Tanya Marya Dick Stock v Pantrust International SA

Jurisdiction:	Jersey
Judge:	Matthew John Thompson
Judgment Date:	31 March 2016
Neutral Citation:	[2016] JRC 75
Reported In:	[2016] JRC 75
Court:	Royal Court
Date:	31 March 2016

Text

[2016] JRC 75

ROYAL COURT

(Samedi)

Before:

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

In the Matter of the Manor House Trust and in the Matter of the Russian Trust

And in the Matter of Article 51 of the Trusts (Jersey) law 1984

Between
Tanya Marya Dick Stock
Representor
and
Pantrust International SA
First Respondent

Richard George de Winton Wigley
Second Respondent
James Richard de Winton Wigley
Third Respondent
G. B. Trustees Limited
Fourth Respondents
John William Dick (Senior)
First Third Party Respondent
John William Dick (Junior)
Second Third Party Respondent
Darrin Stock
Third Third Party Respondent

Advocate S. C. Thomas **for the Representor, Second Third Party Respondent and Third Third Party Respondent**.

Advocate D. P. Le Maistre **for the First Third Party Respondent**.

Advocate N-L. M. Langlois **for the First to Third Respondents**.

Advocate M. L. Preston **for the Fourth Respondent**.

Authorities

Representation of the Manor House Trust and the Russian Trust [2015] JRC 208 .

Stock v Pantrust International & Ors [2015] JRC 223 .

Stock v Pantrust International SA [2016] 021 .

Stock v Pantrust International SA & Ors [2015] JRC 268 .

Stock v Pantrust International & Ors [2016] JRC 053 .

Royal Court Rules 2004.

Baron Everlo v Fitel Limited & Others [1987–88] JLR 687 .

Crociani v Crociani [2014] 1 JLR 503 .

Dalemont Limited v Senatorov & Ors [2013] JRC 209 .

Crociani v Crociani [2013] JRC 250 .

Trust — reasons in relation to application by first to third respondents to withdraw counterclaims and notices and parts of amended answers.

CONTENTS OF THE JUDGMENT

THE MASTER:

Introduction

1 This judgment represents my detailed written reasons in relation to an application by the first to third respondents to withdraw entirely their counterclaims and third party notices and parts of their amended answers.

Background

2 The background to this dispute is set out in two judgments of Commissioner Clyde-Smith reported as *Representation of the Manor House Trust and the Russian Trust* [2015] JRC 208 dated 8 th October, 2015, and *Stock v Pantrust International & Ors* [2015] JRC 223, dated 6 th November, 2015, which background I adopt for the purposes of this judgment.

3 On 22 nd January, 2016, Commissioner Clyde-Smith issued a further judgment reported at *Stock v Pantrust International SA* [2016] JRC 021 in these proceedings dealing with the release of security held by the first to third respondents in respect of shares in three companies and giving directions for the filing of evidence on a further hearing in relation to the issue of a second charge over St. John's Manor.

4 On 4 th March, 2016, Commissioner Clyde-Smith gave a further judgment on behalf of the Royal Court refusing to set aside the second charge granted in favour of the first respondent.

5 The procedural history of this matter was set out in an earlier judgment *Stock v Pantrust International SA & Ors* [2015] JRC 268 dated 23 rd December, 2015, on an application before me by the first to third respondents to issue third party notices, at paragraphs 3 to 5

which I repeat as follows:-

> ***"3. Between the first and second judgments of Commissioner Clyde-Smith, the first to third respondents filed an answer. While these proceedings were commenced by way of representations, and no directions have been given for the filing of pleadings, no party made any challenge to the fact that the first to third respondents had filed an answer. Paragraphs 5 to 20 of the answer provides as follows:-***
>
> ***"Paragraph 1 of the Amended Representation is admitted.*** It is however specifically denied that the Representor is a beneficiary of The Manor House Trust or that she has locus to bring these proceedings.
>
> ***Paragraph 2 of the Amended Representation is admitted, save that it is denied that the true nature of the legal relationships created was that of discretionary trusts for the reasons which follow*** .
>
> ***The Settlor and sole beneficiary of "the Dick Trusts" was and is John W Dick Snr, a fact known to all those concerned with the formation and administration of "the Dick Trusts" over the years*** .
>
> ***The true nature of the legal relationship comprising "the Dick Trusts" was a relationship of agency between John W Dick Snr (as principal) and the "trustee" of "the Dick Trusts" from time to time (as agent)*** .
>
> ***The reality of the situation throughout was that John W Dick Snr was Richard Wigley's client, a relationship being far more akin to that of principal and agent or of client and banker, than to ordinary notions of Anglo Saxon trusteeship.*** The Respondents did as they were told by John W Dick Snr .
>
> ***John W Dick Snr personally and at all times controlled the affairs and the assets of his financial portfolio, including those contained in the "Dick Trusts".*** Over the course of their relationship, John W Dick Snr directed the Second Respondent, either directly, through the First Respondent or through one or more entities affiliated with the Second Respondent, to pay various expenditures on John W Dick Snr's behalf and / or on behalf of his various entities, using the assets of the "Dick Trusts" .
>
> ***Over the course of their thirty-year relationship, John W Dick Snr has directed, authorized or ratified, and in any event benefitted from, the actions taken by the Respondents on Mr Dick's behalf and for his personal benefit.*** Through his direction, authorization or ratification of the Respondents' actions , ***Mr Dick personally controlled and benefitted from the affairs of the "Dick Trusts"***.
>
> ***John W Dick Snr has, by his direction and for his benefit, utilized the assets of the "Dick Trusts" in the course of real estate developments and other investments carried out by the Dick Family Trust 1 and Dick Family***

Trust 2 ("the Dick Family Trusts), notably by financing or procuring the financing of LSI, a Colorado company forming part of those latter trusts. In effect, John W Dick Snr has at all material times treated the entirety of the "Dick Trusts" and "Dick Family Trusts" as one financial portfolio to be controlled at the direction of John W Dick and for his benefit .

Various expenditures were paid for John W Dick Snr's benefit and / or that of his various entities, which monies were funded by way of loans from inter alia La Hougue Financial Management Services Limited ("LFMS") or Oxford Financial Services Limited ("Oxford") .

John W Dick Snr's modus operandi in business was to borrow heavily in order to meet both his expensive lifestyle and to fund the various investments in which he was involved. Throughout the lifetime of the "Dick Trusts", John W Dick has required the Respondents and their predecessors to arrange such borrowing on a near constant cycle. By way of illustration, the Respondents have records of arranging borrowing for John W Dick Snr and his related entities from 78 private loans through 157 lenders .

For many years Mr Dick directed the Respondents to pay various expenditures on his behalf and / or on behalf of his various entities such as: (1) payment of personal credit card bills of Mr Dick; (2) the expenses of St John's Manor; and (3) to meet expenditure arising in the course of various real estate developments with which Mr Dick was involved. Mr Dick converted some personal debts into loans arranged through LFMS; other loans were arranged by the Respondents at Mr Dick's behest and for the benefit of Mr Dick and the "Dick Trusts" (collectively "the Pantrust Loans"). Mr Dick directed, authorized or ratified, and in any event enjoyed the benefit of, all of the Pantrust Loans .

The lenders of the Pantrust Loans were entities affiliated with the Respondents and included LFMS and Oxford. The Pantrust Loans and the amounts still outstanding in respect of the same are detailed in Schedule 1 to this pleading. As at 30 June 2015, the outstanding balance totalled USD $29,559,317 .

LFMS and Oxford have since assigned their interest in the Pantrust Loans and associated loan documentation to the First Respondent .

In the premises, the true analysis of the relationship between the Respondents and John W Dick Snr is that of agency, the former being agents for the latter principal .

Further or alternatively, there existed between the Respondents and John W Dick Snr a contractual relationship, whereby the Respondents agreed to act in accordance with John W Dick Snr's instructions in exchange for which they were remunerated for their services in carrying out those instructions and administering the assets of the "Dick Trusts" .

The following were express or implied terms of that contractual relationship :

The Respondents would at all times act in accordance with John W Dick Snr's instructions insofar as it was able to do so .

John W Dick Snr would indemnify the Respondents in respect of any loss, damage or liability incurred as a result of acting upon his instructions .

John W Dick Snr would in reality remain the sole party beneficially entitled to the assets of the "Dick Trusts" .

John W Dick Snr would assume liability in respect of and repay all lending procured by the Respondents for his benefit and / or for the benefit of the "Dick Trusts"."

4. As a result of the decisions of Commissioner Clyde-Smith, (subject to the first to third respondents' appeal to the Court of Appeal in respect of the first judgment), the only issue raised by the representation that remains concerns whether the proper law of the Trusts was altered from Jersey to Panama as pleaded at paragraphs 23A to 23T of the amended representation .

5. However, the first to third respondents' answer and counterclaim went much further, as summarised by Commissioner Clyde-Smith at paragraphs 2 and 3 of his judgment of 6th November, 2015, as follows:-

"2. The Panamanian Trustee and the first and second directors (together "the respondents") resist the applications for their removal because by their answer, counterclaim and third party claims, filed on 16th October, 2015, in respect of the two representations, they deny that the true nature of the legal relationships created was that of discretionary trusts. The true nature of the legal relationship, they say, is that of agency between the Settlor as principal and respondents as agents. The relationship was more akin to that of a client and banker than to ordinary notions of Anglo-Saxon trusteeship and so the idea of the Court having a supervisory role has no relevance. The trusts were not in truth discretionary settlements established by declaration of trust by Barclaytrust. Alternatively, they plead that the terms of the deeds of trust have been overridden, varied and/or surpassed by agreement between the Settlor and the respondents .

The respondents assert that over many years they arranged loans at the Settlor's direction and for his benefit through entities affiliated with the respondents ("the Pantrust loans") of which the balance outstanding is some $29.5M. The Pantrust loans have now been assigned to the Panamanian Trustee, it would seem in its personal capacity. It was an express or implied term of the contractual relationship between the Settlor and the respondents, they say, that he would assume liability for the repayment of the Pantrust loans.

> The respondents allege a conspiracy by the Settlor, the representor, her brother and her husband ("the family") to defraud the respondents by denying the existence of the Pantrust loans and counterclaim against the family for damages in the amount of the outstanding balance."

6 On 29 th January, 2016, the representor and the second and third third party respondents issued summonses seeking security for costs. On 22 nd February, 2016, Messrs. Baker & Partners on behalf of the representor and second and third third party respondents provided their hearing bundle in respect of their application for security for costs, which hearing bundle included the sixth affidavit of James Michael Sheedy exhibiting the details of the costs claimed.

7 Also on 22 nd February, 2016, the first third party issued an application for security for costs which application I directed should be heard at the same time as the application issued by Baker & Partners. The affidavit in support of the application for security for costs by the first third party respondent was sworn by Alexander David Charles Jeffery on 25 th February, 2016.

8 As set out in the first judgment of Commissioner Clyde-Smith reported at [2015] JRC 208, there are also proceedings in Colorado. At paragraph 56 of his first judgment Commissioner Clyde-Smith said this in respect of the Colorado proceedings:-

> ***"56. It is the case that in the Colorado proceedings, the Panamanian Trustee does allege that the Settlor controlled the affairs of the Trusts (and other trusts established by the Settlor), in particular in relation to the loans. The Trusts are described as the alter ego or mere instrumentality of the Settlor. However, the claim is made in its personal capacity and not as trustee of the Trusts and the relief it seeks is damages against the Settlor, the representor, her husband and her brother; no relief is sought in its capacity as trustee of the Trusts. The Colorado court is not seeking to exercise any supervisory role over the Trusts, which on Advocate Sinel's case would in any event be for the exclusive jurisdiction of the Panamanian courts."***

9 It appears to be common ground between the parties that in the Colorado proceedings, Pantrust is seeking to reclaim from the first third party respondent personally, damages equivalent to the amount of loans alleged to have been made to him. The position of the first respondent was summarised in paragraph 9(ii) of Commissioner Clyde-Smith's judgment reported at *Stock v Pantrust International & Ors* [2016] JRC 021 as follows:-

> ***"9(ii). At John Dick Sr's direction, loans (referred to by the parties as "the Pantrust loans") were made by entities affiliated with the former trustees through two of their companies, namely La Hougue Financial Management Services Limited and Oxford Financial Services Limited to meet his***

expensive lifestyle and fund the investments in which he was involved. No disclosure is given as to the identity of the recipients of these loans. The principal recipient appears to have been Land Securities Investors Limited, based, as we understand it, in Colorado and owned by the Dick Family Trusts Nos 1 and 2. There were some 157 (unidentified) ultimate lenders and some 78 private loans to unidentified recipients. The total currently outstanding is some US$29.5M, although no claim is made in the Jersey proceedings for repayment of the Pantrust loans by the trustee of the Manor House and Russian Trusts as debtor."

10 On 18 th February, 2016, which was not disputed by the parties, the Colorado Court was informed that the dates of loan documentation relied upon by Pantrust and Mr Richard Wigley were inaccurate. In particular, counsel for the first and second respondents in Colorado stated as follows:-

> *"We yesterday learnt that to be inaccurate and that the loan documentation especially the promissory notes and facility letters were executed at the same time in 2013.* And that is a necessary clarification that we need to make, is material, and obviously goes to the heart of the promissory note claim."

11 This admission was drawn to the attention of Commissioner Clyde-Smith who, at paragraphs 27 and 28 of his judgment of *Stock v Pantrust International & Ors* [2016] JRC 053, stated as follows:-

> ***"27. Following the hearing, but before this judgment was handed down in draft, the Court was informed by Advocate Baker, for the representor, that the Colorado proceedings have now been adjourned to 17th August, 2016, with mediation to take place in the interim. In a further affidavit from the representor (which appears to be undated), she deposes that US counsel for Richard Wigley and Pantrust had sought the adjournment in order to resolve issues relating to his clients' sworn discovery responses in the Colorado proceedings. His clients had stated that the loan documentation in relation to the Pantrust loans had been prepared and executed at the time of the loans, i.e. the dates reflected in the documents, but that it had now been determined that the documentation for the Pantrust loans was collectively created and executed at the same time in 2013. In addition to correcting this error, US counsel felt obligated as officers of the Colorado court to investigate and confirm the accuracy of all of the discovery responses*** .
>
> ***28. This is clearly a serious matter, suggesting, as Advocate Baker says, that this documentation was manufactured and falsely dated, but both Baker & Partners and Sinels confirm in correspondence between them that the loan by Pantrust to St John's Manor Limited is not included in the Pantrust loans being claimed in the Colorado proceedings."***

12 On 24 th February, 2016, the representor issued a summons seeking to inspect the loan documents referred to in the amended answers and counterclaims filed in respect of the Manor House Trust and the Russian Trust.

13 On 25 th February, 2016, Messrs. Sinels Advocates on behalf of the first to third respondents wrote to the advocates for the other parties informing them that the first to third respondents would shortly be seeking leave pursuant to Rule 6/31(1) of the Royal Court Rules 2004, as amended to discontinue the counterclaims and the third party notices in the proceedings.

14 Following an exchange of correspondence between the parties, I directed by email that the application by the first to third respondents to withdraw their counterclaims and third party notices should be heard on 9 th March, 2016, being the dates fixed for the security for costs applications referred to above and the application for inspection of certain documents issued by the representor. I made this direction as I considered it likely that, if the counterclaims and third party notices were withdrawn, then any applications for security for costs and inspection might prove unnecessary. As matters turned out at the hearing on 9 th March, 2016, the parties ultimately agreed that the applications for security for costs and inspection should be adjourned *sine die*.

The Relevant Legal Principles

15 There was no real dispute between the parties on the relevant legal principles on an application to discontinue or withdraw a claim or counterclaim. The relevant is Rule 6/31(1) of the Royal Court Rules 2004, as amended and states as follows:-

> ***"6/31 Withdrawal and discontinuance***
>
> ***(1) Except with the consent of the other parties to the action, a party may not discontinue an action or counterclaim, or withdraw any particular claim made by that party therein, or withdraw his or her defence or any part of it, without the leave of the Court, and any such leave may be given on such terms as to costs, the bringing of a subsequent action or otherwise as the justice of the case may require."***

16 The basis upon which the court might exercise its discretion to permit a withdrawal was considered in *Baron Everlo v Fitel Limited & Others* [1987–88] JLR 687. The relevant extract is found at line 33 page 690 to line 19 page 691 and provides as follows:-

> ***"All counsel agree that the plaintiff is entitled to leave.*** 1 The Supreme Court Practice 1988, 35 para. 21/2–5/11, at 372 says that—
>
> ***"nevertheless it is not desirable that a plaintiff should be compelled to litigate against his will; the Court will normally grant him leave to***

discontinue if he wants to, provided no injustice will be caused to the defendant nor will he be deprived of any advantage which he has already gained in the litigation, which so far as possible should be preserved…"

This court is not going to compel the plaintiff to litigate against his will and subject to what we have to say hereafter, we grant leave to the plaintiff to discontinue the action. However, as the White Book says (op. cit., para. 21/2–5/12, at 5 372):

"The Court has a wide discretion as to the terms upon which it may grant leave to a plaintiff … to discontinue … the action… It may impose terms as to costs, as to the bringing of a subsequent action or otherwise as it thinks just."

The paragraph continues: "(1) As to costs… If the order gives leave to discontinue on the payment of the costs, the action survives until the costs are paid." Mr. Begg accepts that the costs of all other parties must be paid by the plaintiff. However, for reasons connected with the financial state of the first defendant, we are not prepared to delay a discontinuance until the costs are paid. Thus discontinuance will be immediate but we order that the plaintiff will pay the costs of all the other parties, of and incidental to this action, on a taxation basis."

17 The real issue between the parties was whether I should impose terms or conditions and what terms or conditions I could order. I specifically indicated at the outset of the hearing that I wanted to be addressed on whether I should make an order preventing the first to third respondents from issuing any new proceedings based on matters raised by the paragraphs in the answers and counterclaims that were being withdrawn without leave of the court.

The parties' contentions

18 Advocate Langlois on behalf of the first to third respondents contended as follows:-

(i) It was accepted that the costs of the representor of and occasioned by the withdrawal of the counterclaims should be paid by the first to third respondents on an indemnity basis.

(ii) Most of the costs incurred in particular by the representor however went to the issue of removal and/or the lifting of security. In respect of the removal application while the representor had been successful, to date no costs order had been made. This issue however did not focus on the loans or the counterclaims.

(iii) Likewise in respect of applications to discharge security, no cost orders had been made. Furthermore her clients in relation to the judgment issued on 4 th March, 2016, had been successful. Again the security issue was not relevant to the loans. It would

have been argued whether or not there was a counterclaim in Jersey because damages were sought equivalent to repayment of loans from the first third party in proceedings against him in Colorado.

(iv) If I was minded to order any payment of costs on account, quantum of costs was difficult and care should be taken not to order sums that went beyond amounts that could be recovered on a taxation in respect of the counterclaims.

(v) In respect of not commencing any further proceedings without leave, this was difficult to the extent such an order related to proceedings outside Jersey. Any such order should also not prevent developments in the Colorado proceedings and also should not prevent proceedings being commenced against St. John's Manor Limited to recover loans referred to in the judgment issued by Commissioner Clyde-Smith on 4 th March, 2016.

(vi) I did not have sufficient information to make an appropriate costs order. The schedule of costs set out by the representor related to the entirety of the costs claimed and it was impossible to know what level of costs related to the counterclaims and third party proceedings.

(vii) Notwithstanding the incorrect dating of loan documentation, her clients were still seeking to recover repayment of money advanced for the benefit of the first third party respondent in Colorado but now on a different basis.

(viii) To the extent that the first to third respondents might be prevented from commencing new proceedings, then she would need instructions from her clients as to whether, if they were prevented from bringing a new cause of action, that whether they would wish to continue with the counterclaims and third party proceedings or whether they would continue with a withdrawal.

19 Advocate Thomas argued that while his overall claim for costs was in excess of £500,000 after 31 st October, 2015, the cost incurred totalled £232,000. He suggested a proper approach was to reduce this figure by 20% and therefore he sought a payment on account and a payment into court of £186,000, i.e., £93,000 direct to his clients and £93,000 into court.

20 The fact that there might have been a different argument about security, even if there had been no counterclaims in Jersey, was not what had happened. The position was that security had been sought to be retained on the basis of loans set out in the counterclaims and third party notices, which claims had then been withdrawn. I should therefore take a pragmatic approach by looking at the reality of what had happened to date and ordering a payment on account and into court accordingly.

21 Any order I made in respect of payment to the representor and the first to third party respondents together with a payment into court would not prejudice assessment of quantum. What it would mean is that his clients would be able to enforce any assessment

on taxation. The court should take a realistic view as to whether or not the respondents are able and are willing to pay the indemnity costs that they have agreed to pay.

22 Requiring leave of the court in respect of any further proceedings was an appropriate safety net.

23 Advocate Preston for the fourth respondent, who is the trustee currently holding assets to the order of the Royal Court, contended that the effect of the withdrawal was that the current injunctions fell away. Therefore, if the first to third respondents wanted his clients to hold assets to the order of the Jersey court pending the outcome of the Colorado proceedings, that was a different injunction and one which the first to third respondents would have to seek from the Royal Court.

24 Advocate Le Maistre for the first third party respondent also sought an interim payment and a payment into court. He reminded me that the approach for interim payments was considered by the Court of Appeal in *Crociani v Crociani* [2014] (1) JLR 503 at paragraphs 16 and 17 as follows:-

> ***"16 In my view, the achievement of justice, to which all exercises of discretion under procedural rules aspire, would usually require that a party who is, pursuant to a court order, entitled to his costs, should be paid on account a percentage of the amount he is likely to recover on taxation calculated on a conservative basis to avoid any real risk of overpayment*** .
>
> ***17 This conclusion is consistent with and supported by the jurisprudence in England and Wales at a time before the CPR contained its present presumption."***

25 The amount of his costs incurred to date totalled £113,000. He therefore sought a payment into court of £45,000, plus a further payment to his firm of £45,000 on a joint and several basis.

26 He also suggested that the payment of costs should be a condition of the withdrawal.

27 If withdrawal was allowed he also reserved his position as to what remained and whether it might be necessary for his client to apply to intervene in relation to how the remainder of the proceedings were to be conducted.

Decision

28 By the time the matter came before me, it was clear that the first to third respondents

intended to discontinue their counterclaims and third party claims and had also set out, in response to a direction from me, the amendments to the amended answers that were sought in light of the discontinuance. This was subject to one qualification in that, if I was minded to impose a restriction preventing further proceedings Advocate Langlois did not have instructions on that issue, and wanted a short period of time to obtain such instructions. At the conclusion of the hearing therefore I made it clear that the orders I made would take effect from 12 noon Friday, 11 th March, 2016, unless Advocate Langlois before that time indicated that her clients no longer wished to discontinue proceedings. I further made it clear that, if that became her clients' position, then I would immediately deal with the security for costs applications and the application for inspection as well as making orders in relation to the wasted costs of the arguments on 9 th March, 2016.

29 Subject to the preceding paragraph, I therefore reached the view that it was not appropriate to put off any further making an order to permit the first to third respondents to withdraw their claims, by reference to the *Baron Everlo* decision referred to above. To delay the withdrawal to another day while a summons was formally issued to amend the answers and counterclaims simply delayed the inevitable. To leave the present pleadings in place ultimately was also compelling the first to third respondents to litigate against their will. I was not prepared to take such an approach.

30 I was also not prepared to make any withdrawal conditional upon certain orders being met. This is because if the first to third respondents failed to fulfil any such condition, that would have a consequence that the answers and counterclaims remained and I would again be compelling the first to third respondents to litigate issues they no longer wished to litigate.

31 However I also concluded that I could make orders containing terms which required the first to third respondents to meet as the price for a withdrawal at the same time as agreeing to the withdrawal. If the first to third respondents failed to adhere to any of those terms then it was a matter for the other parties as to whether they then wished to seek any sanction as a consequence of not adhering to any term. Any such failure however did not set aside the withdrawal.

32 The agreement to allow the first to third respondents to withdraw their third party proceedings and certain paragraphs of their amended answers was qualified in one respect. The proposed amendments in respect of the Manor House Trust at paragraph 57 of the draft re-amended answer and at paragraph 3 of the prayer, if I had agreed to these, would have had the effect of requiring the fourth respondent to hold assets of the Manor House Trust and the Russian Trust to the order of the Royal Court pending determination of the Colorado proceedings. This however was not the order the Royal Court had previously made. The Royal Court had simply ordered the fourth respondent to hold assets to the order of the Royal Court pending determination of the present proceedings in Jersey not the Colorado proceedings (see paragraphs 21 and 22 of the judgment of 6 th November, 2015, reported at [2015] JRC 223).

33 I therefore directed that the issue of paragraph 57 and paragraph 3 of the prayer of the re-amended Answer in respect of the Manor House Trust and the equivalent paragraphs in respect of the Russian Trust should be referred to the Royal Court for determination, because such an application was in effect an application to vary the injunction presently ordered by the Royal Court. As Master I do not possess the power to vary injunctions save where such variation has been agreed by consent. As a consequence of referring this issue to the Royal Court, I ordered the respondents to file an affidavit in support of the amendments sought by paragraphs 57 and paragraph 3 of the prayer and the corresponding paragraphs in respect of the Russian Trust by close of business Friday, 18 th March, 2016. I also gave permission to the representor and the fourth respondent to file affidavits in reply by Friday, 1 st April, 2016, and the parties were also ordered to attend upon the Bailiff's Judicial Secretary to re-fix a date with a time estimate of 1 day in respect of this application to amend.

34 I further directed in relation to the re-amended answers that remained, that the representor had to file a reply within 28 days. Within the same period, in the alternative, the representor was to make any such application as she was advised to do so in relation to what issues the Royal Court was now being asked to determine in light of the re-amended answers. If the issues remaining were to go to trial then appropriate directions had to be given; if the representor did not wish to pursue what remained in Jersey any further, then proceedings had to be withdrawn or resolved. What was required from the Court's perspective was for the representor to reach a decision on how she wishes to progress the remainder of the Jersey proceedings within 28 days.

35 I formally ordered that the wasted costs of the withdrawal of the representor and the third parties including the costs of filing any amended replies were to be paid by the first to third respondents on an indemnity basis as had been conceded as soon as the first to third respondents indicated their intention to withdrawal to counterclaim and third party proceedings.

36 I also ordered a payment on account of costs. By reference to paragraphs 16 and 17 *Crociani* I agree I should take a conservative approach to assessing quantum when ordering an interim payment on account of costs to be paid. *Crociani* also suggests that such an order is ‘usually’ required. This goes further than some earlier decisions of the Royal Court (see *Dalemont Limited v Senatorov & Ors* [2013] JRC 209 and *Crociani v Crociani* [2013] JRC 250). In the present case however I have taken into account the fact that in respect of the applications for security for costs, the first to third respondents have not responded at all to any requests for information about details of their assets or their financial position and whether or not they would or able to meet any costs ordered against them. I also reached the conclusion that the decision to withdraw the amended answers and counterclaims was either due to the first to third respondents not wishing to put up security for costs or arose as a result of the admissions that had been made in the Colorado proceedings relating to certain loan documentation being backdated and any corresponding request to inspect original loan documentation. In either case the withdrawal was tactical.

37 In deciding what amount of interim payment to order, I firstly deal with the position of the first third party respondent. This is because the first third party respondent's position was straightforward. The first third party respondent only retained Collas Crill in January 2016 and did not take part in any of the hearings in 2016 that led to the judgments of Commissioner Clyde-Smith other than to maintain a watching brief at one of those hearings. I was informed by Advocate Le Maistre that the amount of time recorded to date on his firm's system representing actual charge out rates was £113,000. I had already been provided by him with a detailed schedule of costs claimed on the standard basis up to 22 nd February, 2016, in the sum of £67,000. Given the difference between actual rates charged and what is recoverable on a standard basis, I was satisfied it was appropriate to proceed on the basis that the claim for indemnity costs would represent £113,000. Adopting a conservative approach, I then concluded that it would be appropriate to assume that on a taxation 75% of this sum would be recovered, i.e., the figure of £85,000. Of this sum I ordered that 50% of the sum be paid to Collas Crill as advocates for the first third party respondent by close of business Thursday, 24 th March, 2016. I allowed this period of time because in light of the failure by the first to third respondents to respond to the evidence filed in respect of the application for security for costs by the representor and the third party respondents, there is no evidence to suggest that the first to third respondents could not make these payments. Indeed, in conceding that indemnity costs should be paid, and in deciding to withdraw the counterclaims and the third party proceedings, the first to third respondents must have been made aware that significant costs consequences would follow.

38 In addition to ordering a payment to the first third party respondent, I also ordered, as a term of the withdrawal, a further payment of £42,500 into court. This was for two reasons. Firstly, the first to third respondents, as I had noted, failed to give any information in respect of security for costs. In the context of hostile proceedings, absent security, it will not be easy for the first third party respondent to enforce any costs order in his favour. Such enforcement will require the first third party respondent both to ascertain where assets are located and then to take steps to enforce any costs order through the courts of the country or legal jurisdiction where an asset is located. The second reason for ordering a payment into court is that in my view the withdrawal of the counterclaims and third party proceedings was tactical for the reasons set out above.

39 In respect of the costs of the representor and the second and third third party respondents, this is more complex and more difficult. Much more significant costs have been incurred relating to the removal proceedings, and arguments about releasing security as well as in respect of the counterclaims.

40 I reached the view that the counterclaims were of some relevance to the removal proceedings and security arguments and would have been reviewed in part in relation to those hearings. The issue of claiming damages from the first third party respondent in Colorado and the true nature of the trusts was raised in the removal application as recorded

at paragraphs 21 to 23 of the 8 th October, 2015, judgment reported at [2015] JRC 208 as follows:-

> ***"21. In his affidavit, the first director stressed that it was important for the Court to appreciate the true nature of the Trusts and how they have been used by the Settlor in practice for the last 30 years. Quoting from paragraph 19 of his affidavit:-***
>
> ***"Although [the Settlor] is not expressed to be within the class of beneficiaries listed in the trusts, in practice he was the party who principally enjoyed the benefit of their assets.*** The trusts are, in reality, devices by which he has sought to remove the indicia of ownership of those assets in his own name and yet still enjoy the benefits of their ownership. In an effort to shield and protect himself from wives/partners and creditors he went to great lengths to have no assets in his name. Nevertheless, he personally controlled the affairs and assets of his financial portfolio at all times, including these trusts. Over the course of our relationship he directed me, either directly or through one of the aforementioned entities, to pay various expenditures on his behalf or on behalf of his various entities, using the assets of the trusts."

41 In the judgment reported at [2015] JRC 223 the Royal Court at paragraphs 2 and 3 stated as follows:-

> ***"2. The Panamanian Trustee and the first and second directors (together "the respondents") resist the applications for their removal because by their answer, counterclaim and third party claims, filed on 16th October, 2015, in respect of the two representations, they deny that the true nature of the legal relationships created was that of discretionary trusts. The true nature of the legal relationship, they say, is that of agency between the Settlor as principal and respondents as agents. The relationship was more akin to that of a client and banker than to ordinary notions of Anglo-Saxon trusteeship and so the idea of the Court having a supervisory role has no relevance. The trusts were not in truth discretionary settlements established by declaration of trust by Barclaytrust. Alternatively, they plead that the terms of the deeds of trust have been overridden, varied and/or surpassed by agreement between the Settlor and the respondents*** .
>
> ***3. The respondents assert that over many years they arranged loans at the Settlor's direction and for his benefit through entities affiliated with the respondents ("the Pantrust loans") of which the balance outstanding is some $29.5M. The Pantrust loans have now been assigned to the Panamanian Trustee, it would seem in its personal capacity. It was an express or implied term of the contractual relationship between the Settlor and the respondents, they say, that he would assume liability for the repayment of the Pantrust loans. The respondents allege a conspiracy by the Settlor, the representor, her brother and her husband ("the family") to defraud the respondents by denying the existence of the Pantrust loans***

and counterclaim against the family for damages in the amount of the outstanding balance."

42 In assessing the position in relation to the loans the court also stated at paragraph 9(iv) as follows:-

"9. We would summarise the position in relation to the Trusts as follows:-

(iv) The respondents have a conflict between their personal interests in the repayment of the Pantrust loans and their duties as trustees. In his second affidavit, the first director exhibits lists of the loans made over the years, but there is no indication as to whom the loans were made. We note in this respect that the respondents do not claim repayment of the loans by the Settlor as debtor, but seek damages in the amount of the loans. The first director deposes at paragraphs 18 and 19 of his second affidavit that these loans often needed no actual transfer of monies, as they were dealt with by an adjustment of the client's account, leading Advocate Sinel to comment that in essence ***they had been providing the Settlor with a very substantial overdraft facility.*** Also exhibited to his second affidavit are a number of deeds of assignment between La Hougue Financial Management Services Corp ("La Hougue"), an entity affiliated to the respondents, and the Panamanian Trustee. The preamble states that the Trusts are indebted to La Hougue and the benefit of that debt is then assigned to the Panamanian Trustee. However, it is well established, certainly under Jersey law, that a trust is not a legal entity and it is conceptually inaccurate to talk in terms of a trust being indebted. It will be the Panamanian Trustee, as trustee, that will be indebted to La Hougue if it had borrowed funds in its capacity as trustee. This has not been the subject of full discussion but by way of provisional comment there would seem, therefore, to be two possibilities:-

(a) The Panamanian Trustee, as trustee, has taken the benefit of an assignment of a debt due by itself as trustee. As it would become both debtor and creditor, the debt would be extinguished .

(b) The Panamanian Trustee has taken the benefit personally of an assignment of a debt due by itself as trustee. This seems more likely as there is no reference in the deeds to the Panamanian Trustee acting in its capacity as trustee of the Trusts. This raises the question of whether the Panamanian Trustee can owe money to itself in two different capacities, and even if that is possible, it raises an issue as to conflict between its personal interests as creditor and its interests as a debtor trustee .

Whatever the true position, which will only become clear at trial, it seems clear that the respondents have a conflict of interest."

43 In the judgment reported at [2016] JRC 21, Commissioner Clyde-Smith at paragraph 9(ii) summarised the first to third respondents' case on the loan set out at paragraph 9 above.

44 On the other hand I accept that the first to third respondents are entitled to argue that the representor would have sought the discharge of the security in any event. I must also take in to account the fact that in respect of the judgment issued on 4 th March, 2016, the first to third respondents successfully resisted an application to lift security in respect of a loan to St. John's Manor which means that it is unlikely that the representor will recover her costs in respect of that hearing.

45 Taking all these matters into account, and looking at the overall costs of the representor and the second and third party respondents which total £500,000 up to 19 th February, 2016, (which are now likely to have increased) and also taking into account the fact that since the end of October the representor's costs total £232,000 again up to 19 th February, 2016, the view I reached was that a conservative order would be to make the same orders I made in respect of the first third party respondent in terms of a payment into court and a payment direct to Baker & Partners in favour of the representor and the second and third third party respondents. I therefore ordered that the first to third respondents jointly and severally also to pay £42,500 to Messrs Baker & Partners as an interim payment on account of costs and £42,500 into court. I made this order for the same reasons as I made the same orders in respect of the first third party respondent. I do not regard either order as preventing the first to third respondents challenging the overall quantum of costs. However the orders I have made mean that once costs have been assessed on a taxation process then such orders can be given effect to without further disputes about where assets might be located and whether such orders should be enforced in other jurisdictions.

46 Finally, I ordered that the first to third respondents should not commence any other proceedings in Jersey arising out of the same facts which have now been withdrawn as pleaded in the answers, the counterclaims or the third party notices against any of the representor or the third party respondents without leave of the court. However this order did not apply to any proceedings to recover the loan made to St. John's Manor Limited referred to in the judgment of Commissioner Clyde-Smith dated 4 th March, 2016. I made this order because of the clear hostility between the parties in the present proceedings. Without making any order the first to third respondents would be at liberty to issue fresh proceedings in respect of the withdrawn part of their present pleading. In the context of what I have found is a tactical withdrawal, it is entirely appropriate for the court to require an obligation of leave to prevent further tactical game playing or proceedings which could otherwise be an abuse of process. I expressly limited this order to proceedings in Jersey because I do not regard it as appropriate to make any order which purported to have extra territorial effect. If similar proceedings are commenced in any other jurisdiction relating to the matters that have been withdrawn in these proceedings that is a matter to be raised before the courts of the country concerned by any party if so advised to do so. The order made therefore also does not affect the existing Colorado proceedings.