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

Jurisdiction:	Jersey
Judge:	Matthew John Thompson
Judgment Date:	13 January 2023
Neutral Citation:	[2023] JRC 9
Court:	Royal Court

Text

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

and

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

(12) Medha Varsani
Third Parties

[2023] JRC 9

Before:

Advocate Matthew John Thompson, Master of the Royal Court.

ROYAL COURT

(Samedi)

Trust — application by the plaintiffs to amend their order of justice and costs

Authorities

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

Patel v JTC Trust Company Limited and Ors [2022] JRC 150

Toothill v HSBC Bank Plc [2008] JLR 77.

Kuwait Oil Tanker Co SAK v Al-Bader (No.3), 2000 WL 571379 (2000)

M B & Services Limited and Golovina v United Company Rusal International Public Joint Stock Company [2021] (1) JLR Note 9

Federal Republic of Brazil & Anor v Durant & Anor [2012] (2) JLR 356

Re Esteem Settlement [2002] JLR 53

Ballard v Lumb 1968 JLR 923

Service of Process Rules 2019

Royal Court Rules 2004, as amended

Monteagle International Limited & Anor v Grocery Market Research Limited [2022] JRC 216

Trust (Jersey) Law 1984

Steelux Holdings Limited v Edmonstone (née Hall) [2005] JLR 152

Trico v Buckingham [2019] JRC 095

MacFirbhisigh v CI Trustees and Executors Limited [2014] (1) JLR 244

Bagus Investments v Kastening [2010] JLR 355

Federal Republic of Brazil & Anor v Durant International Corporation & Anor [2012] (2) JLR 356

Fang & Ors v Attorney General & Ors [2020] JCA 013

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

Advocate J. P. Speck **for the Defendant.3**

Advocate D. Evans **for the First and 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 a further application by the plaintiffs to amend their order of justice. This application follows on from my previous decisions in this matter dated 8 th April 2022 reported at *Patel v JTC Trust Company Limited and Ors* [2022] JRC 089 ("the April judgment") and my judgment dated 12 th July 2022 reported at *Patel v JTC Trust Company Limited and Ors* [2022] JRC 150 ("the July judgment").

Background

2 The background to the present dispute is set out at paragraphs 2 to 16 of the April judgment which I adopt for the purposes of this judgment without setting out the same. In relation to this decision, where I have referred to Mr Patel, this should be read as now relating to claims against his estate unless the context appears otherwise.

3 In the July judgment, which was a previous application to amend by the plaintiffs, while I rejected that application, I reached the following conclusion at paragraph 137.

> ***"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."***

4 The present application therefore follows on as a result of the observations made in the July judgment.

The nature of the amendments sought

5 The nature of the amendments sought were extensive but can be summarised as follows:-

(i) A plea that the disclaimers and indemnity were procured by misrepresentation or *dol*;

(ii) A revised application seeking to add Mr Patel, Vimal and Gaurang as defendants to existing causes of action including duress, undue influence and mistake;

(iii) A revised claim in relation to the Letter of Assurance;

(iv) A claim in conspiracy based on either a lawful or unlawful means conspiracy;

(v) Pleas in dishonest assistance, knowing receipt and unjust enrichment;

6 There were also a number of other amendments as follows:-

(i) minor typographical amendments;

(ii) factual particulars about the Balata Trust and the Peekay Trust deeds of exclusion; and

(iii) further detail about the background to the family agreement and the plaintiffs' exclusion from discussions within the family about the family agreement. These were disputed in part insofar as they were relied upon in relation to the causes of action the plaintiffs now seek to advance; and

(iv) certain particulars of loss and damage and the relief sought.

Applicable legal principles

7 In relation to the applicable legal principles, these were set out in the July judgment at paragraph 90 and 91 and these are the principles I have applied.

Submissions of the parties

8 Given the nature of the amendments it is appropriate to set out the objections taken to those amendments by the defendant, Mr Patel and Vimal, and Gaurang followed by the position of the plaintiffs.

The defendant' submissions

9 Advocate Speck for the defendant firstly fairly accepted that there needed to be an enquiry to determine the plaintiffs' claims. What was sought however from his client's perspective was that the claim was fairly described and defined which he argued was not the case. He was therefore critical of the plaintiffs for not having done so notwithstanding that his client had filed an answer, had filed evidence, that there had been general discovery and the plaintiffs had the benefit of the July judgment setting out what needed to be pleaded. Accordingly, the focus of his criticism was that the pleaded case did not say what the defendant should have done, and why what was done was not good enough. Why this mattered according to Advocate Speck was that his client wanted to know what the consequences were in relation to the disclaimers and the effect on the family agreement and what the plaintiffs were saying they were now entitled to.

10 In relation to the disclaimers and the indemnity, it was clear that these were sought to be set aside. It now appeared to be the case the plaintiffs were not seeking to set aside the family agreement or other exercises of discretion by the defendant to give effect to the family agreement but rather they were asserting that those steps were taken in breach of trust.

11 Why this mattered was that the defendant wanted to understand what restitution was sought.

12 This led to the criticism that the order of justice was hard to follow because what was

pleaded in respect of each trust was the whole value of that trust. The only parts of the pleading setting out what was sort were vague. In paragraph 2.1.4.2 what the plaintiffs sought was fair *"and at least equal treatment"*. In relation to the Balata Trust what was sought was fair treatment with the value of the discretion interest being said to be very significant. The same phrase was used in respect of the Peekay Trust.

13 Advocate Speck was critical of this approach because the plaintiffs should be required to say what it is they should be entitled to. Matters were summarised this way in his skeleton at paragraphs 26 to 28.

> *"26. The particulars at paragraph 63 of the DAOJ are wholly deficient. They do not differentiate between the separate heads of claim and the losses that flow from each head of claim. Instead, all heads of claim are said to have generated losses of "very significant sums" (see paragraph 63.3). This statement is Insufficient to resolve the issues identified by the Learned Master in the First Amendment Judgment at paragraphs 100–104, for a pleading of mistake at paragraph 111, for a pleading of misrepresentation at 117, for a pleading of dol at 130 and a pleading of réticence dolosive at 131.*
>
> *27. The generalised estimated values of the Trusts that the Plaintiffs have now included at paragraphs 2.1.4.2, 2.2.5 and 2.3.5 do not particularise the loss the Plaintiffs are said to have suffered by their exclusion from the Trusts. As emphasised by the Learned Master at paragraph 100 of the First Amendment Judgment, all of the Trusts were discretionary trusts and therefore the Plaintiffs' interests were not fixed. Any discussion surrounding the "entitlement" of the Plaintiffs to a proportion of the Trust funds simply has no merit.*
>
> *28. Neither is it clear what relief the Plaintiffs seek from their pleading (for example, which distributions should be reconstituted to the Trusts), nor how they claim (if indeed they do) the Defendant could have exercised its discretion as trustee differently. Instead, they plead that the Defendant should have exercised its discretion "so as to deliver at least parity of treatment" (see paragraph 63.1). It is unclear how such "parity of treatment" could be exercised differently by the Defendant in the context of resolving a longstanding family dispute."*

14 In relation to the allegations of conspiracy the averment at paragraph 14 that the correspondence referred to amounted to an agreement between the defendant, Mr Patel, Vimal and Gaurang to conceal from the plaintiffs the full extent of their rights was not supported by any particulars.

15 The assertions made by the plaintiffs that the defendant deliberately concealed information from the plaintiffs in paragraphs 33 to 35 of the draft pleading did not address the intent required or how the defendant might benefit from any such agreement.

16 In relation to the claims in *dol*, the requisite standard required set out at paragraphs 129 to 131 of the July judgment had not been met. It was not clear whether *dol* was being alleged to set aside the disclaimers and indemnity or what facts applied to this part of the pleading. Again, Advocate Speck criticised the lack of any particulars showing intent on the part of the defendant.

17 In relation to *dol* Advocate Speck fairly accepted that it was a matter for the Royal Court at trial as to what the scope of *dol par reticence* was given the discussion in *Toothill v HSBC Bank Plc* [2008] JLR 77 at paragraphs 20 to 22.

Submissions on behalf of Mr Patel and Vimal

18 Advocate Evans for Mr Patel and Vimal was also critical of the plaintiffs' approach and categorised the plaintiffs' approach as both confusing and confused notwithstanding the July judgment. Although it appeared to be the position based on written skeletons and oral submissions that the plaintiffs were seeking to set aside the documents they had executed and otherwise claim compensation for breach of trust, this was not currently pleaded. While Advocate Evans did not dispute that equitable compensation could be sought, he was critical of the pleading for not setting this out and not explaining the basis upon which compensation was said to be payable.

19 In respect of the claims on the basis of mistake or duress the pleading was not clear whether or not damages were being claimed.

20 Advocate Evans also stated that insofar as the plaintiffs were still trying to suggest fraud, nothing had changed since the last occasion. While the plaintiffs were not pleading fraud expressly, they were relying on the same allegations in a different way to now plead conspiracy; however the analysis in the July judgment at paragraph 122 still applied to the claims in conspiracy. The same criticism also applied to the current allegations of *dol* and fraudulent misrepresentation.

21 In relation to the issue of claiming damages for misrepresentation, damages could not be claimed if the misrepresentation was to set aside the disclaimers only and where there was no claim for damages for misrepresentation or *dol*. The observations at paragraphs 129 and 130 of the July judgment had not been followed.

22 In relation to the allegations of conspiracy, the intention was to resolve the family dispute. A claim based on lawful means conspiracy as defined at paragraph 108 of *Kuwait Oil Tanker Co SAK v Al-Bader (No.3)*, 2000 WL 571379 could not therefore made out. This was implicitly recognised in the draft amended order of justice at paragraphs 9, 10 and 26 and by the first plaintiff in her first affidavit sworn on 28 th March 2022 at paragraphs 17 and 18.

23 In relation to the unlawful means conspiracy, there was a lack of particularity about how Mr Patel, Vimal and Gaurang are said to have conspired as alleged in paragraph 42.2.

24 He also argued it was the defendant's decision not to go to court for directions. There was therefore no loss caused to the plaintiffs by the third parties' alleged misconduct. This was why the claim was therefore one for breach of trust against the defendant only.

25 The plaintiffs had no entitlement to an interest in Cosmos which was the purpose of the family agreement; it was simply trust property; the plaintiffs were not therefore entitled to bring claims against Advocate Evans' clients in the absence of fraud or conspiracy.

26 In addition in relation to the unlawful means conspiracy, the family agreement concerned the restructuring of property held on trusts and therefore did not concern any property of the plaintiffs.

27 Advocate Evans also raised a point (which he accepted was technical in nature) that the amendments to plead conspiracy was a tortious claim with the results that the pleading was required to set out the country where the relevant acts took place because the relevant acts did not take place in Jersey and accordingly the acts had to amount to a tort in those other countries (see *M B & Services Limited and Golovina v United Company Rusal International Public Joint Stock Company* [2021] (1) JLR Note 9).

28 In relation to conspiracy Advocate Evans further contended that the claim was time barred because at its highest the conspiracy was complete by April 2017 and therefore any conspiracy, if it could be pleaded, became time barred in April 2020 in any event. There was also no case of *empêchement* advanced by the plaintiffs.

29 Finally, in relation to conspiracy Advocate Evans' skeleton argued that nothing had changed since the previous application when the plaintiffs had conceded that they could not plead conspiracy.

30 In relation to the claim based on dishonest assistance Advocate Evans repeated that the plaintiffs could not show any causal link between the alleged breach of trust and a loss to the plaintiffs because of the limited rights the plaintiffs had as beneficiaries. He also argued that the plaintiffs had no right to require his clients to account to the plaintiffs for any trust property transferred to his clients by reason of the alleged dishonest assistance.

31 In relation to the claim in knowing receipt the plaintiffs were not entitled to bring such a claim because none of their assets have been transferred in breach of trust. Knowing receipt related to disposal of a plaintiff's assets in breach of trust (See *Federal Republic of Brazil & Anor v Durant & Anor* [2012] (2) JLR 356).

32 In relation to a claim in unjust enrichment, the claim failed for the same reasons as the knowing receipt claim failed because the plaintiffs as discretionary beneficiaries could not say that the defendant or the third parties had been enriched at their expense. The plaintiffs had no equitable proprietary interest in the Trusts (See *Re Esteem Settlement* [2002] JLR 53). It was therefore only the defendant as trustee if it wished to do so who could bring a claim in unjust enrichment.

33 In relation to the claims in mistake it appeared that these were not being made against Mr Patel, Vimal or Gaurang, a position which Advocate Sinel confirmed during submissions. Only the defendant was therefore a necessary party for claims in mistake.

34 In relation to claims in undue influence Advocate Evans contended that Mr Patel or Vimal were not necessary parties to a claim in undue influence seeking to set aside the validity of the disclaimers and indemnity when they were not parties to those documents. In addition, while there was a claim for loss and damage, the pleading did not address the points made at paragraphs 111 to 113 of the July judgment on undue influence.

35 In the absence of any fiduciary relationship between the parties, to plead undue influence also required a positive averment that any influence was in fact exercised and was operative (see *Ballard v Lumb* 1968 JLR 923) at page 936. The general reliance on Indian heritage was not sufficient to amount to undue influence.

36 In relation to claims in duress Advocate Evans argued that the requirements of paragraphs 114 and 115 of the July judgment had not been met and again was critical that why damages were claimed had not been set out.

37 In relation to the Letter of Assurance, the governing law of the Letter of Assurance needed to be pleaded. In addition, this could not be a further claim but only an alternative claim.

38 In relation to the questions of prescription, prescription applied to the claims in conspiracy and dishonest assistance. However the matters pleaded at paragraph 9 and the various sub-paragraphs were all known to the plaintiffs. As the plaintiffs knew sufficient to plead breach of trust from the outset, the plaintiffs also had sufficient information to plead dishonest assistance and conspiracy (if such claims could be made out) and so the claims were time barred because they were new claims against new parties.

Submissions on behalf of Gaurang

39 Advocate Nicholls focused on the allegations in the draft amended order of justice against Gaurang. In relation to the suggestion at paragraph 33 that the disclaimer was executed on the instructions of Gaurang or it could be inferred this was so, discovery had taken place. There was therefore no basis to plead that instructions could be inferred because either

documents existed to record that instructions were given, or they did not. As there was no record of such instructions, neither case was capable of being pleaded.

40 In relation to the suggestion in paragraph 11 of the draft amended order of justice that Gaurang was under a legal and moral obligation to inform the plaintiffs about what was going on, any moral duty could not give rise to a claim in law. In relation to any legal duty no duty was pleaded; nor was any basis for any legal duty set out. There were also no particulars about how Gaurang is said to have deliberately misled any of the plaintiffs. In relation to the reliance on the email from Mukesh Shah to the defendant dated 6 th September 2016, Gaurang was not party to this correspondence. It could not therefore be relied upon in any assertion against him.

41 In relation to the correspondence relied upon at paragraph 14 of the draft amended order of justice, Gaurang was again not party to it and so it could not amount to or evidence an agreement involving Gaurang.

42 In respect of paragraph 15 there were no particulars as to why it should have been known to Gaurang that the plaintiffs were not represented or advised and that they ought to be. In that regard none of the misrepresentations relied upon by the plaintiffs were made by Gaurang. There was also no suggestion of any inadequate disclosure by him.

43 Advocate Nicholls also drew to my attention certain texts between the first plaintiff and Gaurang exhibited to the affidavit of Mark Christopher Woodford sworn on 9 th December 2021 filed on behalf of the defendant. He criticised the first plaintiff for not referring to these texts in her affidavits. In addition, he relied on a text between the first plaintiff to Gaurang sent on 25 thDecember 2016 at 10:55 stating “Merry Christmas and congratulations as you and your family have a lot to celebrate. It is unusual that you have not called to tell me your great fortune. To all my misjudgement it was Vimal who has rung up and explained the situation as well as to compensate what was owed to me and my girls….” This led to a reply from Gaurang saying that same day saying “We have nothing to celebrate. You should have been deserved to be told the truth by your father in whom you invested so much trust. As for Vimal he should have also told you the truth that he gets the company and the house as well as 80% of all Papa's assets. You should find out the truth before jumping to conclusions…”

44 These texts were important because they were exchanged before the disclaimers and indemnity were signed and did not support a claim against Gaurang. He had told her what was happening and was suggesting that the first plaintiff take up matters with her father. There was therefore no concealment or any conspiracy of silence.

45 In relation to the plaintiffs' argument that Gaurang was bound by the knowledge of the protector, this was not pleaded. All the protector was saying in a letter dated 9 th July 2015 that he did not wish to be involved. This did not sit with Gaurang and the protector being

"joined at the hip."

46 In relation to Section G of the draft amended order of justice at paragraph 42 and the claim in conspiracy, the only allegations relied upon were the alleged misrepresentations but none of these were made by Gaurang.

47 Advocate Nicholls also suggested in relation to any lawful means conspiracy that the plaintiffs' pleas were confusing the dominant purpose with the consequences of the dominant purpose. The main purpose was to resolve a family dispute. I was therefore referred to an email dated 4 th October 2016 from Mr Ellis of the defendant to Mukesh Shah where at paragraph 2 Mr Ellis referred to having received a call from the first plaintiff stating, "she is uncertain the extent to which she needs to be involved in the GP arrangement…". The same email also stated, "she indicated to me that she would be concerned about participating in a transaction if she didn't know enough about what is going on and how it affects her children's interests.." This showed that the first plaintiff was not in the dark and was aware of the deal. If the first plaintiff did not follow up with the defendant, that was not Gaurang's problem.

Submissions for the plaintiffs

48 Advocate Sinel in relation to his application and the defendant's submissions made the following submissions:-

49 In relation to what the defendant as trustee should have done his position was that they should have ensured the plaintiffs were fully informed about what was happening and only then should it have exercised its discretion.

50 What the plaintiffs were seeking to set aside were the disclaimers and the indemnity based on allegations of misrepresentation, mistake and conspiracy.

51 What was also sought was equitable compensation. His clients were entitled to pursue each of the defendant, Mr Patel, Vimal and Gaurang for the reasons set out in the draft amended order of justice and wanted compensation from them all. His clients were not limited to pursuing the defendant alone.

52 In relation to the knowledge of the plaintiffs Advocate Sinel's position was that his clients had been kept in the dark and he was critical of the emails attached to the affidavit of Mr Woodford referred to above because they did not tell the whole truth; this was made clear by the first plaintiff's second affidavit. The overriding objective was to keep the first plaintiff from being involved in the deal which all the parties involved knew was the position.

53 In relation to Gaurang, he did not inform the first plaintiff that what was being said to her was untrue and did not inform her that other grandchildren had received $1 million. He was under a duty to do so because otherwise he was giving effect to the conspiracy of silence about what had been agreed between him Mr Patel and Vimal which the defendant had given effect to. This led to liability.

54 In relation to why Advocate Sinel was now alleging conspiracy, at the previous hearing, although he appeared, he explained that the case had not been conducted by him at that time and he therefore had limited knowledge. Since then he had met all the plaintiffs, had gone through all the material and taken advice from English counsel. The draft amended order of justice was based on this review. The fact that his clients were cut out from the deal was clear from Recital K of the family agreement dated 30 th December 2016 which provided all beneficiaries wanted the defendant as the trustee to give effect to the agreement. This involved all other family members apart from the plaintiffs. All the other parties therefore knew what was being done was a breach of trust but they wanted to get rid of the plaintiffs.

55 Conspiracy was either a lawful means conspiracy because the dominant purpose was to get rid of the plaintiffs or alternatively it was an unlawful means conspiracy based on misrepresentation and not communicating to the plaintiffs when they should have done. He also relied on the confidentiality clause contained in the family agreement at Clause 5.1 as also deliberately intending to keep the plaintiffs in the dark.

56 What was claimed as a result was loss of a chance to be considered. The starting point for that was equal treatment. Advocate Sinel clarified that what he meant by equal treatment was that, while there was no legal right to an equal share, the trustee should have exercised its discretion to divide assets equally. The trustee should also have considered the position of the second and third plaintiffs as grandchildren of Mr Patel when other grandchildren received benefits and they had not.

57 The justification for the amendment at paragraph 33 that each of Mr Patel, Gaurang and Vimal did provide instructions was by reference to Recital K of the agreement.

58 In relation to paragraph 11 of the draft and the moral obligation, this was a reference to the applicable test on dishonesty. The legal obligation was a duty not to act unlawfully. It was unacceptable to allow someone else to be misled and to take a benefit as a result.

59 In relation to paragraph 13 the defendant Mr Patel, Vimal and Gaurang all knew that the later drafts of the family agreement excluded the plaintiffs.

60 In relation to damages, damages could be claimed for conspiracy and for fraudulent misrepresentation and equitable compensation could be sought for breach of trust. Advocate Sinel therefore appeared to accept that he was not seeking damages for mistake,

duress and undue influence; rather those matters led to the setting aside of the disclaimers and indemnity.

61 In relation to the Letter of Assurance this was a fallback position where the plaintiffs' sought damages.

62 In relation to the claims in *dol* and the Indian family culture Advocate Sinel disagreed that this would lead to any form of floodgates because this was a claim based on the defendant, as trustee, deliberately excluding the plaintiffs from benefit. Also in relation to *dol*, this was a developing area which therefore should be determined at trial.

63 In relation to the position of Gaurang, fundamentally Gaurang did not say enough. He did not give the first plaintiff the full picture. He did not inform her of the true value of Cosmos and how much benefit he was getting. Whether he was under such a duty could only be determined at trial. What was clear was that from September 2016 the plaintiffs had been deliberately cut out which was sufficient to show a conspiracy and a duty to speak up.

64 The plaintiffs were entitled to bring the claims set out in the draft they wished to claim because they had been excluded from benefitting from the trust. Advocate Sinel relied on *Re Esteem* at paragraph 183.

65 In relation to undue influence what was asserted was actual undue influence not presumed undue influence.

66 In relation to prescription the plaintiffs did not see the family agreement until 2020 and did not know the value of Cosmos until 2021. They were not therefore in a position to bring claims for dishonest assistance until they had this information.

67 In relation to the Letter of Assurance time started to run in December 2019 when Mr Patel and Vimal failed to honour their assurances.

Decision

68 The main focus of this decision concerns whether or not leave to amend should be given. It is right however to observe that Mr Patel, Vimal and Gaurang if leave to amend is given, accepted that they should be joined as parties and permission should be given to serve them out of the jurisdiction on the basis that they were necessary or proper parties pursuant to Rule 3 of the Service of Process Rules 2019 and Ground 1(3) of the Schedule to those Rules.

69 I now turn to deal with the application to amend. I have already referred to the legal

principles above which I have applied. I therefore propose to consider the application by reference to the categories listed at paragraphs 5 and 6 above. I will deal with each of these in turn.

Misrepresentation

70 This claim is found in the draft amended order of justice in sections E at paragraphs 19 to 39 which sets out the misrepresentations said to have been made and in section F which pleads why the misrepresentations are said to be false. The misrepresentations are summarised in paragraph 40 of the draft as follows:-

> *"40 Each of the (1) no need for or time to obtain advice representations, (2) Gaurang induced destitution representation.* (3) filial obligation representation. (4) Kenyan Government fiscal pressure representation, (5) urgency representation. (6) the Patel threat to health representation and implied Trust Value representation was false and made by the maker of the same (as particularised above) knowing the same to be untrue or being recklessly indifferent as to whether the same was true or false."

71 All the representations identified apart from the Implied Trust Value representation are alleged to have been made by Mr Patel and/or Vimal. These representations were pleaded in the original order of justice as the basis to set aside the disclaimers and indemnity (see the particulars under section 5.2). The reliance on these representations to set aside the disclaimers and the deed of indemnity is maintained in the draft (see section H).

72 In relation to the Implied Trust Value representation, this is pleaded at paragraph 34 of the draft order of justice and is an allegation made against the defendant. It is a new allegation based on the fact that the value of the main asset (Cosmos) was not provided to the plaintiffs until 8 th September 2021 as pleaded at paragraph 35. No objection was taken by the defendant to this allegation being made against it on the basis of misrepresentation. The draft claims damages for such misrepresentation at paragraph 63.1.

73 In relation to the amendments concerning Mr Patel and Vimal, Advocate Evans did not object to these amendments save that they could not be relied upon to allege known untruthfulness or any dishonest or fraudulent intent. In relation to the allegation that Mr Patel and Vimal knew that the statements they were making were untrue, I accept that this was only expressly alleged for the first time when the application to amend was made. However it is implicit in the original order of justice where the plaintiffs sought to set aside the disclaimers and indemnity on the basis of mistake, undue influence and duress that the statements made were untrue. These part of the pleaded case therefore meets the required threshold. I deal later with the question of the claims in *dol*, dishonest assistance and conspiracy. Accordingly, subject to my observations below in respect of what damages may be claimed, the amendments to the claims in misrepresentation are otherwise allowed. I will deal with what amendments are permitted in the conclusion of this judgment because,

while the pleading is an improvement on the draft supplied for the July judgment, there are still overlaps between the different allegations the plaintiffs appear to be making which I need to address.

74 There are certain parts of the pleading which purport to relate to the claims in misrepresentation which are not permissible for reasons addressed later in this judgment. These are identified below.

Mistake

75 These claims are pleaded at paragraph 44. By paragraph 44.1 the sections relating on misrepresentation are repeated to contend that the plaintiffs operated under a mistake when they signed the disclaimers and indemnity. The pleading also seeks to set aside the disclaimers and indemnity on the basis of mistake.

76 In relation to the issue of whether Mr Patel and Vimal are necessary parties to claims in mistake, the issue can be summarised in this way. Where party A enters into an agreement with party B on the basis of a mistake due to misrepresentations by party C, is party C a necessary or proper party to such allegations?

77 The power to join parties is contained in Rule 6/36 of the Royal Court Rules 2004, as amended. In my judgment the presence of Mr Patel and Vimal as parties is necessary to ensure that all matters in dispute in the cause or matter may be effectually determined (Rule 6.36 (b)(i)) or alternatively to resolve a question relating to any relief of remedy claimed namely whether or not the disclaimers and indemnity should be set aside on the grounds of mistake (Rule 6.36 (b)(ii)). In this case what is clear that what is required is one investigation (see the discussion in *Monteagle International Limited & Anor v Grocery Market Research Limited* [2022] JRC 216 at paragraphs 57 to 59). The actions of Mr Patel and Vimal are arguably closely bound up with the setting aside of the disclaimers and indemnity and there is a sufficient common thread between the application to set aside and the facts relied upon to justify them being joined as parties as if they were within this jurisdiction. I accept this is a different analysis from the July judgment but I have concluded in light of the draft put forward by the plaintiffs that Mr Patel and Vimal should be joined as parties to the claims made in mistake because the grounds relied upon to plead mistake to a significant degree flow from misrepresentations Mr Patel and Vimal are said to have made.

78 For the sake of completeness, once it is appropriate to join as them as parties on the assumption that they are within the jurisdiction, then the test for service out of the jurisdiction summarised at paragraph 37 of *Monteagle* is also met, a point which was not disputed by the parties.

79 . However, in relation to the claims in mistake, objection is taken to paragraph 44.3.3 which

provides that “the value of their respective interests in the trusts and therefore the pecuniary sum which they would lose should they sign the disclaimers and indemnity”. I will deal later in this judgment with other similar allegations found in the draft but in short, this pleading is inconsistent with the conclusions reached in the April judgment where the defendant sought an indemnity against the interests of the third parties on the basis of Article 46 of the Trust (Jersey) Law 1984. I rejected such a claim because of the limited nature of the interest a discretionary beneficiary has in a trust for the reasons set out at paragraphs 63 to 78 of that decision. The same conclusion applies to any assertion that the plaintiffs have an interest in the trusts beyond that of being discretionary beneficiaries.

80 . In addition, while the draft order of justice seeks to claim damages for mistake and undue influence, the basis upon which the plaintiffs are entitled to claim damages, this is not pleaded notwithstanding the invitation to do so at paragraph 108 of the July judgment. Having given the plaintiffs the opportunity to do so, which opportunity has not been taken up, then the claim for damages based on mistake should not be allowed to be pleaded. It appears that Advocate Sinel conceded as much. To the extent that he did, he was right to do so.

Undue influence/duress

81 For the same reasons that Mr Patel and Vimal are proper parties to a claim in mistake, they are also proper parties to a claim to set aside the deeds of indemnity and disclaimers on the basis of undue influence and duress. This conclusion is subject to certain observations on the nature of the claims that can be made in undue influence.

82 Similarly, for the same reasons the claims for damages based on undue influence and duress are not allowed because again the plaintiffs have not taken up the invitations contained at paragraphs 113 and 115 of the July judgment to plead why damages can be claimed as a consequence of findings of undue influence and duress.

83 The one qualification to the above conclusion in relation to the claim in undue influence concerns the pleading that undue influence can be presumed. I accept that the plaintiffs can allege actual undue influence on the basis of the relationship between the plaintiffs, Mr Patel and Vimal as pleaded at paragraph 45.3. However, given that there is no fiduciary relationship between the plaintiffs and Mr Patel and Vimal, a case of presumed undue influence does not arise. Rather actual undue influence has to be pleaded, that any such influence was exercised and was also operative (see *Ballard v Lumb* 1968 JLR 923 at page 936). The amendment of the final sentence at paragraph 45.2 is not therefore permitted. For the same reasons, *“further or in the alternative”* at the start of paragraph 45.3 and the words *“presumed or”* in paragraph 45.4 should also be removed from the final pleading.

84 In relation to the claim in duress, because it is based on acts of misrepresentation which

are said to have been known to Mr Patel and Vimal I am satisfied that an arguable case has been pleaded to meet the requirements at 114 of the July judgment.

Dol

85 In relation to the claims in *dol*, the plaintiffs now rely on allegations that the misrepresentations alleged to be made by Mr Patel and Vimal were known by them to be untrue. The plaintiffs therefore argue that the claims amount to fraudulent misrepresentation. I accept this claim is arguable by reference to the observations of Sir Philip Bailhache, Bailiff in *Steelux Holdings Limited v Edmonstone* (née Hall) [2005] JLR 152 at paragraph 10 where he stated:-

> ***"10 Fraudulent conduct, including the making of a fraudulent misrepresentation, can be a moyen de nullité, or a cause of the nullity of an agreement.*** The underlying principle of fraud, which we may say embraces both dol and fraude, is bad faith…"

86 The same case is clear that damages can be claimed for *dol*.

87 I wish however to stress, that the claim in *dol* is strictly limited to the claims based on misrepresentation. It does not allow the plaintiffs to make allegations of fraud generally by effectively treating *dol* as a replacement for the word fraud. I rejected the claims in fraud in the July judgment, which judgment has not been appealed. The conclusions in that judgment refusing to allow the plaintiffs to plead claims in fraud still stand. The plaintiffs are therefore only allowed to plead *dol*, because they are entitled to bring claims based on misrepresentation and are accordingly also entitled to assert that those same allegations amount to *dol*.

88 The claim in *dol* is however limited to Mr Patel and Vimal. This is because in the case of Gaurang, there are no allegations of misrepresentations being made by him. If claims in misrepresentation cannot be made against him, claims in *dol* cannot be made. I will deal shortly with the question of the claim against Gaurang on the basis of *dol par reticence*.

89 In relation to the claims in *dol* against the defendant, these are on the basis of the no need for or time to obtain advice representations and the Implied Value Representation, pleaded at paragraph 34 of the draft. However, the allegations against the defendant do not necessarily amount to fraudulent misrepresentation. If misrepresentations were made as alleged, the relevant test to make allegations of deliberate dishonesty has not been met. This test was considered by me in *Trico v Buckingham* [2019] JRC 095 at paragraphs 49 to 51 as follows:-

> ***"49. In relation to the allegation that remains, namely that the defendant was deceived in a manner unknown to him because he disputes that he did not sign the Side Letter, this is still not a basis to allege fraud. At***

paragraph 62 of Brakspear Commissioner Clyde-Smith referred to the case of *JSC Bank of Moscow v Kekhman* [2015] EWHC 3073 (Comm) ***and cited the following:-***

"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."

50. In my judgment, no factors were produced to me in respect of the defendant's case to tilt the balance to justify any inference of dishonesty. For the purposes of this part of my judgment (as I deal with the summary judgment application later) assuming there is a factual dispute between the plaintiff and the defendant as to whether or not the Side Letter was executed on 13th February, 2014, as pleaded by the plaintiff, in my judgment this dispute is equally explainable by a difference of recollection. 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."

90 In relation to the no need for or time to obtain advice representations, (if made) these are as explainable as having been made carelessly or negligently rather than dishonestly. Similarly in relation to what the defendant said about the value of Cosmos, what may have been said by the defendant is also explainable either on the basis that the defendant was

provided with untrue statements by others or that the defendant was careless or negligent in relation to what it had been told and what it may have said. This position contrasts with the allegations against Mr Patel and Vimal where the allegations clearly allows the plaintiffs to assert that the misrepresentations made were known to be untrue. The representations said to have been made by the defendant do not therefore take the plaintiffs' case into the arena of fraud or dol. This conclusion therefore requires paragraph 40 of the draft to be amended to plead that in relation to the Implied Trust Value representation to add the words *"or careless or negligent"* after " *indifferent*".

Dol par Reticence

91 In relation to the legal effect of this doctrine, its scope has yet to be determined by the Royal Court as is clear from the observations of Sir Philip Bailhache, Bailiff at paragraph 13 in *Steelux* compared with the observations of Sir Michael Birt, Bailiff at paragraph 22 of *Toothill v HSBC* [2008] JLR 77. Only the Royal Court can resolve the scope of this doctrine at a trial.

92 However, the doctrine does not apply to Gaurang.

93 This is because there was no silence on the part of Gaurang. Before the disclaimers and indemnity was signed, as set out paragraph 43 above, Gaurang informed the first plaintiff that Vimal was getting the company and the house as well 80% of their father's assets and encouraged her to find out the truth before jumping to conclusions. This was in response to the first plaintiff saying that Vimal had called her and explained the situation.

94 This exchange means that the first plaintiff cannot assert silence on the part of Gaurang. He put her on notice in broad terms of the nature of the deal before the plaintiffs signed any documents and warned the first plaintiff to find out the truth before jumping to conclusions. The fact that Gaurang did not reveal the full value of the assets of Cosmos or was party to the family agreement does not save this part of the pleading. There was no silence on his part. In addition, the first plaintiff's second affidavit does not dispute this exchange. Indeed, at paragraph 26 there appears to be an admission that it took place where the first plaintiff deposes "Gaurang also knew that I was being kept in the dark and despite talking to me and emailing me he failed to inform me of the relevant facts." The first plaintiff therefore admits that Gaurang was talking to her. The only emails produced are those I have referred to. In that regard it should not be forgotten that discovery has taken place including from the third parties. Had any other emails been produced showing that Gaurang was either misleading the plaintiffs or indicating that he was keeping silent deliberately then these could have been pleaded. The fact that no such emails have been identified either in the draft or in the second affidavit, further supports the conclusion that silence by Gaurang cannot be pleaded given his email on 25 th December 2016.

95 The other part of the draft used to assert *dol par reticence* concerns the relationship

between the Gaurang and the protector. Paragraph 56 states that Gaurang both in person and acting through the protector (Mr Wilson) deliberately withheld knowledge from each of the plaintiffs. I have already addressed the position of Gaurang and what he said on 25 th December 2015. In relation to Mr Wilson, what is relied upon is that he was an old school friend of Gaurang. However, all that is pleaded in paragraph 12 of the draft was Mr Wilson expressing concerns about the risk of him facing legal proceedings and he wished to have his own representation and that he resigned as protector although he executed the family agreement. While those may be criticisms that be made of Mr Wilson, Mr Wilson is not a party to these proceedings and there was no application to join him to do so on the basis of any allegation of breaches of duty as protector said to be owed to the plaintiffs. Furthermore, what is pleaded is not capable of amounting to *dol par reticence* because the pleading simply refers to Mr Wilson expressing concerns. This part of the allegations in the draft are not therefore permitted.

96 In relation to a claim in *dol par reticence* against the Mr Patel and Vimal, this amendment is also refused as the primary claim against them is on the basis of alleged untrue statements that they made. Assertions that they owed a duty to speak up and failed to do so are therefore inconsistent with the case that the plaintiffs have always advanced and are not arguable. The claim is also not pleaded as an alternative, if it is found that untrue statements were not made. Such a claim would also have to explain why Mr Patel and or Vimal should have explained the true position but did not do so. The same analysis applies to a claim in *dol par reticence* against the defendant. Such a claim is also inconsistent with the claims for breach of trust and for misrepresentation based on the misleading statements the defendant is said to have made.

Conspiracy/dishonest assistance

97 In relation to the allegations of conspiracy the heart of these is pleaded at paragraph Section G where it is pleaded that each of Mr Patel, Vimal and Gaurang *“conspired to cause financial harm to the plaintiffs”*.

98 The conspiracy is put on the basis of two different grounds namely the dominant purpose of concluding the family agreement was to cause loss and damage to the plaintiffs. Alternatively, an unlawful means conspiracy is pleaded on the basis of dishonest assistance to the defendant's breaches of trust. Both allegations lead to a claim in damages.

99 However, there are other allegations in the draft which also contend that the defendant was part of the conspiracy. Paragraph 14 of the draft contains the following:-

> *“This amounted to an agreement between the First Defendant, Mr Patel, Vimal, and Gaurang to conceal from the Plaintiffs the full extent of their rights and thereby ensure that they could not exercise those rights and/or Mr Patel thereby actively sought to conceal from the Plaintiffs the full extent of their rights and the*

information necessary for them to assert those rights."

100 At paragraph 46.2.5 the pleading asserts that the "plaintiffs were as a matter of joint policy between each of and all of Gaurang, Vimal. Mr Patel and the first defendant being excluded from knowledge as to what was being done and the value."

101 In relation to what amounts to a conspiracy it was common ground that this was set out in *Kuwait Oil Tanker Co SAK v Al-Bader (No3)* [2000] WL 571379 at paragraph 108 as follows:-

> ***"108. We shall treat them as different torts, although, as it seems to us, they are better regarded as species of the same tort. It matters not. For present purposes we would define them as follows:-***
>
> ***A conspiracy to injure by lawful means is actionable where the claimant proves that he has suffered loss or damage as a result of action taken pursuant to a combination or agreement between the defendant and another person or persons to injure him, where the predominant purpose of the defendant is to injure the claimant.*** A conspiracy to injure by unlawful means is actionable where the claimant proves that he has suffered loss or damage as a result of unlawful action taken pursuant to a combination or agreement between the defendant and another person or persons to injure him by unlawful means, whether or not it is the predominant purpose of the defendant to do so."

102 I also refer to paragraph 111 as follows:-

> ***"111. A further feature of the tort of conspiracy, which is also found in criminal conspiracies, is that, as the judge pointed out at page 124, it is not necessary to show that there is anything in the nature of an express agreement, whether formal or informal. It is sufficient if two or more persons combine with a common intention, or, in other words, that they deliberately combine, albeit tacitly, to achieve a common end. Although civil and criminal conspiracies have important differences, we agree with the judge that the following passage from the judgment of the Court of Appeal Criminal Division delivered by O'Connor LJ in*** *R v Siracusa* (1990) 90 Cr. App. R. 340 ***at 349 is of assistance in this context:***
>
> ***Secondly, the origins of all conspiracies are concealed, and it is usually quite impossible to establish when or where the initial agreement was made or when or where other conspirators were recruited.*** The very existence of the agreement can only be inferred from overt acts. Participation in a conspiracy is infinitely variable: it can be active or passive. If the majority shareholder and director of a company consents to the company being used for drug smuggling carried out in the company's name by a fellow director and minority shareholder, he is guilty of conspiracy. Consent, that is agreement or

adherence to the agreement, can be inferred if it is proved that he knew what was going on and the intention to participate in the furtherance of the criminal purpose is also established by his failure to stop the unlawful activity."

103 It is right to record in relation to this allegation that in the July judgment, Advocate Sinel conceded that he could not plead conspiracy. When challenged as to what was now different, he contended that he was now much more familiar with the matter because previously the case had been handled by Advocate Leeuwenburg his former Consultant. While Advocate Sinel might now be much more familiar to plead conspiracy if he was not ready to have presented the application in July he should not have done so. This may be relevant to costs.

104 In relation to the lawful means conspiracy, this is inconsistent with the pleading at paragraph 9 that Mr Patel, Gaurang and Vimal have been engaged since at least mid-2015 " *in a process aimed at Gaurang and his family exiting Cosmos Limited*". The same allegations are repeated in different ways in paragraphs and 10 and 26 of the draft. In addition, in her first affidavit at paragraph 16, the first plaintiff referred to the purpose of a family meeting on 12 th December 2016 as being "to agree terms for Gaurang's departure from Cosmos, his and his family's removal from the beneficial class of each of the trusts save for Corfield, and for his and his family's compensation for the same." I am not therefore satisfied that the plaintiffs have shown a pleadable case to allege that the dominant purpose of giving effect to the family agreement was to exclude the plaintiffs from benefit. I appreciate that their exclusion was the consequence of the disclaimers and the indemnity but in my view that was ancillary to the main driver for the family agreement which was the dispute involving Gaurang which the plaintiffs appear to recognise.

105 In relation to unlawful means conspiracy, the pleading at paragraph 42.2 asserts that the unlawful means was dishonest assistance.

106 As to what amounts to the dishonest assistance, this is set out in *MacFirbhisigh v CI Trustees and Executors Limited* [2014] (1) JLR 244 at paragraph 63 as follows:-

> ***"63 As to what amounts to dishonest assistance, the classic definition is to be found in the speech of Lord Nicholls in*** *Royal Brunei Airlines Sdn.* Bhd. v. Tan (8). ***The essential elements of the definition were summarized succinctly by Proudman, J. in the case of*** *Weavering Capital (UK) Ltd. v. ULF Magnus Michael Peterson (11)*, ***where she stated as follows*** ([2012] EWHC 1480 (Ch), ***at para. 200):***
>
> ***"The classic definition of dishonest assistance is contained in the speech of Lord Nicholls in*** *Royal Brunei Airlines v. Tan* [1995] A.C. 378 ***at 392.*** There are a number of requirements to make out such a case. First, a trust or, as here, other fiduciary relationship. Secondly, a breach of the fiduciary duty on the part of the fiduciary, in this case Mr. Peterson. Thirdly, a causal link between the breach and a loss to the beneficiaries (or between the breach and a gain to the

defendant, as the case may be). Fourthly, assistance by the defendant in the breach and fifthly a dishonest state of mind on the part of the defendant.""

107 What is relied upon to plead dishonest assistance, is said to be the misrepresentations. However, as no misrepresentations are alleged to have been made by Gaurang and as a claim in *dol par reticence* cannot be pleaded as set out above, a claim in dishonest assistance cannot be made against him because he did not assist in any breaches of trust.

108 To the extent that the plaintiffs suggest that execution of the family agreement amounts to assistance in a breach of trust, it was the trustee's decision whether or not to give effect to the family agreement and whether or not to seek directions. There is no assertion that Gaurang had any input in relation to those decisions or that he took steps to influence how the trustee chose to exercise its discretion. If he did this would have been identifiable through the discovery provided. No such documents have been identified by the plaintiffs for this application. There was therefore no assistance by Gaurang and so dishonest assistance and therefore conspiracy cannot be pleaded against him.

109 In relation to Mr Patel and Vimal, I accept that the arguable allegations of fraudulent misrepresentation, which extends to *dol* for the reasons set out above, are also capable of amounting to dishonest assistance. The assistance is that by the misrepresentations and/or *dol* Mr Patel and Vimal procured the execution of the disclaimers and indemnity by the plaintiffs. It is a matter for the Jurats whether Mr Patel and /or Vimal made these representations, and, if they were made, whether they were made deliberately and whether they were made dishonestly.

110 I also accept that a conspiracy can be inferred having regard to paragraph 111 of *Kuwait* set out above. It is not therefore necessary for the plaintiffs to have to prove or particularise an agreement. Rather they are entitled to invite the court to draw a conclusion as a matter of inference that Mr Patel and Vimal were acting in concert i.e. they were acting with a common intention or deliberately combining tactically to achieve a common end. To invite the court to draw such an inference does not require any new material facts to be pleaded.

111 This conclusion is subject to the plaintiffs pleading the county or countries where the misrepresentations were made and that the misrepresentations amount to torts in those countries. This is to address the technical point raised by Advocate Evans referred to at paragraph 27 above.

112 In relation to the assertion at paragraph 14 of the draft, this assertion does not apply to Gaurang because he was not party to the correspondence. It is therefore not capable of amounting to him being involved in any conspiracy. There are also no particulars as to why the email of 8 th September 2016 amounts to an agreement notwithstanding discovery having been provided and notwithstanding this is the second application by the plaintiffs to amend their order of justice. Furthermore, conspiracy is an allegation of dishonesty. Again,

the test in *Trico* to plead dishonesty is not met by what is pleaded at paragraph 14. The decision to exclude the plaintiffs from the family agreement and instead to rely on disclaimers and indemnity is one open to a trustee to make. It may or may not be a breach of trust but the possibility of a breach of trust claim does not tilt the balance to allow the plaintiffs to allege conspiracy. The words *"this amounted to"* down to *"and/or"* in the final sentence of paragraph 14 should therefore also be struck out.

113 In relation to paragraph 46.2.5 why there was a joint policy is not particularised again notwithstanding discovery having taken place. There are no particulars about when this policy was concluded, how it was concluded and what documents are relied upon to suggest that such a policy existed. In addition the conclusions reached at paragraph 43 and paragraphs 93 and 94 above mean that the plaintiffs cannot assert that there was a joint policy to exclude the plaintiffs as to what was being done and the value of the trust assets. The application to add the words "as a matter of joint policy between each of and all of Gaurang, Vimal and Mr Patel and the first defendant" is therefore refused.

Knowing receipt

114 As to what is meant by knowing receipt this is pleaded in *Bagus Investments v Kastening* [2010] JLR 355 at paragraphs 49 to 55 as follows:-

> ***"49 Advocate James argues that there is not a sufficiently pleaded case of knowing receipt.*** In order to consider the validity of this submission, I must remind myself of the elements of a claim for knowing receipt. I agree with Advocate James that a convenient summary of the position is to be found in two cases. In *Charter plc v. City Index Ltd.* ***(2), Carnwarth, L.J. approved*** ([2008] Ch. 313, ***at para. 7) the following passage of the judgment of Sir Andrew Morritt, C. sitting in first instance in that case*** ([2007] 1 W.L.R. 26, ***at para. 9): "The relevant cause of action is now commonly called 'knowing receipt.'*** The essential elements of such a cause of action were elaborated by Hoffmann, L.J. in *El Ajou v. Dollar Land Holdings plc* [1994] 2 All E.R. 685, 700 ***in these terms: 'For this purpose the plaintiff must show, first, a disposal of his assets in breach of fiduciary duty; secondly, the beneficial receipt by the defendant of assets which are traceable as representing the assets of the plaintiff***; 2010 JLR 374 ***and thirdly, knowledge on the part of the defendant that the assets he received are traceable to a breach of fiduciary duty.***""
>
> ***50 Having referred to the decision of the Court of Appeal in*** *Bank of Credit & Comm.* Intl. (Overseas) Ltd. v. Akindele ***(I) (which established that "unconscionability" was the test in relation to the degree of knowledge required), Carnwath, L.J. summarized the position as follows*** ([2008] Ch. 313, ***at para. 8): "Accordingly, liability for "knowing receipt' depends on the defendant having sufficient knowledge of the circumstances of the payment to make it 'unconscionable' for him to retain***

the benefit or pay it away for his own purposes."

51 The headnote to the report of Akindele in the Law Reports records the decision of the Court of Appeal as follows ([2001] Ch. at 437): ***"That, although a knowing recipient would often be found to have acted dishonestly, dishonesty was not a prerequisite to liability under the knowing receipt head; that in order to be liable for knowing receipt the recipient had to have knowledge that the assets received were traceable to a breach of trust or of fiduciary duty, the single test for which was whether the recipient's state of knowledge was such as to make it unconscionable for him to retain the benefit of the receipt …"***

52 A dispute arose between Advocate James and Advocate Blakeley as to whether the "payment" referred to by Carnwath, L.J. in the passage referred to at para. 50 above is, in the context of this case, the original payment by Bellows from the plaintiff's account to the Midland account (as contended by Advocate James), or whether it is the payment by the defendant of the cheque intended for Beaufort into the account of Lesara Anstalt (as contended by Advocate Blakeley) .

53 In my judgment, the knowledge which a defendant must have in order to be liable for knowing receipt is knowledge of the breach of trust or fiduciary duty which underlies and gives rise to the claim. Thus, in the passage from the judgment of Hoffmann, L.J. in *El Ajou v. Dollar Land Holdings plc (4)*, ***he refers first to the need for there to be a disposal of the plaintiff's assets in breach of fiduciary duty and later for there to be knowledge on the part of the defendant that the assets he received are traceable to a breach of fiduciary duty.*** In context, this must be a reference to the same breach of fiduciary duty, i.e. the breach of fiduciary duty as a result of which the assets were wrongly disposed of. Similarly, in Akindele (1) the decision refers to knowledge that the assets received were traceable to a breach of trust or a fiduciary duty. [Emphasis Added]

54 In this case, the underlying breach of fiduciary duty relied upon was that committed by Bellows when he wrongly transferred the plaintiff's 2010 JLR 375 ***money from its own bank account to the Midland account.*** Without that breach of fiduciary duty, the plaintiff would have no claim. It is therefore that breach of fiduciary duty of which the defendant must have such knowledge as to make it unconscionable for him to retain the traceable moneys he has received .

55 I therefore consider that a proper pleading of a claim for knowing receipt must set out all facts and matters relied upon in support of the assertion that the knowledge of the defendant of this original breach of fiduciary duty is such as to render it unconscionable for him to retain the moneys which ultimately found their way to Lesara Anstalt."

115 The same approach was taken in *Federal Republic of Brazil & Anor v Durant*

International Corporation & Anor [2012] (2) JLR 356 at paragraph 179 as follows:-

> ***"179 In order to succeed on a claim of knowing receipt in Jersey law it is said, substantially on the basis of English case law, to be necessary for a plaintiff to show, first, a disposal of his assets in breach of trust or fiduciary duty; secondly, the beneficial receipt by the defendant of assets which are traceable as representing the assets of the plaintiff; and thirdly, knowledge on the part of the defendant of the breach of trust or fiduciary duty such as to render it unconscionable for the recipient to retain the benefit of what he has received*** ((*Bagus Invs.* Ltd. v. Kastening (4) 2010 JLR 355, ***at paras, 49–56)).*** Such a claim is a personal claim and admits of no change-of-position defence (ibid. at para. 45(v))-not that any such change is alleged in the present case. 180 By contrast, in order to succeed on a claim for restitution based on unjust enrichment, guilty knowledge on the part of the recipient is, unlike the position in English law, not a necessary ingredient: *In re Esteem Settlement (12)*, ***in which Birt, then Deputy Bailiff, said*** (2002 JLR 53, ***at para. 157):***
>
> ***"We hold that, under the law of Jersey, where property in respect of which a person (a beneficiary) has an equitable proprietary interest (because the property has been taken from the beneficiary by a person who is in a fiduciary position towards that beneficiary) is received by an innocent volunteer, the beneficiary has a personal claim in restitution against the recipient even where the recipient has not been guilty of any 'fault' in receiving the property.*** In other words, the state of mind required for a 'knowing receipt' claim under English law is not required in Jersey. It is a strict restitutionary liability. However, the claim is based upon unjust enrichment and, accordingly, the beneficiary can only succeed to the extent that the recipient remains unjustly enriched. A defence of change of position is therefore available. We emphasize that the liability is a personal one; the recipient is not a constructive trustee for the beneficiary.""

116 The difficulty with the plaintiffs' claim in knowing receipt is that what was transferred out of the trusts to Vimal and/or Gaurang were assets of the trusts not assets of the plaintiffs. The reasoning in paragraph 79 above therefore also applies to this part of the draft. I also add that, while in my previous judgment I referred to a possible claim in knowing receipt, I did not have the benefit of the authorities now put before me. A claim in knowing receipt is therefore a claim that the defendant might bring as an alternative to its claims in unjust enrichment as allowed by the April judgment at paragraphs 90 to 99. This claim is therefore refused.

Unjust enrichment

117 In relation to this claim, this fails for the same reasons that the claim in knowing receipt is not permitted. In the matter of the *Esteem Settlement* referred to at paragraph 92 of the April

judgment what is required for such a claim is for a plaintiff to have an *"equitable proprietary interest"*. A discretionary beneficiary does not have such an interest in relation to those receiving distributions to allege that the latter have been enriched at the expense of a trust where a trustee has chosen to exercise a discretion in favour of another beneficiary. Such a position would allow every exercise of discretion to be challenged by a dissatisfied beneficiary. Such a person's remedy is a claim for breach of trust against the trustee and not a claim against another beneficiary, absent something more, who received a distribution of a trust asset. I wish to add in that regard that if a trustee for some reason was unable or unwilling to bring an unjust enrichment claim to restore assets to a trust, then that might be an appropriate case for a derivative action to be brought by another beneficiary in the name of the trustee against those who had received distributions. However, that does not arise in this case because the defendant has already pleaded that it wishes to bring such a claim and subject to the provision of appropriate particulars, I have allowed the defendant to do so. For all these reasons the application to plead a claim on the basis of unjust enrichment is therefore refused.

Prescription

118 In relation to prescription it was asserted by the defendant and the third parties that the claims for conspiracy and dishonest assistance were prescribed because they were capable of being made within three years of the misrepresentations which I have said are capable of amounting to a claim in dishonest assistance. I accept that a case pleading an express agreement to injure the plaintiffs would be pleading new material facts and therefore such a case would be prescribed applying *Bagus*. However, as set out in paragraph 110 above the existence of a conspiracy between Mr Patel and Vimal can be inferred. It does not therefore require new material facts to be pleaded. Accordingly, I am satisfied that the allegations of dishonest assistance and therefore conspiracy against Mr Patel and Vimal are not prescribed.

Letter of Assurance

119 The pleading in respect of the letter of assurance can be approved subject to removal of the words *"Further or"* at the beginning of paragraph 57 because it was accepted by Advocate Evans that the claim in Section L commencing with paragraph 57 could be brought as an alternative claim albeit it was not a further claim.

120 I wish to add that I was satisfied that it remains proper to grant permission to serve Mr Patel and Vimal out of the jurisdiction as set out in the July judgment at paragraphs 132 and 133. This was a position that was clear at the hearing itself leading to the July judgment. The fact that Vimal on his own behalf and as executor of Mr Patel's estate subsequent to the July judgment has started proceedings in England in relation to matters that appears to be covered by the Letter of Assurance is not a basis to cede jurisdiction to the English Court. The issues raised in those proceedings overlap with issues already before me and which Advocate Evans had not challenged should not be heard before me.

The English proceedings therefore appear to be tactical in nature and, while it is a matter for the English Court, I am concerned they are an abuse of process designed to open up an overlapping dispute in two jurisdictions. The issues raised by this case insofar as permitted by this decision require resolution in a single court. I am satisfied that court is Jersey as the court first seized of the overall dispute between the plaintiffs and Mr Patel and Vimal (and the defendant as trustee).

Loss and damage

121 The claim for loss and damage is set out paragraph 63 of the draft as follows:-

> *"63 The best particulars the Plaintiffs can presently provide of their loss and damage are as follows:*
>
> *63.1 But for the breaches of Trust, mistake, deceitful misrepresentations.* conspiracy and the execution of the Disclaimers and Indemnity procured thereby (as hereinabove complained about), each of the Plaintiffs would have reasonably been entitled to expect the First Defendant to exercise its discretion equitably, equally and fairly as between the beneficiaries of the Trusts so as to deliver at least parity of treatment.
>
> *63.2 Had the First Defendant performed its duty in the manner described above, alternatively had the First Defendant did not commit the breaches of Trust hereinabove complained about each of the Plaintiffs would have succeeded to the benefits referred to in paragraphs 2.1.4.2.* 2.2.5 and 2.3.5.
>
> *63.3 In the premises, the Plaintiffs have lost very significant sums*.
>
> *63.4 Alternatively, there was a material and not a fanciful chance of that the Plaintiffs would benefit from the Trusts by payments out as particularised above; they will accordingly therefore claim in the alternative damages for those lost chances and contend (subject to further quantification/ assessment by the Court) that no material discount falls to be made against the amounts contended for above."*

122 The first difficulty with this claim is in paragraph 63.1 where the plaintiffs state that they would have been entitled to expect the first defendant to exercise its discretion *"equally"*. This pleading is ambiguous because other parts of the draft appear to refer to the plaintiffs having an entitlement to an equal share of the trust assets which is incorrect in law for the reasons set out paragraph 79 above. The word *"equally"* in paragraph 63 should therefore be removed.

123 The pleading at paragraph 63.2 also cannot stand. The benefits referred to paragraph 63.2 are the total value of the trust assets. The plaintiffs cannot assert in law that they are entitled to the whole of the trust assets and such a claim is bound to fail. For the reasons set

out in relation to paragraph 63.1 the plaintiffs cannot assert a legal right to a one third share of the trust assets. Paragraph 63.3 as a consequence also falls away.

124 What can however be pleaded are the averments at paragraph 63.4 namely a loss of a chance claim either amounting to equitable compensation or damages.

125 In relation to Advocate Speck's objection that the plaintiff should set out what the defendant should have done and why that was done was not good enough, in my judgment there is some force to this request, but it goes too far. What I consider the plaintiffs should plead within paragraph 63 is what the defendant failed to consider. This is partly touched upon in paragraph 49.1.10. However, I consider the plaintiffs are entitled to make the following complaints:-

(i) That the defendant failed to consider as a matter of discretion that the trust assets should be divided equally between each of the three branches of Mr Patel's family i.e. his three children; the failure to consider whether an equal division should have taken place is different from the plaintiffs possessing a legal right to an equal share of trust assets. The former can be alleged; the latter cannot for the reasons set out above.

(ii) In the alternative the defendant as trustee failed to consider whether there should be equal treatment between Gaurang and the first plaintiff;

(iii) In the further alternative the defendant as trustee failed to consider as a matter of discretion whether it was right to conclude that the plaintiffs should not receive any benefit from the trust assets;

(iv) The defendant as trustee further failed to consider whether the first plaintiff should receive any benefit and whether it was a proper exercise of discretion for trust assets to be split between Vimal on the one hand and Gaurang on the other only; and

(v) The trustee further failed to ensure that either Mr Patel or Vimal gave effect to the matters set out in the Letter of Assurance or to exercise their discretion to provide the benefits referred to in the Letter of Assurance out of trust assets.

126 All these matters are capable of forming a loss of a chance claim and it is sufficiently clear for the defendant as trustee to be able to plead an answer to the same and to file evidence setting out why they exercised their discretion in the way they did. Assessment of the different ways a loss of a chance claim may be put then becomes a matter for the Jurats at trial once they have heard and reviewed all relevant evidence.

Miscellaneous amendments

127 In relation to the miscellaneous amendments, I have allowed these unless specific objection was taken to the same. The following amendments have therefore been refused:-

(i) The reference to equal treatment in paragraph 2.1.4.2;

(ii) The reference to the value of the discretionary interest of the first plaintiff being very significant in paragraphs 2.2.5 and 2.3.5;

(iii) The reference to legal and moral obligations in paragraph 11;

(iv) The final sentence at paragraph 25 because this is inconsistent with the conclusions at paragraphs 93 and 94 above;

(v) The reference to prospective value in paragraph 49.1.10; and

(vi) As a consequence of this decision paragraph 5 of the prayer seeking damages for unjust enrichment is also struck out.

Conclusion

128 For the reasons set out in this judgment, the following amendments are allowed:-

(i) A claim against Mr Patel or Vimal that the disclaimers and indemnity were procured by misrepresentation or *dol*;

(ii) that Mr Patel and Vimal are added as defendants in relation to the allegations of misrepresentation, *dol*, duress, undue influence and mistake and the alternative claim in relation to the Letter of Assurance; and

(iii) A claim in conspiracy between Mr Patel and Vimal based on an unlawful means conspiracy relying on assertions of dishonest assistance if the trial court concludes that it could be inferred that Mr Patel and Vimal were acting in concert.

129 The following claims are refused:-

(i) All claims against Gaurang;

(ii) The claim of *dol* against the defendant;

(iii) The claims in *dol par reticence*

(iv) The claims of knowing receipt; and

(v) The claims of unjust enrichment.

130 The amendments set out in paragraph 6 above are allowed unless I have refused to allow them for the reasons set out in this judgment. A schedule is attached to this judgment setting out which parts of the draft order of justice are therefore refused.

Costs

131 In relation to costs, the plaintiffs agreed without argument to pay Gaurang's costs on the standard basis because he had clearly been the successful party in relation to the plaintiffs' application to amend and I made an order accordingly.

132 Advocate Chiddicks, who I am grateful for stepping in in the absence of Advocate Sinel on holiday, otherwise applied for his clients' costs against the first and sixth to twelfth third parties and as against the defendant on the basis that his client was the clear winner in relation to their application to amend. He also indicated that the other parties had brought the application upon themselves by virtue of not providing information until after proceedings had started which made the application to amend inevitable.

133 The conclusion I reached in relation to the defendant's costs was that the plaintiffs should pay 50% of the defendant's costs on the standard basis with the balance being in the cause. This conclusion followed an earlier indication I gave prior to the costs hearing which the defendant accepted. My reason for reaching this conclusion was that the points of concern raised by the defendant were allegations of *dol* and conspiracy made against the defendant or at least hinted at and a lack of particulars as to what losses the plaintiffs were claiming. The defendant had not otherwise opposed the amendments the plaintiffs were seeking.

134 In relation to concerns about dol and conspiracy, I agreed with Advocate Speck's submissions and therefore on those issues his client was the clear winner. In relation to the particulars of loss and damage the outcome was something of a draw because, while I had disallowed certain of the amendments, I also did not go as far as Advocate Speck invited me to do in relation to requiring the plaintiffs to particularise what it was they were seeking. This justified costs in the cause. I therefore apportioned the defendant's costs so that it recovered 50 % of the costs to reflect where it had been successful with the other 50% being in the cause. This apportionment was necessary to reflect the outcome of the arguments between the plaintiffs and the defendant.

135 As Advocate Speck had not changed my initial indication and Advocate Chiddicks had not persuaded me to make any different order, it was also right that Advocate Speck recovered the costs of attending for the argument on costs, without any deduction.

136 I was not persuaded by the argument that the defendant and the third parties had brought the application on themselves by virtue of a delay in providing material to the plaintiffs. This was because this was the second application to amend. The plaintiffs had received all relevant material prior to the first application to amend leading to the July judgment. The present application to amend was not therefore dependent upon any new material coming to light. Rather the present application was the plaintiffs taking up the invitation contained in

the July judgment to reformulate its case in a manner that addressed the concerns raised in the July judgment.

137 In relation to Advocate Davies' suggestion that I should order costs in the cause because this would not cause any prejudice due to the judgment not being determinative of the merits of those claims, the judgment was determinative of whether or not the plaintiffs should be allowed to amend. To order costs in the cause potentially therefore allowed a party, to the extent it was unsuccessful in resisting the application to amend to recover costs, even though that party's arguments did not succeed. That is not an outcome that is just and it confuses the merits of a claim with the merits of a contested procedural application. The latter should be determined independently of the ultimate outcome of a claim.

138 In this case, the plaintiffs were unsuccessful in relation to their applications to plead *dol par reticence*, knowing receipt, unjust enrichment and lawful means conspiracy. The claim in undue influence was also limited to actual rather than presumed undue influence. The plaintiffs could not as discretionary beneficiaries plead a claim for an equal share of trust assets and the plaintiffs' were not permitted to claim damages as a consequence of claims in mistake undue influence and duress.

139 In relation to Mr Patel and Vimal their resistance to claims in mistake, undue influence (subject to one qualification), duress, *dol*, misrepresentation, the letter of assurance, unlawful means conspiracy and dishonest assistance were unsuccessful. They should not recover their costs of their resistance to these parts of the application to amend.

140 Where does this leave matters. Standing back I concluded that no clear winner was readily apparent even if I could say that the plaintiffs had preserved the heart of their claims against Mr Patel and Vimal.

141 I have therefore reached the conclusion that 60% of the plaintiffs' costs should be in the cause, with the plaintiffs bearing the balance of their costs. If therefore the plaintiffs make out the allegations where they were allowed to amend, they will recover those costs of the amendment application. However, this order also prevents them recovering costs for applications where they were unsuccessful.

142 In relation to Mr Patel and Vimal, they should bear 60% of their own costs because of their unsuccessful resistance to the applications to amend, with the balance being in the cause.

143 I have drawn a distinction between the percentages that are costs in the cause because the plaintiffs have preserved the heart of their claims against Mr Patel and Vimal even though I disallowed significant parts of their application to amend.

144 Any other alternative would not lead to a just result. A costs order in favour of the plaintiffs even with a significant reduction to reflect where Mr Patel and Vimal were successful would lead to a very small percentage order in their favour and thus the plaintiffs bearing a large proportion of their cost themselves. By contrast, the order I have made allows them to recover much more costs reflective of the outcome if they prevail at trial. The same reasoning applies in reverse. to Mr Patel and Vimal for the costs were they were successful In addition a costs order in their favour would not reflect that the plaintiffs had preserved the heart of their claims against Mr Patel and Vimal.

145 The other alternative I considered was each party bearing their own costs in their entirety, but I considered that such an order would be too punitive to both parties and did not reflect the overall decision that I reached.

146 I appreciate that in reaching this conclusion I have made an apportionment between issues where the plaintiffs were successful and those where they were not successful. In relation to this application this approach was necessary notwithstanding the warning against making percentage-based orders contained in the *Fang & Ors v Attorney General & Ors* [2020] JCA 013. This is one of those cases, given the number of issues that had to be considered, where some form of apportionment of costs was required to reflect the conclusions reached.

Schedule of Amendments Refused

		Paragraph
1	" *And at least equal*" in the final sentence	2.1.4.2
2.	The remaining words starting with " *such that the value*"	2.2.5
3.	The final part starting with " *such that the value*"	2.3.5
4.	The words " *and/or on the instructions of Mr Patel*" down to " *profited therefrom*"	3.3
5.	The words " *despite each of them having both legal and moral obligations to do so*"	11
6.	The words " *all those involved*" should be replaced by *Mr Patel and Vimal*	11
7.	The words " *this amounted*" down to *"their rights and/or"*	14
8.	The word " *and*" should be inserted before " *Vimal*" and the words *"and Gaurang"* should be removed; the final sentence should also be removed	25
9.	The words " *or careless or negligent*" should be inserted after the word	40

9.	"indifferent" in the final line	40
10.	The heading should be replaced with the word " *conspiracy*"	Section G
11.	The entire sub-paragraph	42.1
12.	Now renumbered to 42.1 – the words " *and Gaurang*" should be struck out and the word " *and*" inserted before Vimal	42.2
13.	The entire sub-paragraph	43.3.3
14.	The entire sub-paragraph	43.4.12
15.	The final sentence	45.2
16.	The words " *further or in the alternative*" in the first line	45.3
17.	The words "presumed or"	45.4
18.	The entire sub-paragraph	45.5
19.	The words " *as a matter of joint policy between each of all of Gaurang, Vimal, Mr Patel and the first defendant*"	46.2.5
20.	The entire sub-paragraph	49.1.10
21.	The word *"Gaurang"* should be removed	51
22.	The word " *Gaurang*" should be removed	51.3
23.	The entire paragraphs	52 to 54
24.	The words " *first, second and fourth defendants*" should be replaced by " *Mr Patel and Vimal*" in line 1. The second sentence.	55
25.	The entire paragraph	56
26.	The words " *further or alternatively*" with the paragraph starting with " *insofar*"	57
27.	The entire sub-paragraphs	63.2 and 63.3
28.	The particulars referred to in paragraph 123 above may be inserted	63.1
29.	This paragraph may be amended as follows " *There is therefore a material and not a fanciful chance that the plaintiffs would benefit from the trusts.*	63.4

29. They will accordingly therefore claim damage, equitable compensation and/or damages for those lost chances." 63.4

30. Paragraph (5) and the reference to *Gaurang* in paragraph (8) The prayer