Maya Mayur Patel v JTC Trust Company Ltd (formerly Minerva Trust Company Ltd)

Jurisdiction:	Jersey
Judge:	Matthew John Thompson
Judgment Date:	12 July 2022
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Court:	Royal Court

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Text

Between
(1) Maya Mayur Patel
(2) Mayur Patel
(3) Mumta Patel
(4) Priyanka Patel
Plaintiffs
and
JTC Trust Company Limited (formerly Minerva Trust Company Limited)
Defendants

and

(1) Prakashchandra Patel
(2) Gaurang Patel
(3) Illakumari Patel
(4) Parthiv Patel
(5) Akash Patel
(6) Vimalrai Patel
(7) Darshnaben Patel
(8) Alakh Patel
(9) Harshal Patel
(10) Laxman Varsani

(11) Chaitanya Varsani
(12) Medha Varsani
Third Parties

[2022] JRC 150

Before:

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

ROYAL COURT

(Samedi)

Trust.

Authorities

Patel v JTC Trust Company Limited and Ors [2022] JRC 089.

Cunningham v Cunningham [2009] JLR 227.

Royal Court Rules 2004.

Makarenko v CIS Emerging Growth Limited [2001] JLR 348

Trico Limited v Buckingham [2019] JRC095

Steelux Holdings Limited v Edmonstone (née Hall) [2005] JLR152

Hervé v H&H Jersey Growers [1994] JLR Notes 5a

Helm Trust Company Limited v Chatfield [2013] (1) JLR Note 13

In Re A Trust and B Trust [2018] JRC068

X Trust Company and Anor v C & Ors [2018] JRC068

Monteagle International Limited v Grocery Market Research Limited [2020] JRC244

A v Minister for Health and Social Services [2021] JRC036

Cunningham v Cunningham [2009] JLR 227

Trico v Buckingham [2019] JRC163

Brakspear & Ors v Nedgroup Trust (Jersey) Limited [2018] JRC121

Monteagle International Limited v Grocery Market Research Limited [2022] JRC051

Service of Process Rules 2019

Maywell Limited v Nautech Services Limited [2014] (2) JLR 527

Helm Trust Company Limited v Chatfield [2013] (1) JLR Note 13

MacFirbhisigh & Anor v C.I. Trustees & Executors Limited & Ors [2014] (1) JLR 244

Re Esteem Settlement [2002] JLR 53

Bagus Investments Ltd v Kastening [2010] JRC 144

Advocate P. C. Sinel **for the Plaintiffs**..

The Defendant not appearing being excused from appearance.

Advocate D. Evans **for the First and the Sixth to Twelfth Third Parties**.

Advocate P. G. Nicholls **for the Second to Fifth Third Parties**.

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THE MASTER:

Introduction

1 This judgment contains my decision in respect of an application by the plaintiffs to amend their order of justice and an application by the second to fifth third parties that the plaintiffs are debarred from bringing such an application because the application is in breach of an Act of Court dated 31 st August 2021.

Background

2 The general background to the present dispute is set out in my previous judgment in this matter reported at *Patel v JTC Trust Company Limited and Ors* [2022] JRC 089 dated 11 th April 2022. I adopt paragraphs 2 to 15 of that judgment including the definitions for ease of reference. Paragraph 16 of that judgment also refers to the material terms of what is described as the "Family Agreement".

3 In relation to the relevant procedural history of this matter, paragraphs 1 to 5 of the Act of Court dated 31 st August 2021 stated as follows:

> *"1. any party wishing to bring interlocutory applications including, for the avoidance of doubt:*
>
> > *(a) applications for strike out;*
> >
> > *(b) applications for summary judgment; and/or*
> >
> > *(c) applications for specific discovery, shall institute the required summons, together with any supporting evidence required, before 21 October 2021.*
>
> *2. any interlocutory applications issued pursuant to order (1) above (save for any specific discovery or third party discovery application instituted by the Plaintiffs) shall be listed for determination after the conclusion of the mediation (listed for 21 and 22 October 2021);*
>
> *3. any respondent to any interlocutory application issued pursuant to order (1) above (save for in connection with any specific discovery or third party discovery application issued by the Plaintiffs) shall not be required to file any evidence in response to the application (to the extent they are required to do so by any statute or rule of Court) until after the conclusion of the mediation, and shall do so as follows:*
>
> > *(a) any affidavit in response to the application(s) shall be filed 21 days after the mediation; and*
> >
> > *(b) any affidavit in reply shall be filed 14 days after receipt of the affidavit of response; and*
> >
> > *(c) skeleton arguments and bundles shall be prepared and filed in accordance with the applicable Rules and Practice Directions.*

4. any application the Plaintiffs' wish to bring for specific discovery of their Third Party discovery shall be issued by 5:00 p.m. Friday, 10th September 2021 and shall be listed at the earliest opportunity with evidence in response being filed:

(a) by the respondents to the application by 5:00 p.m. Friday, 17th September 2021; and

(b) by the Plaintiffs by 5:00 p.m. Tuesday, 21 st September 2021.

5. if there are no interlocutory applications issued pursuant to paragraph 1 of this order, the Parties within 14 days of conclusion of the mediation listed for 215 and 22" October 2021 (if unsuccessful) shall attend upon the Master's Secretary to fix a date for a further directions hearing…"

4 It is because the plaintiffs are said to be in breach of paragraph 1 of this Act that the second to fifth third parties contend that the plaintiffs cannot now apply to amend their order of justice.

5 On 8 th September 2021 I approved a consent order pursuant to which the first and sixth to twelfth third parties provided certain discovery on a voluntary basis for the purposes of a mediation.

6 The hearing leading to my judgment of 11 th April 2022 took place on 31 st January 2022. The present hearing came about as a result of paragraph 100 of that judgment as follows:

"100. In terms of what happens next, ordinarily I would have required the defendant to particularise its case on unjust enrichment and to plead whether it was seeking any other form of equitable relief. However, I was informed during argument that the plaintiffs intended to amend their order of justice. To avoid a multiplicity of amendments I therefore consider that a directions hearing is required to take place four weeks after this judgment is handed down. I would have required the plaintiffs to be present and by the time of that directions hearing to have provided a draft amended order of justice to the defendant for agreement. However, a draft has now been produced and a summons seeking leave to amend since the hearing of the present applications. If the draft amended order of justice is not agreed at the directions hearing I will either rule on the disputed amendments or set a timetable for a hearing to enable any disputed amendments to be resolved depending on the nature of them and how complex they might be. Consequent upon any approved amendments, I will then set a timetable for the defendant to file an amended answer dealing with any amendments in the order of justice and the matters raised in this judgment. The third parties will then be given an opportunity to file amended answers to the third party claim with an appropriate timetable."

The second to fifth third parties' procedural objections

7 In relation to this objection, the second to fifth third parties contended that paragraph 1 of the Act of Court of 31 st August 2021 required any party to issue any interlocutory application they wished to make before 21 st October 2021, with any respondent to any such application not having to take any steps until conclusion of the mediation. Paragraph 3 of the said Act of Court provided for a timetable for the filing of any evidence in response and reply to any application made.

8 Advocate Nicholls' objection was that terms of the order were clear, and it covered any interlocutory application including the present application brought by the plaintiffs. The context for the order was that any issue that was contemplated or should have reasonably been contemplated should have resulted in an application to the Court before 21st October 2021. As the plaintiffs' application to amend was said to have arisen out of the provision of discovery by the defendant, the plaintiffs could have issued their application in accordance with the timetable set out in the Act of Court of 31st August 2021.

9 Advocate Nicholls' criticism of the plaintiffs was that there was no explanation as to why they had not issued their application to amend or at least reserved the right to do so. The parties had a legitimate expectation that any application that could have been brought would have been brought. Yet, the first time the third parties knew of the plaintiffs' application to amend was in December 2021. By this time mediation had clearly failed. Yet the delay was unexplained. In particular, there was no evidence notwithstanding the affidavit of the first plaintiff to explain the plaintiffs' conduct and why a court order had been disregarded.

10 In deciding what order to make it was submitted that I had to balance the interests of justice between whether pleadable claims should be adjudicated upon with the need for finality. As matters stood, the next directions the court could order were production of witness statements and the fixing of trial dates. Allowing amendments at this stage would delay progressing the case to a trial. The application was therefore late. This was why plaintiffs had to justify why they had not brought their application earlier, which they had failed to do.

11 Advocate Sinel argued that it was important to look at the context of the order of 31 st August 2021 which was to deal with actual applications that were already pending. The main purpose of the order was to prevent the parties from being distracted from the mediation that was proposed. This was why the Court only required limited procedural steps to be taken for pending applications before the mediation took place.

12 The order of 31 st August 2021 did not mean that his clients should be precluded from amending at this stage. To do so was inconsistent with the overriding objective. He also argued that the application was not late given that this was an application post-discovery which was not unusual in the context of complex litigation.

13 He did accept that his clients could have indicated an intention to amend prior to the mediation but, given that this was a family dispute, his clients at that stage did not want to *"up the ante"* while there was a mediation pending. He could not recall the nature of the amendments that the plaintiffs might have been contemplated and whether they included fraud.

Decision on procedural objection

14 In relation to this objection, the starting point is paragraph 1 of the Act of Court 31 st August 2021. In my judgment that paragraph is clear that it covers any applications any party wished to bring. I accept that the order does not cover any unforeseen applications or applications that might only arise following directions given at a later stage. However, it did cover other applications that were or should reasonably have been in contemplation of a party. As the plaintiffs accept that the application arises from the defendant's discovery, an application to amend based on that discovery is covered by paragraph 1 of the said Act. While I cannot conclude, due to the lack of evidence, whether the application was actually in the plaintiffs' contemplation (or that of their advisors) or whether some form of amendment was contemplated without drafting that same, at the very least, the application should reasonably have been in contemplation given it is said to follow discovery and that the parties were trying to resolve the dispute. The plaintiffs will have analysed the defendant's discovery prior to mediation and will have identified the documents they wished to rely on to advance their case.

15 In my judgment therefore the plaintiffs, by not identifying that they intended to bring an application to amend, are in breach of paragraph 1. In relation to the submission that Advocate Sinel did not want to *'raise the stakes'* in advance of a mediation by indicating that his clients were going to look to amend their case, I in part understand that submission because the likely response would have been a request for Advocate Sinel to produce the amendments. On the other hand, the parties were looking to resolve matters through negotiation. In order to persuade the other parties to settle, it is not unrealistic to have expected the plaintiffs to have set out how they put their case even if only in a statement for mediation. In addition, although the plaintiffs have said they wish to preserve family harmony, how the amendment is subsequently put does not sit easily with that the submission, given the nature and extent of the allegations below now made against some of the third parties.

16 The plaintiffs' approach is also not consistent with the overriding objective and in particular the obligation on the parties to assist the court to further that overriding objective. The lack of any explanation as to why an application to amend was not identified prior to 21 st October 2021 and was only produced in December 2020, does not easily sit with active case management. Rather it reflects parties proceeding with the case at their own pace and keeping their cards close to their chest. Such an approach is no longer acceptable.

17 However, I cannot ignore reality. If the plaintiffs had stated that they were looking to make an application to amend but did not wish to incur the costs of drafting the same until after a mediation and because they wanted to try and resolve matters, it is likely that I would have allowed such an approach subject to the plaintiffs producing a draft amendment within a specified time after the mediation.

18 The progress of this action has also been affected by the third party's application to strike out the third party claims against them which was only resolved in April this year. This meant there were separate issues relating to pleadings which had to be resolved before this case could progress in any event. Although the plaintiffs are in breach of the order of 31 st August 2021, it is appropriate to excuse that breach because I would have allowed a reservation by the plaintiffs to bring an application to amend and the timing of it now does not cause significant prejudice given the decision on the third party claims I had to make in any event. This action is not at a stage which could said to be late applying the approach in *Cunningham v Cunningham* [2009] JLR 227. In addition to witness statements, the defendant's case also needs amendment as a result of my decision in April 2022. That decision is also likely to lead to the third parties filing pleadings in response.

19 However, although I have not granted the relief sought by the second to fifth third parties, their objections could have been avoided, had the plaintiffs complied with the terms of the Act of Court of 31 st August 2021 by at least indicating they were contemplating an application to amend in the way I have explored. This means that in respect of the costs of and occasioned by the present application the order that best reflects that the plaintiffs are in breach of the Act of Court but that the third parties have not persuaded me to prevent the plaintiffs' application to amend, is that each party should bear their own costs of the second to fifth third parties' application. This conclusion also applies to the other third parties who supported the application brought by Advocate Nicholls' clients.

20 Having concluded that the plaintiffs can bring their application to amend I now proceed to consider that application.

The application to amend

21 In relation to the amendments sought, a number were not disputed because they were either additions of factual matters which were uncontroversial or were minor typographical corrections. I do not propose to set out these changes in this judgment.

22 The first main amendment to which objection taken concerns paragraph 4.2 of the draft amended order of justice which states as follows:-

> *4.2. Further or alternatively each of the Disclaimers and the Indemnity are void and of no effect by virtue of having been procured by and given by mistake and/or under duress and / or undue influence and / or misrepresentation and / or*

fraud and / or dol (including reticence dolosive), in each case being occasioned by the Defendant and / or Mr Patel, and / or Vimal and / or Gaurang.

PARTICULARS

4.2.1. By late 2016 Maya's father (Mr Patel) was in ill health. Maya's mother had died in 2010. Following her death relationships within the family had become strained.

4.2.2. On 13 December 2016 Maya received a text message from Jeremy Ellis, an employee of the Defendant. Mr Ellis stated that an agreement had been made in Nairobi which related to the Trust, that he was aware that Maya was returning home from Thailand on 15 December 2016 and that he would like to visit her at home on 16 December 2016 in order for her to sign some forms.

4.2.3. On or around 16 December 2016 Mr Ellis visited Maya at her home in Great Missenden. The purpose of his visit to Maya's home was to procure that Maya signed the Disclaimers and Indemnity and that Mayur and Mumta signed the Disclaimer in respect of the Corfield Trust.

4.2.4. Mr Ellis made clear that he was in a hurry because he wished to begin his Christmas holiday with his family, presented Maya with the Disclaimers and Indemnity (for the first time) and asked her to sign them.

4.2.5. Maya asked Mr Ellis whether she should get legal advice in respect of the Disclaimers and Indemnity. Mr Ellis told her that there was no need to get legal advice, and that in any event there was no time to do so.

4.2.6. Maya asked Mr Ellis about the agreement apparently reached in Nairobi. Mr Ellis did not provide Maya with any details about the agreement but confirmed that she had been deliberately excluded from it by her father (Mr Patel) and brother (Vimal). When Maya became visibly upset, Mr Ellis said words to the effect of "I have found out that this happens a lot with Asian families, where the women eventually are cut out." Mr Ellis suggested that Maya speak with her father, Mr Patel.

4.2.7. Maya then telephoned Mr Patel and explained that Mr Ellis was there. Mr Patel told Maya to sign the papers and to get Mayur and Mumta to sign as soon as possible. Maya asked her father what was happening. Mr Patel said that she did not need to know, that Gaurang had taken all of her father's money and he had none left, before saying goodbye and ending the telephone call.

4.2.8. Maya asked Mr Ellis for more information about what had happened. Mr Ellis refused to provide further information, but told Maya that it was best for her just to sign the papers as "things didn't look good for [her father]".

4.2.9. Maya asked Mr Ellis for information about what was in the Trusts and how much might pass to her and her children. Mr Ellis said that he was unable to advise on how much might pass to Maya or her children, but drew a rudimentary

diagram to describe broadly how the Trusts were structured. In the course of doing so Mr Ellis said words to the effect of "obviously the value of Cosmos [presumed to be a trading company within the trust structure] was undervalued to pay off Gaurang." The diagram is wholly unclear and made little sense to Maya. Mr Ellis left shortly thereafter.

4.2.10. Approximately 20 minutes later Maya received a telephone call from Vimal. He asked if Maya and Mayur could sign and return the papers as soon as possible. He explained the urgency with words to the effect that "the Kenyan government wanted everyone to declare outside income for tax purposes". Vimal also told Maya that their father had lost "all the money in the trust and we nearly lost everything" as a result of Gaurang "taking him to court".

4.2.11. Later that evening Vimal telephoned Maya again, emphasizing that it was urgent that the papers be signed and returned.

4.2.12. Over the following days both Mr Patel and Vimal telephoned Maya repeatedly, pressuring her and her family to sign and return the papers urgently. The subject of Mr Patel's ill health was emphasized. Mr Patel himself repeatedly said words to the effect that "he might lose his life in this worry". Vimal also began to telephone Mayur at his place of work, imploring him to sign and return the papers as soon as possible.

4.2.13. Maya became increasingly anxious, suffered panic attacks and became depressed as a result of the pressure being brought to bear upon her by Mr Patel and Vimal. Maya's doctor prescribed anti-depressants.

4.2.14. Maya felt unable to deal with the situation herself and sought the assistance of a family friend, Jayesh Patel ("Jayesh"). Jayesh dealt with Mr Patel and Vimal directly, but Maya continued to receive telephone calls from Mr Patel and Vimal pressuring her to sign the papers. Mr Patel became increasingly unkind to Maya during these telephone calls, stating that she was "good for nothing", had always brought problems to the family and that he never wanted her, while at the same time praising Vimal.

4.2.15. Jayesh spoke with Mr Patel and Vimal and ultimately recommended to Maya that she, Mayur and Mumta sign the Disclaimers and Indemnity upon the strength of a promise by Mr Patel and Vimal eventually reduced to writing in a letter dated 27 December 2016 that they would pay off £500,000 of Maya and Mayur's mortgage (then in the order of about £850,000), pay US$1,000,000 to each of Mumta and Priyanka in the next three years, and continue to pay for Priyanka's school fees (and subsequently university costs) (the "Letter of Assurance").

4.2.16. Mr Patel and Vimal told Maya that there was no time to get lawyers involved and that they had to have the signed papers by 1 January 2017, failing which they would lose "Cosmos" and potentially Mr Patel's home to the Kenyan government.

4.2.17. As a result of non comprehension, the pressure brought to bear upon Maya, on or around 28 December 2016 Maya signed the Disclaimers and Indemnity and procured that Mayur and Mumta signed the Corfield Trust Disclaimer.

4.2.18. It is now understood that Gaurang had not sued Mr Patel, Vimal, or any company or business within their control or within the trust structures. It has also come to light that Mr Patel did not "lose everything" and in fact was not at risk of so doing at that time, and in any event if he were (which is denied in any event), nothing Maya, Mayur, Mumta, or Priyanka could have done at the time would have changed that situation, save for gratuitously giving over their interests in the Trusts, which is ultimately what they did by signing the Disclaimers and Indemnity."

23 The original pleading simply sought to set aside the disclaimers and indemnity entered into by the plaintiffs on the basis that these had been procured by mistake and/or duress or undue influence. These claims were made against the defendant only.

24 The proposed amendment has now added claims based on misrepresentation, fraud, dol, including *reticence dolosive*. There are therefore six separate claims now made which are made against Mr Patel (the first third party), Vimal (the sixth third party), and Gaurang (the second third party) as well as against the defendant. The defendant does not oppose the amendments sought and has played no part in the present hearing. I record however that there is an issue for another day as to whether correspondence between the plaintiffs' and the defendant's legal advisors about the present application is disclosable or whether a claim to privilege can be made.

25 I also observe at this stage that the draft amended order of justice does not on its face seek to have Mr Patel, Vimal or Gaurang added as co-defendants, but it is clear this is intended from the body of the text set out above and Advocate Sinel confirmed the same in submission.

26 The second amendment of substance concerns the Letter of Assurance referred to in paragraph 4.2.15 leading to the following allegations at paragraph 7 of the draft amended order of justice as follows:-

"7.1. Further, Mr Patel and Vimal are in breach of contract and their promises:

7.1.1. By the Letter of Assurance, Mr Patel and Vimal agreed to pay off £500,000 of Maya and Mayur's mortgage, pay Mumta and Priyanka $1,000,000 each within three years, and continue to pay Priyanka's school fees and subsequent university costs.

7.1.2. By letter dated 29 June 2018, Mr Patel and Vimal agreed to pay off the entirety of the outstanding mortgage (then being around £810,000).

7.1.3. Priyanka continued to attend Cheltenham Ladies College from January 2017 until June 2020 incurring fees which were invoiced on a termly basis after the end of the term billed, and subsequently commenced a History degree at Kings College London in around September 2021 incurring tuition fees of £9,250 per annum and accommodation costs of £18,000 per annum expected to continue until the completion of the degree, expected to be in Summer 2024.

7.1.4. In partial compliance with the obligations created upon them by the Letter of Assurance, the mortgage was paid off on or around 18 June 2018.

7.1.5. However:

7.1.5.1. payments in respect of Priyanka's education ceased in or around January 2018; and

7.1.5.2. on the third anniversary of the Letter of Assurance, no payment of $1,000,000 had been made to either of Mumta or Priyanka, and for the avoidance of any doubt, no portion of such payment was made; and

7.1.5.3. None of the payments described at 7.1.5.1 and 7.1.5.2 above have been made at any time.

7.1.6. The failure to make the following payments each constitute a breach of contract enforceable by the intended recipient of each:

7.1.6.1. $1,000,000 to Mumta on or before 27 December 2019;

7.1.6.2. $1,000,000 to Priyanka on or before 27 December 2019; and

7.1.6.3. Sums to Maya and Mayur equal to those billed in each invoice issued by Cheltenham Ladies College in respect of Priyanka's attendance between January 2017 and June 2020; and

7.1.6.4. Sums to Maya and Mayur in respect of all undergraduate university tuition fees and accommodation costs incurred by Priyanka by reason of her pursuit of a degree in History

7.1.7. Interest is claimed on each of the payments specified at 7.1.6 above from the date the payment was due until payment of the same at the court rate."

27 In terms of the relief sought this is now amended to seek the following at paragraph 8 as follows:-

"…8.2.1. A declaration that the Disclaimers, Indemnity and Corfield Deed of Exclusion are of no effect in respect of the Plaintiffs; and

8.2.2. An order that Mr Patel and / or Vimal make the payments specified at 7.1.6 above together with interest as claimed."

28 Finally, I set out the prayer to the draft amended order of justice which reads as follows:-

> *"(1) A declaration that the Disclaimers, Indemnity and Corfield Deed of Exclusion are of no effect in respect of the Plaintiffs;*
>
> *(2) Such consequential relief by way of orders for reconstitution of those Trusts and / or the payment of equitable compensation or damages as such accounts and inquires shall disclose;*
>
> *(3) An order that Mr Patel and / or Vimal make the payments specified at 7.1.6 above together with interest as claimed;*
>
> *(4) Such further or other relief as the Court thinks fit; and*
>
> *(5) That provision be made for payment of the Plaintiffs' costs from the Trusts or by the Defendant or Mr Patel and / or Vimal."*

29 It is these amendments that the third parties objected to.

Submissions of the plaintiffs

30 Advocate Sinel's position was that he had pleaded the material facts that he was required to plead which was all that Rule 6/8(1) of the Royal Court Rules 2004, as amended, required. The particulars provided supported the different heads of claim at paragraph 4.2 of the draft amended order of justice. His position was that it was for the trial court, having heard all the evidence and determined all the material facts, to resolve what relief it should grant.

31 In respect of Gaurang he accepted that he could not make a claim on the basis of undue influence or misrepresentation or duress because Gaurang did not say anything to any of the plaintiffs, in particular the first plaintiff. However, Advocate Sinel contended he could still bring the other claims in particular la reticence dolosive.

32 In relation to the claim in fraud he contended that Mr Patel, Vimal and Gaurang conspired to exclude the plaintiffs from the family wealth with Gaurang receiving a proportion and the remainder being held for Vimal. Advocate Sinel contended that the defendant went along with this plan by taking no steps to inform the plaintiffs of what was occurring and misrepresenting the position. The fraud was not letting the plaintiffs know what was going on, coupled with asking the plaintiff to sign the deeds of disclaimer and indemnity. This meant that the plaintiffs had been lied to by the defendant and by Mr Patel and Vimal. What was untrue was that the family was going to lose all its wealth and that Gaurang had issued proceedings. This was coupled with pressure from Mr Ellis for the defendant and pressure from Mr Patel and Vimal. The conduct of the defendant, Mr Patel, Vimal and Gaurang was therefore dishonest.

33 What the plaintiffs were seeking were damages for breach of trust.

34 Advocate Sinel relied on the fact that defendant was not objecting to the amendments and therefore must have concluded that there was an arguable case in fraud notwithstanding that the defendant was a regulated entity.

35 Advocate Sinel accepted that he could not plead conspiracy because he could not ascertain what had been agreed between the other parties. He could do no more than say what had occurred and what remedy the plaintiffs were seeking as a consequence. He had done all he could by pleading the material facts relied upon.

36 In relation to the Letter of Assurance, Advocate Sinel accepted that the primary case was that this Letter of Assurance was linked to the transaction that he was seeking to set aside. His claim was that the trustee had failed to ensure that the payments set out in the Letter of Assurance were made. However, as the defendant had not signed the letter, the claim was only made against Mr Patel and Vimal as the two signatories.

37 In terms of adding Mr Patel (through his estate as Mr Patel has sadly recently passed away) and Vimal, Advocate Sinel argued they were necessary and proper parties and therefore permission to serve them out of the jurisdiction should be given. He contended there would be *"mayhem"* if separate proceedings had to be brought in London or Kenya to pursue Mr Patel and Vimal in respect of the Letter of Assurance.

38 In terms of the governing law of the Letter of Assurance, he argued for Jersey law because the Letter of Assurance related to an exercise of discretion by a Jersey based trustee in respect of a trust governed by Jersey law. He had no issue with pleading that the governing law of the Letter of Assurance was Jersey law.

39 Finally in respect of the Letter of Assurance, Advocate Sinel further contended that, even if the disclaimers and indemnity were set aside, his client had a separate standalone claim on the basis of a Letter of Assurance as a contract. The cause for that contract was because gifts had been made to other grandchildren and therefore there was an enforceable promise to make similar gifts to the third and fourth plaintiffs.

Submissions of the third parties

40 Advocate Nicholls, for the second to fifth third parties, in particular Gaurang, contended that notwithstanding the plaintiffs' written and oral submissions, he was no clearer as to what the case was that the plaintiffs were looking to plead. He therefore objected to the case as pleaded. In particular, he relied on the concession made by Advocate Sinel during the hearing that there was no case of undue influence or mistake or duress that could be made out against Gaurang.

41 The purpose of pleadings was to make a party's case clear. The plaintiffs' arguments did not give any clarification as to what the issues were between the parties. What was required for each proposed defendant was the case against them to be set out with proper particulars for each head of claim relied upon by the plaintiffs. This was so that each defendant knew the case he had to meet for each claim made against that defendant.

42 If what was being suggested was a conspiracy to defraud, this was not pleaded and there were no particulars.

43 The court was also not required to second guess the case it had to adjudicate on. The court should be able to look at the pleadings and understand what the case was.

44 All the third parties had objected to the draft amended order of justice when it was provided for their agreement and had set out detailed explanations as to the basis of their response; yet the plaintiffs had failed completely to address the concerns of the third parties.

45 Advocate Nicholls was critical of paragraph 33 of the plaintiffs' skeleton which referred to there being *"strong evidence"* that Mr Patel, Vimal and Gaurang all knew the arrangements they were encouraging the defendant in to making would disadvantage the plaintiffs. Nowhere was this evidence, according to Advocate Nicholls, identified.

46 To the extent it was suggested that Gaurang was under some form of duty to set out what was occurring, that duty needed to be explained.

47 To the extent that allegations were made about the knowledge of each of Mr Patel, Vimal and Gaurang, the extent of the knowledge of each of them should be pleaded.

48 Advocate Nicholls was also critical of differences between the particulars relied upon and the plaintiffs' skeleton. The knowledge referred to in paragraph 34 of the skeleton, the evidence referred to in paragraph 35 and in paragraph 36 were all not pleaded.

49 Paragraph 4.2 of the draft amended order of justice was also a general assertion. It was not supported by the particulars for each of the heads of claim said to arise. Advocate Nicholls could not therefore make any requests for clarification because there were no relevant material facts clearly pleaded.

50 The lack of clarity in the pleading was significant because what was alleged was misconduct. That was his overriding concern because allegations of misconduct were being made without any evidential basis being pleaded. Without the rules of pleading being met the claim was not understandable.

51 In relation to the claim in fraud, what was pleaded at best was a claim of fraudulent misrepresentation based on his client's case on silence. Otherwise Advocate Nicholls contended that there was no standalone pleaded claim in fraud that could be advanced by reference to the particulars currently relied upon.

52 He also wanted to understand whether the plaintiff's wanted to add Gaurang as a defendant and to understand what relief was sought against him.

53 He was also critical that a claim in damages was made but this was also not pleaded.

54 The fact that the defendant was not objecting to the proposed amendments was irrelevant. The third parties were not satisfied with the current form of the pleading, and it did not meet the required threshold. The third parties were entitled to know the credible evidence that the plaintiffs relied upon to make the allegations set out in the draft amended order of justice.

55 It was significant that nowhere in her affidavit did the first plaintiff use the word fraud. At best she adverted to things she was told were untrue. While these statements might, if properly pleaded, amount to a claim in fraudulent misrepresentation, the statements did not amount to a case in fraud. The first plaintiff was not saying that the approach of Mr Patel, Vimal and Gaurang was a fraudulent or dishonest scheme.

56 The plaintiffs' approach was in effect the same approach which had been criticised in paragraph 4 of *Makarenko v CIS Emerging Growth Limited* [2001] JLR 348. In addition, there was no claim for damages for anything said to be due as a result of the fraud.

57 Advocate Evans, for Mr Patel, Vimal and the seventh to twelfth plaintiffs, supported the contentions of Advocate Nicholls. In addition, he relied on the approach taken in *Trico Limited v Buckingham* [2019] JRC095 at paragraphs 50 and 51. What was required was clarity, particularity and in particular pleading intent with all facts, matters and circumstances relied upon. The present draft pleading did not meet that threshold. The fact that the plaintiffs were beneficiaries and were not invited to participate in the negotiations leading to the Family Agreement was not enough to plead fraud.

58 In relation to the evidence referred to at paragraph 65 of the first plaintiff's affidavit, there was no plea that the defendant was expressly instructed to keep the plaintiffs in the dark. When the relevant correspondence exhibited to the first plaintiff's affidavit was analysed, the correspondence was not evidence of any fraudulent intent.

59 The fact that plans for a restructuring had been ongoing for at least a year was also not evidence of fraud. No inferences to plead a case in fraud or conspiracy could be drawn from the correspondence. The email from Mr Mark Woodford of the defendant dated 15 th

February 2016 simply referred to meetings in Jersey in September 2015 and a decision not to go ahead with what had been discussed at that time.

60 In relation to Mr Patel not being sued by Gaurang, he was at risk of being sued which was clear from a lengthy letter before action dated 19 th October 2016 from Collas Crill on behalf of Gaurang.

61 In relation to the draft pleading, there were six causes of action against three individuals and a Jersey regulated trustee. In relation to those causes of action Advocate Evans contended the following:-

(i) In respect of mistake, the nature of the mistake was not pleaded.

(ii) The same criticism of mistake applied to any case of undue influence or duress. The parties were entitled to know by whom acts of duress or undue influence had been carried out, when they had been carried out, what the acts were and what was the effect of any such finding.

(iii) For misrepresentation

(a) was the allegation one of innocence or fraudulent misrepresentation.

(b) What were the particulars?

(c) By whom was the misrepresentation said to be made?

(d) Was it asserted that the misrepresentation was knowingly false (see *Steelux Holdings Limited v Edmonstone (née Hall)* [2005] JLR152) at paragraph 10.

(iv) In respect of the pleading in fraud it was not clear which particulars of paragraph 4.2 of the draft amended order of justice applied to the assertion of fraud. The same applied to the allegations of *dol* including *réticence dolosive*.

62 Advocate Evans then looked at the particulars of paragraph 4.2 in respect to paragraph 4.2.1 to 4.2.4, Advocate Evans asked which allegation these sub-paragraphs were particulars of.

63 In respect of paragraph 4.2.5, and an assertion that Mr Ellis for the defendant told the first plaintiff that there was no need to get legal advice, this assertion contrasted with the overall approach the defendant had pleaded at paragraph 22 of its answer referred to above. The defendant's answer was not an acceptance that there was a case in fraud.

64 In relation to paragraph 4.2.7. Advocate Evans posed the question whether an allegation in the sub-paragraph was being made that Mr Patel was saying something false upon which the plaintiffs relied but that was not pleaded; nor was it pleaded that there was any undue

influence or duress. To the extent it was asserted that Gaurang had taken all of Mr Patel's money, Advocate Evans posed the question whether that was what Mr Patel thought was going on? He posed these rhetorical questions in support of his assertion that the particular paragraph was not clear as to what cause of action it supported.

65 Paragraphs 4.2.8. and 4.2.9. related to the claim against the defendant and were therefore not particulars of a claim against Advocate Evans' clients.

66 Paragraph 4.2.10. did not amount to fraud or *dol*.

67 Paragraph 4.2.11. was simply the matter becoming urgent and was not supportive of an assertion of fraud or misrepresentation.

68 In respect of paragraph 4.2.12., again it was not clear which cause of action these particulars supported and whether it was duress or misrepresentation, but it was not fraud. What Advocate Evans was contending for was that any pleadings should set out with clarity the person against whom an allegation of fraud was made, the acts relied upon said to amount to fraud, and why that party had a fraudulent intent.

69 Paragraph 4.2.13 was pleading the effects of pressure on the first plaintiff. Advocate Evans asked whether this was relied upon in support of a claim undue influence or duress.

70 In respect of Paragraph 4.2.14, how the first plaintiff was being pressurised needed to be clarified.

71 Paragraph 4.2.15 referred to the advice of a family friend that the first plaintiff should sign the disclaimers and indemnity. Advocate Evans asked why this showed any fraudulent intent. It was also not clear what assertion this sub-paragraph was supporting. If the reference to the Letter of Assurance was part of a claim in fraudulent misrepresentation, then the first plaintiff ought to say so. This paragraph was also relevant to the amendments in respect of the Letter of Assurance; his clients were entitled to know whether the claim being advanced was part of the same transaction that was said to be void or was it a separate contract, but it could not be both.

72 Paragraph 4.2.16 was not clear as to what claim it related to, but it was not fraud.

73 The particular concern was fraud. The current particulars did not show strong evidence of fraud contrary to the assertion made at paragraph 65 of the first plaintiff's affidavit.

74 The fact that there was a dispute between the first plaintiff and the defendant about what was said did not mean that there was fraud. Otherwise, assertions of fraud could be made

in every case (see *Trico Limited v Buckingham*).

75 The plaintiffs should also explain why the assertions now made were not made before applying *Hervé v H&H Jersey Growers* [1994] JLR Notes 5a. The plaintiffs had not explained why the allegation had not been made from the outset and had to satisfy the court that exceptional circumstances existed which justify the allegation being made at this stage.

76 For duress to be pleaded what was required was some wrongful or illegitimate threat (see *Helm Trust Company Limited v Chatfield* [2013] (1) JLR Note 13).

77 To plead undue influence the pleading had to show that undue influence was in fact exercised in the absence of any fiduciary relationship between the parties. There was no such relationship between other family members and the plaintiffs.

78 In relation to the Letter of Assurance, clarity was sought as to whether this was a claim that was part of the transaction challenged or whether it was a separate standalone claim. If it was the former and the letters of disclaimer and indemnity that were set aside then the Letter of Assurance would also fall. The plaintiffs could not have it both ways. Whether it was pleaded as part of the transaction was not however clear. Paragraph 4.2.15 of the draft amended order of justice suggested it was but paragraph 4.2.17 and section 7 suggested the opposite.

79 In relation to the alternative case, this was a breach of contract claim not a fraud claim. This was why understanding the governing law was significant. It also gave rise to an issue as to whether a claim in respect of the Letter of Assurance as being a standalone contract met the requisite tests for service out of the jurisdiction. Advocate Evans rightly accepted that if the transaction was valid then the plaintiffs could seek to recover under the Letter of Assurance, but the plaintiffs had to make their position clear.

80 Finally, he relied upon *In Re A Trust and B Trust* [2018] JRC068 and my observations at paragraph 24 about a party having to make it clear that certain facts had a particularly legal effect in a pleading.

81 Advocate Sinel in reply contended that the fraud was the fact that the first plaintiff would lose everything because she had been completely excluded from the family trusts. She was told to sign here or else, which allowed for claims in mistake or *dol* or fraud. It was clear the first plaintiff did not know what she was signing. The relevant facts had been pleaded which justified the assertions the first plaintiff was making which would be resolved once the court had heard all the evidence at trial. The plaintiffs could not do more than say what had happened and to make their case accordingly.

82 The untrue statements were that Gaurang had sued Mr Patel when he had not, that the family were at risk of everything being lost to the Kenyan Government and everything in the trusts were worthless. There was also no urgency; this was a deal taking the plaintiffs out of the family trusts based on falsehoods.

83 In respect of the Letter of Assurance, the cause for the contract was gifts that had been made to other grandchildren and Mr Patel and Vimal had promised that the first plaintiff's children would be treated in the same way.

Decision

84 In evaluating the plaintiff's application, it is relevant to have regard to the following principles.

85 Firstly, it is important to have regard to what is the purpose of pleadings. I consider this in *X Trust Company and Anor v C & Ors* [2018] JRC068 where I stated the following at paragraph 24:-

> ***"24. …Ultimately, a party's pleading must make their case clear so that the party required to respond to it understands what the case is. If that involves saying that particular facts as a matter of law had a certain effect, then a pleading should set that out. It is not, therefore, satisfactory simply to say matters of law are for trial without explaining in a pleading the legal issue or legal foundation a party is relying on. This is so the other party then knows the case they have to meet and can decide whether they dispute that part of the other party's claim. This does not require pleadings to become skeleton arguments or to cite legal authorities. However, if a party's case is that certain facts had a particular legal effect, then that effect must be pleaded."***

86 *In Monteagle International Limited v Grocery Market Research Limited* [2020] JRC244 at paragraphs 14 to 23, I explored the relevant legal principles in relation to the power in Rule 6/15 of the Rules allowing the court or another party to obtain information about a party's case. The relevant legal principles again make it clear that a party is required to make its case clear if its pleading does not do so.

87 It is therefore no longer sufficient simply to plead material facts.

88 The above principles in my judgment also extend to clarity as to what relief a party is seeking. That is why in personal injury cases when an order of justice is served the order of justice should contain at that stage the best estimate of the types of damage and the amounts of damage being sought (see *A v Minister for Health and Social Services* [2021] JRC036). Although I accept that in other cases the position about what is being

sought is clear, the party or parties pursued must understand with sufficient detail to be able to respond to what relief is sought against them.

89 The second relevant principle concerns the applicable legal principles on an application to amend.

90 In *Cunningham v Cunningham* [2009] JLR 227 Deputy Bailiff Birt stated at paragraph 4 as follows:-

> ***"4 According to the order of justice, the first defendant indicated at the end of 2000 that he wished to leave the business.*** Thereafter, there were discussions about the terms on which this might occur but these were unsuccessful and eventually the first defendant started litigation against the plaintiff in various jurisdictions concerning the business."

91 In *Trico v Buckingham* [2019] JRC163 I reviewed the current English principles on applications to amend in light of the introduction of the overriding objective at paragraphs 35 to 37 leading to the following conclusion at paragraph 38:-

> ***"In my judgment, the approach now taken in England should be reflected in this jurisdiction and therefore greater emphasis should be given to the overriding objective compared to the approach taken in MacFirbhisigh and other decisions in Jersey.*** I stress however this is a change of emphasis rather than a marked departure from the previous approach because some of the factors in MacFirbhisigh overlap with those now relied upon before the English Court. Nevertheless that change of emphasis giving greater emphasis to the overriding objective is one that in the future I consider should be taken in this jurisdiction."

92 The third relevant legal principle to the plaintiffs' application concerns pleading fraud. I explored these principles in *Trico v Buckingham* [2019] JRC 095. At paragraph 47 I cited paragraphs 4 and 5 of *Makarenko v CIS Emerging Growth Limited* [2001] JLR 348 as follows:-

> ***""4 We have to say that the Order of Justice as pleaded does not begin to come near the required standard of particularity for an allegation of fraud.*** General assertions of fraudulent conduct are made with no supporting allegations of fact. Furthermore, although the body of the Order of Justice states that the plaintiff seeks a declaration that the agreement is null and void because of the defendant's fraud, no such relief is sought in the prayer of the Order of Justice, which confines itself to seeking rescission of the contract and/or damages .
>
> ***5 We would remind practitioners of a fundamental rule of pleading, namely, that general allegations of fraud are not permitted.*** Any pleading which

alleges fraud must set out the facts, matters and circumstances relied upon to show that the party charged has or was actuated by a fraudulent intention. The acts alleged to be fraudulent must be stated fully and precisely, with full particulars. Furthermore, it is of course the duty of counsel not to enter a plea of fraud on the record unless he or she has clear and sufficient evidence to support it. In fairness to Mr. Benest, we should add that he assured us that he had not forgotten this latter duty and had carefully considered the evidence produced to him before launching the proceedings."

93 Also, in *Trico* I referred to the authority of *Brakspear & Ors v Nedgroup Trust (Jersey) Limited* [2018] JRC121. The relevant paragraphs in respect of fraud are contained at paragraphs 61 and 62 of *Brakspear* as follows:-

> ***"61. In the case of*** *In the matter of Il* [2018] JRC 031, ***the Royal Court upheld the decision of the Master*** (*In the matter of Il* [2016] JRC 116) ***striking out particulars alleging fraud applying the principles as to pleading of fraud contained in the opinion of Lord Millett in*** *Three Rivers DC v Bank of England (No 3)* [2003] 2 AC 1 ***at paragraphs 184–190, which, as they are directly relevant to the case before us, we set out in full:-***
>
> ***"184 It is well established that fraud or dishonesty (and the same must go for the present tort) must be distinctly alleged and as distinctly proved; that it must be sufficiently particularised; and that it is not sufficiently particularised if the facts pleaded are consistent with innocence: see Kerr on Fraud and Mistake 7th ed (1952), p 644*** ; *Davy v Garrett* (1878) 7 Ch D 473, 489; *Bullivant v Attorney General for Victoria* [1901] AC 196; *Armitage v Nurse* [1988] Ch 241, 256. ***This means that a plaintiff who alleges dishonesty must plead the facts, matters and circumstances relied on to show that the defendant was dishonest and not merely negligent, and that facts, matters and circumstances which are consistent with negligence do not do so***.
>
> ***185. It is important to appreciate that there are two principles in play. The first is a matter of pleading. The function of pleadings is to give the party opposite sufficient notice of the case which is being made against him. If the pleader means 'dishonestly' or 'fraudulently', it may not be enough to say 'wilfully' or 'recklessly'. Such language is equivocal. A similar requirement applies, in my opinion, in a case like the present, but the requirement is satisfied by the present pleadings. It is perfectly clear that the depositors are alleging an intentional tort*** .
>
> ***186. The second principle, which is quite distinct, is that an allegation of fraud or dishonesty must be sufficiently particularised, and that particulars of facts which are consistent with honesty are not sufficient. This is only partly a matter of pleading. It is also a matter of substance. As I have said, the defendant is entitled to know the case he has to meet. But since dishonesty is usually a matter of inference from primary facts, this***

involves knowing not only that he is alleged to have acted dishonestly, but also the primary facts which will be relied upon at trial to justify the inference. At trial the court will not normally allow proof of primary facts which have not been pleaded, and will not do so in a case of fraud. It is not open to the court to infer dishonesty from facts which have not been pleaded, or from facts which have been pleaded but are consistent with honesty. There must be some fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved .

187. In *Davy v Garrett* 7 Ch D 473, 4789 ***Thesiger LJ in a well known and frequently cited passage stated:***

'In the present case facts are alleged from which fraud might be inferred, but they are consistent with innocence. They were innocent acts in themselves, and it is not to be presumed that they were done with fraudulent intent.'

188 In *Armitage v Nurse* [1998] Ch 241 ***the plaintiff needed to prove that trustees had been guilty of fraudulent breach of trust.*** She pleaded that they had acted 'in reckless and wilful breach of trust'. This was equivocal. It did not make it clear that what was alleged was a dishonest breach of trust. But this was not fatal. If the particulars had not been consistent with honesty, it would not have mattered. Indeed, leave to amend would almost certainly have been given as a matter of course, for such an amendment would have been a technical one; it would merely have clarified the pleading without allowing new material to be introduced. But the Court of Appeal struck out the allegation because the facts pleaded in support were consistent with honest incompetence: if proved, they would have supported a finding of negligence, even of gross negligence, but not of fraud. Amending the pleadings by substituting an unequivocal allegation of dishonesty without giving further particulars would not have cured the defect. The defendants would still not have known why they were charged with dishonesty rather than with honest incompetence .

189 It is not, therefore, correct to say that if there is no specific allegation of dishonesty it is not open to the court to make a finding of dishonesty if the facts pleaded are consistent with honesty. If the particulars of dishonesty are insufficient, the defect cannot be cured by an unequivocal allegation of dishonesty. Such an allegation is effectively an unparticularized allegation of fraud. If the observations of Buxton LJ in *Taylor v Midland Bank Trust Co Ltd* (unreported) 21 July 1999 ***are to the contrary, I am unable to accept them*** .

190. In the present case the depositors (save in one respect with which I shall deal later) make the allegations necessary to establish the tort, but the particulars pleaded in support are consistent with mere negligence. In my opinion, even if the depositors succeeded at the trial in establishing all the facts pleaded, it would not be open to court to draw the inferences necessary to find that the essential elements of the tort had been proved."

62. It appears that the Courts in the case of *In the matter of Il* ***were not made aware of the more recent authority of*** *JSC Bank of Moscow v Kekhman* [2015] EWHC 3073 (Comm), ***a High Court decision which articulates the test in Three Rivers in somewhat clearer terms. Quoting from paragraph 20 of the judgment of Flaux J:-***

"I agree with Mr Gourgey QC that this overstates what is required for a valid plea of fraud. The claimant does not have to plead primary facts which are only consistent with dishonesty. The correct test is whether or not, on the basis of the primary facts pleaded, an inference of dishonesty is more likely than one of innocence or negligence. As Lord Millett put it, there must be some fact "which tilts the balance and justifies an inference of dishonesty". At the interlocutory stage, when the court is considering whether the plea of fraud is a proper one or whether to strike it out, the court is not concerned with whether the evidence at trial will or will not establish fraud but only with whether facts are pleaded which would justify the plea of fraud. If the plea is justified, then the case must go forward to trial and assessment of whether the evidence justifies the inference is a matter for the trial judge.""

94 This led me to say the following at paragraphs 50 and 51 of *Trico*:-

"50. …There are many disputes where parties disagree whether or not they have reached an agreement, what was agreed and the circumstances in which they came to reach an agreement. When considering such disputes, the Royal Court frequently decides matters on the basis of preferring the evidence of one party or its witnesses to another party. The fact that one party's evidence is preferred over another does not make the evidence of the other party fraudulent; nor does it justify an allegation of fraud .

51. Something else is therefore required to take a case about a disputed agreement into the arena of fraud. Otherwise in every case where there was a dispute about what parties had agreed or the extent of their agreement, allegations of fraud could be made routinely. The policy of the Royal Court (following the courts in England and Wales) is however clear. The defendant's belief that he is a victim of an unknown deception is not enough to allow such an allegation to be made. The rival contentions of the plaintiff and the defendant about the execution of the Side Letter can equally be decided, putting at its lowest, by the Jurats choosing to prefer the evidence of one party over the other."

95 In relation to an application to amend to plead fraud, in *Hervé v H&H Jersey Growers* [1994] JLR Notes 5a the head note states the following:-

"There is no rule of practice by which amendments alleging fraud are to be treated differently from other amendments and, in all cases, the objective

of the court should be to all the real matter in controversy between the parties to be litigated.in controversy between However, a party seeking to introduce an allegation of fraud for the first time by amendment will only be allowed to do so in exceptional circumstances and at an early stage and the court will require an explanation of why the allegation was not made from the outset."

96 These are the principles that I have applied in reaching my decision.

97 Before I turn to the amendments sought by the plaintiffs, it is also appropriate to review the relief sought by the plaintiff in light of the submissions made by Advocates Nicholls and Evans that they did not understand the claim against their clients as the case was currently pleaded.

98 In the prayer to the draft amended order of justice, the first relief sought is a declaration that the disclaimers, the indemnity and the deed of exclusion in relation to the Corfield Trust are no effect. The prayer does not make it clear what relief is sought in relation to the Balata and Peekay trusts. It is not clear what the plaintiffs seek to restore and in respect of which trusts and which decisions of the defendant they seek to set aside. In particular, do they seek to set aside the Family Agreement and the settlement reached with Gaurang and to restore the previous position including the plaintiffs as discretionary beneficiaries of all trusts where they were previously beneficiaries?

99 Why I have referred to the relief sought and the questions that arise as a consequence is because it is not clear what consequential relief the plaintiffs say should follow the declarations they are seeking including whether and how much equitable compensation or damages should be payable. At present there is a missing link between the plaintiffs being restored to the position enjoyed previously, if that is what is sought, and, if they are restored, why compensation should still be payable. It is also not clear whether the plaintiffs seek to set aside any of the distributions made. It is also not clear whether the plaintiffs allege that the defendant should exercise its discretion in some different way in relation to the Family Agreement. Nor is it made clear how much compensation should be payable to the plaintiffs as a result of the defendant's exercise of discretion in relation to those steps it took to give effect the Family Agreement and the reasons why.

100 Advocate Sinel in the course of oral argument suggested that his clients' claim was for around US$7 million, but neither the order of justice, nor the affidavit filed, nor his skeleton argument articulate the basis upon which such a claim is calculated or the reasons why such compensation is payable. If the status quo is restored on the basis of disclaimers, and the indemnity and deeds of exclusion being set aside, the claim as presently pleaded does not address the fact that the plaintiffs would be discretionary beneficiaries only and who may or may not therefore benefit from the trusts depending upon how the defendant might choose to exercise its discretion in the future. For complex litigation such as this case, the trial court and the other parties need to understand the plaintiffs' approach so that the other

parties can prepare a case in response and the trial court can adjudicate the same

101 I have referred to these issues because they are relevant to the application to add Mr Patel, Vimal and Gaurang as defendants who as part of their opposition to the present application assert that they wish to understand what relief is sought against them and why. The above analysis shows there is force to their concerns. I refer to these concerns further later in this judgment.

102 Turning now the proposed amendments set out in paragraph 4.2 of the draft amended order of justice, this paragraph contains six claims against four different entities namely mistake, duress, undue influence, misrepresentation, fraud and dol (including *réticence dolosive*). In my judgment, it is necessary to look at each head of claim and against each defendant whether the particulars relied upon are sufficiently clear so that each entity or person pursued knows the case they have to meet. In adopting this approach, although there was force to the detailed analysis by Advocate Evans of each of the sub-paragraphs and what case a particular sub-paragraph related to, it is also appropriate to look at matters in the round for each head of claim to see whether there is a case capable of being pleaded.

103 I have looked at each head of claim in this way because the plaintiffs' current draft is too broad brush in approach. It looks to leave too much to trial without the parties whom the plaintiffs wish to pursue being able to understand the case they have to meet by reference to each head of claim. It also conflates different concepts without explaining the material facts applicable for each concept or what relief applies as a consequence of a head of claim being established.

104 The fact that some facts relied upon or the relief may at times be the same or may overlap does not excuse or justify a lack of clarity. The plaintiffs wish to bring a series of different claims against different legal persons. The complexity of a multi-party and multi-issue dispute requires a pleading that makes their claims clear. If the plaintiffs by the time they go to trial, can articulate the basis of their claims, in my judgment they should be able to do so now. It is not effective case management to leave matters to trial.

105 How the plaintiffs address these concerns ultimately is a matter for the plaintiffs. It is well known that it is not for the Court to draft the claim. All the court can do is set out why the current draft is not sufficiently clear which I will address shortly by reference to each head of claim and addressing the position of each of the persons the plaintiffs wish to join as defendants.

106 The current draft pleading is also unsatisfactory because to add parties as defendants, the court needs to be satisfied that they are either necessary or proper parties to an existing claim under Rule 6/36 of the Rules (See the analysis in *Monteagle International Limited v Grocery Market Research Limited* [2022] JRC051. To decide whether any of Mr Patel,

Vimal or Gaurang are such parties to existing or agreed claims against the defendant also requires an analysis of what the claim or claims are being made against each of the individuals the plaintiffs propose should be added as defendants. Yet the pleading fails to do this even though Advocate Sinel accepted that he could not bring claims against Gaurang in relation to mistake, undue influence or duress. The analysis below of each of the heads of claim further explains the difficulties that arise with the plaintiffs' current approach and why it is not satisfactory.

107 The next reason why each head of claim should be pleaded separately is because the proposed defendants all reside out of the jurisdiction. I therefore have to be satisfied for each head of claim that one of the gateways set out in the Schedule to the Service of Process Rules 2019 is met. In addition, just because the threshold might be met in respect of one claim does not necessarily mean that it is met in respect of all of them. The draft amended order of justice in its current form, does not allow me to do this. I should add that nor was there before me any application to serve the proposed defendants out of the jurisdiction which there should have been. When a party wishes to add defendants who are out of the jurisdiction, the application should be made both to add them as defendants and to serve them out of the jurisdiction. A properly formulated pleading dealing with each head of claim against each proposed defendant is a necessary precursor to apply the tests set out in *Maywell Limited v Nautech Services Limited* [2014] (2) JLR527.

Mistake

108 In relation to the claim based on mistake, this part of the case seeks to set aside the disclaimers and the deed of indemnity; in other words the plaintiffs are seeking to set aside a contractual document entered into by the first plaintiff. The only necessary party to this aspect of the claim is the defendant. This is because the defendant is the other party to the contract, and it is the first plaintiff who seeks to set aside that contract. Accordingly it is not necessary to join Mr Patel, Vimal and Gaurang to this claim as they are not parties to the deeds of disclaimer or indemnity. This conclusion does not mean that they might not be referred to in the particulars relied upon as to why the first plaintiff says she was mistaken, but no relief is required against them in order to set aside the deeds of disclaimer and/or the indemnity. This conclusion can be tested this way. If the only relief was sought was the setting aside of the disclaimers and the indemnity, only the defendant is a necessary party to that application.

109 As to why the first plaintiff says she entered into the disclaimer and the deed of indemnity by mistake, I accept the first plaintiff is entitled to rely on a combination of what was said to her by Mr Ellis and Mr Patel and/or Vimal. That includes setting out the first plaintiff's case that she entered into the documents on the basis of a mistake because untrue statements had been made to her.

110 What is required for a claim in mistake is a pleading against the defendant alone that particularises all matters relied upon as to why the first plaintiff was mistaken. These

matters should be separate from any other head of claim.

111 By reference to the discussion at paragraphs 98–101 above, the pleading should also set out what relief is sought as a result of a finding of mistake. If a finding of mistake leads to a claim for equitable compensation and/or damages, why that is so as a consequence of a finding of mistake should be pleaded and the heads of compensation and loss identified.

Undue Influence

112 In relation to a claim in undue influence, I agree with Advocates Nicholls and Evans that their clients are entitled to know who it is said exercised undue influence over the first plaintiff. In that regard Advocate Sinel accepted that undue influence could not be pleaded against Gaurang. However as the plaintiffs assert that Mr Patel and Vimal exercised undue influence, then the first plaintiff needs to set out what the case of undue influence is, by whom acts of undue influence had been carried out, when they were carried out, what the acts were and why the influence was said to be undue. While it is for Advocate Sinel to provide a draft pleading with the particulars relied upon for this head of claim, I accept that acts taken either individually or together might be relied upon to assert a claim in undue influence. However each act relied upon should be identified. The present pleading does not do so in a way that can be understood. At present the current particulars only appear to refer to pressure or family concerns without explaining why the contact from Mr Patel and/or Vimal is said to amount to undue influence.

113 As with the claim in mistake, the pleading should also set out what relief is sought as a result of a finding of undue influence. If a finding of undue influence leads to a claim for equitable compensation and/or damages, why that is so as a consequence of such a finding should also be pleaded and the heads of compensation and loss identified.

Duress

114 In relation to the claim of duress, again Advocate Sinel accepted that such a claim could not be made against Gaurang. However, the same concerns as for an undue influence arise in respect of this head of claim and so what is required is a pleading addressing this head of claim alone and particulars relied upon i.e. by whom any acts of duress were said to be carried out, when they were carried out, when they were carried out, what the acts were and what was the effect of any such acts. The acts relied upon must be capable of amounting to some wrongful or illegitimate threat which must also be pleaded (see *Helm Trust Company Limited v Chatfield* [2013] (1) JLR Note 13. I accept it may be that, if reliance is placed upon allegedly undue statements, then it is likely to be a matter for the Jurats as to whether those statements amount to a wrongful or illegitimate threat, but the proposed defendants are entitled to know the case that is going to be put so they may answer the same in their pleading, in witness statements and at trial.

115 As for the claim in mistake, the pleading should also set out what relief is sought as a result of a finding of duress. If a finding of duress leads to a claim for equitable compensation and/or damages, why that is so as a consequence of such a finding should also be pleaded and the heads of compensation and loss identified.

Misrepresentation

116 In relation to a claim of misrepresentation, again the proposed defendants are entitled to know by whom any misrepresentation was made, when it was made, was it innocent or fraudulent misrepresentation and what was said. In that regard I consider there is a difference between the first plaintiff being told that Gaurang was suing rather than only threatening to sue. I also accept that there is a difference between the first plaintiff being told that everything would be lost when the accounts since provided suggest the trusts held an entity of significant value and I accept that the risk of assets being lost to the Kenyan authorities is also capable of being a misrepresentation. However, it is not for me to formulate the plaintiffs' case. They must provide under the heading of misrepresentation the particulars they rely on, and the nature of the misrepresentation made and by whom.

117 For the claim in misrepresentation, as with the other heads of claim, the effect of any such finding should also be pleaded and what other parts of the transactions steps taken by the defendant are challenged. Is a claim in misrepresentation a basis to set aside the disclaimers or indemnity or are other transactions impugned? Is equitable compensation and/or damages sought? If the latter, again the plaintiffs need to plead the heads of compensation they seek and/or losses suffered they say they have suffered.

Fraud

118 In relation to the claim in fraud, Advocate Sinel fairly in my judgment rightly conceded that he could not plead any form of conspiracy to defraud either between the defendant and Mr Patel, Vimal and/or Gaurang acting alone. Given this concession, it is difficult to see how Advocate Sinel can allege fraud if he cannot maintain a plea in conspiracy to defraud. To plead fraud, he is required to set out the acts alleged to be fraudulent fully and precisely with full particulars and to show that each of the parties had or is activated by a fraudulent intention (see *Trico*).

119 The pleading in relation to the defendant, albeit the defendant does not oppose the amendments, does not address the defendant's defence at paragraph 22 of its answer to the effect that what occurred was a proper exercise of discretion in order to resolve a family dispute. Nor does the pleading allege why the actions of the defendant through Mr Ellis are said to be fraudulent. The criticism is that Mr Ellis is alleged to have said there was no need to get legal advice, there was no time to do so and failed to provide any details of the agreement. It is not clear why these criticisms amount to fraud. This is relevant both to the defendant and to the proposed defendants. The latter are entitled to know what it is said

amounts to acts of fraud and fraudulent intent by the defendant to which they are said to be party or privy.

120 In respect of Mr Patel he refused to tell the first plaintiff what was going on apart from saying that Gaurang had taken all of his money and he had none left and emphasising his ill health. Vimal is criticised for putting pressure on the first plaintiff and saying that all the money in the trusts had been lost and that Gaurang was suing. Again the draft pleading does not currently explain why these acts are said to be fraudulent or are evidence of a fraudulent intent.

121 In relation to the affidavit of the first plaintiff, paragraph 64 states the following:-

> *"64. Discovery has revealed that the First, Second, and Sixth Third Parties were so embroiled in the plans to re-structure the trusts, and the circulation of lies to that end, that it is difficult to distinguish their culpability from that of the Defendant."*

122 Paragraph 65 then sets out the relevant evidence revealed. In relation to this evidence however:

> (i) The correspondence exhibited between pages 29 and 37 of the exhibits of the first plaintiff's affidavit is not evidence that is supportive of fraud. It is correspondence between the defendant as trustee and certain of its beneficiaries about the basis of which a family agreement might be approved. The defendant in particular was clear in respect of the first plaintiff in Mr Ellis's email of 8 th September 2016 that for her to be removed as a beneficiary she would have to agree to be excluded from the trusts and provide an indemnity. The exchanges of communication, and in particular this communication, are not therefore evidence of fraud.
>
> (ii) In respect of paragraph 65.b., discovery simply revealed that the defendant had had discussions with other family members a year earlier; this is also not indicative of fraud (see Mark Woodford's email from the defendant dated 15 th February 2016 at page 37 of the exhibit to the first plaintiff's affidavit).
>
> (iii) In relation to paragraph 65.c., that Mr Patel was at risk of being sued by the second and third parties is clear from a letter from Collas Crill dated 19 th October 2016. This letter included the following statement "Our instructions are to contest your proposals however, at this early stage, our clients would be prepared to enter into negotiations in an attempt to avoid costly and protracted litigation".

123 As matters stand therefore the current proposed amended pleading does not justify a claim in fraud and neither does the affidavit of the first plaintiff.

124 As with the claims referred to above, the pleading also does not set out what relief is sought as a result of a finding of fraud, what other transactions might be impugned and what categories of equitable compensation and/or damages are sought and why as a consequence of any such finding.

125 As a plea in fraud is not sustainable as currently drafted, it is not necessary to determine or ascertain why these matters were not pleaded before. However, I observe that the plaintiffs did not receive copies of the accounts and had no understanding of the value of the trust assets until after proceedings had been commenced and so may not have appreciated that what is alleged to have been said by Mr Patel and Vimal may not have been true.

126 These conclusions on the current claim in fraud do not mean however that there is no force to Advocate Sinel's criticism that at least Mr Patel and Vimal made untrue statements to the first plaintiff about the risk of everything being lost and that Gaurang had already sued Mr Patel. I also observe that paragraph 5.1.2 of the order of justice (without amendment) makes an allegation of breach of trust against the defendant. Allegations of breach of trust are also made in paragraph 6. Subject to addressing the question of what equitable compensation is sought by the plaintiffs and why, the complaints Advocate Sinel advances may be capable of founding claims in accessory liability against Mr Patel, Vimal and Gaurang as the complaint of Advocate Sinel may be capable of being pleaded against the proposed defendants as a claim in dishonest assistance (see paragraph 63 of *MacFirbhisigh & Anor v C.I. Trustees & Executors Ltd & Ors* [2014] (1) JLR244 where I summarised what is meant by dishonest assistance). This is because there was a claim of breach of trust against the defendant and it is arguable that the statements made by Mr Patel and Vimal which were alleged to be untrue and steps taken by Mr Patel, Vimal and Gaurang to exclude the plaintiffs from any family wealth are capable of being assessed by the Jurats as individuals acting dishonestly to prefer their own interests over that of the plaintiffs.

127 To the extent that the plaintiffs seek to set aside any other transactions carried out by the defendant where distributions were made to third parties, the plaintiffs may be able to plead either a claim in restitution applying *Re Esteem Settlement* [2002] JLR53 or alternatively a claim based on *"knowing receipt"*. The requisite degree of knowledge for *"knowing receipt"* is that it would be unconscionable for the proposed defendants to obtain the benefit of assets received and traceable to a breach of fiduciary duty (see paragraphs 49 to 51 of *Bagus Investments Ltd v Kastening* [2010] JRC 144). Again the matters relied upon by Advocate Sinel are capable of amounting to unconscionable conduct to found such a claim. Whether they in fact amount to such conduct (if properly pleaded) would of course be a matter for trial.

128 I have referred to these possible claims based on accessory liability because applying the words in *Cunningham* "… ***so far as possible all matters in dispute between parties to litigation should be resolved and leave to amend should therefore be granted if there would be no prejudice to the other party which could not be compensated for by an***

award of costs." While the current draft amended order of justice does not meet the modern-day requirements for a pleading, I am also of the view that if properly pleaded and having regard to this judgment, the complaints of Advocate Sinel may be capable of being set out properly in a pleading leading to leave being granted. While therefore allegations of fraud are not justified for the reasons set out, the facts relied upon may be capable of supporting heads of claim which are sustainable by reference to what was at the heart of Advocate Sinel's complaint namely exclusion of his clients from family trusts completely and their exclusion from being considered for benefit derived from assets of significant value.

Dol

129 In relation to the claim in dol in my judgment this allegation stands or falls with the allegations in fraud unless *dol* is relied upon to set aside the disclaimer and indemnity. However, simply setting aside those documents is a claim against the defendant only.

130 As with the claim in mistake, if dol is relied upon to set aside the disclaimers and indemnity (as distinct from a claim in fraud), the pleading should also set out what relief is sought as a result of such a finding of *dol*. If a finding of *dol* leads to a claim for equitable compensation and/or damages, why that is so as a consequence of such a finding should also be pleaded and the heads of compensation and loss identified.

Réticence Dolosive

131 In relation to *réticence dolosive*, as against the defendant and each propose defendant, the claim does not at present plead why each was under a duty to warn the plaintiffs of what was happening. In addition to this failing, this claim as currently pleaded is otherwise no different from a claim in *dol* and fails for the same reasons.

Letter of Assurance

132 In relation to the amendment in paragraph 7 of the draft amended order of justice concerning the Letter of Assurance, I have no difficulty with an alternative claim against Mr Patel and Vimal seeking to recover sums not paid under the Letter of Assurance if the disclaimers and indemnity are not set aside, because there is an arguable link pleaded at paragraph 4.2.15 of the draft amended order of justice between the first plaintiff executing the deeds of disclaimer and indemnity and promises made under the Letter of Assurance.

133 This would certainly be sufficient to join Mr Patel and Vimal as defendants as necessary or proper parties under Rule 6/36 and to give permission to serve them out of the jurisdiction for this claim (see *Monteagle International Ltd & Anor v Grocery Market Research Ltd* [2022] JRC051).

134 However, paragraph 7 of the draft amended order of justice is headed *"breaches of contract and/or promise"*. Yet the pleading does not explain what the contract is that has been breached. While Advocate Sinel explained this was an alternative claim based on payments made to other grandchildren of Mr Patel which was the cause for the promises to make payments to the second and third plaintiffs, this is not pleaded. It needs to be pleaded because I would then need to be satisfied whether it was appropriate to join Mr Patel and Vimal as necessary or proper parties in respect of an allegation not linked to the setting aside of the disclaimers or indemnity. I would also need to be satisfied that it was appropriate to grant permission to serve Mr Patel and Vimal out of the jurisdiction in respect of this alternative claim. I cannot do so without the claim based on the contract or promise said to have been made being pleaded. In addition to the pleading being incomplete, the plaintiffs also need to explain why Mr Patel and Vimal would be necessary or proper parties to the current proceedings in respect of a claim for payments under the Letter of Assurance based on treatment of other grandchildren.

135 The governing law for a claim in respect of the Letter of Assurance also needs to be pleaded. While there is force to the argument that the governing law is that of Jersey for the claim based on the Letter of Assurance being linked to the disclaimers and the indemnity, for the claim based on a separate contract based on treatment of other grandchildren, why the law of Jersey applies to such a promise needs to be pleaded. The governing law of such a contract may also be relevant to the question of service out of the jurisdiction for such a claim.

Lateness

136 While I am not willing to approve the draft amend order of justice in its current form, for the sake of completeness, I wish to make it clear that I do not however regard either this application or one based on this judgment, if made promptly, as being late. Applications to amend are often made following discovery and this application is no exception. In addition, as mentioned above, this application has followed on from the strike out application brought by the third parties which was only concluded in April 2022. Following that judgment, amendments to pleadings were required in any event and so this case is not at a point where either witnesses statements can be exchanged or trial dates fixed.

Conclusion

137 For the reasons set out in this judgment, the application for leave to amend the order of justice is refused. However, if the plaintiffs produce an amended pleading which addresses the matters set out in this judgment, accompanied by an application to join the defendants where appropriate as additional defendants, and seeks leave to serve them out of the jurisdiction, the plaintiffs may be able to meet the threshold on a further application for leave to amend albeit that is a matter for another day until any further pleading is produced.