the filing of the Answer from "on or before 29th May" to "on or before 14th June". I also encourage the parties to agree that time should not run for the requirement of any further procedural steps in the substantive Jersey proceedings until the hearing in August when this topic can be revisited by the Commissioner. This will enable the parties to concentrate their efforts over the next few weeks in preparing for the forum hearing, but with the benefit of the Order of Justice being formally responded to in the Answer — to which I now return.***
>
> ***11. The Commissioner, having vacated the 29th May date for the hearing of the forum challenge, then considered, as he put it, "the balance [of] the potential prejudice to the [Appellants] in having to file a full answer to the Order of Justice against the potential prejudice to the [Respondents] in their claim being very substantially delayed" — see paragraph 24 of his judgment. The Commissioner expressly accepted that "it would be a very heavy burden for the [Appellants] to prepare a full (as opposed to a holding) answer and at the same time to prepare for the forum challenge hearing, some 6 weeks away" — see paragraph 12 of the April judgment. But the "6 weeks" reference makes it clear that the "very heavy burden" was being linked to the forum hearing on 29th May. As that date has been postponed for 3 months, the burden is considerably lightened. In any event, it would be surprising if much of the work necessary for the drafting of the Answer has not already been done."***

52 Pleming J.A.'s order had the practical effect that the time to file an answer was extended to 14 th June, 2013. To put this in context, as recorded at paragraph 5 of Commissioner Clyde-

Smith's judgment of 19th April, 2013, [2013] JRC 080, the third defendant placed the action on the pending list on 1st February, 2013. The previous day Messrs. Mourant Ozannes had accepted service for the first, second and fourth defendants. The defendants had therefore had some four and a half months to prepare an answer by the time one came to be filed although they had issued the forum challenge during this period.

53 It is also right to observe that during this period the first, second and fourth defendants had changed legal advisers, had to respond to an anti-suit injunction and file evidence and prepare submissions for the forum challenge.

54 It is also right to record that the undertaking given by the plaintiffs in their letter of 25th April, 2013, to the effect that any procedural steps taken by the first to fourth defendants would not be used against them at the forum challenge hearing or any equivalent hearing in Mauritius, did not deal with the effect of any procedural steps taken beyond the Royal Court hearings.

55 When the matter was before the Court of Appeal, both parties undertook not to take any steps in the Jersey proceedings or the Mauritius proceedings pending determination of the appeal to the Court of Appeal (see Act of Court dated 27th September, 2013). I therefore observe that this undertaking is different to the undertaking given by the plaintiffs on 25th April, 2013, to the Royal Court. The undertakings to the Court of Appeal were that neither party would take any steps, whereas the undertaking to the Royal Court was that the first to fourth defendant would not be prejudiced by any steps taken before the Royal Court. I address the significance of this difference below.

56 The forum challenge judgment was handed down by the Royal Court on 2nd October, 2013. The appeal was heard by the Court of Appeal on 28th January, 2014, and the Court of Appeal issued its judgment on 7th April, 2014.

57 On 23rd April, 2014, the plaintiffs' application to amend its order of justice came before me resulting in my judgment reported at [2014] JRC 102A.

58 On 2nd June, 2014, the first to fourth defendants filed their appeal to the Privy Council and on the same day issued a stay application.

59 Paragraph 54 of an affidavit filed by Advocate Hoare dated 2nd June, 2014, on behalf of the first to fourth defendants in support of the stay application, contended:–

> *"While the Court of Appeal approached the question of whether or not there should be a stay as one of case management, the appellants consider that the point is fundamental to the appeal — while it remains to be finally determined*

that the dispute will be resolved in Jersey, the appellants ought not to be required to take substantial procedural steps such as pleading, discovery and witness statements in the Jersey proceedings."

60 This application was heard by Lord Neuberger who indicated that the Privy Council would be prepared to provide an early listing of the appeal, if to do so, would allow the parties to reach agreement regarding a stay. Ultimately, by a letter, from Bedell Cristin for the plaintiffs, dated 9 th June, 2014, the plaintiffs proposed that they would not invite the Royal Court to consider a summons for directions until after determination of the appeal to the Privy Council.

61 Therefore, while the matter was before the Privy Council, there was a *de facto* stay. I am not aware that there were any undertakings given that any steps taken in the Jersey proceedings by the defendants, while the matter was before the Privy Council would not be used against them in the Privy Council appeal by the plaintiffs.

62 The Privy Council dismissed the appeal on 26 th November, 2014. Accordingly a directions summons came before me which ultimately was heard in early January 2015.

63 I refer to this chronology because, while Commissioner Clyde-Smith required the defendants to file a full answer, as distinct from an answer simply referring to the forum challenge, which he described as a holding answer, there is a distinction, as I have referred to above, between the position before the Royal Court and the appellate courts. Before the Royal Court, the defendants enjoyed the benefit of an undertaking that no steps taken by them in the proceedings would be used against them in relation to the forum challenge. By contrast when the forum challenge was before the appellate courts, no such protection was afforded. Rather, the position was that both parties before the appellate courts had either undertaken or agreed not to take any steps to progress the Jersey proceedings.

64 I now turn to consider the final sentence of paragraph 15 of the third affidavit and the fourth affidavit filed by the first defendant and the paragraphs I have referred to above. As the first defendant set out in paragraph 2 of her fourth affidavit, she is fluent in French and Italian, the latter being her mother tongue. She therefore explains that while she speaks some English she is not very fluent or comfortable with the English language and therefore gives instructions in Italian which are translated into English for the purpose of her lawyers who helped her approve the fourth affidavit. This does not surprise me. Indeed, I have assumed that both the third affidavit and the fourth affidavit were drafted for the first defendant by the legal team advising her. Whether the draft was by Carey Olsen or counsel, or a combination of both I am unable to say.

65 I refer to who drafted the affidavits however because the words appearing in the final sentence of paragraph 15 must have been prepared by the first, second and fourth defendant's legal team. This affidavit was of course filed on 15 th May, 2015, in opposition

to the pre-emptive costs application. No explanation has been forthcoming as to why the lawyer or legal team who drafted the affidavit thought, in May 2015, that the only reason why the counterclaim was not pursued earlier was because the first defendant was advised that it might jeopardise or otherwise adversely affect the forum challenge and why the position has since changed. Five weeks later the first defendant states that she never received such advice. This is also in an affidavit drafted for her by her legal team. There is no evidence before me as to why the legal team some five weeks earlier thought that she was advised as set out in the third affidavit at paragraph 15 and why they were then of a different view as recorded in paragraph 11 of the fourth affidavit.

66 In paragraph 11 the first defendant also relies on the application for a stay to the Privy Council and indicates that this application was made because the defendants were concerned that pursuing a claim might prejudice the forum challenge. However, that is not what the application to the Privy Council states. The concern of the defendants as explained to the Privy Council was that being required to conduct the action generally, before any Privy Council appeal was heard, might prejudice the forum challenge. In effect it was a submission that any appeal might be rendered pointless if the substantive arguments had in fact been determined in Jersey before the Privy Council heard the forum challenge. There is no reference in the application to the Privy Council and the affidavit of Advocate Hoare of any specific concern about pleading a claim, by way of counterclaim, and the effect this might have on the forum challenge.

67 Furthermore the statement in paragraph 11 that pursing a claim in Jersey might prejudice the forum challenge, in the context in which it appears, I conclude is a reference to pleading a counterclaim on the basis of mistake.

68 This conclusion is consistent with what the first defendant says at paragraph 61 of the fourth affidavit. In paragraph 61 she deposes that she did not give *"much thought"* to any possible counterclaim or when the appropriate time might be to seek to advance such a counterclaim. This means that she gave some thought to this possibility. Paragraph 61 relates to the period when the appeal was before the Court of Appeal i.e. between September 2013 and April 2015.

69 When the appeal was before the Privy Council, the first defendant at paragraph 78 of her fourth affidavit states "I continued to hold the view that it would have looked odd to be pursuing a counterclaim of the proceedings in Jersey at the same time as seeking a stay of those proceedings, and arguing those proceedings should not take place in Jersey." I find this statement difficult to follow. The first defendant has deposed that she was not advised not to pursue the mistake claim until after the resolution of the forum challenge. Yet by the time of the Privy Council she held a view that it would have looked odd to pursue such a counterclaim even though she had not been advised not to pursue such a claim.

70 In particular I am not told how the first defendant came to have the concerns referred to in paragraphs 61 and 78 of her fourth affidavit. I am not told how the concerns of Carey Olsen

or any counsel involved arose, when they arose or who discussed them. I am not told whether these concerns were ever discussed with the first defendant or a representative on her behalf. In my view the concerns of the first defendant and her legal advisers must have been discussed either between the legal advisers, or the legal advisers and the first defendant or the legal advisers and the first defendant's representatives which concerns were then passed on to the first defendant.

71 In my view it matters not which of these scenarios occurred. I am satisfied that some form of consideration of these concerns took place. What is significant in relation to the present application is that in light of this conclusion, i.e. that the concerns were explored in the manner I have just set out, I cannot accept that the third affidavit of the first defendant was wrong by reference to the assertions contained at paragraph 11 of the fourth affidavit.

72 While Advocate Kelleher contended that the defendants' concern was in respect of any possible counterclaim, I do not accept this submission. No other counterclaim has been identified. The only counterclaim that has ever been identified is to plead the mistake claim and it was this counterclaim that was known about in 2012. While the first defendant may have forgotten this part of the advice of Mr Green and Mr Le Poidevin in 2013, the defendants' experienced legal team would not have done so. While therefore Carey Olsen's' letters of 3 rd and 9 th June, 2015, and their skeleton argument in respect of the present application referred to any possible counterclaim, as does the first defendant in her fourth affidavit, I have reached the view that there was only one counterclaim they had in mind namely the present application. The conclusion at paragraph 45 of my judgment of 1 st July, 2015, therefore stands. Indeed, given the opinion of Mr Le Poidevin that I have referred to, which I was not aware of when I gave my judgment of 1 st July, the view I reached at paragraph 45 is reinforced by the opinion of Mr Le Poidevin. Furthermore, I do not regard either the note of Brian Green or the opinion of Mr Le Poidevin to be a passing reference to a mistake claim as was contended.

73 As to when the concerns about pleading a mistake claim were being considered, it is clear from paragraphs 61 and 78 of the fourth affidavit of the first defendant as I understand them that these concerns were being considered by the time the matter came before the Court of Appeal. That does not surprise me. This is because by that stage the first to fourth defendants' forum challenge before the Royal Court had failed. It is therefore not surprising that the first to fourth defendants and their advisers started to give consideration to how the substantive arguments might be fought if the appeal was unsuccessful. It is a natural question that would arise following an unsuccessful forum challenge.

74 What I am unable to conclude is whether such considerations took place when the matter was before the Royal Court. Although in my judgment dated 1 st July, 2015, at paragraph 52 I indicated I would proceed on the assumption that the counterclaim could have been pleaded at the time the answer was filed in June 2013, I do not consider it appropriate having heard further submissions from the defendants to proceed on such an assumption. This is for the following reasons:–

(i) I accept that while the forum challenge was being pursued before the Royal Court, this was a particularly busy time in relation to the filing of evidence for the forum challenge, preparing for the forum challenge itself, dealing with the anti-suit injunction and additional appeals in respect of the obligation to file an answer. Without hearing from the lawyers involved I do not consider it appropriate to proceed on the assumption that a deliberate decision was taken not to plead the counterclaim when the first to fourth defendants were involved in many other significant steps;

(ii) Given the number of tasks the first to fourth defendants had to carry out, I can see that the pleaded answer was only responding to the factual allegations made by the first to fourth defendants rather than pleading a counterclaim. I can see that it may be that this was the focus of the first to fourth defendants. In my judgment I am not prepared to reach a conclusion as to what the focus of the first to fourth defendants was without actual evidence; as Advocate Kelleher observed in argument, both his firm and the counsel involved are highly experienced and well regarded and it would be unfair and unjust to reach a conclusion that a counterclaim was not pleaded in the answer without having heard from those involved which could seriously affect their professional reputation. Not without a degree of hesitation, given I afforded an opportunity for such an explanation to be put forward, I have decided to accept this submission.

(iii) There was no evidence of any consideration of a counterclaim being discussed during the period an answer was being drafted in 2013 even though pleading a mistake claim had been identified the previous year.

75 To be clear, however I am not concluding that the first to fourth defendants and their advisers were not aware of the possibility of pleading a mistake claim when they were pleading the answer and they may have discussed it. Rather, I am simply unable to draw a conclusion as to whether or not it was discussed and why the mistake claim was not pleaded while the answer was filed, in the absence of evidence from the legal advisers to the first, second and fourth defendants. I simply do not know whether the decision not to plead a counterclaim was deliberate or whether it was left to another day because of the number of tasks that had to be carried out in a relatively short period.

76 When the matter came before the appellate courts, in my view the position is different. The effect of the evidence is that at some time before the Court of Appeal hearing the first defendant had given some thought as to when a counterclaim might be advanced. By the time of the Privy Council she continued to hold the view (which view she held at some earlier point in time) that it would have looked odd to pursue a counterclaim. Her lawyers were also concerned at some point which remains unspecified about the prejudice to the forum challenge if a counterclaim were pursued. I do not accept that the thoughts or views held by the first defendant and the concerns of Messrs. Carey Olsen were held in isolation from the first defendant. The concerns and thoughts of the first defendant in my view are more likely than not to have originated from the first defendant's legal team. The point of concern was also a technical pleading point which it is also more likely than not emanated

from the defendants' legal team. Looking at matters the other way, if a legal team has thoughts and concerns, in particular in a case as valuable or important to the parties involved as this one, such concerns would ordinarily be expected to be discussed with a client, or a client's representative. Yet I am left with no evidence addressing these points or explaining them. Without such an explanation, the assertion that the third affidavit at paragraph 15 was wrong is no more than assertion. It is also contradicted by later statements made at paragraphs 61 and 78 in the sense that it is inconsistent to say that the first defendant was not advised to take a particular step in circumstances where both that person and her legal team were thinking about and concerned about taking that step. As I have found above, the concern being considered was also not any possible counterclaim but rather was about the effect of pleading a mistake claim. This concern I find led to the application to amend not being advanced until after the Privy Council appeal was concluded. Why there is no advice to that effect I am unable to resolve but I am satisfied that the defendants and their advisers had this concern and in some manner considered the same when the defendants proceeded before the appellate courts.

77 I also do not accept the submission that the first, second and fourth defendants were only concerned about taking any step in the proceedings. I consider they were also concerned about the specific effect of pleading a counterclaim to assert mistake. However, it is right to take into account the fact that after the Royal Court's ruling on the forum challenge, the first, second and fourth defendants did not have the benefit of any undertaking relating to any step in the proceedings. Rather as I have noted at paragraph 63 above, before the Court of Appeal there were only undertakings by both parties not to take any step in the proceedings and before the Privy Council there was only an agreement that the next stage of issuing a directions summons by the plaintiffs would not occur until the Privy Council appeal was determined. I therefore consider the defendants, when before the appellate courts, were concerned both about taking any step as well as the effect of applying to amend via the counterclaim to plead mistake. If the parties were only concerned about any step generally, why would the first defendant and the legal advisers have been considering the specific step of any possible counterclaim unless they had an actual counterclaim in mind? There are other steps that could have been taken or which the defendants might have been required to take that could have given rise to the general concerns explained by Advocate Hoare at paragraph 54 set out above.

78 I also accept Advocate Robinson's submission that once the reply was filed, which was neither a lengthy nor a complex document, the requirement to amend to plead the counterclaim now sought must have been obvious and would have been immediately apparent to those reviewing the reply. I cannot accept that consideration of the reply was therefore left until after the Privy Council appeal. Rather I consider it is more likely than not that the need to plead a counterclaim on the basis of mistake, which had already been considered to some degree when the matter was before the Court of Appeal, was clear once a reply was filed and before argument took place before the Privy Council.

79 The counterclaim set out in the draft amended answer and counterclaim does not rely on any new material facts, but follows on from the paragraphs of the answer already pleading

that the first defendant was entitled to benefit set out at paragraph 40 and 41 of the judgment of 1 st July, 2015, and cited above. There were therefore no new matters for the plaintiffs to plead as a result of the proposed amendments. I am also of the view, given that no new facts are now pleaded, that it was not necessary to undertake extensive investigations in order to plead the counterclaim. Some of the work required, given what is contained the answer, would have already have been carried out. Rather, at best I consider that the first to fourth defendants would have wanted to check that there was nothing inconsistent in the documentation in their possession with pleading the proposed counterclaim.

80 What is also right to note is that the application to amend is not a volte face or a new case being advanced. It was already an issue on the pleadings. This position is therefore different from the authorities the plaintiffs referred to in their skeleton where an entirely new and inconsistent stance was taken by the party seeking to amend, which amendments were refused.

81 I am further of the view that the existence of a counterclaim which fell outside any jurisdiction clause was of relevance to the forum challenge appeals. How relevant it was and what difference it might have made is impossible for me to say. To try to do so would require me to put myself in the minds of the judges of the Court Appeal and the Privy Council. To attempt to draw such conclusions would be speculation on my part. Whether this would have affected the prospects of success before the Court of Appeal and the Privy Council I am therefore unable to say. All I can conclude is that I neither accept Advocate Robinson's submission that the counterclaim would have driven “a coach and horses” through the forum challenge nor Advocate Kelleher's submission that the counterclaim was of no relevance. The only view I am able to reach is that it would have been of some relevance because any counterclaim had no connection with Mauritius but I am unable for the reasons given to say to what degree. What I am clear about, based on how this litigation has been conducted to-date, is that I consider it more likely than not that the forum challenge would have been pursued to the Privy Council in any event, even if the first, second and fourth defendants had indicated that they were minded to amend the counterclaim in the manner now sought.

82 In deciding how to exercise the discretion vested in me, it is also relevant to consider the nature of the counterclaim. If I were to not to allow it to be pleaded, even if the defendants were able to establish the matters already pleaded in the answer to which I have made reference, they would be prevented from seeking a remedy. This does not seem just to me. If the plaintiffs were otherwise successful in their claims, but the first defendant was able to establish that the Grand Trust should be set aside on the basis of mistake, not to allow her to seek such relief would deprive her of an interest in trust assets of a very great value. The promissory note alone is said to be worth US$ one hundred million. In my judgment this would be a disproportionate sanction to impose even though I am not satisfied with the explanations given in the first defendant's fourth affidavit at paragraph 11. To refuse to allow the counterclaim would in my view be a draconian and an unfair remedy. This is so even if the amendment broadens the claims beyond a construction question as the plaintiffs

contend.

83 What does this mean in terms of the discretion I have to exercise? Ultimately, I am not prepared to refuse to allow the counterclaim to be pleaded because to do so would be disproportionate. Equally the first, second and fourth defendants by the time the matter came before the appellate courts, while they did not issue an application to amend for fear of taking a step in the proceedings, they did not indicate that they were likely to pursue a counterclaim which was of some relevance to the forum challenge. I am also not satisfied with the explanations given in the fourth affidavit for the reasons I have set out above.

84 Therefore I consider it is appropriate that I express the Court's displeasure. Accordingly, I return to the principles of *Re Esteem* cited at paragraph 32 of my judgment of 1 st July and the objective of all involved in civil proceedings to progress to trial in accordance with an agreed ordered timetable at a reasonable level of cost and within a reasonably short time. In my judgment the first to fourth defendants by not raising the counterclaim earlier and in light of the matters referred to above, have not met the *Esteem* principle.

85 In these circumstances, while I agree that leave should be granted because there is a real issue to be tried between the parties following on from what is contained in the pleadings already, leave is granted on the basis that the first, second and fourth defendants on a joint and several basis should pay the costs thrown away of and occasioned by the amendment on the indemnity basis rather than the standard basis. These costs should include the costs of any additional steps to be taken by the plaintiffs to produce any additional discovery required as a result of the counterclaim. The first second and fourth defendants should also bear their own costs of producing any additional discovery as a result of the amendment. Had the intention to make the amendment been referred to when the matter was before the appellate courts, then further discovery enquiries by both parties, which will have to be undertaken as a result of the amendment, could have been avoided. I consider this order best reflects the merits of the application before me.

86 While I considered whether or not it would be appropriate to revisit the cost orders made by the Court of Appeal or the Privy Council or to order further payments of costs on account, I am not prepared to do so. As far as revisiting the costs orders made by the Court of Appeal or the Privy Council, to do so would be to fall into the trap of speculation of the effect of the amendment on the forum challenge which I am not prepared to do. To require a further payment on account of costs is to interfere in the taxation process being conducted by the Assistant Judicial Greffier in relation to the Royal Court and the Court of Appeal and the Registrar of the Privy Council, for costs incurred in London, which again is not appropriate.

87 As far as concerns the costs of this application and the application referred to in my judgment of 1 st July, 2015, while the plaintiffs were not successful in either application, in view of my criticisms of the evidence filed by the first defendant in this case, I consider that the just order is that each party bears their own costs of the plaintiffs' application for disclosure of privileged advice and of this present hearing.