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## A v B

<b>Jurisdiction:</b>	Jersey
<b>Judge:</b>	Bailiff
<b>Judgment Date:</b>	18 September 2018
<b>Neutral Citation:</b>	[2018] JRC 174A
<b>Reported In:</b>	[2018] JRC 174A
<b>Court:</b>	Royal Court
<b>Date:</b>	18 September 2018

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### Text

[2018] JRC 174A

ROYAL COURT

(Samedi)

Before:

Sir William Bailhache, Bailiff, **and** Jurats Thomas **and** Pitman

Between  
A  
First Representor  
and  
B  
Second Representor  
and  
C and others

---

Respondents

**Advocate N. A. K. Williams and Advocate J. W. Angus for the Representors.**

**The Respondents did not appear.**

**Authorities**

Taxation of Capital Gains Act 1992.

Trusts (Jersey) Law 1984.

*BNP Paribas Jersey Trust Corporation Limited and Others v Crociani and Others*  
[\[2018\] JCA 136A](#).

Trust — reasons of the Court for making orders setting aside dispositions from one trust to another and making other consequential orders

Bailiff

**THE**

- 1 This judgment contains the reasons of the Court for making orders setting aside dispositions from one trust to another and making other consequential orders, the decision having been handed down on 4th July.
- 2 The First Representor (“A”) and the Second Representor (“B”) are limited companies incorporated in Jersey which provide trustee and related fiduciary services. They were the trustees of the D 1973 Settlement (“the 1973 Trust”), made by an instrument dated 8th May 1973 between the Settlor and E and others as trustees. A has been a trustee in place of the original trustees since 1986, and B was appointed as an additional trustee in 1991.
- 3 The 1973 Trust is governed by the laws of Jersey. There are wide dispositive discretionary powers as to capital and income. When establishing the 1973 Trust, the Settlor was domiciled in Ireland. She became domiciled in the United Kingdom in 1988.
- 4 The primary beneficiaries of the 1973 Trust at the date it was made were the children of the Settlor and any further issue, whether children or remoter issue of the Settlor. The secondary beneficiaries included the children and remoter issue of the Settlor’s brother and sister. The beneficial class includes charitable organisations. It is clear that the trustees are not to make appointments to any of the secondary beneficiaries for as long as there are primary beneficiaries able to benefit.

5 Clause 7(A) of the 1973 Trust provides as follows:-

***“Subject to any appointment made pursuant to clause 5 the Trustees shall during the Trust Period have power in their discretion to pay or transfer any income or capital of the Trust Fund to the trustees of any other trust wherever established and subject to the laws of whatever jurisdiction under which any one or more of the Discretionary Beneficiaries (but not any other persons or person) is or are interested Provided that no interest thereunder is capable of vesting in interest later than the expiration of the Trust Period and Provided also that neither the settlor nor any spouse for the time being of the settlor is or is capable of being appointed a trustee of such trust.”***

- 6 The discretionary beneficiaries are described as the primary and secondary beneficiaries, together with any charitable body, organisation or association.
- 7 On 1<sup>st</sup> April, 1999, the Representors exercised their powers under the 1973 Trust to appoint (the “1999 Appointment”) and declare revocably that the trust fund should from that date be held by them as trustees upon trust for the benefit of those falling within the class of selected beneficiaries – namely the existing and future born grandchildren of the Settlor. The children were excluded. There was an express power of revocation in the 1999 Appointment provided that the effect of revocation would not directly or indirectly permit the capital or income of the trust fund to become payable to or applicable for the benefit of any excluded person.
- 8 On 21<sup>st</sup> November, 2001, A made a declaration of trust establishing the F 2001 Discretionary Trust (“the 2001 Trust”). As its name suggests, it is a declaration of trust which contains wide dispositive discretionary powers in the trustees (A). The beneficiaries are named as the grandchildren and remoter issue of the Settlor of the 1973 Trust, their spouses, widows and widowers and the children and remoter issue of the Settlor's siblings, together with charities. In other words, the beneficial class under the 2001 Trust was the same as the class of beneficiaries under the 1973 Trust before the 1999 Appointment save that under the 1973 Trust, spouses, widows and widowers of the grandchildren and remoter issue were not eligible for benefit. The initial trust fund was in the sum of £8,045,000 sterling and the 2001 Trust is expressed to be subject to the laws of England and Wales.
- 9 The trust fund in relation to the 2001 Trust was obtained through a scheme devised for the avoidance of capital gains tax in relation to unrealised stockpiled gains in the 1973 Trust. The scheme in question was apparently one which was not uncommon in 2001 when it was put into effect. Essentially the investments held by the Representors as trustees of the 1973 Trust, and all those held by one of the companies wholly owned by the trustees would be sold in order to realise all the inherent gains within the Trust and the trustees would then use those assets to acquire a holding in short-dated gilts. The trustees would then take out

a loan on normal commercial terms, which can be secured against the Trust assets, and the proceeds of the loan would be appointed onto a new trust, in this case the 2001 Trust. When the gilts were redeemed, the loan would then be repaid. It would be seen that the effect of these related transactions was to realise the gains, transfer into a new trust a capital sum which was ostensibly unrelated to those gains, as the proceeds of a borrowing, and subsequently repay the borrowing with the gilts which had been acquired.

10 The Representors took full tax advice at the time. This was obtained from Messrs Withers, a well-known firm of London solicitors, and from Mr Michael Furness QC, leading counsel specialising in tax law. We have seen the instructions to Withers and the note of the consultation with counsel, duly settled. There was an analysis of risk which included the possibility that there might be subsequent legislation which would block schemes of this nature retrospectively and make the scheme therefore ineffective. In fact this is precisely what happened, and the scheme was accordingly ineffective for the purposes for which it was designed. This became known to the Representors by September 2003.

11 What however was not known to the Representors at that stage, and only came to their attention when other arrangements were being contemplated in 2015 was that there were other fiscal difficulties caused by the transfers into the 2001 Trust (the "2001 Transfers"). Those difficulties arose in two areas:-

(i) A different tax counsel (Miss Emma Chamberlain) advised that the 2001 Trust was unlikely to be regarded as excluded property for inheritance tax purposes; and

(ii) It was considered that the 2001 Trust was also a qualifying settlement for the purposes of Section 86 of the Taxation of Capital Gains Act 1992, and that gains would therefore be taxable on the Settlor. The trustees are advised that their exposure to United Kingdom inheritance tax ("IHT") based upon the missing ten year charges and the value of the assets currently in the Trust extends to approximately £800,000.

12 The Representors accordingly brought the present proceedings contending that the 2001 Transfers were made by mistake. Pursuant to Article 47G and H of the Trusts (Jersey) Law 1984 ("the Trusts Law"), the Representors sought an order that the 2001 Transfers be declared voidable and be set aside from the date on which they were made. A number of other consequential orders were sought because, since 2001, there had been other developments:

(i) A number of administrative decisions were taken by A as trustees of the 2001 Trust involving purchases and ultimate liquidation of quoted investments, the acquisition and disposal of shares in related companies, the conversion of a related company's indebtedness into two promissory notes, the operation of bank accounts and the payment of all fees and expenses including but not limited to trustees' fees, consultancy fees, investment advisory fees, investment handling/holding charges, legal and professional fees, management fees, travel and entertainment expenses,

other professional fees and sundry expenses.

(ii) A number of distributions have been made out of the 2001 Trust to some of the grandchildren beneficiaries.

(iii) There were further transfers made from the 1973 Trust in 2012 (the “2012 Transfer”):-

(a) To the trustees of the 2001 Trust, to be held on those trusts; and

(b) To the beneficiaries of the 1973 Trust distributing out all the assets of the 1973 Trust (the “Termination Distributions”) and declaring it to be terminated.

13 All these subsidiary actions had been taken since 2001 upon the basis that the 2001 Trust did not carry the tax consequences which in 2015 had been identified, and therefore it was necessary to request the Court to make some orders in connection with these transactions as well. The Respondents did not appear before us but wrote letters to the court indicating their agreement with the relief being sought by the Representors.

## The Law

14 The relevant provisions of the Trusts Law are these:

***“47G. Power to set aside the exercise of powers in relation to a trust or trust property due to mistake***

***(1) In this paragraph, “person exercising a power” means a person who, otherwise than in the capacity of trustee, exercises a power over, or in relation to a trust, or trust property .***

***(2) The court may on the application of any person specified in Article 47I(2), and in the circumstances set out in paragraph (3), declare that the exercise of a power by a trustee or a person exercising a power over, or in relation to a trust, or trust property, is voidable and –***

***(a) has such effect as the court may determine; or***

***(b) is of no effect from the time of its exercise .***

***(3) The circumstances are where the trustee or person exercising a power –***

***(a) made a mistake in relation to the exercise of his or her power; and***

***(b) would not have exercised the power, or would not have exercised the power in the way it was so exercised, but for that mistake, and the mistake is of so serious a character as to render it just for the court to make a***

***declaration under this Article .******47H. Power to set aside the exercise of fiduciary powers in relation to a trust or trust property***

***(1) In this paragraph, “person exercising a power” means a person who, otherwise than in the capacity of trustee, exercises a power over, or in relation to a trust, or trust property and who owes a fiduciary duty to a beneficiary in relation to the exercise of that power .***

***(2) The court may on the application of any person specified in Article 47I(2), and in the circumstances set out in paragraph (3), declare that the exercise of a power by a trustee or a person exercising a power over, or in relation to a trust, or trust property, is voidable and –***

***(a) has such effect as the court may determine; or***

***(b) is of no effect from the time of its exercise .***

***(3) The circumstances are where, in relation to the exercise of his or her power, the trustee or person exercising a power –***

***(a) failed to take into account any relevant considerations or took into account irrelevant considerations; and***

***(b) would not have exercised the power, or would not have exercised the power in the way it was so exercised, but for that failure to take into account relevant considerations, or that taking into account of irrelevant considerations .***

***(4) It does not matter whether or not the circumstances set out in paragraph (3) occurred as a result of any lack of care or other fault on the part of the trustee or person exercising a power, or on the part of any person giving advice in relation to the exercise of the power.”***

- 15 These and parallel provisions were considered by the Court of Appeal in *BNP Paribas Jersey Trust Corporation Limited and Others v Crociani and Others* [\[2018\] JCA 136A](#). Taking the natural meaning of the words which appear in Article 47G(2) and Article 47H(2) the court may follow one of three courses – it may declare the transfer in question to be voided and of no effect from the time it took place, or it may declare the transfer to be voided from the time of its having taken place but nonetheless be deemed to have had such effect as the court may determine or it may declare the transfer to be voided from a date subsequent to the time of its having taken place. As the Court of Appeal said in *Crociani*, these Articles are consistent with the general approach of the Trust Law “ ***in establishing overall principles and allowing them to be developed flexibly by the Royal Court***. In essence the legislature has conferred upon the court a discretion to determine which of the three courses it would follow if satisfied that the mistake was of so ***serious a character as to render it just for the court to make any declaration at all under that Article.***”

16 At paragraphs 94 and 95 of its judgment in *Crociani*, the Court of Appeal said:-

***“94. Turning to guiding principles in the exercise of this jurisdiction, the court must first identify, as the Royal Court did below, that the application has been made by an appropriate person and that there has been a mistake bearing the characteristics required by the statute. The court then has a discretion as to whether to declare the transfer voidable and, the jurisdiction being equitable, it may be that, even with the required characteristics, the whole circumstances militate against a declaration. Having determined to make such a declaration the court would bear in mind for its consequent orders that the transfer or disposition will have had legal effect until the point of declaration. It is only upon the making of the declaration that the trustee will become a bare trustee of the transferred funds or property: declaring the transfer to be of no effect will not result in the relationship of trust never having existed. In considering the effect of the declaration upon donees and third parties (and in this respect the trustees entitled to be considered as a potentially affected third party) the court may require to adjudicate upon change of position defences. Accordingly, in exercising its discretion as to the appropriate remedies and consequential orders to authorise, the court will have to take into account all factors relevant to those issues .***

***95. It follows, therefore, that as regards the consequences of the now statutory jurisdiction the court may determine that, albeit the transfer has had some effects, none of those are to be a bar to the transferor potentially achieving full recovery. Thus, an appropriate order could have the effect of allowing the settlor to make a claim against the trustee for monies distributed to beneficiaries, as a result of which the trustee would make a claim against the beneficiaries; both claims being subject, in principle, to the response of a change of position defence. In practice, however, a declaration of no effect from the date of the transfer will often require the making of sometimes numerous consequential orders: see *Z Trust* 2016 (1) JLR 132 and *Link Trustee Services* [2018 JRC 043](#).”***

## Discussion

17 A curiosity of the present application is that the Court is asked to make a number of orders under the Trusts Law in relation to the activities of the trustees of the 2001 Trust which is governed by the Law of England and Wales. Nonetheless Jersey Law governs the 1973 Trust, and it therefore will also govern any disposition from that Trust, including the transfer or disposition into the 2001 Trust. If it should turn out that that transfer or disposition is set aside, the 2001 Trust will not have the assets in question and there is nothing against which English Law would apply. The Court is thus left with a number of administrative decisions taken by trustees of an English trust where the trust in question had no assets. In our judgment it is right to apply Jersey Law to all the events which happened after the date



of the transfer set aside for mistake because the substratum of the English trust has disappeared. The Court is exercising the powers conferred upon it under Article 47H, giving effect or not as the case may be to events which post-dated the transfer which has been set aside.

- 18 It is clear from the materials which have been put before the Court that the question as to whether the tax consequences of the 2001 Transfers are as adverse as the trustees are now advised they are is disputed. The Court is therefore faced with a position where respected tax counsel on both sides of the argument have given contrary opinions as to the effect of what was done. The Representors described the tax advice of Messrs Withers and Mr Furness QC as the “*flawed tax advice*”. The opinion offered by counsel advising English solicitors for Messrs Withers and Mr Furness QC suggests the tax advice was not flawed at all.
- 19 The Court does not feel it is necessary at this point to express a view as to which tax advice is correct. We have seen copies of the various opinions or notes of conference settled by counsel, but those opinions have not been tested with live evidence and cross-examination. HMRC, who have been given notice of these proceedings in the usual way, have not expressed any view. However, whilst we do not feel able to say that the tax advice on which the Representors are now proceeding is necessarily right, it is certainly not necessarily wrong either. For the purposes of this application only, we take it to be at least probably right. We think the position is that no reasonable trustees would be expected to have taken the steps which the Representors took in 2001 if they had known that the possible outcome of those steps was exposure to IHT in sums of approximately £800,000 and the exposure of the Settlor to capital gains tax on gains arising in the 2001 Trust. We are satisfied therefore that but for the tax advice which was received, the 2001 Transfers would not have been made. Accordingly, the mistake made was not so much that there necessarily was a tax problem, but rather that there was a probability that there was if the power were exercised in the way it was, and in our judgment, the Representors would not have exercised the power of appointment as they did but for that mistake.
- 20 The next question is whether the mistake is of so serious a character as to render it just for the Court to make a declaration. In our judgment, the tax consequences are significantly serious both for the 2001 Trust and for the Settlor, a person whose interests the Representors were entitled to consider not as a beneficiary but in the sense that adverse consequences for her might affect the otherwise positive relationships which the beneficiaries might have with her. For these reasons, we consider that the mistake was of so serious a character as to render it just for the Court to make a declaration under Article 47G.
- 21 It is to be noted that the power conferred on the Court under Article 47G is to set aside the exercise of powers in relation to a trust or trust property due to mistake. It might be thought that the setting aside of the exercise of powers does not affect the fact that the transfer has been made. That is academic in the present case. We consider that the Court could have exercised its power under Article 47E (although we were not asked to do so) because in



this context, the trustees of the 1973 Trust were a “Settlor” for the purposes of the disposition of the property to the 2001 Trust. It was submitted by Advocate Williams that the 2001 Trust, being an English law trust, required that the identification of the Settlor be made in accordance with English law; but we do not agree with that because the question for the Court would be whether the terms of Article 47E of the Trusts Law have been complied with, and therefore it seems to us that it would be open to the Court to determine that the Representors are entitled to seek a declaration under Article 47E(2)(a) because they fall into the category of “ *a Settlor acting in person (whether alone or with any other Settlor)*”.

22 Whether the Court then proceeds under Article 47F(2) or under Article 47H(2), we have a discretion to exercise. We can declare the transfer of property or the exercise of power as the case may be to be voidable and:-

- (i) Declare the transfer to be avoided and of no effect from the time of its having taken place;
- (ii) Declare the transfer to be avoided from the time of its taking place but nonetheless deemed to have had such effect as the Court might determine; or
- (iii) Declare the transfer to be avoided from a date subsequent to the time of its having taken place.

23 In the present case, the reasons why the mistake is of so serious a character that the transfer ought to be set aside *ab initio* flow from the potential tax consequences of what was done in 2001. We then have to consider whether there are any other consequences of setting aside the transfer into trust as at that date which might cause serious injustice and, if so, whether any other consequential orders might be made. In other words the exercise of powers under Article 47E and F or under Article 47G or H need to be considered holistically with a view to reaching an equitable solution on the issues before the Court at the time.

24 The Representors seek also to set aside the 2012 Transfers and the termination distributions out of the 1973 Trust. The questions arising in relation to those applications are the same as apply in relation to the 2001 Transfers with only minor qualifications. The 2001 Transfers deed was described as a “ *deed of partial revocation and transfer*” and it contained expressly a revocation by the trustees, in exercise of the power reserved by clause 9 of the 1999 Appointment, of the trust's powers and provisions in clauses 3 to 6 of the 1999 deed in respect of the fund so appointed. This was no doubt thought to be crucial to the validity of the exercise of the power of the trustees under clause 7A of the 1973 Trust to make an appointment to the 2001 Trust, because the beneficiaries had to be the same. In fact, although it was submitted by Advocate Williams that the power of revocation removed any possibility of invalidity from this exercise of power, it appears to us that even revoking the 1999 Appointment in this respect, the beneficiaries under the 2001 Trust are still not the same as the beneficiaries under the 1973 Trust because the 2001 Trust contains provisions which enable spouses, widows and widowers of the grandchildren and remoter issue to

benefit, whereas the 1973 Trust does not. In any event, the 2012 transfer was effected without reference to any revocation of the 1999 Appointment and as there were assets within the 1973 Trust after 2001 which were subsequently transferred into the 2001 Trust by the 2012 Transfer, a potential ground of invalidity arose not only in relation to spouses, widows and widowers, but also in relation to the children and remoter issue of the Settlor's brother and sister.

- 25 Be all that as it may, and to the extent that the transfers in each case were valid, we are satisfied that they were made by mistake for the reasons which we have given. All flowed from the mistake identified in paragraph 19 above.
- 26 On the day of the 2012 Transfer, the balance of assets within the 1973 Trust was appointed to the grandchildren as beneficiaries of that Trust. The language of the appointment was that the trustees would apply “ *one seventh of the income and capital of the whole of the trust fund of the settlement immediately prior to execution of this deed*” to the First Respondent. There were similar provisions in relation to his siblings. The effect of the setting aside of the 2001 Transfers *ab initio* means that all those assets so transferred would come back into the 1973 Trust with effect from that date, and accordingly would be deemed to have been appointed out in 2012 by virtue of the provisions to which we have referred. That was clearly not the intention, and we have no hesitation therefore in saying that if it be right to set aside the 2001 Transfers *ab initio*, as we think it is, it must also be right to set aside the termination distributions pursuant to the deed of appointment indemnity and termination of 2nd March 2012. This latter deed also contained the provision, slightly unusually, that:-

*“The trustees hereby declare that [the 1973 Trust] be and shall henceforth stand terminated.”*

- 27 We can understand that that might have been thought to be logical given that all of the assets of the 1973 Trust were at that stage thought to have been appointed or transferred out; and no doubt the Representors considered at that time that there was nothing left in the 1973 Trust. To that extent it might be thought that this particular provision in the deed of appointment referred to was unnecessary. For the avoidance of doubt, a consequential order which would be appropriate if the 2001 Transfers are to be set aside *ab initio* would therefore be the setting aside also of the declaration that the 1973 Trust stand terminated, and we make that order accordingly.
- 28 We turn next to the other consequences which would flow from a decision the 2001 Transfers be set aside *ab initio*. These appear to us to be two-fold:-

- (i) A number of distributions to beneficiaries under the 2001 Trust have been made using the assets transferred in from the 1973 Trust.
- (ii) A number of administrative actions have also been taken as set out above.

- 29 We deal first with the distributions to beneficiaries under the 2001 Trust – these are the grandchildren of the Settlor, and are therefore beneficiaries of both the 1973 Trust and the 2001 Trust. On nine occasions between 8<sup>th</sup> December, 2004 and 28<sup>th</sup> March, 2018, equal payments were made to or for the benefit of each of those beneficiaries. It is unnecessary to set them out in detail in the judgment, but a Schedule of them is lodged with the Court papers at the Judicial Greffe. In each case, the trustees made the distributions out of the 2001 Trust, and those trust distributions were made in good faith upon the basis that the 2001 Trust was valid and had the assets appointed into it from the 1973 Trust. We think that, given that the receiving beneficiaries were beneficiaries under each of the two Trusts, there is no reason to think that the trustees would have reached any different view had they been considering an appointment under the earlier of the two Trusts. For these reasons, we ratify and approve the distributions to beneficiaries under the 2001 Trust using the assets transferred by mistake from the 1973 Trust.
- 30 We now turn to the administrative actions. These are many and varied. They relate to the purchase, sale and ultimate liquidation of a portfolio of quoted investments, the acquisition of some common shares of no par value in companies owned by the trustees, and the disposal of some of those shareholdings; and they relate also to loans made by the trustees to some of the companies in question.
- 31 Finally, the trustees seek approval for their operation of various bank accounts and for the payment of fees and expenses including but not limited to trustees' fees, consultancy fees, investment advisory fees and the like. In other words, the trustees ask us to order that despite the fact that the 2001 Transfers are set aside *ab initio*, all the activities of the trustees under the 2001 Trust should be ratified as though valid.
- 32 In our judgment this might cause difficulties if there were to be different beneficiaries, in which case the equities would need to be considered in more detail. However in this case, the beneficiaries under the 2001 Trust and the 1973 Trust are much the same – and such differences as there are lie in the class of secondary beneficiaries because we treat the Settlor's grandchildren as the primary beneficiaries – and, given that the trustees would be acting lawfully in relation to these administrative powers, whether acting as trustees of the 1973 Trust or as trustees of the 2001 Trust and there is no objection from any respondent, we see no reason why we should not authorise and ratify all the various administrative acts. Once again, it is unnecessary to set them out in detail, but a list of the intervening transactions is registered on the Court file with the Judicial Greffe.
- 33 For all these reasons, the Court acceded in the application of the trustees and made:
- (i) A Declaration that the exercise of the trustees' powers by which the 2001 Trust was established and effecting the 2001 Transfers, the 2012 Transfer and the Termination Distributions are voidable and as such are set aside and of no effect from the date of the exercise of such powers;

(ii) A Declaration that as a result of *inter alia* the setting aside of the above mentioned Termination Distributions (notwithstanding the trustees' declaration in the Termination Deed to the contrary) the 1973 Settlement was not terminated and it exists on the same terms as existing immediately prior to 2nd March 2012;

(iii) An Order that the administrative actions of the trustee of the 2001 Trust, including but not limited to the Intervening Transactions (as set out in the Schedule to the Order) should be ratified as valid actions of the Representors as trustees of the 1973 Trust, to take effect from the date of each action, and the trustees were directed to enter into any necessary documents and / or take any action to perfect such administrative actions;

(iv) An order that the Representors should:

(a) Enter into any necessary documents and / or take any action to procure that the assets received by each of the Beneficiaries pursuant to the Intervening Distributions and the Termination Distributions and all rights of recovery in respect of such assets be held in trust for each of the respective recipient Beneficiaries absolutely;

(b) That the income if any of the relevant part of the trust fund which has arisen since the Intervening Distributions and all the Termination Distributions should be held in trust for each of the respective recipient Beneficiaries absolutely;

(v) An Order that, the Court being satisfied that it would be contrary to the welfare of the beneficiaries to reverse or otherwise interfere with the dispositive acts or omissions of the trustee of the 2001 Trust, the trustees be authorised and directed, as an alternative to the authorisation and direction above, to administer the 1973 Trust on the same footing as though those dispositive acts or omissions had been done or omitted to be done by or with the authority of the Representors as trustees of the 1973 Trust;

(vi) An Order that the trustee of the 2001 Trust enter into any necessary documents and /or take any necessary action to transfer and vest all assets in the Representors as trustees of the 1973 Trust;

(vii) An Order that all the Representors' costs of and incidental to the Representation be paid out of the assets of the 1973 Trust on the trustee indemnity basis.

34 The Representors sought alternative relief in case the primary relief were not granted, namely an authority to pursue remedial litigation against their former advisers. That does not arise in this case as a result of the orders which we have made, and accordingly we do not take that further in this judgment.