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

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Nicolle, Sparrow
Judgment Date:	12 November 2015
Neutral Citation:	[2015] JRC 228
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Court:	Royal Court
Date:	12 November 2015

Text

[2015] JRC 228

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith, **Esq., Commissioner, and** Jurats Nicolle **and** Sparrow

Between
Cristiana Crociani
First Appellant/Plaintiff

and

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

and

B (by her Guardian ad Litem, Nicholas Delrieu)
Third Appellant/Plaintiff
and
Edoardo Crociani
First Respondent/Defendant

and

Paul Foortse
Second Respondent/Defendant

and

BNP Paribas Jersey Trust Corporation Limited
Third Respondent/Defendant

and

Appleby Trust (Mauritius) Limited
Fourth Respondent/Defendant

and

HRH Princess Camilla De Bourbon Des Deux Siciles
Fifth Respondent/Defendant

and

Camillo Crociani Foundation IBC (Bahamas) Limited
Sixth Respondent/Defendant

and

BNP Paribas Jersey Nominee Company Limited
Seventh Respondent/Defendant

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

Advocate J. D. Kelleher **for the First Respondent/Defendant.**

Authorities

Crociani -v- Crociani [2015] JRC 177.

Crociani -v- Crociani [2015] JRC 145.

Trusts (Jersey) Law 1984 (as amended).

Brown v Barclays Bank [2002] JLR Note 1.

Cunningham v Cunningham [2009] JLR 227.

Re Esteem [2000] JLR Note 41a.

Murphy v Collins [2000] JLR 276.

G L Baker Ltd v Medway Buildings & Supplies Limited [1958] 3 All ER.

Taylor & Ors (trading as Stancliffe Todd & Hodgson v Kitchin & Anor (trading as Charltons) (unreported, 27 October 1986).

Cobbold v Greenwich LBC, August 9, 1999 (unreported).

Bourke v Favre [2015] EWHC 277 (Ch).

Disclosure, 4th edition by Paul Matthews and Hodge Malek.

R v Derby Magistrates' Court ex parte B [1996] 1 AC 487.

Wentworth v Lloyd [1864] 10 HLC 589.

Trust — appeal by the plaintiffs against part of the Master's decision regarding leave for the first defendant to amend the answer.

THE COMMISSIONER:

1 The plaintiffs appeal against that part of the decision of the Master by which he gave the first defendant ("Madame Crociani") leave to amend the answer filed by including a counterclaim by her, in the alternative, to set aside the Grand Trust on grounds of mistake, should she fail in the main contention of herself, the second and fourth defendants that she was able to benefit from the Grand Trust through her interest in the sixth defendant, Camillo Crociani Foundation IBC (Bahamas) Limited ("the Foundation").

2 The Master's decision is contained in his judgment of 27 th August, 2015, (*Crociani -v-*

Crociani [2015] JRC 177) and that in turn has to be read in conjunction with his earlier judgment of 1 st July, 2015, (*Crociani -v- Crociani* [2015] JRC 145). We will refer to them, as the first and second judgments of the Master respectively.

3 The procedural history and the contentions of the parties are considered in great detail in those judgments and we limit this judgment to what we regard as the key points.

4 In essence, the plaintiffs contend that Madame Crociani made a deliberate decision not to plead her counterclaim when the answer was filed on 14 th June, 2013, in order not to damage the challenge to the jurisdiction of the Jersey courts that was due to be heard before the Royal Court on 28 th — 30 th August, 2013. The Privy Council ultimately delivered its opinion dismissing the forum challenge on 26 th November, 2014. For Madame Crociani to subsequently seek to amend the answer to include this counterclaim is, Advocate Robinson submits, an abuse of process. She should be held to her election not to plead the counterclaim at the time the answer was filed.

5 In the counterclaim, Madame Crociani seeks firstly a declaration that Madame Crociani was able to benefit from the Grand Trust by reason of her interest in the Foundation (to which amendment the plaintiffs had no objection) but, if she is not entitled to such declaration, Madame Crociani then seeks, in the alternative, a declaration that the Grand Trust and each of the dispositions she made into it are voidable and should be set aside under Article 47E (power to set aside a transfer or disposition of property to a trust due to mistake) of the Trusts (Jersey) Law 1984 (as amended) and/or Article 11 (validity of a Jersey trust) of the Trusts (Jersey) Law 1984 (as amended) and/or otherewise.

6 Save to the extent required for the purposes of the forum challenge, the provisions of the Grand Trust have not yet been construed by the Court, but for the purposes of this appeal, it can be said that it is divided into two substantially equal funds identified by the names of Camilla (the fifth defendant) and Cristiana (the first plaintiff) held on discretionary trusts of income for them, their issue and the Foundation. The trustees have a discretionary power to pay all or part of the capital for the benefit of Camilla or Cristiana during their lifetimes and Camilla and Cristiana have a special power of appointment exercised by will to direct which of their issue shall receive the fund which bears their name. There are default trusts in favour of their issue and in default in favour of Madame Crociani and, if she is not then living, of the Foundation.

7 In the substantive proceedings the plaintiffs challenge, inter alia, an appointment made out of the Grand Trust (i.e. from both of these funds) on 9 th February, 2010, of some $100M (including certain works of art, which the plaintiffs understand are worth a further $100M) ultimately for the benefit of Madame Crociani.

8 The plaintiffs base their contention that to allow Madame Crociani to plead her counterclaim now is an abuse of process upon the following chronology of events:–

(i) In its letter before action on 3 rd July, 2012, in which Bedell Cristin outlined the plaintiffs' claims, the contention that Madame Crociani was not a beneficiary was made clear:–

> "Save for the penultimate default beneficiary, the terms of the settlement secure that no power or discretion may be exercised for Madame Crociani's benefit".

(ii) In its response of 17 th August, 2012, Mourant Ozannes set out Madame Crociani's claim that she was entitled to benefit from the Grand Trust via the Foundation.

(iii) In a consultation with Brian Green QC on 26 th July, 2012, (instructed on behalf of Madame Crociani and the second and third defendants), Advocate MacRae raised the possibility of rectification or setting aside for mistake.

(iv) In a draft opinion dated July 2012, Nicholas Le Poidevin QC (instructed on behalf of Madame Crociani and the second and third defendants) raised the possibility of an application for the rectification of the Grand Trust.

(v) The Order of Justice dated 18 th January, 2013, challenged Madame Crociani's entitlement to benefit from the Grand Trust directly or via the Foundation:–

> (a) "The Foundation was incorporated for wholly charitable purposes" (paragraph 19)
>
> (b) "The Grand Trust was not created for the purpose or intention of providing any benefit to Madame Crociani. Under its terms, Madame Crociani was not able to benefit otherwise than as a default beneficiary." (Paragraph 27)
>
> (c) "The Trustees' justification for the Agate Appointment was materially influenced by the false assertion that Madame Crociani is and always has been intended to benefit from the Grand Trust via the Foundation." (Paragraph 100)
>
> (d) "The Foundation was at the time of the creation of the Grand Trust a wholly charitable foundation from which Madame Crociani could not benefit." (Paragraph 100.2)

(vi) On 19 th April, 2013, the Court ordered Madame Crociani and the second, third and fourth defendants to file "a full answer" on or before 29 th May, 2013. Leave to appeal that order was refused by Pleming JA as a single judge of the Court of Appeal although the time for filing of the full answer was extended to 14 th June, 2013.

(vii) At the hearing on 19 th April, 2013, the plaintiffs, through Advocate Robinson, gave an undertaking that the filing of an answer would not be used against the

defendants at the forum challenge hearing, which undertaking was extended by letter of 25 th April, 2013, to any procedural steps taken by the defendants in the Jersey proceedings beyond the filing of an answer to the forum challenge.

(viii) In the answer filed on 14 th June, 2013, these defendants denied the allegations in relation to Madame Crociani's ability to benefit from the Grand Trust. The answer itself lays the groundwork for a claim in mistake but stops short of seeking that remedy.

(ix) The judgment of the Royal Court dismissing the Forum Challenge was issued on 2 nd October, 2013. Leave was given for an appeal to the Court of Appeal which appeal was dismissed by the Court of Appeal on 7 th April, 2014. Leave was granted by the Court of Appeal to the defendants to appeal to the Privy Council.

(x) The plaintiffs filed a reply on 28 th May, 2014, in which it was averred that the Foundation was not and had never been legally able to be a corporate vehicle for Madame Crociani to benefit from the Grand Trust.

(xi) Following the delivering of the opinion by the Privy Council dismissing the forum challenge on 26 th November, 2014, Carey Olsen by letter dated 22 nd December, 2014, informed Bedell Cristin that the defendants were looking to amend the answer without indicating the nature of the amendments.

(xii) On 30 th April, 2015, the defendants provided a draft amended answer and counterclaim to the plaintiffs for their agreement. No such agreement was forthcoming, which led to these defendants issuing an application by summons to amend the answer.

(xiii) On 15 th May, 2015, Madame Crociani filed her third affidavit for the purposes of an application made by the plaintiffs for a pre-emptive costs order, in which she said at paragraph 15:–

> "I certainly would never have set up the Grand Trust as I did, or settled any assets into it, if I had thought that — in effect, and as the Plaintiffs argue — I would no longer have any right to enjoy them. It is for this reason that I now seek — insofar as the Plaintiffs are correct that I am not an object of the power in clause 11 of the Grand Trust Agreement (pages 70 — 71) and that I am not allowed to benefit from distributions or appointments made in favour of the Foundation — to pursue a counterclaim in these proceedings setting aside the Grand Trust, and all settlements of assets that I have made into the Grand Trust, on the grounds of mistake. 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"). (emphasis added)

(xiv) In a letter dated 3rd June, 2015, Carey Olsen explained the circumstances in which the application to amend had been made, namely that it was in response to the reply which the defendants' legal team had not been able to consider properly because it was heavily involved in the Forum Challenge before the Privy Council, which raised complex and novel issues. The letter went on to say this:–

> *"d. Beyond this, whilst the forum challenge was being conducted:*
>
> (i) Ds 1–4's legal team 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.
>
> (ii) It would not have been a productive use of time or money for Ds1–4's legal team to have produced amendments to the Answer that would immediately have become redundant if these proceedings had been stayed in favour of proceedings in Mauritius.
>
> (iii) Ds1–4 had consistently concluded — entirely reasonably — that it would be a waste of resources to undertake procedural tasks necessary for these proceedings that would not be of assistance if the proceedings were to be stayed in favour of Mauritius."

(xv) In a letter dated 9th June, 2015, Carey Olsen made this further observation:–

> "Whilst, as I said in my letter dated 3 June 2015, Ds1–4's legal team were concerned that it might prejudice the forum challenge (consciously or unconsciously) if they were to pursue a counterclaim in the Jersey proceedings at the same time as arguing that those proceedings should not take place in Jersey, the nature of any counterclaim that might have been contemplated would have made absolutely no difference to the forum challenge." (their emphasis)

9 The plaintiffs say it is perfectly clear from this chronology that Madame Crociani was aware firstly of the plaintiffs' contention that she was not able to benefit directly or indirectly from the Grand Trust and secondly of her ability to counterclaim for mistake.

10 The decision not to plead the counterclaim when the answer was filed was a deliberate decision by these defendants, the plaintiffs say, to gain a tactical advantage in the forum challenge proceedings. Such conduct amounts to an abuse of process and they should therefore be kept to their election. The question posed by Advocate Robinson for the Court was as follows:–

> "Did these defendants deliberately decide not to plead the counterclaim when they filed their answer in order not to prejudice their forum challenge?"

11 As a consequence of Madame Crociani referring to legal advice in her third affidavit as set out above, the plaintiffs applied for disclosure of that legal advice and this gave rise to the Master's first judgment.

Findings of the Master

12 We now turn to the findings of the Master. In his first judgment he found:–

(i) The possibility of pleading a mistake claim was known about before the proceedings commenced and the issue of whether or not Madame Crociani could benefit from the Grand Trust was already part of the matters in dispute by June, 2013 (paragraph 45).

(ii) It was open to Madame Crociani to plead the counterclaim at the time the answer was filed. It would have been covered by the undertaking given by the plaintiffs (paragraph 46).

(iii) The third affidavit of Madame Crociani was not deployed in evidence, as it had been filed to resist the pre-emptive costs application which was withdrawn before the matter was argued. (Paragraph 47). Privilege is not easily lost and in the circumstances it was not fair for the legal advice referred to by Madame Crociani to be disclosed (paragraph 49).

(iv) Madame Crociani's third affidavit was, however, on the court record and the issue of when and why advice was given was material to the application to amend the answer to include the counterclaim (paragraph 50).

(v) Accordingly, Madame Crociani, the second and the fourth defendants (the third defendant was now being separately represented and played no part in these applications) were ordered to disclose when the advice referred to in paragraph 15 of Madame Crociani's affidavit and the letter of 3 rd June, 2015, from Carey Olsen was given (paragraph 51) and they were given permission to file an affidavit setting out the reasons why the counterclaim had not been filed earlier in support of the contentions set out in the letter of 9 th June, 2015, from Carey Olsen. Any such explanations were to be supported by evidence. In the absence of such an affidavit and based on the material already provided to him, he indicated he would proceed on the assumption that the counterclaim could have been pleaded at the time the answer was filed in June 2013. Quoting from paragraph 52:–

> ***"… 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 QC*** .

(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."

(vi) It was for Madame Crociani, the second and the fourth defendants to choose whether they wished to maintain legal professional privilege, allowing the Master to proceed on the assumptions that he had set out in his judgment, or whether they wished to waive privilege and explain why the application was not made sooner (paragraph 54).

13 Following the issuing of the first judgment, Madame Crociani maintained privilege and there was therefore no affidavit setting out the reasons why the counterclaim had not been filed earlier. In compliance with the order made as to when the advice was received, Madame Crociani filed a fourth affidavit in which she addressed the question posed by the Master in this way:–

"10 As a consequence of the plaintiffs' complaints, I have been ordered to swear an affidavit "setting out when [I] was first advised not to pursue the Mistake Claim" and "when [I] decided not to pursue the Mistake Claim until resolution of the forum challenge" (as set out at paragraph 2 of the Act of Court.

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."

14 Having explained the difficulties encountered by the defendants in 2013 namely the plaintiffs' application for an anti-suit injunction in respect of the Mauritius proceedings brought by them, the requirement to file a full answer, the defendants being from different jurisdictions with Madame Crociani having limited command of English, the proceedings brought by Cristiana Crociani in France and the forum challenge (which was the main focus) she went on to say this:–

> *"46 I certainly did not "make a deliberate and informed election" not to pursue the Mistake Claim at this time.* When approving the answer I certainly did not have in mind (and do not think that I even remembered) the passing reference that had been made to a possible claim for rectification or mistake at the conference with Mr Green QC around a year earlier, which I did not even attend. I did not have it in mind that I would seek to plead a claim for rectification or mistake at any point. Insofar as I might even have given any thought to any other possible claim or counterclaim against the Plaintiffs (i.e. a claim other than one for rectification or mistake), I would have felt uncomfortable pleading such a claim in proceedings in Jersey at the same time as arguing that those proceedings should not take place in Jersey. I certainly do not recall having any particular claim or counterclaim in mind, however. I was just focusing on doing the best I could to ensure that the Answer set out, in Pleming JA's words, **"the points of agreement and disagreement"** with the claims that the Plaintiffs were pursuing in the limited time available.
>
> *47 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 to plead the Mistake Claim at the time the Answer was filed, I could not have done so.
>
> *47.1 I certainly did not know that the Plaintiffs would argue that "the Foundation is not and has never been legally able to be a corporate vehicle for [me] to benefit from the Grand Trust" or that "the effect of the Agate Appointment if it were valid would be that the property appointed by the Agate Appointment may only be applied for the charitable objects of the Foundation in 1987 to the exclusion of the family beneficiaries of the Grand Trust".* These matters were first asserted by the *Plaintiffs in their Reply dated 28 May 2014 — nearly a year after we had filed the original Answer.* They are, however, an important part of the counterclaims that I now seek to plead.
>
> *47.2 In any event, I had not undertaken the important process of investigating, obtaining and testing potential evidence relevant to the counterclaims set out in the Amended Pleading.* There was simply no way that I could have done this in the short period available to me prior to the deadline for filing the Answer.
>
> *…*
>
> *61 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.

…

78 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 that 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."

15 Madame Crociani was not in a position, she said, to file a counterclaim at any point prior to the Privy Council handing down its decision on the forum challenge and in any event it required detailed investigation and consideration of events that had taken place over the previous thirty years and careful consideration of difficult legal issues.

16 In his second judgment, dealing with the application to amend the answer to include the counterclaim in mistake, the Master made the following findings:–

(i) This was not a late application to amend as compared with the position in say *Brown v Barclays Bank* [2002] JLR Note 1 and *Cunningham v Cunningham* [2009] JLR 227. In the former case application to amend was made on the eve of the trial to include a new allegation that would unjustifiably enlarge the scope of the action. In the latter case, the application was made after discovery and some four months before the final hearing. Even then, limited leave to amend was granted.

(ii) The Master found Madame Crociani's fourth affidavit difficult to follow, in particular over how and when concerns as to the filing of the counterclaim arose. The explanations contained in paragraph 11 of the fourth affidavit did not persuade him that what she had said in her third affidavit about receiving legal advice was wrong (paragraph 71).

(iii) The counterclaim these defendants had in mind was that which is the subject matter of the application to amend (paragraph 72).

(iv) The concerns about pleading the counterclaim had arisen after the unsuccessful hearing before the Royal Court, when it would not be surprising for the these defendants and their legal advisors to start giving consideration as to how the substantive arguments might be fought if the appeal was unsuccessful (paragraph 73).

(v) He was unable to conclude whether such concerns had been considered before the forum challenge before the Royal Court (paragraph 74). He did not consider it appropriate, however, to proceed on the assumption that the counterclaim could have been pleaded at the time the answer was filed in June 2013 for the following reasons:–

> ***"a) 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;
>
> ***b) 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 .
>
> ***c) 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."***

(vi) He went on to clarify the position as follows:–

> ***"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." (Paragraph 75)

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(vii) The counterclaim did not rely on any new material facts but follows on from the paragraphs of the answer already pleading that Madame Crociani was entitled to benefit. There were therefore no new matters for the plaintiffs to plead as a result of the proposed amendments. It was not necessary to undertake extensive investigations in order to plead the counterclaim (paragraph 79).

(viii) The existence of a counterclaim which fell outside any jurisdiction clause contained within the Grand Trust deed would have been of relevance in the forum challenge appeals but how relevant it was impossible to say. It was clear, however, that it was more likely than not that the forum challenge would have been pursued to the Privy Council in any event even if these defendants had indicated that they were minded to amend the answer by including the counterclaim in the manner now sought (paragraph 81).

(ix) He exercised his discretion in relation to the amendment in this way:–

> ***"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 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."

(x) It was appropriate to show the Court's displeasure to this application following the principles set out in *Re Esteem* [2000] JLR Note 41a and leave for the answer to be amended (to include the counterclaim) was given on the basis that Madame Crociani,

the second and the fourth defendants on a joint and several basis should pay the costs thrown away of and occasioned by the amendment on the indemnity basis. These costs should include the costs of any additional steps to be taken by the plaintiffs to produce any additional discovery with these defendants paying their own costs of producing any additional discovery as a result of the amendment (paragraph 85).

Decision

17 Advocate Robinson said that it is clear from Madame Crociani's third affidavit and the letters from Carey Olsen of 3 rd and 9 th June, 2015, that a decision had been taken by these defendants not to plead the counterclaim in mistake because it would damage the forum challenge. The possibility of such a remedy had been referred to in consultation with Brian Green QC and the draft advice of Nicholas Le Poidevin QC and the issue of Madame Crociani's ability to benefit from the Grand Trust flagged both in the letter before action and the Order of Justice. The defendants were represented by a very experienced legal team and it was inconceivable that the possibility of such a counterclaim had not been fully considered and a decision taken not to plead it at that stage.

18 It is well established that when considering an appeal against a decision of the Master, the Court should exercise its own discretion, but may give such weight, as it thinks fit, to the manner in which the Master has exercised his discretion (see *Murphy v Collins* [2000] JLR 276). Exercising our own discretion we are satisfied that there has been no abuse of process here. Addressing the question posed before us, we have concluded on the evidence before us that there was no deliberate decision not to plead the counterclaim because it would damage the forum challenge. In reaching this decision we have given considerable weight to the careful manner in which the Master exercised his discretion as set out in his judgments. In the circumstances we will not set out all of the submissions made by Advocate Kelleher for Madame Crociani.

19 We agree with the Master that this was not a late application to amend and accordingly the principle to be applied is that set out by Jenkins LJ in the English Court of Appeal in *G L Baker Ltd v Medway Buildings & Supplies Limited* [1958] 3 All ER cited with approval by the Royal Court in *Taylor & Ors (trading as Stancliffe Todd & Hodgson v Kitchin & Anor (trading as Charltons)* (unreported, 27 October 1986) namely that the ***"guiding principle of cardinal importance"*** is that ***"generally speaking, all such amendments ought to be made as may be necessary for the purpose of determining the real questions in controversy between the parties."***

20 This reflects the ongoing approach of the English courts. As Peter Gibson LJ said in *Cobbold v Greenwich LBC*, August 9, 1999 (unreported):–

> ***"Amendments in general ought to be allowed so that the real dispute between the parties can be adjudicated."***

21 In this case, the pleadings are not closed. The plaintiffs have recently amended the Order of Justice to include a further breach of trust claim and further applications for amendments to pleadings are, we understand, anticipated. Notwithstanding this cardinal principle, Advocate Robinson submits that the conduct of these defendants is such as to amount to an abuse of process. The Master, he says, really didn't like what he saw but he shied away from the big finding, tinkering instead around the edges. He should have proceeded on the assumption set out in paragraph 52 of his first judgment that the counterclaim could have been pleaded at the time the answer was filed in June 2013 and furthermore, that there was a deliberate decision not to do so in order not to damage the forum challenge.

22 Advocate Robinson acknowledged that he could produce no example of a court holding a party to an election in this way at this stage of civil proceedings, but pointed out that the Court often drives parties from the judgment seat where, for example, unless orders are made. He did draw our attention to the decision in *Bourke v Favre* [2015] EWHC 277 (Ch), a case involving a late application to amend under the Civil Procedure Rules. In that case there had been a conscious decision only to plead a contractual claim in the first instance and not to amend until after receipt of the witness statements. The Court refused to characterise this as an abuse of process, but did regard it as misguided. The application to amend was refused on the basis that it was not a refinement or modification of the existing claim but a wholly new case.

23 What underpinned the Master's decision was a lack of evidence as to what had occurred between the legal team and their clients and it was that lack of evidence which led him to feeling unable to find that there had been a deliberate decision not to file the counterclaim in order not to damage the forum challenge.

24 Advocate Kelleher reminded us of the importance of legal professional privilege. In Disclosure, 4th edition by Paul Matthews and Hodge Malek, it states at paragraph 11.08 that the importance of legal professional privilege can hardly be over-estimated, citing as authority the case of *R v Derby Magistrates' Court ex parte B* [1996] 1 AC 487 at 507 where it was held that:–

> ***"The principle that a client should be free to consult his legal advisers without fear of his communications being revealed was a fundamental condition on which the administration of justice as a whole rested; that notwithstanding the public interest in securing that all relevant evidence was made available to the defence, legal professional privilege was to be upheld in all cases as the predominant public interest, even … where the witness no longer had any recognisable interest in preserving the confidentiality."***

No adverse inference can therefore be drawn from Madame Crociani maintaining privilege (see *Wentworth v Lloyd* [1864] 10 HLC 589), although Advocate Robinson submitted that abuse of process could be found on the facts without drawing such an inference.

25 We accept, as did the Master, that the period leading up to the filing of the answer in June 2013 was a very busy time for these defendants and their main focus would understandably have been on the forum challenge, a challenge which was clearly arguable; indeed, leave to appeal was granted by both the Royal Court and the Court of Appeal. Their preferred forum was Mauritius, where they had issued proceedings and where the current trustee, the fourth defendant, is resident, which jurisdiction is currently the forum for administration. We can understand a wish not to create an unnecessary distraction by filing or giving notice of a counterclaim in mistake (assuming Madame Crociani was in a position to do so) when it was their contention that the proceedings as a whole should be conducted in Mauritius.

26 These defendants did file an answer addressing the factual allegations contained within the Order of Justice and which ran to 153 paragraphs fulfilling, in our view, the direction of the Court to file ***"a full answer"***. Thereafter, we accept the submission of Advocate Kelleher that there was a *de facto* procedural stay during the appeals before the Court of Appeal and Privy Council.

27 The allegation made by the plaintiffs is not just the making of a decision not to file a counterclaim, but a decision not to do so in order not to damage the forum challenge. Advocate Robinson was unable to substantiate his contention that knowledge of such a counterclaim would have *"driven a coach and horses"* through the forum challenge. We agree with the Master that even if the counterclaim had been filed or notice given of it, the forum challenge would still have been pursued through to the Privy Council. We would go slightly further. Firstly, the counterclaim is made in the alternative to the defendants' substantive case and secondly, we can see nothing in it which makes it inherently more suitable to be heard in Jersey than in Mauritius. The Grand Trust was created in 1987 under Bahamian law and whilst we do not have a breakdown of when further assets were added, it did not become subject to Jersey law until 1992. In 1999, the proper law was changed to that of Guernsey, returning to Jersey law in 2007 where it remained until 2012. Any claim to set aside dispositions into the trust would normally have been brought against the current trustee, which holds the trust assets, namely the fourth respondent in Mauritius, applying we suggest Bahamian law at least to the initial assets settled.

28 In our view knowledge of the existence of a counterclaim in the alternative would not have damaged these defendants' forum challenge in any material way.

29 We do part company with the Master over his finding in paragraph 79 that it was not necessary to undertake extensive investigations in order to plead the counterclaim. It seems to us that there is material difference between an argument over Madame Crociani's ability to benefit under the Grand Trust by reference to the relevant constitutional documentation and her seeking to have set aside dispositions made into the trust going back to 1987, for which extensive contemporaneous evidence would be required, as Brian Green QC pointed out. Whilst no new facts are now being pleaded, it would not be reasonable to expect the defendants to base a counterclaim on those facts without investigating, obtaining and testing potential evidence to be put forward in support of those

facts. We would therefore accept Advocate Kelleher's submission that in the period leading up to June 2013, there was no time to carry out that process, bearing in mind the other pressures upon the legal team as found by the Master at paragraph 74(a) of his second judgment.

30 As against that, we have Madame Crociani's statement in her third affidavit that she was advised that the counterclaim might jeopardise or otherwise adversely affect the forum challenge and the letter from Carey Olsen of 3rd June that the legal team was concerned that the counterclaim might prejudice the forum challenge. Advocate Robinson submitted that this letter constitutes an admission binding on Madame Crociani that she did consider the counterclaim might jeopardise the forum challenge, although the letter does not make clear why it was thought it might do so. Advocate Kelleher could only apologise for the impression given by Carey Olsen in that letter and the following letter of 9th June, 2015, and Madame Crociani now says in the fourth affidavit that she never received any such advice.

31 We do not think it is fair or proportionate to hold Madame Crociani to the terms of Carey Olsen's letters when we ourselves cannot see how the counterclaim would have damaged the forum challenge and Advocate Robinson has been unable to explain to us why it would do so. At most, it might have constituted an unnecessary distraction, but that does not take us anywhere near the territory of abuse of process. In any event, we agree with the Master that there is no evidence of a decision being taken when the answer was filed in June 2013 not to plead the counterclaim because it would damage the forum challenge.

32 If this were a late amendment, the principles to be applied would be those laid down in the Court of Appeal decision of *Brown v Barclays Bank* where Southwell J said this at paragraph 11:–

> ***"11 Where there is a late application for an amendment to the Order of Justice (or to the answer or reply) the Jersey Courts have to strike a balance which is primarily between the parties to the instant case.*** The burden on the applicant is a heavy one to show, for example, (1) why the matters now sought to be pleaded were not pleaded before, (2) what is the strength of the new case, (3) why an adjournment should be granted, if one is necessary, (4) how any adverse effects on the other party including the effects of any adjournment, any additional discovery, witness statements or experts' reports, or other preparation for trial can be remedied, and (5) why the balance of justice should come down in favour of the party seeking to change its case at a late stage of the proceedings."

This is not a late application, but even so, applying those principles, this amendment will not give rise to an adjournment of the trial dates as none have been fixed and the groundwork for the counterclaim in mistake has already been laid within the existing pleadings. The amendment is unlikely to place any undue burden upon the plaintiffs in terms of additional discovery, bearing in mind, as Advocate Kelleher points out, that

Cristiana was a young child when the Grand Trust was created and her children had not yet been born, so it is unlikely that they will have documents to discover or evidence to give.

33 The Master was not satisfied with the explanations given by Madame Crociani in her fourth affidavit as to why the counterclaim had not been filed earlier and in the context of the principles in *Re Esteem Settlement* [2000] JLR Notes 41a, he considered it appropriate to express the Court's displeasure, and we endorse that approach, but the Master was clear where the balance of justice lay, calling the sanctions sought by the plaintiffs as disproportionate, draconian and unfair. We agree with that assessment.

34 If it is found at trial that Madame Crociani cannot benefit from the Grand Trust and (with other defendants) is required to reconstitute the trust fund, then by refusing to allow the counterclaim, the Court will be preventing her from seeking to remedy what she alleges was the mistake of making dispositions into a trust from which she could not benefit. We appreciate that the plaintiffs instituted these proceedings on the basis that they were dealing with a valid trust and now find they face the possibility of losing the Grand Trust completely should the counterclaim succeed, but if that is where justice ultimately leads the Court, having determined all of the issues between the parties, then the plaintiffs cannot complain as to the possibility of such an outcome.

35 If we are wrong in our assessment of the evidence and there had been a deliberate decision not to plead the counterclaim in order not to damage the forum challenge, we would characterise such conduct as misguided (as in *Bourke v Favre*) rather than as an abuse of process. Unlike that case the application to amend with which we are dealing was not made late and provided a remedy for a case in mistake, the groundwork for which had already been pleaded; it was not a wholly new case. To deny that remedy at this stage of the proceedings would still be a disproportionate reaction and unjust.

36 In all the circumstances, the appeal is dismissed.